NORTH CAROLINA REPORTS

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SUPREME COURT OF NORTH CAROLINA

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THE SUPREME COURT
OF
NORTH CAROLINA

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SUPERIOR COURT DIVISION

DISTRICT	JUDGES	ADDRESS
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	Jeffery B. Foster	Greenville
6A	Norlan Graves	Roanoke Rapids
6B	Cy A. Grant, Sr.	Ahoskie
7A	Quentin T. Sumner[1]	Rocky Mount
7BC	Lamont Wiggins	Rocky Mount
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14	Orlando F. Hudson, Jr.	Durham
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	Frank Jones	Wilmington
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13A	Douglas B. Sasser	Whiteville
13B	Jason C. Disbrow	Southport
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10	Paul C. Ridgeway	Raleigh
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	Vinston M. Rozier	Raleigh
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11A	C. Winston Gilchrist	Lillington
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	Dawn Layton	Rockingham
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	Lee W. Gavin	Asheboro
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	Michael A. Stone	Laurinburg
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20B	Jonathan Perry	Monroe
	N. Hunt Gwyn	Monroe
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	Stanley L. Allen	Sandy Ridge
17B	Angela B. Puckett	Westfield
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	Susan Bray[5]	Greensboro
	William Wood	Greensboro
	Lora C. Cubbage	Greensboro
	Stephanie L. Reese[6]	High Point
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19C	Timothy Gould	Salisbury
21	L. Todd Burke	Winston-Salem
	David L. Hall	Winston-Salem
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	Richard S. Gottlieb	Winston-Salem
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	William Long	Statesville
22B	Mark E. Klass	Lexington
	Lori Hamilton	Mocksville
23	Michael Duncan	Wilkesboro
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24	Gary Gavenus	Burnsville
	R. Gregory Horne	Boone
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	Daniel A. Kuehnert	Morganton
25B	Nathaniel J. Poovey	Newton
	Gregory R. Hayes	Hickory

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	Lisa C. Bell	Charlotte
	Karen Eady-Williams	Charlotte
	Louis A. Trosch	Charlotte
	George Bell	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
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Mark Powell	Hendersonville
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Joseph E. Turner	Greensboro
Tanya T. Wallace	Rockingham

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J. Carlton Cole	Hertford
H. William Constangy	Charlotte
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[1]Retired 31 October 2022. [2]Sworn in 1 October 2022. [3]Retired 30 September 2022. [4]Became Senior Resident Judge 1 October 2022.
[5]Retired 30 September 2022. [6]Appointed 21 November 2022. [7]Resigned 1 August 2022. [8]Died 4 October 2022. [9]Died 18 October 2022.

DISTRICT COURT DIVISION

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	Christopher J. Welch	Jacksonville
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	Robert H. Gilmore	Clinton
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	Jeffrey Evan Noecker	Wilmington
	Chad Hogston	Wilmington
	Robin W. Robinson	Wilmington
	Lindsey L. McKee	Wilmington
6	Brenda G. Branch (Chief)	Roanoke Rapids
	W. Turner Stephenson, III	Roanoke Rapids
	Teresa R. Freeman	Roanoke Rapids
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	Anthony W. Brown	Spring Hope
	Wayne S. Boyette	Tarboro
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	Annette W. Turik	Kinston
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	Adam S. Keith	Louisburg
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	Sean Smith	Charlotte
	Matt Osman	Charlotte
	Gary Henderson	Charlotte
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	Tracy H. Hewett	Charlotte
	Faith Fickling	Charlotte
	Roy H. Wiggins	Charlotte
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	Michael J. Standing	Charlotte
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	Kimberly Gasperson-Justice	Hendersonville
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Larry J. Wilson	Shelby

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H. Thomas Church	Statesville
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William L. Long	Chapel Hill
James E. Martin	Greenville
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Anne B. Salisbury	Cary
Jan H. Samet	Greensboro
J. Larry Senter	Raleigh
Margaret L. Sharpe	Greensboro
Leonard W. Thagard	Clinton
Charles M. Vincent	Greenville
Richard K. Walker	Hayesville

[1]Retired 30 November 2022. [2]Resigned 9 September 2022. [3]Retired 28 August 2022. [4]Sworn in 19 September 2022.

ATTORNEY GENERAL OF NORTH CAROLINA

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SETH DEARMIN

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CASES REPORTED

ORDERS

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

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

CROSS-REFERENCE TABLE[1]

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Connette v. Charlotte-Mecklenburg Hosp. Auth.	382 N.C. 57	2022-NCSC-95
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State v. Hooper	382 N.C. 612	2022-NCSC-114
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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).

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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

ANDERSON CREEK PARTNERS, L.P.; ANDERSON CREEK INN, LLC; ANDERSON CREEK DEVELOPERS, LLC; FAIRWAY POINT, LLC; STONE CROSS, LLC D/B/A/ STONE CROSS ESTATES, LLC; RALPH HUFF HOLDINGS, LLC; WOODSHIRE PARTNERS, LLC; CRESTVIEW DEVELOPMENT, LLC; OAKMONT DEVELOPMENT PARTNERS, LLC; WELLCO CONTRACTORS, INC.; NORTH SOUTH PROPERTIES, LLC; W.S. WELLONS CORPORATION; ROLLING SPRINGS WATER COMPANY, INC; AND STAFFORD LAND COMPANY, INC.

v.

COUNTY OF HARNETT

PF DEVELOPMENT GROUP, LLC

v.

COUNTY OF HARNETT

Nos. 62PA21 and 63PA21

Filed 19 August 2022

1. Constitutional Law—unconstitutional conditions doctrine—land-use permits—water and sewer impact fees—legislatively enacted and generally applicable

Where plaintiffs filed suit challenging a county ordinance that required residential property developers to pay one-time water and sewer "capacity use" fees (which were generally applicable and non-negotiable) for each lot they wished to develop as a precondition for the county's concurrence in the developer's applications for water and sewer permits, the "capacity use" fees were properly considered as both impact fees and monetary exactions, and they were subject to review under the unconstitutional conditions doctrine; therefore, the fees had to have an essential nexus and rough proportionality

to the impact of plaintiff's developments on the county's water and sewer systems in order to avoid being treated as takings of plaintiffs' property. While plaintiffs' complaint admitted the existence of the required essential nexus, the question of rough proportionality needed to be determined on remand.

2. Appeal and Error—mootness—statute amended during appeal —request for damages—constitutionality of fees

Where plaintiffs filed suit challenging a county ordinance that required residential property developers to pay one-time water and sewer "capacity use" fees for each lot they wished to develop as a precondition for the county's concurrence in the developer's applications for water and sewer permits, plaintiffs' request for declaratory relief was not rendered moot by the legislature's amendments to the relevant statutory provisions during the pendency of the appeal because plaintiffs' request for declaratory relief was inextricably intertwined with their claim for monetary relief. Further, the county's statutory authority to enact the fees at issue had no bearing on the constitutionality of those fees.

Justice BERGER concurring in part and dissenting in part.

Chief Justice NEWBY joins in this concurring in part and dissenting in part opinion.

Justice EARLS dissenting.

Justices HUDSON and MORGAN join in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 275 N.C. App. 423 (2020), affirming an order entered on 26 November 2018 by Judge Michael J. O'Foghludha in Superior Court, Harnett County. Heard in the Supreme Court on 9 May 2022.

Scarbrough, Scarbrough & Trilling, PLLC, by John F. Scarbrough, James E. Scarbrough, and Madeline J. Trilling; James R. DeMay, for plaintiff-appellants.

Fox Rothschild, LLP, by Kip David Nelson, Bradley M. Risinger, and Troy D. Shelton; and Christopher Appel, for defendant-appellee.

Erin E. Wilcox for amicus curiae Pacific Legal Foundation; and J. Michael Carpenter, for amicus curiae North Carolina Homebuilders Association.

F. Paul Calamita for amicus curiae North Carolina Water Quality Association and the National Association of Clean Water Agencies.

ERVIN, Justice.

¶ 1 This appeal arises from a challenge to an ordinance adopted by defendant Harnett County that requires residential property developers to pay one-time water and sewer "capacity use" fees associated with each lot that they wish to develop as a precondition for obtaining the County's concurrence in the developer's application for the issuance of required water and sewer permits by the North Carolina Department of Environmental Quality. After the trial court granted the County's motion for judgment on the pleadings and dismissed all the claims asserted against the County by plaintiff PF Development Group and all but one of the claims asserted against the County by plaintiffs Anderson Creek Partners, L.P.; Anderson Creek, Inc., LLC; Anderson Creek Developers, LLC; Fairway Point, LLC; Stone Cross, LLC d/b/a Stone Cross Estates, LLC; Ralph Huff Holdings, LLC; Woodshire Partners, LLC; Crestview Development, LLC; Oakmont Development Partners, LLC; Wellco Contractors, Inc.; North South Properties, LLC; W.S. Wellons Corporation; Rolling Springs Water Company, Inc.; and Stafford Land Company, Inc., the Court of Appeals affirmed the trial court's decision. Our review of the Court of Appeals' decision requires us to determine whether the challenged "capacity use" fees are monetary land-use exactions subject to constitutional review under the "essential nexus" and "rough proportionality" test articulated by the United States Supreme Court in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and *Koontz v. St. Johns River Water Management District*, 570 U.S. 595 (2013). After careful consideration of the parties' arguments in light of the record and the applicable law, we reverse the decision of the Court of Appeals and remand this case to Superior Court, Harnett County, for further proceedings not inconsistent with this opinion.

I. Factual Background

A. Substantive Facts

¶ 2 On 20 October 1980, the Harnett County Board of Commissioners established the Buies Creek-Coats Water and Sewer District for the

purpose of collecting and treating wastewater within the District's boundaries. On 23 July 1984, the County and the District entered an interlocal agreement pursuant to which the County agreed to operate the District's water and sewer systems. In resolving a legal challenge to the 1984 agreement, this Court held that counties had the authority to enter into interlocal cooperative agreements providing for the operation of a water and sewer system on behalf of a water and sewer district and to exercise all "rights, powers, and functions granted to water and sewer districts" in the course of doing so, *McNeill v. Harnett County*, 327 N.C. 552, 558–59 (1990) (citing N.C.G.S. § 153A-275 (1987)), with the powers that the County was authorized to exercise including the District's authority to "establish, revise, and collect rates, fees or other charges and penalties for the use of or the services furnished or to be furnished by any sanitary sewer system, water system or sanitary sewer and water system of the district[,]" *id.* (quoting N.C.G.S. § 162A-88 (1987)).

¶ 3 As of 1998, the County had established eight water and sewer districts for the purpose of managing water and wastewater services throughout its entire land area. In May 1998, the County and the districts entered a joint interlocal agreement which governed the manner in which the County operated each district's water and sewer systems. In the 1998 agreement, the County and the districts agreed that the districts would lease all of their real and personal property to the County, that the districts would transfer their financial and intangible assets to the County, that the County would assume most of the districts' liabilities, and that the County's Department of Public Utilities would "administer all operations and maintenance of" the water and sewer systems in each district. In addition, the County agreed to "[e]stablish and revise from time to time schedules of rates, fees, charges, and penalties for the use of or the water and sewer services furnished and to bill and collect same."

¶ 4 On 1 July 2016, acting in accordance with the 1998 Agreement, the County adopted an ordinance "for the purpose of establishing a schedule of rents, rates, fees, charges and penalties for the use of and services furnished by water supply and distribution systems and sewer collections systems owned or operated by [the Department of Public Utilities]." Section 28(h) of the ordinance provides for the collection of "capacity use" fees for the purpose of "partially recover[ing] directly from new customers the costs of capacity of the utility system to serve them." More specifically, the ordinance provides that, for each new residential connection to a water or sewer system owned or operated by the County, the landowner must pay a one-time, non-negotiable fee of $1,000 for water service and $1,200 for sewer service, with the landowner being

required to make the required payment prior to the County's concurrence in the landowner's application to the North Carolina Department of Environment and Natural Resources[1] for the issuance of the required water and/or sewer permits. According to the ordinance, "such charges are reasonable and necessary and result in a more equitable and economically efficient method of recovery of such costs to handle new growth and to serve new customers without placing an additional financial burden on existing customers solely through inordinate enhancement of water and sewer rates." Plaintiffs, who are engaged in the business of developing property in Harnett County, have paid the "capacity use" fees required pursuant to the ordinance in the course of their development-related activities.

B. Procedural History

¶ 5 On 1 March 2017, the Anderson Creek plaintiffs filed a complaint in which they sought (1) a declaration that the County lacked the statutory authority to adopt and enforce the ordinance; (2) a declaration that the adoption and enforcement of the ordinance violated the Anderson Creek plaintiffs' rights to equal protection and substantive due process pursuant to Article I, Section 19 of the North Carolina Constitution; (3) a refund of all "capacity use" fees that had been paid to the County along with prejudgment interest; (4) an award of costs and attorney's fees; (5) an accounting for all "capacity use" fees that the Anderson Creek plaintiffs had paid to the County; and (6) the entry of an order allowing the Anderson Creek plaintiffs to deposit all future "capacity use" fees into an escrow account pending the entry of a final judgment in this case. The Anderson Creek plaintiffs claimed to have paid more than $25,000 in "capacity use" fees to the County pursuant to the ordinance.

¶ 6 On 19 May 2017, the County filed an amended answer denying the material allegations of the complaint, asserting numerous affirmative defenses, advancing counterclaims for breach of various agreements into which the individual Anderson Creek plaintiffs had entered with the County, and seeking the imposition of sanctions against counsel for the Anderson Creek plaintiffs.[2] On 16 March 2018, the Anderson Creek plaintiffs amended their complaint to add claims for breach of a 2018 settlement agreement between Anderson Creek Partners and the County and a declaration concerning the severability of a provision contained in that agreement addressing any future determination that the relevant

1. The Department of Environment and Natural Resources is now the Department of Environmental Quality.

2. The County's initial responsive pleading is not contained in the record on appeal.

"capacity use" fee payments were unlawful. On 1 February 2018, the County filed an answer to the Anderson Creek plaintiffs' amended complaint and asserted an additional counterclaim seeking a declaration that the County had the authority to collect the challenged "capacity use" fees.[3] On 12 February 2018, the County filed a motion seeking the entry of judgment in its favor with respect to all but one of the claims that had been asserted in the amended complaint and a motion to join necessary parties or, in the alternative, a motion for permissive joinder of parties.

¶ 7 On 19 July 2017, plaintiff PF Development Group, LLC, filed a complaint asserting six claims for relief against the County that were identical to those set out in the initial complaint filed by the Anderson Creek plaintiffs. On 8 November 2018, the trial court consolidated the two cases, entered an order granting the County's motion for judgment on the pleadings with respect to all but one of the claims asserted by the Anderson Creek plaintiffs and all of the claims asserted by PF Development and dismissing those claims with prejudice and concluded that its substantive decision had rendered the County's joinder motions moot. Plaintiffs noted an appeal to the Court of Appeals from the trial court's order.

C. Court of Appeals Decision

¶ 8 In seeking relief from the trial court's orders before the Court of Appeals, plaintiffs argued that the trial court had erred by entering judgment on the pleadings in favor of the County on the grounds that (1) the pleadings disclosed the existence of genuine issues of material fact; (2) the 1998 Agreement did not provide the County with the authority afforded to water and sewer districts by N.C.G.S. § 162A-88 to collect fees for water and sewer service "to be furnished;" and (3) plaintiffs had alleged a valid claim that the challenged "capacity use" fees were an "unconstitutional condition" for permit approval that failed to satisfy the "essential nexus" and "rough proportionality" requirements articulated in *Koontz*. In addition, plaintiffs contended that the trial court had erred by taking judicial notice of the 1984 and 1998 agreements without giving plaintiffs an adequate opportunity to challenge that decision.

¶ 9 In rejecting plaintiffs' challenges to the trial court's order, the Court of Appeals began by observing that "[j]udicial notice is appropriate

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3. Although the County's answer to the amended complaint was filed before the Anderson Creek plaintiffs received authorization from the trial court to amend their complaint, no party has raised any issues about the timeliness of either the amended complaint or the amended answer or the parties' authority to file either document.

where a fact is 'not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned,' " *Anderson Creek Partners, L.P. v. Cnty. of Harnett*, 275 N.C. App. 423, 429 (2020) (quoting N.C.G.S. § 8C-1, Rule 201 (2017)), and that trial court decisions to judicially notice particular facts or items are subject to review on appeal only for abuse of discretion, *id.* at 429–30 (citing *Muteff v. Invacare Corp.*, 218 N.C. App. 558, 568 (2012)). After noting that "important public documents will be judicially noticed," *id.* at 429 (quoting *State ex rel. Utils. Comm'n v. S. Bell Tel. & Tel. Co.*, 289 N.C. 286, 287 (1976)), the Court of Appeals determined that the 1984 and 1998 agreements "are public contracts between government entities" that are "subject to public review" that and "their existence is therefore 'not subject to reasonable dispute,' " *id.* at 430. In addition, the Court of Appeals reasoned that "[t]he agreements are important public documents germane to the resolution of this case" and that "some of the [plaintiffs] reference—or even incorporate—the 1998 Agreement in their pleadings." *Id.* As a result, the Court of Appeals concluded, the trial court did not abuse its discretion by judicially noticing the 1984 and 1998 agreements. *Id.*

¶ 10 Secondly, the Court of Appeal held that, while the relevant statutory provisions "authorized the County only to assess fees for the 'contemporaneous use' of its water and sewer systems, and otherwise 'clearly and unambiguously fail[ed] to give [the County] the essential prospective charging power needed to assess [the fees,]" *id.* at 432 (alterations in original) (quoting *Quality Built Homes, Inc. v. Town of Carthage*, 369 N.C. 15, 22 (2016) (*Quality Built Homes I*)), the water and sewer districts did have the authority to collect fees for service to be provided in the future given that, unlike N.C.G.S. §§ 153A-277(a) or 160A-314(a), which govern the authority of counties and cities, respectively, to set rates for water and sewer service, N.C.G.S. § 162A-88 allowed water and sewer districts to set rates for "services furnished *or to be furnished*," *id.* at 433 (emphasis added).[4] In addition, the Court of Appeals observed that "local government entities may generally cooperate through

4. In 2017, the General Assembly amended N.C.G.S. §§ 153A-277(a) and 160A-314(a) to permit cities and counties to establish prospective fees like those at issue here. *See Public Water and Sewer System Development Fee Act*, S.L. 2017- 138, §§ 3, 4, 2017 N.C. Sess. Laws 996, 1000. However, the amended language did not become effective until 1 October 2017, with the General Assembly having specified that "[n]othing in this act provides retroactive authority for any system development fee, or any similar fee for water or sewer services to be furnished, collected by a local governmental unit prior to October 1, 2017." *Id.*, § 11, 2017 N.C. Sess. Laws at 1002.

interlocal agreements to carry out their purposes," *id.* (citing N.C.G.S. §§ 153A-275, 153A-278 (2015)), and determined that, in accordance with our decision in *McNeill*, "a county may contract with another local government entity to enable the county to exercise authority given to that entity," *id.* As a result, even though the County lacked the authority to charge fees for water and sewer service to be provided in the future, the water and sewer districts operating in Harnett County had the authority to do so and were free to enter into contracts with the County pursuant to which the County was entitled to exercise the authority that had been granted to the water and sewer districts. *Id.* at 433–34. For that reason, the Court of Appeals concluded that "the only way the County could have had the authority to charge any prospective fees would be pursuant to an interlocal agreement through which the county could exercise authority held by the [d]istricts." *Id.* at 434.

¶ 11 Thirdly, the Court of Appeals held that, since "the 1998 Agreement granted the County the ability to exercise the [d]istricts' prospective fee-collecting authority," the pleadings "failed to present a material issue of fact regarding the County's authority to collect prospective fees." *Id.* at 436. In rejecting plaintiffs' contention that the record revealed the existence of a genuine issue of material fact concerning the extent to which the County either managed infrastructure owned by the districts or operated its own facilities, the Court of Appeals determined that this distinction was immaterial on the grounds that, "[r]egardless of whether the County is operating its own physical water and sewer infrastructure, the [d]istricts' infrastructure, infrastructure it acquired from the [d]istricts, or a combination thereof, the issue is whether the County had the authority to use any means to assess prospective fees for water and sewer services to be furnished in the future." *Id.* As a result, the Court of Appeals held that the trial court did not err in concluding that the 1998 agreement permitted the County to exercise the districts' fee-collecting authority "by any legal means." *Id.* at 437.

¶ 12 Finally, the Court of Appeals addressed plaintiffs' contention that the record revealed the existence of a genuine issue of material fact concerning the extent to which the challenged "capacity use" fees were subject to "unconstitutional conditions" analysis pursuant to *Koontz*. *Id.* The Court of Appeals noted that, in accordance with *Nollan* and *Dolan*, "the government is allowed to condition approval of land-use permits by requiring the landowner to mitigate the impact of his or her proposed use." *Anderson Creek Partners*, 275 N.C. App. at 438 (citing *Dolan*, 512 U.S. at 391; *Nollan*, 483 U.S. at 837). As part of this process, the Court of Appeals determined that "[t]he government may require that the landowner agree to a particular public use of the landowner's real property,

as long as there is an 'essential nexus' and 'rough proportionality' between the public impact of the landowner's proposed developments and the government's requirements." *Id.* (citing *Nollan*, 438 U.S. at 837; *Dolan*, 512 U.S. at 391). According to the Court of Appeals, *Koontz* extended the "essential nexus" and "rough proportionality" test enunciated in *Nollan* and *Dolan* to encompass demands that a landowner make a monetary payment in exchange for permit approval "where there is a 'direct link between the government's demand and a specific parcel of property.' " *Id.* (quoting *Koontz*, 570 U.S. at 614).

¶ 13 In the Court of Appeals' view, the challenged fees "were categorized as impact fees and referred to as 'capacity use fees,' despite the County's requirement that the fees be paid prior to approval of a developer's permits." *Id.* at 439. After acknowledging the Supreme Court's statement that the "unconstitutional conditions" doctrine "did not affect the ability of governments to impose property taxes, user fees, and similar laws and regulations that may impose financial burdens on landowners," citing *Koontz*, 570 U.S. at 615, the Court of Appeals noted that the Supreme Court had "otherwise provided little guidance on how courts should tread the fine line between unconstitutional exactions and constitutional, routine taxes and fees" and pointed out that "the application of the unconstitutional conditions doctrine to monetary exactions in North Carolina" was a question of first impression, *Anderson Creek Partners*, 275 N.C. App. at 439, 441. The Court of Appeals found the decisions from other jurisdictions upon which plaintiffs relied "regarding the thin line between unconstitutional exactions and constitutional user fees" to be unpersuasive given that they were "part of the pre-*Koontz* division of authority over whether a demand for money could give rise to an unconstitutional conditions claim under *Nollan/Dolan*—a [question] which *Koontz*," in the Court of Appeals' opinion, "settled in the affirmative." *Id.* at 442 (citing *Koontz*, 570 U.S. at 603). On the contrary, the Court of Appeals found *Dabbs v. Anne Arundel County*, 458 Md. 331 (2018), in which Maryland's highest court held that generally applicable fees do not implicate the "unconstitutional conditions" doctrine, to be persuasive. *Anderson Creek Partners*, 275 N.C. App. at 442.

¶ 14 As the Court of Appeals noted, *Dabbs* involved a challenge to impact fees that the defendant county had collected in connection with the development of real estate that were designed to facilitate improvements to the county's transportation and education infrastructure, *Dabbs*, 458 Md. at 336–38, with these fees having been "legislatively-imposed[,] predetermined, based on a specific monetary schedule, and applie[d] to any person wishing to develop property in the district," *id.* at 353. In rejecting arguments similar to those that plaintiffs have advanced in this case,

the Maryland Court of Appeals concluded in *Dabbs* that the challenged fees were not subject to constitutional scrutiny under *Nollan* and *Dolan* because, "unlike *Koontz*, the [challenged ordinance] [did] not direct a [land]owner to make a conditional monetary payment to obtain approval of an application for a permit of any particular kind, nor [did] it impose the condition on a particularized or discretionary basis." *Id.* (citations omitted). On the contrary, the Maryland Court of Appeals held that the fee at issue in *Dabbs* "applied on a generalized district-wide basis" rather than having been established in the course of determining "whether an actual permit will issue to a payor individual with a property interest." *Id.* (citing *Koontz*, 570 U.S. at 628 (Kagan, J., dissenting) (suggesting that the Supreme Court should "approve the rule, adopted in several states, that *Nollan* and *Dolan* apply only to permitting fees that are imposed ad hoc, and not to fees that are generally applicable")).

¶ 15 The Court of Appeals concluded that *Dabbs* was "in harmony with" both *Koontz* and the definition of an "exaction" articulated in *Franklin Road Properties v. City of Raleigh*, 94 N.C. App. 731, 736 (1989) (defining an "exaction" as a fee assessed "in lieu of compliance with dedication or improvement provisions" or "reflecting [developers'] respective prorated shares of the cost of providing new roads, utility systems, parks, and similar facilities serving the entire area") (citation omitted). In the Court of Appeals' view, "[t]his definition did not include fees assessed on a generally applicable basis in a static quantity indifferent to the particular developers' prorated share of any resulting impact." *Anderson Creek Partners*, 275 N.C. App. at 443. As a result, the Court of Appeals held that

> impact and user fees which are imposed by a municipality to mitigate the impact of a developer's use of property, which are generally imposed upon all developers of real property located within that municipality's geographic jurisdiction, and which are consistently imposed in a uniform, predetermined amount without regard to the actual impact of the developers' project do not invoke scrutiny as an unconstitutional condition under *Nollan/Dolan* nor under North Carolina precedent.

Id. In view of the fact that the "capacity use" fees at issue in this case "are predetermined, set out in the [ordinance], and non-negotiable" and "are not assessed on an *ad hoc* basis or dependent upon the landowner's particular project," the Court of Appeals concluded that they did not come within the ambit of the approach adopted in *Koontz*. *Id.* In other words, the Court of Appeals held that, even though the challenged fees

"are assessed in conjunction with the landowners' intent to make use of real property located within the County's jurisdiction," they differ from the type of fee that is subject to the "unconstitutional conditions" doctrine because, "unlike the conditions imposed in *Koontz*, the County does not view a landowner's proposed project and then make a demand based upon that specific parcel of real property." *Id.*

¶ 16 The Court of Appeals noted that *Dabbs* could be distinguished from this case on the grounds that the challenged water and sewer "capacity use" fee was "assessed *prior* to the County's grant of building permits, thus making [it] a condition of approval," and that *Dabbs* "expressly [rested], in part, on the fact that the fees at issue were *not* 'a conditional monetary payment to obtain approval of an application for a permit of any particular kind[.]' " *Id.* at 444 (quoting *Dabbs*, 458 Md. at 353) (emphasis in original). According to the Court of Appeals, "this distinction" "speaks directly to the type of coercive harms that the United States Supreme Court sought to prevent in *Koontz*," that is, "to prevent the government from leveraging its legitimate interest in mitigating harms by imposing '[e]xtortionate demands' which may 'pressure [a] [land]owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation.' " *Id.* (quoting *Koontz*, 570 U.S. at 605–06). In the Court of Appeals' view, this "distinction [was not] material in this case" because, regardless of "whether the [f]ees were to be paid prior to or after [plaintiffs] began their projects, the fees were predetermined and are uniformly applied—not levied against [plaintiffs] on an *ad hoc* basis—and thus do not suggest any intent by the County to bend the will or twist the arm of [plaintiffs]." *Id.* As a result, the Court of Appeals held that plaintiffs had "failed to present a constitutional takings claim under current federal and state unconstitutional conditions jurisprudence as a matter of law." *Id.* This Court allowed plaintiffs' discretionary review petitions for the purpose of examining "[w]hether the 'essential nexus' and 'rough proportionality' test under the application of the doctrine of unconstitutional conditions to land-use exactions applies to generally applicable legislative impact fees" and "[w]hether the pleadings demonstrate a genuine issue of material fact as to whether the County's 'capacity use' fees, as applied to [p]laintiffs, ha[ve] an 'essential nexus' and 'rough proportionality' to the impact of [p]laintiff's developments on the County's water and sewer systems."

II. Analysis

A. Standard of Review

¶ 17 The purpose of a motion for judgment on the pleadings pursuant to N.C.G.S. § 1A-1, Rule 12(c), "is to dispose of baseless claims or defenses

when the formal pleadings reveal their lack of merit," with the entry of judgment on the pleadings being appropriate when "all the material allegations of fact are admitted in the pleadings and only questions of law remain." *Ragsdale v. Kennedy*, 286 N.C. 130, 137 (1974). In deciding whether to grant or deny a motion for judgment on the pleadings, "[t]he trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party," with "[a]ll well pleaded factual allegations in the nonmoving party's pleadings [being] taken as true and all contravening assertions in the movant's pleadings [being] taken as false." *Id.* "A party seeking judgment on the pleadings must show that the complaint fails to allege facts sufficient to state a cause of action or admits facts which constitute a complete legal bar thereto." *DiCesare v. Charlotte-Mecklenburg Hosp. Auth.*, 376 N.C. 63, 70 (2020) (cleaned up). We review a trial court's ruling granting or denying a motion for judgment on the pleadings using a de novo standard of review. *Id.* (citing *Old Republic Nat'l Title Ins. Co. v. Hartford Fire Ins. Co.*, 369 N.C. 500, 507 (2017)).

B. The Unconstitutional Conditions Doctrine and Land-Use Exactions

¶ 18 **[1]** According to the "unconstitutional conditions" doctrine, "the government may not deny a benefit to a person because he [or she] exercises a constitutional right," *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545 (1983) (citing *Perry v. Sinderman*, 408 U.S. 593, 597 (1972)), which "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up," *Koontz*, 570 U.S. at 604. *Nollan* and *Dolan* "involve a special application" of the "unconstitutional conditions" doctrine "that protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits." *Id.* Those cases recognize that, in instances involving "land-use exactions," applicants for land use permits "are especially vulnerable to the type of coercion that the unconstitutional doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take," thereby creating a situation in which the government can "pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation." *Id.* at 604–05 (citing *Dolan*, 512 U.S. at 385; *Nollan*, 483 U.S. at 831). On the other hand, *Nollan* and *Dolan* acknowledge that "many proposed land uses threaten to impose costs on the public that dedications of property can offset" and that "[i]nsisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible

land-use policy," with the Supreme Court having "long sustained such regulations against constitutional attack." *Id.* at 605 (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)). As a result, *Nollan* and *Dolan* sought to accommodate these two concerns by allowing the government to condition approval of a land-use permit application on the landowner's agreement to dedicate a portion of his or her property to public use if there is an "essential nexus" and "rough proportionality" between the property that the government demands and the social costs of the landowner's proposed use for the remaining property, *Dolan*, 512 U.S. at 391; *Nollan*, 483 U.S. at 837, with this arrangement serving to "enable permitting authorities to insist that [permit] applicants bear the full costs of their proposals while still forbidding the government from engaging in 'out-and-out . . . extortion' that would thwart the Fifth Amendment right to just compensation." *Koontz*, 570 U.S. at 606 (quoting *Dolan*, 512 U.S. at 387).

¶ 19 In *Koontz*, the Supreme Court extended the requirement to show an "essential nexus" and "rough proportionality" to cases involving "monetary exactions." *Id.* at 612. *Koontz* arose when a Florida resident sought to develop a portion of his property by raising its elevation to make the land suitable for building, grading the land at the southern edge of the building site down to the height of nearby high-voltage electrical lines, and installing a dry-bed pond to retain and release stormwater runoff from the proposed building and associated parking lot. *Id.* at 601. According to Florida law, the plaintiff first had to obtain a Wetland Resources Management permit, which "require[d] that permit applicants wishing to build on wetlands offset the resulting environmental damage by creating, enhancing, and preserving wetlands elsewhere." *Id.* In an attempt to satisfy this requirement, the plaintiff offered to provide a conservation easement on the southern 11-acre portion of his 14.9-acre property that would have precluded the possibility of future development. *Id.* In response, the St. Johns River Water Management District, the entity responsible for reviewing the plaintiff's permit application, proposed that the plaintiff limit the size of his development to a single acre and make the remaining 13.9 acres subject to a conservation easement. *Id.* In the alternative, the District offered to accept the plaintiff's original proposal if he agreed to pay for improvements to property that the District already owned at another location. *Id.* at 602.

¶ 20 In addressing the plaintiff's claim that the District's alternative proposal resulted in a taking of property without just compensation, the Florida Supreme Court concluded that the *Nollan/Dolan* rule was inapplicable "because the subject of the exaction at issue [in the case]

was money rather than a more tangible interest in real property." *Id.* at 612 (citing *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So.3d 1220, 1230 (Fla. 2011)). On further review, however, the United States Supreme Court observed that, "if we accepted this argument[,] it would be very easy for land-use permitting officials to evade the limitations of *Nollan* and *Dolan*" by "simply giv[ing] the [land]owner a choice of either surrendering an easement or making a payment equal to the easement's value." *Id.* In the Court's view, since "[s]uch so-called 'in lieu of' fees' " were "functionally equivalent to other types of land use exactions," they "must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*." *Id.*

¶ 21 On the other hand, the Supreme Court also stated that "[i]t is beyond dispute that taxes and user fees are not takings," so that its decision had no bearing upon "the ability of governments to impose property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners." *Id.* at 615 (cleaned up). According to the Supreme Court, "[t]he fulcrum this case turns on is the direct link between the government's demand and a specific parcel of property" and therefore *Koontz*

> implicate[d] the central concern of *Nollan* and *Dolan*: the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property.

Id. at 614. As a result, the Supreme Court held that "the government's demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money." *Id.* at 619.

¶ 22 Neither party has cited, nor has our own research discovered, any North Carolina precedent other than the Court of Appeals' decision in this case that addresses the applicability of the "unconstitutional conditions" doctrine to monetary exactions since the Supreme Court decided *Koontz* in 2013. In *Batch v. Town of Chapel Hill*, which was decided prior to *Koontz*, the plaintiff applied to the town for the issuance of a permit authorizing the subdivision of a 20-acre tract of property located within the town's extraterritorial jurisdiction into eleven lots. 92 N.C. App. 601, 603 (1989), *rev'd on other grounds*, 326 N.C. 1 (1990). Although

the plaintiff revised her application in response to concerns expressed by the town's planning staff, the planning staff ultimately recommended that the plaintiff's application be denied because, among other things, the plaintiff had "failed to indicate on her subdivision plat an intent to dedicate to the Town of Chapel Hill a right-of-way through her property for the proposed Laurel Hill Parkway." *Id.* The Chapel Hill Town Council adopted the planning staff's recommendation on the grounds that the plaintiff's application was "not consistent with the orderly growth and development of the [t]own" as contemplated in the town's land use plan and "[did] not have streets which coordinate with existing and planned streets and highways as required" by town ordinance. *Id.* at 603–04. In seeking relief from the town's decision, the plaintiff asserted that it (1) violated her due process rights; (2) resulted in an unconstitutional taking of her property; (3) deprived her of the equal protection of the laws; (4) worked a temporary taking of her property; (5) violated her civil rights under 42 U.S.C. § 1983; and (6) involved an inverse condemnation of her property actionable pursuant to N.C.G.S. § 40A-51. *Id.* at 604.

¶ 23 In seeking to defend an order granting summary judgment in her favor on appeal, the plaintiff argued that "the conditions imposed by the town were unlawful exactions of defendant's property and [are subject to] the Fifth Amendment regulatory taking doctrine enunciated in [*Nollan*]." *Id.* at 612. The Court of Appeals agreed with the plaintiff's contention, holding that the requirement that the plaintiff dedicate a right-of-way for the future Laurel Hill Parkway was "an exaction with Fifth Amendment implications" and defining an "exaction" as

> a condition of development permission that requires a public facility or improvement to be provided at the developer's expense. Most exactions fall into one of four categories: (1) requirements that land be dedicated for street rights-of-way, parks, or utility easements and the like; (2) requirements that improvements be constructed or installed on land so dedicated; (3) requirements that fees be paid in lieu of compliance with dedication or improvement provisions; and (4) *requirements that developers pay "impact" or "facility" fees reflecting their respective prorated shares of the cost of providing new roads, utility systems, parks, and similar facilities serving the entire area.*

Id. at 613 (emphasis added) (quoting Richard D. Ducker, *"Taking" Found for Beach Access Dedication Requirement*, 30 Local Gov't Law Bulletin 2,

Institute of Government (1987)). After acknowledging that "[n]ot all exactions are constitutional takings" and that determining which exactions were and were not constitutionally permissible required identification of "when an individual property owner should pay for community improvement and when that cost fairly lies with the 'public as a whole,' " *id.* at 614–15 (quoting *Nollan*, 483 U.S. at 836 n.4), the Court of Appeals, relying, in part, upon statutory authority delegated to municipalities by the General Assembly, adopted a "rational nexus test" for the purpose of "guid[ing] the trial court in evaluating when an exaction is tantamount to a taking," stating that,

> [t]o determine whether an exaction amounts to an unconstitutional taking, the court shall: (1) identify the condition imposed; (2) identify the regulation which caused the condition to be imposed; (3) [and] determine whether the regulation substantially advances a legitimate state interest. If the regulation substantially advances a legitimate state interest, the court shall then determine (4) whether the condition imposed advances that interest; *and* (5) whether the condition imposed is proportionally related to the impact of the development.

Id. at 621 (emphasis in original). After conducting what it believed to be the required analysis, the Court of Appeals held that the challenged condition failed to satisfy the final component of this "rational nexus" test because it was "not proportionately related to the impact of the development" and there was "no commensurate benefit to the subdivision for its forfeit of land to preserve the Parkway Plan." *Id.* at 622.[5]

¶ 24 Shortly after deciding *Batch*, the Court of Appeals applied the "rational nexus test" in evaluating the validity of a determination made by the City of Raleigh in enforcing its setback ordinance by refusing to approve the plaintiff's application for a building permit unless the

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5. Although this Court subsequently reversed the Court of Appeals' decision in *Batch*, our decision rested upon a determination that the town had the authority to deny the plaintiff's permit application on the grounds that the proposed subdivision plan failed to comply and coordinate with the town's transportation plan, as required by a municipal ordinance. *Batch*, 326 N.C. at 12–13. In addition, we determined that the trial court erred by making its own findings of fact concerning the Town's justification for denying the plaintiff's permit application because those findings were not supported by the evidence in the record. *Id.* at 12. In light of these determinations, we concluded that we did not need to consider the lawfulness of the other reasons upon which the Town relied in denying the plaintiff's permit application, expressly declining "to review or decide any of plaintiff's constitutional claims or other issues arising in her complaint." *Id.* at 14.

plaintiff agreed to dedicate a portion of its property for use in widening a portion of the adjacent public street and to pay for the necessary paving work. *Franklin Road Properties*, 94 N.C App. at 736–37. Although the "rational nexus" test and definition of "exaction" utilized in these cases antedated the Supreme Court's decisions in *Dolan* and *Koontz*, the Court of Appeals appropriately recognized in this case that the "rational nexus" test enunciated in *Batch* closely resembles the "essential nexus" and "rough proportionality" requirements set out in *Nollan* and *Dolan* and that *Franklin Road* anticipated, at least to some extent, the Supreme Court's application of those criteria to "monetary exactions" in *Koontz*. *Anderson Creek Partners*, 275 N.C. App. at 441–42. As a result, we find *Batch* and *Franklin Road* helpful in resolving the issues that are before us in this case.

C. Classification of the "Capacity Use Fee"

¶ 25 A crucial, albeit non-dispositive, determination that we must make at the beginning of our analysis is the manner in which the "capacity use" fees at issue in this case should be classified. The County, on the one hand, contends that the relevant payments are nothing more than the sort of "user fees" that we discussed in *Homebuilders Association of Charlotte v. City of Charlotte*, 336 N.C. 37 (1994), and that the United States Supreme Court discussed in decisions such as *United States v. Sperry Corporation*, 493 U.S. 52, 53 (1989). Plaintiffs, on the other hand, assert that the "capacity use" fees at issue in this case are "impact fees" that result in an "exaction" as the Court of Appeals defined that term in *Batch*. 92 N.C. App. 613. In our view, plaintiffs have the better of this disagreement.

¶ 26 As we clearly determined in *Quality Built Homes I*, "impact fees," which are designed to "offset [the] costs to expand [water and sewer] system[s] to accommodate development," are not the same as "user fees," which are associated with the contemporaneous provision of water and sewer service. 369 N.C. at 17, 21. According to a well-recognized treatise concerning North Carolina land use law, impact fees are "assessments upon the owners or developers of land made by local governments to recoup the capital costs for services needed to serve new development" and are collected as an alternative to the use of general tax revenues "to finance the new roads, water, sewers, fire stations, public safety services, parks, schools, and other public facilities that must be provided to service new development." David C. Owens, *Land Use Law in North Carolina*, p. 110 (3d ed. 2020). "User fees," on the other hand, are "charge[s] assessed for the use of a particular item or facility," *User Fee*, Black's Law Dictionary (11th ed. 2019), include fees intended

to cover the cost of regulatory services provided by the relevant unit of government, *Homebuilders Ass'n of Charlotte*, 336 N.C. at 42, and are generally upheld in the event that they are reasonable, *id.* at 46. *See also Sperry Corp.*, 493 U.S. at 62 (holding that a fee deducted from money recovered by American claimants appearing before the Iran-United States Claims Tribunal that was intended to recoup the costs of administering the tribunal was a reasonable user fee rather than an unconstitutional taking).

¶ 27 Although the County labeled the payments at issue in this case as "capacity use" fees and has denied that they constituted "impact fees," the Court of Appeals correctly treated these payments as "impact fees." *See Anderson Creek Partners*, 275 N.C. App. at 439. As the County admits in its brief, the challenged "capacity use" fees are intended to "cover the cost of expanding the infrastructure of the water and sewer system to accommodate the new development," a description that falls squarely within the definition of an "impact fee" discussed above.[6] The fees at issue in this case are not water and sewer service fees, paid by customers at a fixed rate in accordance with their monthly metered water and sewer usage for the purpose of paying for the service that they used. In addition, the challenged fees are not "tap-on fees" paid at the time that individual lots are connected to the County's water and sewer system.[7] Instead, the fees at issue in this case are intended to provide the County with a contribution toward the cost of expanding its water and sewer infrastructure to account for the additional customers that will be added as a result of the developer's development. Thus, the "capacity use" fees at issue in this case, which are not intended to cover the cost of any service that is currently being provided to the person paying them "at the time of actual use," *Quality Built Homes I*, 369 N.C. at 21, are clearly different from those at issue in *Homebuilders Association of Charlotte*, which were specifically intended to "cover the costs of regulatory services provided by the city," including the labor costs associated with reviewing permit applications, 336 N.C. at 45. As a result, for all of these reasons, we hold that the challenged "capacity use fees" are properly categorized as impact fees rather than "user fees," a determination that renders much of the authority upon which the County relies inapplicable.

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6. As an aside, we note that the amicus curiae brief filed by the North Carolina Water Quality Association and the National Association of Clean Water Agencies in support of the County consistently refers to the challenged "capacity use" fees as "impact fees."

7. The parties dispute whether plaintiffs have been charged separate "tap-on fees" in addition to the "capacity use fees," but resolution of that factual question is not germane to the issue that is before us in this case.

¶ 28 In addition, we conclude that the challenged "capacity use" fees are "exactions" as the Court of Appeals used that term in *Batch* and as contemplated by the Supreme Court in *Koontz*. As we have already noted, the definition of "exaction" set out in *Batch* encompasses both "requirements that *land* be dedicated for street rights-of-way, parks, or utility easements" and "requirements that developers *pay* 'impact' or 'facility' fees reflecting their respective prorated shares of the cost of providing new roads, utility systems, parks, and similar facilities serving the entire area." *Batch*, 92 N.C. App. at 613 (emphasis added). Although this Court has yet to specifically define the term "exaction" for purposes of North Carolina law, we have not rejected the definition that the Court of Appeals adopted in *Batch* and reiterated in both *Franklin Road Properties* and more recently in *TAC Stafford, LLC v. Town of Mooresville*, 2022-NCCOA-217, ¶ 34. The definition adopted by the Court of Appeals in *Batch* is consistent with that set out in Black's Law Dictionary, which defines a "land-use exaction" as "[a] requirement imposed by a local government that a developer dedicate real property for a public facility *or pay a fee* to mitigate the impacts of the project, as a condition of receiving a discretionary land-use approval." *Land-Use Exaction*, Black's Law Dictionary (11th ed. 2019). Finally, inclusion of a monetary payment within the definition of an "exaction" is, in our view, fully consistent with how that term was used in *Koontz*. As a result, we adopt the definition of "exaction" set forth in the Court of Appeals' decision in *Batch* as our own and hold that the challenged "capacity use fees" constitute both "impact fees" and "monetary exactions."

D. *Koontz* and Generally Applicable Fees

¶ 29 In light of our determination that the challenged "capacity use" fees are "impact fees" and "monetary exactions," we must address the issue of whether those fees are subject to the "unconstitutional conditions" doctrine enunciated in *Nollan*, *Dolan*, and *Koontz*. According to plaintiffs, any "impact fee" assessed by a local government should be treated as a "taking" subject to scrutiny under the "unconstitutional conditions" doctrine regardless of whether the relevant fee is assessed on an *ad hoc* basis or pursuant to a uniform, generally applicable assessment and regardless of the identity of the governmental entity engaging in the "taking." In plaintiffs' view, the challenged "capacity use" fees implicate the same constitutional concerns that resulted in the adoption of the test delineated in *Nollan* and *Dolan*. More specifically, plaintiffs argue that the ordinance requiring the payment of "capacity use" fees "does not reflect any supporting analysis or methodology that would ensure a sufficient 'nexus' or 'proportionality' to the 'impact' of [p]laintiffs' developments

on the County's water and sewer systems." *See American Water Works Association*, "M1 Manual, Principals of Water Rates, Fees, and Charges" p. 324 (7th ed. 2017) (identifying the minimum "key criteria" for use in determining whether a "rational nexus" exists as including system planning criteria financing criteria, and compliance with state or local laws)). After noting that the County doubled its capacity use fees between 2005 and the dates upon which they filed their complaints in 2017, plaintiffs emphasize that the ordinance requires developers to construct their own water and sewer infrastructure—in addition to paying the capacity use fees—which must then be deeded to the county, arguing that

> this contributed infrastructure for the County to use in the operation of its water and sewer system should reasonably be valued and factored into consideration of the true "impact" of [p]laintiffs' developments and whether the fees still serve to "mitigate" any impact of the development above the value of [p]laintiffs' infrastructure contributions, or if the fees instead lack the necessary "nexus" and "proportionality."

Moreover, plaintiffs point out that "the fact that the 1998 [a]greement between the County and the [water and sewer] districts provides that the impact fee revenue from the individual districts [is] commingled in the County's enterprise funds, without a separate 'equitable and prorata' accounting for each [d]istrict, violates 'nexus' and 'proportionality' principles." *See AWWA Manual* p. 343 (providing that a utility should ensure that impact fees are "managed and used for the facilities needed to provide service to new development in the utility's service area."). For all of these reasons, plaintiffs contend that "impact fees inherently give rise to concerns involving coercion and fairness which the 'unconstitutional conditions' doctrine is meant to address."

¶ 30 Secondly, plaintiffs contend that, contrary to the conclusion reached by the Court of Appeals, the fact that the challenged "capacity use" fees are generally applicable and were enacted by a legislative body, rather than being assessed on an *ad hoc* basis by an administrative agency, does not exempt them from constitutional scrutiny. According to plaintiffs, "[t]here is nothing in *Nollan*, *Dolan*, or *Koontz* to support the view that the Supreme Court meant to limit application of the unconstitutional conditions doctrine to 'ad hoc' or 'administrative' decisions," with "each of the three decisions [having] involved exactions that were legislatively mandated," a conclusion that has led two state appellate courts to apply "a version of the *Nollan/Dolan* test" to impact fees. *See N. Ill. Home Builders Ass'n v. Cnty. of Du Page*, 165

Ill.2d 25 (1995); *Home Builders Ass'n of Dayton & the Miami Valley v. Beavercreek*, 89 Ohio St.3d 121 (2000)).

¶ 31 Plaintiffs assert that the Court of Appeals erred by relying upon *Dabbs* for a number of reasons. First, plaintiffs contend that, as the Court of Appeals recognized, *Dabbs* did not involve an application for the issuance of a permit conditioned on the payment of money to the issuing governmental entity. *See Anderson Creek Partners*, 275 N.C. App. at 444. Secondly, plaintiffs note that "[t]he Court of Appeals went so far as to say that '[t]his distinction speaks directly to the types of coercive harms that the United States Supreme Court sought to prevent in *Koontz*' " before concluding that it "did not find the distinction 'material' for the sole reason that 'the fees were predetermined and are uniformly applied.' " *Id.* "In essence," plaintiffs argue, "the Court of Appeals recognized that the County's impact fees implicated the coercive harms which the unconstitutional conditions doctrine seeks to prevent, but the court was content that the legislative process would prevent those harms from materializing." Plaintiffs dispute the validity of this contention, arguing that "one of the reasons impact fees are popular with local government[s] is the lack of political opposition," given that future residents, who will bear the cost of the impact fees in the form of higher housing prices, do not currently vote. As a result, plaintiffs conclude that the challenged "capacity use" fees are "monetary exactions" subject to the "unconstitutional conditions" analysis enunciated in *Koontz*.

¶ 32 In seeking to persuade us to reach a different result, the County argues that "[t]he unconstitutional conditions doctrine does not apply to generally applicable fees" because "[a] fee charged by the government is not a 'taking' in the constitutional sense." In the County's view, "[t]he established rule in North Carolina is that a government's power 'to regulate an activity implies the power to impose a fee in an amount sufficient to cover the cost of regulation,' " such that "a local government acts reasonably 'by requiring that those who desire a particular service bear some of the costs associated with the provision of that service,' " quoting *Homebuilders Ass'n of Charlotte*, 336 N.C. at 42, 45. According to the County, plaintiffs' reliance upon *Koontz* is misplaced because it "applies to 'in lieu of' fees" and plaintiffs "have not alleged any such fees here." The County argues that "[t]akings and fees 'are essentially different' " because, "when the government charges a fee or tax, it 'only exacts a contribution from individuals' that is used 'for the support of the government, or to meet some public expenditure authorized by it, for which they receive compensation in the protection which government affords, or in the benefits of the special expenditure,' " quoting *Mobile Cnty. v. Kimball*, 102 U.S. 691, 703 (1880). In the County's view,

"[i]t was a 'well-settled' rule even before *Koontz* 'that the government may require fees for public use of certain services without causing a taking,' " quoting *Dudley v. United States*, 61 Fed. Cl. 685, 689 (2004)), with *Koontz* having done nothing to "alter this well-settled rule." In addition, the County contends that "[f]ees that apply the same to everyone do not target 'a specific parcel of real property' as required by *Koontz*, 570 U.S. at 614, citing several decisions from other jurisdictions that it describes as holding that *Koontz* does not apply to "generally applicable fees."[8]

¶ 33 Next, the County argues that "[t]he overwhelming weight of authority is that non-discretionary, generally applicable fees are not subject to the unconstitutional conditions doctrine." In support of this assertion, the County cites *Building Industry Association-Bay Area v. City of Oakland*, in which a federal district court held that an ordinance requiring developers to display or fund art as a condition of project approval did not implicate *Koontz*. *See* 289 F. Supp. 3d 1056, 1057 (N.D. Cal. 2018). According to the district court, *Koontz* did not hold that "generally applicable land-use regulations are subject to facial challenge under the exactions doctrine" and held, instead, "that the exactions doctrine applies

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8. Among the decisions upon which the County relies in support of this assertion are *Santiago-Ramos v. Autoridad de Energia Electrica de P.R.*, *AEE*, 834 F.3d 103, 107 (1st Cir. 2016) (concluding that the plaintiffs "cannot assert a valid property interest in funds paid for electricity" for purposes of *Koontz* because "[c]ustomers lose their interest in money paid to utilities companies for their service"); *United States v. King Mountain Tobacco Co.*, 131 F. Supp. 3d 1088, 1092–93 (E.D. Wash. 2015) (finding *Koontz* inapplicable to quarterly assessments collected from tobacco manufacturers by the Department of Agriculture), *aff'd* 745 F. App'x 700 (9th Cir. 2018); *Fitchburg Gas & Elec. Light Co. v. Dep't of Publ. Utils.*, 467 Mass. 768, 779 (2014) (rejecting an electric company's claim that an annual assessment for the benefit of the state's Storm Trust Fund constituted a per se taking, citing *Koontz* for the proposition that "[f]ederal courts have established that an obligation to pay money is not a per se taking where the obligation does not affect or operate on a specific, identified property interest."); *Page v. City of Wyandotte*, 2018 WL 6331339, at *6 (Mich. Ct. App. Dec. 4, 2018) (per curiam) (unpublished) (holding that charges for water and cable services provided by the city were user fees that did not result in a taking); *In re Buffets, LLC*, 979 F.3d 366, 381 (5th Cir. 2020) (holding that federal legislation increasing the quarterly fees applicable to bankruptcy filings was not unconstitutional because "[t]axes and user fees are not takings under the Fifth Amendment"); *Edmonson v. Fregmen*, 590 F. App'x 613, 615 (7th Cir. 2014) (unpublished) (determining that the imposition of a freeze on an indigent prisoner's trust account based upon a failure to pay court filing fees did not constitute an unconstitutional taking and was, instead, a "reasonable user fee" for "reimbursement of the cost of government services"); *Better Hous. for Long Beach v. Newsom*, 452 F. Supp. 3d 921, 934–35 (C.D. Cal. 2020) (rejecting an argument that *Koontz* "expanded the definition of *per se* takings to include all government-imposed financial obligations 'linked to a specific, identifiable piece of property' " and concluding that a state law requiring landlords to pay or waive one month's rent before terminating a residential tenancy under certain circumstances did not constitute a *per se* taking).

to demands for money (not merely demands for encroachments on property)." *Id.*, 289 F. Supp. 3d at 1057–58. In addition, the County cites *Douglass Properties II, LLC v. City of Olympia*, in which the Washington Court of Appeals held that conditioning the issuance of a building permit upon the payment of a generally applicable traffic impact fee did not implicate *Koontz* because, even though "*Koontz* expanded the scope of takings that require *Nollan/Dolan* scrutiny to include 'monetary exactions,' it did not expand that scope to include legislatively prescribed development fees like those at issue here." 16 Wash. App. 2d 158, 171 (2021). The distinctions made in these cases make sense, in the County's view, "because the 'sine qua non' for application of the *Nollan/Dolan/Koontz* analysis is the 'discretionary deployment of the police power in the imposition of land-use conditions in individual cases,' " quoting *Action Apartment Ass'n v. City of Santa Monica*, 82 Cal. Rptr. 3d 722, 732 (Cal. Ct. App. 2008)).[9] According to the County, "[w]hen a government imposes a generally applicable fee, it is not subject to the same test . . . even when the fees have some connection to property development."

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9. In addition, the County directs our attention to *Tex. Manufactured Hous. Ass'n v. City of Nederland*, 101 F.3d 1095, 1105 (5th Cir. 1996) (declining to apply *Nollan* to a municipal zoning ordinance that prohibited placement of manufactured homes on any lot within the city outside a designated trailer park and observing that the plaintiff landowner had not been singled out for differential treatment like the landowner before the Court in *Nollan*); *Harris v. City of Wichita*, 862 F. Supp. 287, 294 (D. Kan. 1994) (declining to apply the *Dolan* "rough proportionality" test to zoning regulations prohibiting the use of property surrounding an Air Force base on the grounds that the regulations (1) "are land use restrictions and do not impose upon plaintiffs the obligation to deed portions of their land to the local government," (2) that the city's and county's decisions "were legislative rather than adjudicative in nature," and (3) the regulations affected all of the land surrounding the Air Force base, "not merely the individual parcels owned by plaintiffs"); *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 696–97 (Colo. 2001) (determining that *Nollan* and *Dolan* did not apply to a one-time "plant-improvement fee" that was intended to defray the cost of expanding the sanitation district's infrastructure despite the fact that the payment of the fee was a prerequisite for the issuance of a building permit on the grounds that the fee was a "generally applicable service fee on all new development within the [d]istrict," no adjudication was involved, and the fee was "purely a monetary assessment rather than a dedication of real property for public use"); *Greater Atlanta Homebuilders Ass'n v. DeKalb Cnty.*, 277 Ga. 295, 297–98 (2003) (refusing to apply *Dolan* to a county tree preservation ordinance because it "involve[d] "a facial challenge to a generally applicable land-use regulation" that resulted from a "legislative determination" rather than "an adjudicative decision"); *Arcadia Dev. Corp. v. City of Bloomington*, 552 N.W. 2d 281, 286 (Minn. Ct. App. 1996) (concluding that the *Dolan* "rough proportionality" standard did not apply to a city ordinance requiring mobile home park owners to assist residents with relocation costs when the park closed on the grounds that a *Dolan* analysis is only required for "adjudicative determinations that condition approval of a proposed land use on a property transfer to the government"); *Home Builders Ass'n of N. Cal. v. City of Napa*, 108 Cal. Rptr. 2d 60, 65–66 (Cal. Ct. App. 2001) (declining to apply *Nollan* and *Dolan* to a city inclusionary zoning ordinance that required residential property developers to dedicate 10 percent

¶ 34 The County contends that, "as in *Dabbs*, the County's water and sewer fees are 'predetermined, based on a specific monetary schedule,' and apply 'to any person wishing to develop property in the district,' " quoting *Dabbs*, 458 Md. at 353. As a result, the County asserts that "[f]ees that are 'imposed on a generally applicable basis are not subject to a rough proportionality or nexus analysis,' " quoting *Dabbs*, 458 Md. at 353. In the same vein, the County denies that *Dabbs* is some sort of outlier, citing *San Remo Hotel L.P. v. City & County of San Francisco*, in which the Supreme Court of California held that the *Nollan/Dolan* test did not apply to "development fees that are generally applicable through legislative action because the heightened risk of the 'extortionate' use of the police power to exact unconstitutional conditions is not present." 27 Cal. 4th 643, 668 (2002) (cleaned up). As a result, the California Supreme Court held that, while "individualized development fees warrant a type of review akin to the conditional conveyances at issue in *Nollan* and *Dolan* . . . generally applicable fees warrant a more deferential type of review." *Id.* (cleaned up).

¶ 35 The County contends that the Court of Appeals "joined [the] overwhelming line of authority" by holding that *Koontz* did not apply to generally applicable legislative fees and that plaintiffs "have not cited a single case" in which a court held to the contrary. In the County's view, the cases cited by plaintiffs either did not involve a generally applicable fee or were decided based upon state law, rather than the federal constitution. In addition, the County argues that plaintiffs' argument is flawed because "[t]he Supreme Court has said that the rough proportionality test requires the government to 'make some sort of individualized determination,' [512 U.S. *Dolan* at 391] " but that "generally applicable fees, by their very nature, cannot contain an individualized determination" and indeed "are *more* fair because they lack the *ad hoc*, discretionary nature that comes into play in the unconstitutional conditions doctrine." According to the County, generally applicable fees like those at issue in this case mitigate any concerns about the lack of transparency inherent

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of their developed land to affordable housing or, in the alternative, to pay an "in-lieu fee" on the grounds that the ordinance did not involve a "land use bargain between a governmental agency and a person who wants to develop his or her land" and was, instead, "economic legislation that is generally applicable to all development in [the] City") (emphasis in original); *Common Sense Alliance v. Growth Mgmt. Hearings Bd.*, 2015 WL 4730204, at *7 (Wash. Ct. App. Aug. 10, 2015) (unpublished) (rejecting a facial challenge to a county ordinance requiring that habitat buffers and tree protection zones be provided as a prerequisite for development approval within the relevant county on the grounds that "it appears that the courts have confined *Nollan/Dolan* analysis to land use decisions that condition approval of a specific project on a dedication of property to public use" and that "legislative determinations do not present the same risk of coercion as adjudicative decisions").

in *ad hoc* exactions because "all landowners are aware of the fees in advance" and, "[i]f they choose to develop property in the County, they know what the cost will be."

¶ 36 Next, the County claims that plaintiffs erroneously contend that *Koontz* answered the question before the Court in this case on the theory that the issue of "whether the monetary assessment is made by a legislature or an administrator" is "a red herring." From the County's perspective, the "capacity use" fees at issue in this case "are not permissible because they are 'legislative;' " instead, the County contends that the challenged "capacity use" fees "are generally applicable, non-discretionary, and set in advance," with "the relevant line" between fees that do and do not implicate the "unconstitutional conditions" doctrine being "the *nature* of the government action, not the *branch* of government that is acting."

¶ 37 In the County's view, plaintiffs' argument should also fail because "they never identified a constitutional right that they were coerced into giving up." According to the County, "[t]here is no constitutional *right* to expand or use an existing water and sewer system" or "*not* to pay fees for government services." The County argues that "the water and sewer districts could 'command directly' that those who seek to expand the water and sewer systems pay for that expansion" and that "the water and sewer fees would not 'otherwise require just compensation,' " citing *Koontz*, 570 U.S. at 604–05. In addition, the County asserts that, even though the "unconstitutional conditions" doctrine requires some sort of coercion by the government, plaintiffs have "not allege[d] coercion of any kind" and that "[r]equiring a developer to pay the same fee as everyone else for certain services can hardly be described as the 'out and out plan of extortion' targeted by the Supreme Court," quoting *Nollan*, 483 U.S. at 837. In other words, the County argues that, "[w]hen a payment is made in exchange for services offered by the government, the coercive element is missing," with the necessary coercion being absent in this case because "[plaintiffs] *wanted* to connect to the County's water and sewer system."

¶ 38 The County asserts that, while plaintiffs "could have used their properties for other purposes" or "sought to develop properties that used well water and septic tanks," they "elected to use their developments' connection to the County's water and sewer system as a way to increase density and market their homes to potential buyers." In the County's view, "[i]t was not an unlawful 'exaction' to ask [plaintiffs] to pay a standard fee for a service desired to improve the system that buttressed the sale prospects of their investment" given that new housing

developments "place pressure on the water and sewer system and use portions of its capacity, which is why each new development must offset some of the costs of improving and expanding the existing system."[10]

¶ 39 The County argues that the legislative process, rather than the courts, is the proper forum for consideration of plaintiffs' complaints on the theory that, "[i]f someone considers a generally applicable fee exorbitant, the fee is 'subject to the ordinary restraints of the democratic political process,' " because "[a] government 'that charged extortionate fees for all property development, unjustifiable by mitigation needs, would likely face widespread and well-financed opposition at the next election,' " quoting *San Remo Hotel*, 27 Cal. 4th at 671. On the other hand, the County asserts that the judicial branch has no role in resolving the present dispute given that " 'the Takings Clause is meant to bar [the] [g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole' " and that "[j]ustice does not require that current residents pay for new costs created by incoming developments," quoting *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 542 (2005)). According to the County, "[t]he 'capacity fees' at issue here are not 'cost recovery mechanisms,' but rather a means to 'equitably allocate to new users access to an existing system possessing an existing value' and a 'resource through which the utility purveyor may fund necessary capital improvements to the utility system,' " quoting *Landmark Dev., Inc. v. City of Roy*, 138 Wash.2d 561, 572 (1999), and that "[n]othing in the Constitution forbids 'permitting authorities [from] insist[ing] that applicants bear the full costs of their proposals' so long as they do not 'engag[e] in out-and-out extortion,' " quoting *Koontz*, 570 U.S. at 606.

¶ 40 Furthermore, the County contends that a decision to accept plaintiffs' argument would "subject every fee payment to a governmental entity to the *Nollan/Dolan/Koontz* analysis," a result that would be "unworkable" given that local governments have been permitted to charge fees for varied purposes, including using a city's parking facilities, opening graves in a cemetery, issuing permits for the operation of flea markets, granting licenses to engage in certain trades and occupations,

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10. The County also argues in a footnote that "the coercive element is missing here because the County does not even control the permit at issue" and, instead, "merely conditions its *concurrence* on an application for a permit from the State—another governmental entity," with this fact serving to distinguish this case from *Nollan*, *Dolan*, and *Koontz*. However, it is not clear from the record (nor does either party explain) whether the county's concurrence is *required* for the Department of Environmental Quality to approve the permits at issue. Assuming that it is, the County's argument on this point is a meaningless distinction.

registering golf carts, collecting garbage, accessing regional sports facilities, or using natural gas service. According to the County, "[e]xpanding the unconstitutional conditions doctrine to cover fees like these would cripple the ability of governments to tax, mandate fees, and levy other types of monetary payments that finance and make possible the services that governments provide." In addition, the County argues that "[i]t would be improper to allow [plaintiffs] to recoup the fees when they have presumably passed on those costs to others," resulting in a "windfall" to them. *See* 36 Am. Jur. 3d *Proof of Facts* 417 (1996) (describing how developers pass costs associated with expanding infrastructure to ultimate purchasers in the form of higher prices for land and construction)).

¶ 41 In addition to their assertion that the challenged "capacity use" fees were subject to an "unconstitutional conditions" analysis pursuant to *Nollan*, *Dolan*, and *Koontz*, the County argues that plaintiffs have failed to allege sufficient facts to support a conclusion that the relevant fees did not satisfy the "essential nexus" and "rough proportionality" test given the County's legitimate interests in mitigating the impact of the cost of expanding existing infrastructure upon existing customers or the taxpayers. According to the County, plaintiffs have alleged that "the water and sewer fees are imposed to connect new developments to the County's existing water and sewer systems" and have "acknowledge[d] the minimal amounts charged by the County." More specifically, the County argues that plaintiffs have "alleged that the water and sewer fees are used for improvements to the water and sewer system," so as to satisfy the "essential nexus" requirement, and that plaintiffs have "alleged no facts to show that the [$2,200 in fees per residential property] was disproportionate to the effect of new development on the County's water and sewer system," with their legal conclusion to this effect not needing to "be credited at the Rule 12 stage." *See Azure Dolphin, LLC v. Barton*, 371 N.C. 579, 599 (2018). In addition, the County claims that showing "rough proportionality" does not require the use of a "formulaic analysis" or "invite judges to pull out calculators or create spreadsheets to check a local government's math." On the contrary, the County contends that the inquiry involves the exercise of "common sense" and that the "capacity use" fees described in the complaint "meet that common-sense test and do not require a further factual inquiry."

¶ 42 A careful review of the record and the applicable law convinces us that the County's capacity use fees are subject to scrutiny under the "essential nexus" and "rough proportionality" tests articulated in *Nollan* and *Dolan*. In *Koontz*, the Supreme Court specifically held that "the government's demand for property from a land-use permit application must

satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and *even when its demand is for money*," 570 U.S. at 619 (emphasis added), with the Supreme Court's reference to "in lieu of" fees, rather than limiting the reach of the Supreme Court's decision, simply being a response to the Florida Supreme Court's conclusion that a governmental demand for money rather than an interference in tangible property rights did not constitute a taking. As the Supreme Court explained,

> if we accepted this argument it would be very easy for land-use permitting officials to evade the limitations in *Nollan* and *Dolan*. Because the government need only provide a permit applicant with one alternative that satisfies the nexus and rough proportionality standards, a permitting authority wishing to exact an easement could simply give the owner a choice of either surrendering an easement or making a payment equal to the easement's value. Such so-called "in lieu of" fees are utterly commonplace and they are functionally equivalent to other types of land use exactions. . . . [W]e reject respondent's argument and hold that so-called 'monetary exactions' must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*.

Id. at 612. Based upon this logic, the Supreme Court held that "[t]he fulcrum this case turns on is the direct link between the government's demand and a specific parcel of real property," *id.* at 614, and that this link

> implicates the central concern of *Nollan* and *Dolan*: the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property.

Id. As a result, we conclude that the "monetary exactions" with which *Koontz* was concerned were not limited to "in lieu of" fees and, instead, encompassed a broader range of governmental demands for the payment of money as a precondition for the approval of a land-use permit.[11]

11. The dissent in *Koontz* objected to the majority's decision, in part, because it extended the *Nollan/Dolan* test "to *all* monetary exactions" and limited the flexibility of local

¶ 43 In arguing that the principles enunciated in *Koontz* are inapplicable to the challenged "capacity use" fees on the grounds that "[f]ees that apply the same to everyone do not target 'a specific parcel of real property,' " *Koontz*, 570 U.S. at 614, the County overlooks the fact that, by emphasizing the "specific parcel of real property" at issue in that case, the Supreme Court sought to distinguish *Koontz* from *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), in which a majority of the Supreme Court agreed that a federal statute that required a coal mining company to pay medical benefits for retired miners and their families did not constitute a taking for constitutional purposes because "the Takings Clause does not apply to government-imposed financial obligations that 'd[o] not operate upon or alter an identified property interest.' " *Koontz*, 570 U.S. at 613 (quoting *E. Enters.*, 524 U.S. at 540 (Kennedy, J., concurring in the judgment)). As the Supreme Court explained in *Koontz*, "[u]nlike the financial obligation in *Eastern Enterprises*, the demand for money at issue [in *Koontz*] did 'operate upon . . . an identified property interest' by directing the owner of a particular piece of property to make a monetary payment." *Id.* The same is true in this instance given that, by requiring the payment of the challenged "capacity use" fees as a precondition for its concurrence in applications for the issuance of the necessary water and sewer permits, the County is "directing the owner[s] of [each] particular piece of property to make a monetary payment," regardless of whether the same fee is applicable to all tracts of property and regardless of who owns the property. *Id.* In other words, the fee at issue in this case is, in fact, linked to a specific piece of property, in each case the specific parcel of land that has been proposed for development.

¶ 44 In addition, a careful examination of *Koontz* does not suggest that its holding is limited to "ad hoc" fees or exempts "non-discretionary, generally applicable fees," with this position having been advocated for in the dissenting opinion, rather than that of the majority. *See Koontz*, 570 U.S. at 628 (Kagan, J., dissenting) (suggesting that, in the future, "[t]he majority might, for example, approve the rule, adopted in several States, that *Nollan* and *Dolan* apply only to permitting fees that are imposed ad hoc and not to fees that are generally applicable" while acknowledging that the majority had not clearly resolved this issue). In the same vein, we are not persuaded that the non-discretionary, generally applicable nature of the "capacity use" fees at issue in this case eliminates or mitigates the "coercive pressure" concerns that motivated the Supreme

governments "to mitigate a new development's impact on the community[.]" *Koontz*, 570 U.S. at 629 (Kagan, J., dissenting) (emphasis in original). As plaintiffs point out, this statement recognizes that the Court's holding was not limited to "in lieu of" fees.

Court in *Nollan*, *Dolan*, and *Koontz* given that, regardless of whether the fee is imposed on a single developer or on all developers, the County is exercising its "substantial power and discretion in land-use permitting" to exact money from those wishing to develop their land.[12] In the absence of any sort of limitation upon the County's authority to condition permit approval or concurrence in permit approval upon the payment of fees, the County would have the unfettered ability to increase the relevant fees substantially or to use the proceeds from the payment of the challenged fees for purposes unrelated to the development.

¶ 45 Similar concerns have been reflected in a number of prior decisions by this Court. In *Lanvale Properties, LLC v. County of Cabarrus*, Cabarrus County had adopted an "adequate public facilities ordinance" that "effectively condition[ed] approval of new residential construction projects on developers paying a fee to subsidize new school construction to prevent overcrowding in the [c]ounty's public schools." 366 N.C. 142, 143 (2012). In holding that the county lacked the authority to implement the ordinance through the exercise of its zoning power on the grounds that the ordinance did not "define the specific land uses that are permitted, or prohibited, within a particular zoning district," we noted that the relevant fees had increased by over 1,600 percent from 2003 to 2008 and concluded that the ordinance was nothing more than "a carefully crafted revenue generation mechanism that effectively establishes a 'pay-to-build' system for developers." *Id.* at 160–61. After rejecting the county's argument that the relevant fees constituted "voluntary mitigation payments" on the grounds that several members of the county commission had stated that approval of the required construction permits was conditioned on the county's receipt of payment, we opined that "[r]ecognizing that the [c]ounty's [ordinance] could generate significant amounts of revenue from a possibly unpopular group—residential developers—the [board of commissioners] substantially increased its adequate public facilities fee over a five year period," thereby "illustrat[ing] the precise harm that may occur when [such ordinances] are adopted absent specific enabling legislation." *Id.* at 162.

¶ 46 Similarly, in *Quality Built Homes v. Town of Carthage*, the Town of Carthage operated a public water and sewer system for the benefit of its residents and, as part of that service, adopted two ordinances that required the assessment of "water and sewer impact fees" for new

12. Despite the fact that the challenged "capacity use" fees are generally applicable, the County retains "discretion" in the sense that it may, at any time, decide to increase the amount of the impact fee, an authority it exercised when it doubled the fees between 2005 and 2017.

developments that were designed to cover the cost of expanding its existing water and sewer infrastructure to accommodate those developments. 371 N.C. 60, 61–62 (2018) (*Quality Built Homes II*). After this Court determined that the town lacked the authority to assess such fees in *Quality Built Homes I*, we remanded that case to the Court of Appeals "to address whether [the] plaintiffs' claims were barred by the applicable statute of limitations or the doctrine of estoppel by the acceptance of benefits." *Id.* at 62 (describing the Court's action in *Quality Built Homes I*, 369 N.C. at 19–22). In a second appeal arising from the Court of Appeals' decision on remand, this Court rejected the town's estoppel by benefits argument on the grounds that

> plaintiffs do not appear to have received any benefit from the payment of the challenged water and sewer impact fees that they would not have otherwise been entitled to receive. As we held in [*Virginia-Carolina Peanut Co. v. Atlantic Coast Line R. Co.*, 166 N.C. 62, 74–75 (1914)], in an instance in which "[t]he only alternative was to submit to an illegal exaction or discontinue its business," the payment of money "under such pressure[ ] has never been regarded as a voluntary act."

Quality Built Homes II, 371 N.C. at 75.

¶ 47 Admittedly, neither *Lanvale Properties* nor *Quality Built Homes II* addressed a Takings Clause claim or referenced *Koontz* and *Lanvale Properties* antedates *Koontz*. Nevertheless, this Court expressed concern in both of these decisions that local governments might use impact fee ordinances to force landowners to choose between paying a monetary exaction or forgoing development of their land entirely. The Court of Appeals recognized this concern in its discussion of *Dabbs* when it acknowledged that the Maryland case "is distinguishable from the present case" because, unlike the challenged "capacity use" fees, "the fees at issue [in *Dabbs*] were *not* 'a conditional monetary payment to obtain approval of an application for a permit of any particular kind,' " *Anderson Creek Partners*, 275 N.C. App. at 444 (quoting *Dabbs*, 458 Md. at 353), before observing that "[t]his distinction speaks directly to the types of coercive harms that the United States Supreme Court sought to prevent in *Koontz*" given that "the unconstitutional conditions doctrine seeks to prevent the government from leveraging its legitimate interest in mitigating harms by imposing '[e]xtortinate demands' which may 'pressure [a landowner] into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation,' " *id.* (quoting

Koontz, 57 U.S. at 605–06). Even so, the Court of Appeals found this distinction to be immaterial on the grounds that,

> [r]egardless of whether the [f]ees were to be paid prior to or after [plaintiffs] began their projects, the fees were predetermined and are uniformly applied—not levied against [plaintiffs] on an *ad hoc* basis—and thus do not suggest any intent by the County to bend the will or twist the arm of [plaintiffs].

Id. We do not find this logic to be persuasive.

¶ 48 As an initial matter, the fact that the ordinance at issue in *Dabbs* did *not* condition the issuance of a permit upon the payment of the impact fee was the very reason that the Maryland Court of Appeals deemed *Koontz* to be inapplicable in that case. *See Dabbs*, 458 Md. at 353. Aside from this significant distinction, we note that conditioning permit approval upon a landowner's decision to relinquish a property right goes to the heart of the manner in which the "unconstitutional conditions" doctrine has been deemed to be applicable in the land use context and animated the concerns that led to the Supreme Court's decision in *Koontz*. *See* 570 U.S. at 605 (observing that, "[b]y conditioning a building permit on the owner's deeding over a public right-of-way, for example, the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation"). Finally, the Court of Appeals' determination that, because the challenged "capacity use" fees were "predetermined" and "uniformly applied," they "do not suggest any intent by the County to bend the will or twist the arm of [plaintiffs]," *Anderson Creek Partners*, 275 N.C. App. at 444, overlooks the fact that the test enunciated in *Nollan* and *Dolan* is designed to address the *risk* that local governments might use their permitting power to coerce landowners into relinquishing property, with the extent to which the local government actually attempted to engage in such conduct representing a separate issue going to the merits of the claim rather than the identity of the legal standard used to evaluate such claims. Although the trial court may very well conclude on remand from our decision in this case that the County's capacity use fees satisfy both the "essential nexus" and "rough proportionality" requirements and do not, for that reason, result in a "taking," such a determination is irrelevant to the resolution of the issue of whether the "essential nexus" and "rough proportionality" test must be satisfied in the first place. As a result, we cannot agree with the Court of Appeals' determination that *Dabbs* provides the appropriate framework for use in deciding this case.

¶ 49 Aside from its reliance upon *Dabbs*, the County directs our attention to what it claims to be "[t]he overwhelming weight of authority" that "non-discretionary, generally applicable fees are not subject to the unconstitutional conditions doctrine." A careful analysis of the decisions upon which the County relies in making this argument shows that most of them were decided prior to *Koontz*, do not address the lawfulness of land-use exactions, or both, leaving only decisions such as *Building Industries Association-Bay Area*, 289 F. Supp. 3d at 1057–08, *Douglass Properties II*, *LLC*, 16 Wash. App. 2d at 171, and *American Furniture Warehouse Co. v. Town of Gilbert*, 245 Ariz. 156 (Ct. App. 2018) (concluding that "*Koontz* did not hold that *Dolan* applied to generally applicable legislative development fees" such as those used to develop traffic signal systems), to support the County's position. Aside from the fact that none of these decisions are binding on this Court, we are not persuaded by their reasoning or their interpretation of *Koontz*, which generally echo the arguments advanced by the County in its brief and strike us as inconsistent with existing North Carolina precedent relating to the validity of land use exactions and the logic upon which *Koontz* rests. As a result, we do not find these decisions persuasive as we attempt to understand the force and effect of the principles enunciated in *Koontz* as applied to the facts of this case.

¶ 50 In addition, we are not persuaded that the applicability of the test enunciated in *Nollan* and *Dolan* depends upon whether the challenged condition was imposed administratively or legislatively. As at least one member of the Supreme Court has recognized, the lower courts have reached differing conclusions with respect to this issue, which the Supreme Court has yet to address. *See Cal. Bldg. Indus. Ass'n v. City of San Jose*, 577 U.S. 1179 (2016) (Thomas, J., concurring in the denial of certiorari).[13] After carefully reviewing the relevant decisions, we agree with plaintiffs that nothing in *Nollan*, *Dolan*, or *Koontz* supports a view that those decisions only apply in the context of "administrative" decisions,[14] with the Supreme Court having consistently described the

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13. A number of courts have applied the test enunciated in *Nollan* and *Dolan* to generally applicable, legislatively imposed impact fees such as those at issue in this case, *see e.g.*, *Beavercreek*, 89 Ohio St.3d at 128; *Curtis v. Town of S. Thomaston*, 1998 Me. 63 (1998); *N. Ill. Home Builders Ass'n, Inc.*, 165 Ill.2d at 28, while others have limited the applicability of that test to administratively imposed conditions, *see*, *e.g.*, *St. Clair Cnty. Home Builders Ass'n v. City of Pell City*, 61 So.3d 992 (Ala. 2010); *Spinell Homes, Inc. v. Mun. of Anchorage*, 78 P.3d 692 (Alaska 2003); *Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale*, 187 Ariz. 479 (1997).

14. A number of courts have focused on language from *Dolan* distinguishing prior cases upholding the constitutionality of land use planning from the situation before the

"unconstitutional conditions" doctrine as "preventing the *government* from coercing people into giving up" a constitutional right rather than preventing a particular branch of government from acting in a particular manner. *Koontz*, 570 U.S. at 604 (emphasis added); *see also Dolan*, 512 U.S. at 385 (noting that "the *government* may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property") (emphasis added).

¶ 51 Admittedly, the fact that the challenged "capacity use" fees were imposed as the result of a legislative, rather than an administrative, process, may tend to suggest that those fees "more likely represent[ ] a carefully crafted determination of need tempered by the political and legislative process rather than a 'plan of extortion' directed at a particular landowner." *Curtis*, 1998 Me. 63, ¶ 7 (citing *Dolan*, 512 U.S. at 387). In light of that logic, the General Assembly's recent decision to enact the Public Water and Sewer System Development Act, S.L. 2017-138, 2017 N.C. Sess. Laws 996, which provides uniform guidelines for the implementation of water and sewer system development fees on a prospective basis, suggests that, in the future, such fees are likely to satisfy the "essential nexus" and "rough proportionality" requirement enunciated in *Nollan* and *Dolan*. Even so, as a constitutional matter, we believe that a decision to limit the applicability of the test set out in *Nollan* and *Dolan* to administratively determined land-use exactions would undermine the purpose and function of the "unconstitutional conditions" doctrine. *See* James Burling & Graham Owen, *The Implications of* Lingle *on Inclusionary Zoning and other Legislative and Monetary Exactions*, 28 Stan. Envtl. L. J., 397, 438 (2009) (observing that "[g]iving greater leeway to conditions imposed by the legislative branch is inconsistent with the theoretical justifications for the doctrine because those justifications are concerned with questions of the exercise [of] government power and not the specific source of that power"); David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan, *and What State and Federal*

Court in that case because those prior decisions "involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel," 512 U.S. at 385. *See, e.g.*, *St. Clair Cnty. Home Builders Ass'n*, 61 So.3d at 1007. However, those prior cases involved zoning power and general land-use regulations rather than impact fees. *See Agins v. City of Tiburon*, 447 U.S. 255 (1980), *abrogated by Lingle*, 544 U.S. at 528; *Village of Euclid*, 272 U.S. at 365; *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

Courts Are Doing About It, 28 Stetson L. Rev. 523, 567–68 (1999) (finding "little doctrinal basis beyond blind deference to legislative decisions to limit [the application of the test enunciated in *Nollan* and *Dolan*] only to administrative or quasi-judicial acts of government regulators"); *see also Town of Flower Mound v. Stafford Ests. Ltd. P'ship*, 135 S.W.3d 620, 641 (Tex. 2004) (expressing skepticism that "a workable distinction can always be drawn between actions denominated adjudicative and legislative" and noting that the conditions under consideration in both *Nollan* and *Dolan* were imposed pursuant to authority granted by state law). At the end of the day, we conclude that the applicability of the test enunciated in *Nollan* and *Dolan* hinges upon the fact that the government has demanded property from a land-use permit applicant, either through a dedication of land or the payment of money, as a pre-condition for permit approval rather than the identity of the governmental actor that imposed the challenged condition. *See Koontz*, 570 U.S. at 619.

¶ 52 We are equally unpersuaded by the County's contention that plaintiffs "never identified a constitutional right that they were coerced into giving up" or "allege[d] coercion of any kind. According to their complaint, plaintiffs' claim rests upon a contention that, in accordance with *Koontz*, "[m]onetary exactions by a local government as a condition to development approval, plat approval, permit approval, and/or approval of construction, which are designed to offset the impact of a proposed development phase, must bear an essential nexus or rough proportionality to the impact that the development will have on existing infrastructure." In this case, payment of the challenged "capacity use" fees is not just a requirement to ensure that adequate water and sewer capacity is available to for plaintiffs' developments, but also a precondition for the County's support for the issuance of a water and sewer permit from the Department of Environmental Quality. For that reason, we have little difficulty in concluding that plaintiffs have contended that the County violated the "unconstitutional conditions" doctrine set out in *Koontz*, *Dolan*, and *Nollan*, which rests upon the Fifth Amendment right to be free from governmental takings of one's property without just compensation. *See Koontz*, 570 U.S. at 605.

¶ 53 Similarly, the County's decision to condition its support for the issuance of the required water and sewer permits upon the payment of the challenged "capacity use" fees is inherently coercive in the constitutional sense. *See id.* at 614 (recognizing that the "central concern" underlying *Nollan* and *Dolan* was "the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality

to the effects of the proposed new use of the specific property at issue"). The County's contention that it had not engaged in any coercive conduct in this instance because "[plaintiffs] *wanted* to connect to the County's water and sewer system" and "could have used their properties for other purposes" or "sought to develop properties that used well water and septic tanks" is not persuasive for several reasons.

¶ 54 As an initial matter, we note that the payment of the challenged "capacity use" fees was not just necessary to permit the landowner to connect to the County's water and sewer system; instead, as we have already explained, the making of those payments implicated plaintiff's ability to develop their property at all given that plaintiffs were required to pay the challenged "capacity use" fees before the County would support plaintiffs' applications for the issuance of a water and sewer permit, with the issuance of such a permit constituting a necessary precondition for the recording of a residential subdivision plot. In other words, as a practical matter, plaintiffs would have been unable to proceed with their development plans had they refused to make the necessary "capacity use" fee payments to the County, a situation that places them squarely within the ambit of *Nollan*, *Dolan*, and *Koontz*. In the same vein, the fact that plaintiffs "could have used their properties for some other purposes" would have been equally true of the plaintiffs in each of the other relevant Supreme Court land-use exactions cases, with none of those cases having held that the availability of alternative uses for the plaintiff's property sufficed to justify an otherwise unconstitutional land-use exaction.[15]

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15. This argument might be relevant to a contention that the County's ordinance amounts to a "regulatory taking," in which government action violates the Takings Clause because it "denies [a landowner] all economically beneficial or productive use of [his or her] land." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992). Plaintiffs have not advanced any sort of "regulatory taking" claim in this case and we do not believe the facts would support such a claim. The imposition of the challenged "capacity use" fee at issue in this case is simply not a regulation of the type discussed by the Supreme Court in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), which held that a New York City law placing restrictions upon development activities involving individual historic landmarks was not an unconstitutional regulatory taking but was, instead, a valid exercise of the City's police power. *See Lingle*, 544 U.S. at 528 (noting that cases involving "the special context of land-use exactions" are governed by *Nollan* and *Dolan*, rather than *Penn Central*); *see also Lanvale Properties*, 366 N.C. at 160 (holding that an ordinance requiring residential property developers to pay a fee to subsidize new school construction was a mechanism for generating revenue, rather than a land-use regulation); *Durham Land Owners Ass'n v. County of Durham*, 177 N.C. App. 629, 638 (concluding that Durham County lacked the authority under its "zoning and general police powers" to impose a school impact fee), *disc. rev. denied*, 360 N.C. 532 (2006)).

¶ 55 Similarly, we are not persuaded by the County's argument that plaintiffs' concerns should be directed to the legislative, rather than the judicial, branch. To be sure, the Supreme Court of California has opined that,

> [w]hile legislatively mandated fees do present some danger of improper leveraging, such generally applicable legislation is subject to the ordinary restraints of the democratic political process. A city council that charged extortionate fees for all property development, unjustifiable by mitigation needs, would likely face widespread and well-financed opposition at the next election. Ad hoc individual monetary exactions deserve special judicial scrutiny mainly because, affecting fewer citizens and evading systematic assessment, they are more likely to escape such political controls.

San Remo Hotel, 27 Cal. 4th, 643 at 671. On the other hand, the Texas Supreme Court has rejected this view, stating that

> [w]hile we recognize that an ad hoc decision is more likely to constitute a taking than general legislation, we think it entirely possible that the government could "gang up" on particular groups to force exactions that a majority of constituents would not only tolerate but applaud, so long as burdens they would otherwise bear were shifted to others.

Town of Flower Mound, 135 S.W.3d at 641. The view expressed by the Texas Supreme Court echoes in our observation in *Lanvale Properties* that Cabarrus County had an incentive to increase the impact fees that it charged because it "could generate significant amounts of revenue from a possibly unpopular group—residential developers[.]" 366 N.C. at 162. *See also* Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. Rev. 177, 262 (2006) (observing that, "[w]ithout having to face the opposition of future residents who do not currently live or vote in the locality, [local government] officials find impact fees an irresistible policy option" with "continuing political support").

¶ 56 As we have already noted, the Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Consistent with this logic, to the extent that the challenged "capacity use" fees at

issue in this case are intended to cover the cost of expanding the County's water and sewer systems to accommodate the developments in which plaintiffs were involved, then plaintiffs, rather than the public at large (who already support the existing system through the payment of user fees and, perhaps, taxes), can appropriately be made to bear those costs to the extent that they are "roughly proportional" to the impact of the proposed developments upon the County's water and sewer system.[16] As the Supreme Court recognized in *Koontz*, its own precedents "enable permitting authorities to insist that applicants bear the full cost of their proposals," with "[i]nsisting that landowners internalize the negative externalities of their conduct [being] a hallmark of responsible land-use management[.]" 570 U.S. at 605–06. Acceptance of this logic does not mean, however, that the courts have no role to play in analyzing the lawfulness of such exactions, since a state or local government's ability to require property owners to internalize the cost of development does not allow such governmental entities to "engag[e] in 'out-and-out . . . extortion' that would thwart the Fifth Amendment right to just compensation." *Id.* at 606 (quoting *Dolan*, 512 U.S. at 387). *See also Lucas*, 505 U.S. at 1014 (warning that, if "the uses of private property were subject to unbridled, uncompensated qualification under the police power, 'the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed]' ") (alterations in original) (quoting *Mahon*, 260 U.S. at 415).

¶ 57 A number of the arguments that the County has advanced in this case rest upon an erroneous belief that the challenged "capacity use" fees are "user fees" rather than "impact fees." Nothing in the logic of the decision that we believe to be appropriate in this case will "subject every fee payment to a governmental entity to the *Nollan/Dolan/Koontz* analysis" or "cripple the ability of governments to tax, mandate fees, and levy other types of monetary payments that finance and make possible the services

16. In other words, the issue before us is not whether the County may charge developers for the cost that the County may incur to expand its water and sewer capacity in order to serve the new customers that will result from successful development activities. The County may clearly do so if it has the necessary statutory authority, an issue which the Court of Appeals resolved in the affirmative and which is not before us for further review in this appeal, and if the fees in question satisfy the test enunciated in *Nollan*, *Dolan*, and *Koontz*. To be clear, if the impact fees like those at issue in this case have an "essential nexus" and are "roughly proportional" to the costs that the developers' activities will impose upon the County's water and sewer system, then no taking will have occurred. However, for the reasons set forth in elsewhere in this opinion, we cannot assume that this test will be satisfied based on the present record and must leave that issue for resolution by the trial court.

that governments provide."[17] On the contrary, the logic underlying our decision in this case is limited to "impact fees" or "monetary exactions" and does not extend to true user fees such as charges for garbage collection, charges for the provision of actual water or sewer service or the right to tap on to existing water or sewer infrastructure, or fees assessed to cover the cost of enforcing particular regulatory regimes, so that our holding in this case should not be construed as inconsistent with anything that we said in *Homebuilders Association of Charlotte*. *See* 336 N.C. at 42 (discussing the relationship between regulatory authority and fees). In addition, we are confident that the definitions of "impact fee" and "exaction" set out earlier in this opinion will provide the trial courts with the ability to distinguish between different types of payments required by local governments in future proceedings.

¶ 58 The County further contends that, even if *Koontz* is applicable in this case, plaintiffs have failed to allege sufficient facts to support the legal conclusion set out in their complaint that the challenged "capacity use" fees lacked an "essential nexus" and "rough proportionality" to the County's goal of mitigating the impact on existing water and sewer infrastructure. Aside from the fact that the *County*, not plaintiffs, has the burden of showing that the challenged "capacity use" fees satisfy the "essential nexus" and "rough proportionality" test, *see F.P. Dev., LLC v. Charter Twp. of Canton, Mich.*, 16 F.4th 198, 206 (6th Cir. 2021) (noting that the township had "fail[ed] to carry its burden to show that it made the required individualized determination" that "the required dedication is related both in nature and extent to the impact of the proposed development") (citing *Dolan*, 512 U.S. at 391), we note that, while the entry of judgment on the pleadings is appropriate in situations in which the plaintiff alleges facts that defeat his, her, or its legal theory, *DiCesare*, 376 N.C. at 98–99, no such situation exists in this case.

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17. Amici North Carolina Water Quality Association and National Association of Clean Water Agencies separately argue that application of the "unconstitutional conditions" doctrine to impact fees like those at issue in this case would be "an unnecessary and costly exercise" because the Public Water and Sewer System Development Fee Act "now expressly requires that impact fees be tied to the actual capital cost impacts to water and sewer systems imposed by new development, thereby ensuring that fees will exhibit a rational relationship to the costs imposed." *See* S.L. 2017-138, 2017 N.C. Sess. Laws 996. In the event that the analysis outlined by amici is now statutorily required, we fail to see how a requirement that an impact fee satisfy the "essential nexus" and "rough proportionality" test enunciated in *Nollan* and *Dolan* would impose any additional burden upon any unit of local government and that this requirement would serve, instead, to ensure that any properly established impact fee satisfies the relevant constitutional standard.

¶ 59 Admittedly, plaintiffs' allegation that "the water and sewer impact fees are collected by the County to pay for the costs of future improvements to the County's water and sewer system" suffices to defeat any argument that the challenged "capacity use" fees lack an "essential nexus" to the County's objective of properly funding the expansion of its water and sewer system capacity. However, plaintiffs' complaint does not, as the County claims, "confirm[ ] that the fees are roughly proportional to the costs of the expansion." Instead, plaintiffs' complaint simply identifies the rates at which "capacity use" fees for water and sewer service are currently set and alleges that "[t]he water and sewer impact fees for commercial development is an amount determined by the County based upon the estimated water and sewer usage of the property." As a result, while plaintiffs' complaint admits that the challenged "capacity use" fees are based upon what the County estimates to be the cost of expanding existing water and sewer capacity to serve the properties contained in plaintiffs' development, it *does not* concede that these estimates accurately reflect the impact of plaintiffs' proposed developments upon the County's water and sewer systems. Although "[n]o mathematical calculation is required," the County must still show that its estimates are "roughly proportional" to the actual cost of expanding the County's water and sewer system to accommodate plaintiffs' proposed developments, *see Dolan*, 512 U.S. at 391, with the County having provided no support for its assertions that "rough proportionality" inquiry is simply "one of common sense" or that the challenged "capacity use" fees "meet that common-sense test and do not require a further factual inquiry." As a result, whether the challenged "capacity use" fees are or are not "roughly proportional" to the costs that plaintiffs' developments impose upon the County's water and sewer infrastructure is an issue that must be determined on remand.

¶ 60 Finally, despite our acceptance of the plaintiffs' underlying legal theory, we agree with the County that it would be improper for plaintiffs to recover the "capacity use" fees that they have already paid in the event that plaintiffs have passed those costs along to others, such as ultimate purchasers, in order to ensure that no party receives a "windfall." For that reason, we hold that, on remand, the County shall be permitted to present evidence concerning the extent to which, if at all, plaintiffs factored the cost of the challenged "capacity use" fees into the prices at which they have sold lots to ultimate purchasers. In the event that the trial court finds that plaintiffs have done so, it shall be permitted to hear evidence regarding the appropriate manner by which any such amount should be distributed to the parties in order to ensure that no party receives a windfall as a result of these proceedings.

E. Mootness

¶ 61 **[2]** In the alternative, the County requests that this Court dismiss plaintiffs' petition for discretionary review as improvidently allowed on the grounds that the issues that are before the Court have become moot. According to the County, "[plaintiffs'] *Koontz* theory appears in the complaint's complaint for declaratory relief," but "[plaintiffs] no longer have a justiciable claim for a declaration because a declaration about the validity of the old ordinance would not prospectively redress any injury that [plaintiffs] claim[ed] to have suffered." In addition, the County argues that plaintiffs have not sought "money damages—retrospective relief—on their *Koontz* theory" and have "only sought money damages [for] claims that are not before this Court." As a result, in the County's view, plaintiffs' request for declaratory relief has been rendered moot given that the relevant statutory provisions have been amended during the pendency of this case, citing *Cape Fear River Watch v. N.C. Env't Mgmt. Comm'n*, 368 N.C. 92, 98 (2015) (holding that the enactment of new legislation by the General Assembly rendered the trial court's declaratory ruling moot because it superseded the administrative agency rule challenged in the case).

¶ 62 In support of this contention, the County argues that, after plaintiffs had filed their complaints, the General Assembly passed the Public Water and Sewer Development Fee Act, which outlines the process by which local governments are entitled to calculate and assess "system development fees." *See* S.L. 2017-138, 2017 N.C. Sess. Laws 996. The County claims that it has assessed water and sewer system development fees in accordance with these newly enacted statutory provisions since 2017 and that current law "allows the County to impose much higher fees than what [plaintiffs] paid and contest[ed] here." As a result, the County contends that, "even if this Court were to side with [plaintiffs] on their constitutional contentions, that would not affect [plaintiffs'] legal rights going forward."

¶ 63 A careful analysis of plaintiffs' complaints clearly shows that plaintiffs are seeking both a declaration that the challenged "capacity use" fees are unlawful *and* a return of "all water and sewer impact fees paid to the County as damages," along with prejudgment interest, pursuant to former N.C.G.S. § 153A-324, with plaintiffs' request for monetary damages appearing in its claim pursuant to N.C. Const. art. I, § 19, and their contention that the challenged "capacity use" fees lack the required "essential nexus" and "rough proportionality" appearing in its request for declaratory relief. In our view, the fact that these allegations appear in separate portions of plaintiffs' complaint does not suffice to support the

County's mootness argument given that plaintiffs' claim for monetary relief expressly "reincorporate[s] by reference as if fully set forth herein" all of the earlier allegations set out in the complaint, including those referencing *Koontz*, and given that N.C. Const. art. I, § 19 contains an implicit prohibition against the taking of property without just compensation, *Finch v. City of Durham*, 325 N.C. 352, 362–63 (1989) (citing *Long v. City of Charlotte*, 306 N.C. 187, 196 (1982)), which is the same constitutional right that underlies *Nollan*, *Dolan*, and *Koontz*. As a result, since plaintiffs' claim for monetary relief is inextricably intertwined with their request for declaratory relief based upon *Koontz*, we are unable to agree with the County that the claims that are before us in this case have been rendered moot.

¶ 64 As further support for our determination with respect to the mootness issue, we conclude that the passage of the Public Water and Sewer Development Fee Act, while relevant to the validity of any challenge to the County's *statutory* authority to enact "capacity use" fees like those at issue here, has no bearing on the constitutionality of those fees. "A constitutional prohibition against taking or damaging private property for public use without just compensation is self-executing and neither requires any law for its enforcement, nor is susceptible of impairment by legislation." *Sale v. State Highway & Pub. Works Comm'n*, 242 N.C. 612, 617 (1955) (citations omitted). As a result, even if plaintiffs had sought nothing more than a declaration that the "capacity use" fees at issue in this case are unconstitutional under *Koontz*, the enactment of the 2017 legislation does not have the effect of rendering any constitutional claim that plaintiffs may have asserted moot.

F. Demonstration of an Issue of Material Fact

¶ 65 Finally, plaintiffs argue that the trial erred by entering judgment on the pleadings in the County's favor because the pleadings demonstrate the existence of a genuine issue of material fact concerning the extent to which the challenged "capacity use" fees, as applied to plaintiffs, had an "essential nexus" and "rough proportionality" to the anticipated impact that plaintiffs' proposed developments would have on the County's water and sewer infrastructure. Although plaintiffs have not advanced any specific argument with respect to this issue in their brief, a careful examination of the pleadings does tend to show, as we have already noted, that, while there is no genuine issue of material fact concerning the extent to which the challenged "capacity use" fees had an "essential nexus" to the impact of plaintiffs' development upon the County's water and sewer systems, the parties clearly dispute the extent to which relevant fees were "roughly proportional" to the actual impact on the

County's water and sewer systems. As a result, on remand, the parties shall be permitted to conduct discovery and present evidence concerning the issue of whether the challenged "capacity use" fees satisfy the "rough proportionality" component of the *Nollan/Dolan* test. In the event that the amount of the "capacity use" fees that the County has assessed is no more than is "roughly proportional" to the additional costs that the County will incur in providing the facilities needed to ensure the availability of adequate water and sewer services for plaintiffs' developments, then no taking should be found to have occurred. In addition, as we have already discussed, if the trial court determines that the challenged "capacity use" fees are not "roughly proportional" to the impact of plaintiffs' proposed developments upon the County's water and sewer systems, the parties shall be permitted to present evidence regarding the extent to which, if at all, plaintiffs have passed the "capacity use" fees they have already paid to ultimate purchasers and the manner in which any such amount should be distributed in order to ensure that no person receives a "windfall."

III. Conclusion

¶ 66 Thus, for the reasons set forth above, we hold that the "capacity use" fees at issue in this case are "monetary exactions" subject to constitutional scrutiny under *Koontz* and must, therefore, satisfy the "essential nexus" and "rough proportionality" test in order to avoid being treated as takings of plaintiffs' property. As a result, the decision of the Court of Appeals is reversed and this case is remanded to the Court of Appeals for further remand to Superior Court, Harnett County, for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Justice BERGER concurring in part and dissenting in part.

¶ 67 I join in the majority opinion generally. However, if an unconstitutional taking occurred, there is no scenario in which the county can retain the fees collected. The county should not profit from its taking, and I respectfully dissent from that portion of the opinion.

¶ 68 I write separately because "[a] frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. Const. art. I, § 35.

> The admonition of the Constitution requiring frequent recurrence to fundamental principles is politically

> sound. . . . We violate no precedent in referring to the important function these guaranties of personal liberty perform in determining the form and character of our Government. . . . If those whose duty it is to uphold tradition falter in the task, these guaranties may be defeated temporarily, or permanently lost through obsolescence.

State v. Harris, 216 N.C. 746, 762–63, 6 S.E.2d 854, 865–66 (1940).

¶ 69 State constitutional provisions often provide greater protections for our rights, liberties, and freedoms than those secured by the Constitution of the United States. *State v. Jackson*, 348 N.C. 644, 648, 503 S.E.2d 74, 91 (1998). This Court has recognized that

> [o]ur 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 v. University of North Carolina, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992) (cleaned up).

¶ 70 Our Declaration of Rights begins with the foundational statement that "[w]e 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." N.C. Const. art. I, § 1. The "fundamental guaranties" of Article I, section 1 are "very broad in scope." *State v. Ballance*, 229 N.C. 764, 769, 51 S.E.2d 731, 734 (1949). "This Court's duty to protect fundamental rights includes preventing arbitrary government actions that interfere with" these fundamental rights. *King v. Town of Chapel Hill*, 367 N.C. 400, 408, 758 S.E.2d 364, 371 (2014) (citing N.C. Const. art. I, § 1).

¶ 71 The unconstitutional conditions doctrine and the Takings Clause of the Fifth Amendment provide protections from government exactions that require just compensation. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 829, 107 S. Ct. 3141, 3144, 97 L. Ed. 2d 677 (1987); and *Dolan v. City of Tigard*, 512 U.S. 374, 378, 114 S. Ct. 2309, 2313, 129 L. Ed. 2d 304 (1994). *Nollan* and *Dolan* provide the constitutional floor. Although not argued by the parties, given our State's history of jealously guarding

property rights, heightened scrutiny requiring such exactions be directly proportional to the projected impact may be available under the North Carolina Constitution.

Chief Justice NEWBY joins in this concurring in part and dissenting in part opinion.

Justice EARLS dissenting.

¶ 72 At its core, the unconstitutional conditions doctrine is about coercion: the doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013). The basic insight is that allowing governmental entities to impose conditions on the exercise of a constitutional right makes individuals vulnerable to potentially "extortionate demands." *Id.* at 619. In the land-use context, the doctrine has been applied to conditions that require a property owner to cede an interest in their property to the government—or to pay a "monetary exaction" in lieu of conveying a property interest—as a condition of obtaining the permits necessary to develop their property. When a government seeks to impose such a condition, there must be "an essential nexus and rough proportionality" between the condition and "the effects of the proposed new use of the specific property at issue." *Id.* at 614.

¶ 73 In this case, the majority concludes that Harnett County's imposition of a generally applicable impact fee that all property owners must pay if they wish to have the County's water and sewer infrastructure expanded to their property is a potentially "extortionate demand[ ]" that threatens the plaintiffs' rights under the Takings Clause. This conclusion rests on a mischaracterization of the County's actions and the choices presented to property owners in Harnett County. Specifically, the impact fee is not a monetary exaction subject to the unconstitutional conditions doctrine, requiring property owners who want the County to expand its water and sewer infrastructure to their property to offset a portion of the cost is not a taking, and imposition of a generally applicable non-discretionary legislative fee is not coercive. The result is an unwarranted and unwise expansion of the scope of the Takings Clause that will engender frequent litigation and may ultimately diminish the capacity of municipalities to recoup fees to offset the costs of maintaining vital public infrastructure for the public's benefit. Even if this decision has few immediate practical consequences, it also signals an increased hostility towards government that hearkens back to a bygone era. Accordingly, I respectfully dissent.

I. The County's infrastructure fee is not equivalent to the "monetary exaction" at issue in *Koontz*

¶ 74 In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the United States Supreme Court applied the unconstitutional conditions doctrine to ad hoc demands requiring property owners to cede an interest in their property as a prerequisite to obtaining a building permit. In *Koontz*, the Court applied the unconstitutional conditions doctrine for the first time to a government's demand for payment of a fee instead of a demand for an interest in property, or what the Court termed a "monetary exaction." 570 U.S. 595, 612 (2013) ("[S]o-called 'monetary exactions' must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*."). Specifically, the Court made subject to the doctrine a Florida municipality's requirement that, in order to obtain a building permit, a property owner needed either to (1) dedicate a "conservation easement," or (2) pay for the municipality to hire contractors to make improvements to property owned by the municipality. *Id.* at 601–02. The majority holds that the infrastructure fee at issue in the present case is analogous to the monetary exaction at issue in *Koontz*.

¶ 75 There are obvious differences between the monetary exactions at issue in *Koontz* and the County's infrastructure fee. The most notable is the absence of a governmental demand for an interest in the developers' real property in this case. In *Koontz*, the Court recognized that a choice between dedicating an easement and being unable to develop property is not meaningfully different from the choice between dedicating an easement or paying money equivalent to the value of the easement and being unable to develop property. *See Koontz*, 570 U.S. at 612 (explaining that "a permitting authority wishing to exact an easement could simply give the owner a choice of either surrendering an easement or making a payment equal to the easement's value"). *Koontz* was primarily concerned with closing a perceived loophole arising under *Nollan* and *Dolan* whereby governments, cognizant that the unconstitutional conditions doctrine limited their authority to require conveyance of an actual interest in land as a condition of issuing a building permit, required payment of an equally valuable "monetary exaction" as a supposed alternative. *Id.* at 619. The municipality in *Koontz* was trying to do through the permitting process what would have been "a *per se* taking" if done "directly": seize land without providing just compensation. *Id.* at 612. *Koontz* affirmed that governments could not "evade the limitations of *Nollan* and *Dolan* by recharacterizing the demand for an easement as a requirement for "payment equal to the easement's value." *Id.* By

contrast, in this case, there is no demand for an interest in land lurking behind the County's requirement that the developers help defray the cost of the public service they wish to obtain.

¶ 76 Moreover, the exaction sought in *Koontz* was also not levied to offset the costs of any particular service the municipality was providing to the landowner; instead, the exaction was sought to mitigate the diffuse impacts of development on the municipality's water resources. *Id.* at 600–01. The landowner in *Koontz* did not obtain any specific service in exchange for the exaction; the exaction was merely the price of obtaining permission to build. *Id.* at 602. By contrast, in this case, the County has demanded that all of the developers pay a sum of money in order to offset the costs of providing a particular public service to the developers. As the majority recognizes, the fees are imposed to achieve the County's "objective of properly funding the expansion of its water and sewer system capacity." *Ante*, at ¶ 59. The County is asking all property owners who wish to obtain access to a service to bear part of the cost of expanding that service. That is not equivalent to the monetary exaction at issue in *Koontz*. Even if, as the majority asserts, the logic of the Court's decision in *Koontz* "encompassed a broader range of governmental demands for the payment of money as a precondition for the approval of a land-use permit" than the precise kind of demand imposed by the municipality in that case, *ante*, at ¶ 42, *Koontz* does not justify the majority's characterization of the County's impact fee.

II. Requiring developers to pay the infrastructure fee prior to expanding water and sewer infrastructure does not coerce them into ceding their constitutional rights

¶ 77 Even assuming that the fee at issue in this case is akin to the monetary exaction at issue in *Koontz*, application of the unconstitutional conditions doctrine is still improper for two additional reasons: First, the requirement that developers pay a fee to offset the costs of extending the County's existing water and sewer infrastructure to their property before the County extends its existing water and sewer infrastructure to their property does not threaten any enumerated rights provided under the Takings Clause of the United States Constitution. Second, fees that are imposed via legislation on a generally applicable, non-discretionary, and uniform basis do not give rise to a meaningful risk of coercion in the constitutional sense. Accordingly, the justifications for subjecting a monetary fee to the unconstitutional conditions doctrine are not present under the circumstances of this case.

A. Requiring payment of the infrastructure fee does not coerce the developers into giving up a constitutional right

¶ 78 The unconstitutional conditions doctrine recognizes that when "someone refuses *to cede a constitutional right* in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury." *Koontz*, 570 U.S. at 607 (emphasis added). As articulated in *Nollan*, *Dolan*, and *Koontz*, the doctrine applies when the government tries to do something by imposition of a permitting condition that would be a per se taking if done directly. *See id.* at 612 ("A predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing. . . . [I]f the government had directly seized the easements it sought to obtain through the permitting process, it would have committed a *per se* taking."). The gravamen of an unconstitutional conditions claim is thus the existence of an underlying enumerated constitutional right that is threatened by the government's actions.

¶ 79 Here, the majority holds that the unconstitutional conditions doctrine applies to the circumstances of this case because the County's imposition of the infrastructure fee threatens the developers' enumerated constitutional rights under the Takings Clause. *See ante*, at ¶ 52. Under the Takings Clause, property owners have the "right to receive just compensation when [their] property is taken for a public use." *Dolan*, 512 U.S. at 385. "[T]he appropriation of an easement constitutes a physical taking." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2073 (2021). Thus, in both *Nollan* and *Dolan*, it was obvious what constitutional right the municipalities' conditions implicated: the government had conditioned approval of a building permit on the property owner's conveyance of an easement on a portion of their property. *See Nollan*, 483 U.S. at 827 (addressing the question of whether "the California Coastal Commission could condition its grant of permission to [landowners to] rebuild their house on their transfer to the public of an easement across their beachfront property"); *Dolan*, 512 U.S. at 395 (considering whether a city could require dedication of a "floodplain easement" and a "pedestrian/bicycle pathway easement" as a condition of granting a building permit). The County's imposition of an infrastructure fee in this case obviously does not threaten a taking in the *Nollan* / *Dolan* sense.

¶ 80 Nonetheless, relying on *Koontz*, the majority concludes that imposition of the infrastructure fee implicates the developers' "Fifth Amendment right to be free from governmental takings of one's property without just compensation." *Ante*, at ¶ 52. However, *Koontz* does

not support the conclusion that imposition of an impact fee connected to a specific service a government provides to a specific property owner is akin to a taking. The developers are not being coerced to give up any constitutional rights. If the developers refused to pay the infrastructure fee, the County would not provide the benefit of extending the County's water and sewer infrastructure to their property. The developers do not have a constitutional right to access the County's water and sewer infrastructure without contributing to the cost of its provision. *See*, *e.g.*, *Massachusetts v. United States*, 435 U.S. 444, 462 (1978) ("A governmental body has an obvious interest in making those who specifically benefit from its services pay the cost . . . ."). If the developers did not obtain access to the County's water and sewer infrastructure, the County would not sign off on its application for a permit that the developers need to build residential subdivisions. The developers also do not have a constitutional right to build residential subdivisions without complying with applicable regulations. *See*, *e.g.*, *Batch v. Town of Chapel Hill*, 326 N.C. 1, 13 (1990) (concluding that a developer's "failure to comply with [a municipal] ordinance is a sufficient basis to support the council's refusal to approve plaintiff's subdivision plan").

¶ 81 When Harnett County refuses to extend its water and sewer infrastructure to property owned by individuals who refuse to pay the infrastructure fee, the County is not "deny[ing] a benefit to a person because he [is] exercis[ing] a constitutional right." *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545 (1983). The developers have "not alleged a physical taking of any of [their] property" because "[r]equiring money to be spent is not a taking of property," *Atlas Corp. v. United States*, 895 F.2d 745, 756 (Fed. Cir. 1990), at least when the money was "charged as a fee for service or a tax," *Homebuilders Ass'n of Metro. Portland v. Tualatin Hills Park & Recreation Dist.*, 185 Or. App. 729, 740 (2003). The only thing the County is denying the developers is the benefit of a service they would prefer not to pay for. If that is a taking, then it is difficult to see why all user fees are not also monetary exactions subject to the doctrine, notwithstanding the majority's assertion to the contrary: conceptually, "charges for garbage collection, charges for the provision of actual water or sewer service . . . or fees assessed to cover the cost of enforcing particular regulatory regimes," *ante*, at ¶ 57, are also fees imposed to mitigate the (fiscal) impacts of endeavoring to provide a specific public service to residents.

¶ 82 The majority suggests that the potential taking arises from depriving the developers of the opportunity to "proceed with their development plans," *ante*, at ¶ 54, specifically "the recording of a residential

subdivision plot," *id.*, even if they have failed to offset the costs of a service the government provides them and, as a result, cannot comply with applicable building regulations. To begin with, this is really a complaint directed at the North Carolina Department of Environmental Quality based on its refusal to issue a building permit, not at Harnett County. Regardless, this type of claim—that a regulation precludes a property owner from developing their land in one particular way—does not threaten a per se taking as in *Nollan*, *Dolan*, and *Koontz*. Rather, it is a type of claim that fits neatly within the "regulatory takings" doctrine established in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). A regulation which limits a property owner's ability to develop their property but which does not "completely deprive an owner of 'all economically beneficial use' of her property," *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (cleaned up), may constitute a regulatory taking depending on (1) "[t]he economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the governmental action." *Penn Central*, 438 U.S. at 124. Accordingly, "the appropriate test here is a *Penn Central* regulatory takings analysis." *Better Hous. for Long Beach v. Newsom*, 452 F. Supp. 3d 921, 933 (C.D. Cal. 2020); *see also Mead v. City of Cotati*, 389 F. App'x 637, 638–39 (9th Cir. 2010) ("A generally applicable development fee is not an adjudicative land-use exaction subject to the [*Nollan* and *Dolan*]. Instead, the proper framework for analyzing whether such a fee constitutes a taking is the fact-specific inquiry developed by the Supreme Court in [*Penn Central*].").

¶ 83 The choice presented to the developers in this case is not the same as the choice that was presented to the landowner in *Koontz*: it is not the choice between conveying an interest in their property or paying an equivalent fee and being denied permission to develop their property. Rather, the choice is between paying a portion of the costs of extending a public service that will enable the developers to develop their property in one particularly desired way and not paying for the service. Under *Koontz*, that is not the kind of choice that is subject to the unconstitutional conditions doctrine.

B. Application of a non-discretionary, generally applicable, uniform legislative fee does not give rise to a meaningful risk of coercion

¶ 84 The majority's decision to subject the County's infrastructure fee to the unconstitutional conditions doctrine overlooks another important distinction between the requirements at issue in the Supreme Court's

unconstitutional conditions cases and the requirement at issue here. In *Nollan*, *Dolan*, and *Koontz*, the challenged permit conditions were discretionary conditions imposed on an ad hoc basis by a governmental entity after a permit application had been submitted. By contrast, the County's infrastructure fee is imposed on a non-discretionary, generally applicable, and uniform basis. Notwithstanding the majority's tautological assertion that the County's infrastructure fee is "inherently coercive in the constitutional sense," *ante*, at ¶ 54, these features substantially diminish the risk of coercion arising from imposition of the infrastructure fee. The salient distinctions involve both the manner in which the fees are applied and the manner in which they are enacted.

¶ 85 In *Koontz*, the property owner challenged a condition devised by a water management district under a Florida statute that authorized the district to require developers to "offset . . . resulting environmental damage by creating, enhancing, or preserving wetlands elsewhere." 570 U.S. at 601. This kind of permitting process gives rise to a risk of coercion "because the government often has *broad discretion* to deny a permit that is worth far more than property it would like to take." *Id.* at 605 (emphasis added). For example, if developing the undeveloped land imposes costs to the municipality of $1,000, and issuing a building permit will enable the property owner to develop the land in a way that increases its value by $10,000,000, then the municipality has the power to demand a fee that far exceeds the costs of development it will be forced to bear. This is the kind of coercive power the unconstitutional conditions doctrine attempts to mitigate. *Id.* ("So long as the building permit is more valuable than any just compensation the owner could hope to receive for the right-of-way, the owner is likely to accede to the government's demand, no matter how unreasonable."). Under this scenario, there is a significant risk that a municipality will "leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts." *Id.* at 606.

¶ 86 As numerous other courts have recognized, the same risk of coercion is not present when the amount of a fee is fixed beforehand at a set amount for all property owners without regard for the potential value of their property. *See, e.g.*, *Knight v. Metro. Gov't of Nashville & Davidson Cnty.*, 572 F. Supp. 3d 428, 443 (M.D. Tenn. 2021) ("The *Nollan/Dolan* standard of review does not apply to generally applicable land use regulations, as opposed to adjudicative land-use exactions."); *Am. Furniture Warehouse Co. v. Town of Gilbert*, 245 Ariz. 156, 163 (Ct. App. 2018) ("*Koontz* addressed the constitutionality of a government's 'adjudicative decision' unique to a parcel. . . . *Koontz* did not hold that *Dolan* applied to generally applicable legislative development fees.");

Better Hous. for Long Beach v. Newsom, 452 F. Supp. 3d at 932 ("*Koontz* itself involved an adjudicative, individual determination, and the majority never addressed *Nollan/Dolan's* application to general legislation. Instead, it repeatedly emphasized the special vulnerability of land use permit applicants to extortionate demands for money." (cleaned up)); *Douglass Properties II, LLC v. City of Olympia*, 16 Wash. App. 2d 158, 164, *rev. denied*, 197 Wash. 2d 1018 (2021), *and cert. denied*, 142 S. Ct. 900 (2022) ("[T]he *Nollan/Dolan* test does not apply to the traffic impact fees, because such fees are legislatively prescribed generally applicable fees outside the scope of *Koontz*."); *Willie Pearl Burrell Tr. v. City of Kankakee*, 2016 IL App (3d) 150655, ¶ 44 ("Defendant's demand for money stems from . . . a generally applicable ordinance . . . [and] is thus not the sort of *ad hoc* demand contemplated in *Koontz*, but simple compliance with a straightforward ordinance."); *Dabbs v. Anne Arundel Cnty.*, 458 Md. 331, 353–54 (2018) ("This case falls squarely within *Dolan's* recognition that impact fees imposed on a generally applicable basis are not subject to a rough proportionality or nexus analysis."). The fees in this case "are predetermined, set out in [an] Ordinance, and non-negotiable; the Fees are not assessed on an ad hoc basis or dependent upon the landowner's particular project." *Anderson Creek*, 275 N.C. App. at 443. There is no opportunity for the government to assess the value of the permit to an individual property owner and adjust the demand for money accordingly. Instead, "[t]he legislatively-imposed development impact fee is predetermined . . . and applies to any person wishing to develop property in the [County]." *Dabbs*, 458 Md. at 353. There is a meaningful difference between the scenario at issue in this case and the circumstances of *Koontz*: It is the difference between a driver pulling up to a gas station where prices are listed prominently on the pumps and a driver pulling up to a gas station where the attendant chooses a price after the driver asks for a certain amount of gas. In both cases, drivers might not be thrilled at the hit to their wallet, but only in the latter circumstance does the gas station attendant have the chance to levy an "extortionate demand[ ]" based on what kind of car the driver is driving and how important it is to the driver to arrive at his or her destination.

¶ 87 The majority concludes that this distinction in how fees are calculated is irrelevant, suggesting that even a legislature can choose to "exercise . . . government power" in a coercive manner. *Ante*, at ¶ 51. While it may be theoretically possible for a municipality to set predetermined impact fees at an amount totally incommensurate with the cost of providing a service, it is legally prohibited and practically unlikely. As noted above, the regulatory takings doctrine already restrains the capacity of governments to limit how property owners utilize their property;

in addition, state law already precludes municipalities from assessing fees to defray the costs of public services that are "unreasonable." *Homebuilders Ass'n of Charlotte, Inc. v. City of Charlotte*, 336 N.C. 37, 46 (1994). Moreover, the developers have a meaningful opportunity to influence the enactment of legislative impact fees through participation in the political process. *See San Remo Hotel L.P. v. City And Cnty. of San Francisco*, 27 Cal. 4th 643, 671 (2002) ("[G]enerally applicable legislation is subject to the ordinary restraints of the democratic political process."). Quoting the Texas Supreme Court, the majority opines that it is "entirely possible that the government could 'gang up' on particular groups to force exactions that a majority of constituents would not only tolerate but applaud." *Ante*, at ¶ 55. But "[l]egislation designed to promote the general welfare commonly burdens some more than others." *Penn Central*, 438 U.S. at 133. The developers have a right to participate in the process of enacting legislation, not to dictate the results of that process. Their concern that the result may not reflect their preferences is not the same as a complaint that they have been excluded from the political process in any constitutionally salient way.

III. Conclusion

¶ 88 Ultimately, the majority is correct in suggesting that its decision will have little practical effect, either on the parties to this case or on land-use law in North Carolina more generally. The majority opinion attempts to preclude the developers from collecting a "windfall" by recouping fees they passed on to ultimate purchasers, *ante,* at ¶ 61, and the majority notes that passage of the Public Water and Sewer System Development Act should mean that "in the future, such fees are likely to satisfy the 'essential nexus' and 'rough proportionality' requirement enunciated in *Nollan* and *Dolan*," *id*., at ¶ 51. But the majority's decision to convert generally applicable legislative impact fees into monetary exactions subject to the unconstitutional conditions doctrine is not without consequence. Although the majority purports to limit application of the rule it has announced to "impact fees" as distinct from the "true user fees" and taxes governments rely upon to fund their continued operations, *id*. at ¶ 57, the lines that separate these categories are blurry and, often, more semantic than essential. At a minimum, governments will need to expend more resources justifying the imposition of reasonable fees used to defray the costs of providing public services.[1]

1. Although we disagree with the majority that the unconstitutional conditions doctrine applies, we agree that, having determined that it does, on remand, it is appropriate for the trial court to consider whether ordering the developers to be refunded for prior infrastructure fees would provide them with a windfall.

¶ 89 More broadly, the majority's willingness to expand both the unconstitutional conditions doctrine and the Takings Clause to shield property owners from governmental efforts to recoup the costs of providing public services is a troubling throwback to an antiquated jurisprudence. The unconstitutional conditions doctrine is "a product of *Lochner*-like, pre-New Deal understandings" initially designed "to protect common law rights in the face of threats to those rights created by the rise of the regulatory state." Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. Rev. 593, 597 (1990). By constitutionalizing a property owner's objection to a democratically legitimate non-discriminatory policy choice, the majority risks conveying the message that certain constitutional rights asserted by certain litigants are most favored. The Court can dispel this notion in future cases by evenhandedly applying the unconstitutional conditions doctrine with the same solicitousness towards claims brought by other categories of litigants whose rights are allegedly burdened by onerous conditions imposed on their receipt of public benefits. *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1416 (1989) (describing how the unconstitutional conditions doctrine has also been applied "to protect personal liberties of speech, association, religion, and privacy just as it once had protected the economic liberties of foreign corporations and private truckers" in the *Lochner* era). Otherwise, we risk perpetuating an "inconsistent application" of a doctrine which "has never been an overarching principle of constitutional law that operates with equal force regardless of the nature of the rights and powers in question." *Dolan*, 512 U.S. at 407 n.12 (Stevens, J., dissenting). Accordingly, I respectfully dissent.

Justice HUDSON and Justice MORGAN join in this dissenting opinion.

BUCKLEY, LLP
v.
SERIES 1 OF OXFORD INSURANCE COMPANY, NC, LLC

No. 219A21

Filed 19 August 2022

Discovery—attorney-client privilege—communications with outside counsel—investigation of company policy violations

In a case involving alleged violations of a company's policies on sexual harassment, the Business Court properly applied the law of attorney-client privilege where it mandated disclosure of all communications between the company and outside counsel that were unrelated to the provision of legal services but protected communications for which the primary purpose was the giving or receiving of legal advice.

Appeal pursuant to N.C.G.S. § 7A-27(a)(3) from an order and opinion granting in part and denying in part plaintiff's and defendant's motions to compel entered on 9 November 2020 by Judge Louis A. Bledsoe III, Chief Business Court Judge, in Superior Court, Mecklenburg County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(b). Heard in the Supreme Court on 9 May 2022.

McGuire Woods LLP, by Mark W. Kinghorn for plaintiff-appellant.

Womble Bond Dickinson (US) LLP, by James P. Cooney III and G. Michael Barnhill, for defendant-appellee.

Patterson Harkavy LLP, by Paul E. Smith and Narendra K. Ghosh, and Winslow Wetsch, PLLC, by Laura J. Wetsch, for NC Advocates for Justice, amicus curiae.

Alston & Bird LLP, by Brian D. Boone for Chamber of Commerce of the United States of America and Association of Corporate Counsel, amicus curiae.

PER CURIAM.

¶ 1 The order and opinion entered on 9 November 2020, from which this interlocutory appeal is taken, is affirmed per curiam.

¶ 2 Under North Carolina law, to avail itself of attorney-client privilege, a party seeking to shield a portion of a communication from disclosure must show, *inter alia*, "the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated." *In re Miller*, 357 N.C. 316, 335 (2003) (quoting *State v. McIntosh*, 336 N.C. 517, 524 (1994)). "If [this] element[] is not present in any portion of an attorney-client communication, that portion of the communication is not privileged." *Id.*

¶ 3 This Court recently affirmed a Business Court opinion stating that "[b]usiness advice, such as financial advice or discussion concerning business negotiations, is not privileged." *Window World of Baton Rouge, LLC v. Window World, Inc.*, 2019 NCBC 53, 2019 WL 3995941, at *25 (N.C. Super. Aug. 16, 2019), *aff'd per curiam*, 377 N.C. 551, 2021-NCSC-70, ¶ 1 (quoting *N.C. Elec. Membership Corp. v. Carolina Power & Light Co.*, 110 F.R.D. 511, 517 (M.D.N.C. 1986)). In *Window World*, the trial court further stated that "North Carolina courts apply the protection of the attorney-client privilege to in-house counsel in the same way that it is applied to other attorneys." 2019 WL 3995941, at *25. In today's business world, investigations of alleged violations of company policy, including policies prohibiting sexual harassment or discrimination, are ordinary business activities and, accordingly, the communications made in such investigations are not necessarily "made in the course of giving or seeking legal advice for a proper purpose." *In re Miller*, 357 N.C. at 335 (quoting *McIntosh*, 336 N.C. at 24). "When communications contain intertwined business and legal advice, courts consider whether the 'primary purpose' of the communication was to seek or provide legal advice." *Window World*, 2019 WL 3995941, at *25.

¶ 4 Here the business court properly interpreted North Carolina law, including *In re Miller* and *Window World*, by recognizing that the investigation by outside counsel presented in this case had both business and legal purposes, conducting a detailed in camera review of each disputed document, and mandating disclosure of all communications that "were unrelated to the rendition of legal services," while protecting communications that "reflect a primary purpose of giving or receiving legal advice." Accordingly, the business court order is affirmed.

AFFIRMED.[1]

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1. The order and opinion of the North Carolina Business Court, 2020 NCBC 81, is available at https://www.nccourts.gov/documents/business-court-opinions/buckley-llp-v-series-1-of-oxford-ins-co-nc-llc-2020-ncbc-81.

CONNETTE v. CHARLOTTE-MECKLENBURG HOSP. AUTH.

[382 N.C. 57, 2022-NCSC-95]

EDWARD G. CONNETTE, AS GUARDIAN AD LITEM FOR AMAYA GULLATTE, A MINOR, AND ANDREA HOPPER, INDIVIDUALLY AND AS PARENT OF AMAYA GULLATTE, A MINOR
v.
THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY D/B/A CAROLINAS HEALTHCARE SYSTEM, AND/OR THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY D/B/A CAROLINAS MEDICAL CENTER, AND/OR THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY D/B/A LEVINE CHILDREN'S HOSPITAL, AND GUS C. VANSOESTBERGEN, CRNA

No. 331PA20

Filed 19 August 2022

Nurses—medical malpractice claim—professional duty of care—evidence of breach of standard of care—exclusion improper

In a medical malpractice action arising from injuries sustained by a young girl during an anesthesia mask induction procedure, a new trial was required because the trial court improperly excluded evidence regarding whether the certified registered nurse anesthetist (CRNA) who conducted the procedure breached his professional duty of care. The Supreme Court overruled the principle stated in *Byrd v. Marion Gen. Hosp.*, 202 N.C. 337 (1932), that nurses could not be held legally responsible for decisions made when diagnosing or treating patients under the direction of a supervising physician, and held that nurses may be held liable for negligence or medical malpractice if found to have breached the applicable professional standard of care in carrying out their duties.

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, 272 N.C. App. 1 (2020), finding no error in a judgment entered on 20 August 2018 by Judge Robert C. Ervin in Superior Court, Mecklenburg County. Heard in the Supreme Court on 8 November 2021.

Edwards Kirby, LLP, by Mary Kathryn Kurth, John R. Edwards, and Kristen L. Beightol, for plaintiff-appellants.

Robinson, Bradshaw & Hinson, P.A., by Matthew W. Sawchak, Jonathan C. Krisko, Stephen D. Feldman, Erik R. Zimmerman,

and Travis S. Hinman; and Gallivan, White & Boyd, P.A., by Christopher M. Kelly, for defendant-appellees.

McGuireWoods LLP, by Mark E. Anderson, Joan S. Dinsmore, and Linwood L. Jones, for North Carolina Healthcare Association, amicus curiae.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by J. Mitchell Armbruster, for North Carolina Society of Anesthesiologists, amicus curiae.

MORGAN, Justice.

¶ 1 Plaintiffs petitioned this Court for discretionary review of the unanimous opinion rendered by the Court of Appeals in *Connette ex rel. Gullatte v. Charlotte-Mecklenburg Hospital Authority*, 272 N.C. App. 1 (2020), in which the lower appellate court found no error in the trial court's exclusion of evidence proffered by plaintiffs at trial in an effort to show that defendant VanSoestbergen breached the professional duty of care which governed his participation in the preparation and administration of a course of anesthesia which resulted in profound injuries being suffered by plaintiff Amaya Gullatte. The trial court's evidentiary ruling, and the Court of Appeals' affirmance of it, was dictated by the application of the principle entrenched by *Byrd v. Marion General Hospital*, 202 N.C. 337 (1932) and its progeny which categorically establishes that nurses do not owe a duty of care in the diagnosis and treatment of patients while working under the supervision of a physician licensed to practice medicine in North Carolina. *Id.* at 341–43. Due to the evolution of the medical profession's recognition of the increased specialization and independence of nurses in the treatment of patients over the course of the ensuing ninety years since this Court's issuance of the *Byrd* opinion, we determine that it is timely and appropriate to overrule *Byrd* as it is applied to the facts of this case. Accordingly, we reverse and remand this matter to the trial court for further proceedings consistent with this opinion.

I. Factual and Procedural Background

¶ 2 On 11 September 2010, an emergency room visit for an upper respiratory infection revealed that three-year-old Amaya Gullatte was tachycardic, prompting Amaya's pediatrician to refer the child to a cardiologist. The cardiologist's examination of Amaya disclosed that the youngster was plagued by the heart disease known as cardiomyopathy, an affliction which enlarges the heart and makes it difficult for

the heart to pump blood correctly. The cardiologist recommended the performance of an "ablation procedure" on Amaya's heart in order to address the disorder. The child was admitted to a Carolinas Medical Center facility on 20 October 2010, where an anesthetics team consisting of anesthesiologist James M. Doyle, M.D. and Certified Registered Nurse Anesthetist (CRNA) Gus C. VanSoestbergen utilized a mask to administer the anesthetic sevoflurane to Amaya prior to the surgical procedure. Shortly after she was induced with the sevoflurane, Amaya went into cardiac arrest. Although the introduction of resuscitation drugs and the performance of cardiopulmonary resuscitation (CPR) by Dr. Doyle was able to revive Amaya, still the approximately thirteen minutes of oxygen deprivation which was experienced by the child resulted in the onset of permanent brain damage, cerebral palsy, and profound developmental delay. Plaintiff Edward Connette, as Amaya's guardian ad litem, and plaintiff Andrea Hopper, as Amaya's mother, filed a lawsuit against Dr. Doyle, CRNA VanSoestbergen, the Charlotte-Mecklenburg Hospital Authority, and two additional physicians who treated Amaya.

¶ 3 The trial spanned three months and concluded in February 2016. While the jury returned a verdict in favor of the two additional treating physicians, the jury failed to reach a verdict on the claims against Dr. Doyle and CRNA VanSoestbergen. Dr. Doyle and his anesthesiology practice proceeded to settle plaintiffs' claims against them.

¶ 4 A second trial commenced in May 2018, in which plaintiffs asserted a number of claims based on negligence against CRNA VanSoestbergen and the hospital as VanSoestbergen's employer. In plaintiffs' opening statement during the second trial, their counsel referenced a leading pharmacology textbook's description of a process known as intravenous introduction of etomidate, which was depicted as a safer alternative to the method of introducing sevoflurane through the usage of a mask into a patient who has cardiomyopathy. Witnesses testified that Dr. Doyle, in his capacity as the anesthesiologist for the procedure, and CRNA VanSoestbergen, in his respective role as the nurse anesthetist for the surgery, collaborated on Amaya's plan as both medical professionals independently and identically determined that sevoflurane mask induction was the appropriate course of action to implement. CRNA VanSoestbergen concurred with Dr. Doyle's final decision to order this method of the introduction of the anesthetic into Amaya's system after the two consulted with one another about the plan. While the ultimate decision to order the chosen anesthesiological procedure rested with the physician Dr. Doyle, the certified registered nurse anesthetist VanSoestbergen advised the physician, agreed with the physician, and

participated with the physician in the election and administration of the anesthetic sevoflurane through a mask.

¶ 5 Plaintiffs were prepared to present evidence through certified registered nurse anesthetist Dean Cary acting as an expert witness on the manner in which CRNA VanSoestbergen's formulation of, affirmation of, and contribution to the decision to administer sevoflurane to Amaya by utilizing the mask induction procedure rather than by utilizing an intravenous method to induce anesthesia, allegedly breached the professional standard of care applicable to VanSoestbergen. However, the trial court determined that the introduction of evidence regarding a professional standard of care which should apply to VanSoestbergen in his capacity as a certified registered nurse anesthetist was precluded by *Daniels v. Durham County Hospital Corp.*, 171 N.C. App. 535 (2005), *disc. rev. denied*, 360 N.C. 289 (2006), a case which directly applied this Court's holding in *Byrd* to govern the outcome in *Daniels* and which the trial court, in turn, directly applied to the present case. Specifically, the trial court prohibited the introduction of testimony from plaintiffs' expert witness Cary which would have tended to show that the standard practice of CRNAs under the medical facts of Amaya's case would have expressly prohibited the course of action followed by CRNA VanSoestbergen. If allowed by the trial court to do so, the expert would have testified that an intravenous introduction of a drug other than sevoflurane, such as etomidate, would have complied with the applicable professional standard of care for a certified registered nurse anesthetist like VanSoestbergen, while the use of sevoflurane mask induction in this instance would breach the applicable professional standard of care. In its ruling which excluded this aspect of evidence from the testimony rendered by the expert witness Cary, the trial court observed that a nurse may be liable for independent actions taken against a plaintiff but could not be held liable for planning and selecting the appropriate anesthesia technique because nurses operate under the compulsory supervision of physicians licensed to practice medicine.

¶ 6 On 17 July 2018, pursuant to North Carolina General Statutes Section 1A-1, Rule 48, the parties stipulated on the record to the validity of a trial verdict rendered by nine or more jurors. The jury returned a verdict in favor of VanSoestbergen and, correspondingly, his hospital employer, and the trial court entered judgment memorializing the jury's verdict on 20 August 2018. Plaintiffs appealed, among other matters, the trial court's exclusion of plaintiffs' proffered expert testimony regarding CRNA VanSoestbergen's involvement in the determination and implementation of the allegedly negligent anesthesia plan as a claimed breach of the applicable professional standard of care. On 16 June 2020, the

Court of Appeals affirmed the trial court's exclusion of the evidence at issue in a unanimous decision. *Connette*, 272 N.C. App. at 5, 13. Plaintiffs filed a Petition for Discretionary Review of the lower appellate court's determination, and this Court allowed the petition on 10 March 2021.

II. Analysis

¶ 7 A trial court's determination as to the admissibility of evidence, particularly when such admissibility is called into question on the issue of relevance, is generally reviewed for abuse of discretion. *See*, *e.g.*, *State v. Williams*, 363 N.C. 689, 701–02 (2009), *cert. denied* 562 U.S. 864 (2010); *State v. Jacobs*, 363 N.C. 815, 823 (2010). The trial court's exclusion of plaintiffs' proffered testimony in the case sub judice was governed by the application of *Daniels v. Durham County Hospital Corp.*, 171 N.C. App. at 538–40, in which the Court of Appeals properly implemented the unequivocal holding in *Byrd* that nurses did not owe an independent duty to patients in the selection and planning of treatment. The existence of a duty of care between a defendant and a plaintiff is a question of law. *See Pinnix v. Toomey*, 242 N.C. 358, 362 (1955); *see generally Fussell v. N.C. Farm Bureau Mut. Ins. Co.*, 364 N.C. 222, 225–26 (2010) (reciting elements of negligence, including duty of care). "We review questions of law de novo." *State v. Graham*, 379 N.C. 75, 2021-NCSC-125, ¶ 7 (quoting *State v. Khan*, 366 N.C. 448, 453 (2013)). A trial court's determination of the admissibility of evidence which depends dispositively upon its conclusion regarding a question of law is likewise reviewed de novo. *See*, *e.g.*, *Da Silva v. WakeMed*, 375 N.C. 1, 4–5 (2020).

A. Substantive Law

¶ 8 Medical malpractice actions in North Carolina are negligence claims upon which the Legislature has seen fit to erect extra statutory requirements—both substantive and procedural—which a plaintiff must satisfy in order to sustain such allegations. *Turner v. Duke Univ.*, 325 N.C. 152, 162 (1989) (explaining that medical malpractice actions require a plaintiff to offer competent evidence of "(1) the standard of care, (2) breach of the standard of care, (3) proximate causation, and (4) damages"); *see* N.C.G.S. § 1A-1, Rule 9(j) (2021) (requiring dismissal of medical malpractice complaints which do not include one of three enumerated averments). Medical malpractice actions are prescribed by a specific set of enactments found in Article 1B of Chapter 90 of the North Carolina General Statutes. N.C.G.S. §§ 90-21.11 to -21.19B (2021). A medical malpractice action is defined as a "civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider." *Id.* § 90-21.11(2)(a). The

statute expressly contemplates medical malpractice actions against registered nurses for professional services rendered in the performance of "medicine," "nursing," providing "assistance to a physician," and other types of health care listed therein. *Id.* § 90-21.11(1)(a). In order to sustain a medical malpractice action, it is a plaintiff's burden to establish by the greater weight of the evidence that a defending party breached its duty of care by exhibiting professional conduct which was "not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time of the alleged act giving rise to the cause of action." *Id.* § 90-21.12(a). Therefore, these statutes collectively create the requirement of registered nurses to act in accordance with applicable and appropriate standards of practice and establish the burden of proof which a plaintiff must satisfy in order to demonstrate that a registered nurse has violated the expected applicable professional standard of care.

¶ 9 Upon this Court's issuance of the *Byrd* decision in 1932, nurses have not been subject to culpability for the performance of their roles in the administration of any negligent treatment of a patient and could only be held liable for the execution of their primary function within the medical community, which was to "obey and diligently execute the orders of the physician or surgeon in charge of the patient, unless, of course, such order was so obviously negligent as to lead any reasonable person to anticipate that substantial injury would result." *Byrd*, 202 N.C. at 341. While a nurse could be held liable for *how* nursing duties were executed outside the supervision of a physician, it was clear from *Byrd* that a nurse could not be held liable for *what* the nurse did to "diligently execute the orders of the physician." *Id.* at 341–43. In *Byrd*, this Court was asked to answer the legal question: "What duty does a nurse owe to a patient?" *Id.* at 341. In responding to this query, we reasoned that "[n]urses are not supposed to be experts in the technique of diagnosis or the mechanics of treatment"; instead, "the law contemplates that the physician is solely responsible for the diagnosis and treatment of his patient." *Id.* at 341–42. Thus, a nurse could only be held liable for the negligent treatment of a patient when (1) the nurse acted without direction from and outside the presence of a physician, and thus without the requisite "acquiescence and implied approval of the physician," or (2) the nurse was undertaking to carry out a physician's order that "was so obviously negligent as to lead any reasonable person to anticipate that substantial injury would result." *Id.* at 343, 341. As a result, nurses were largely exempted from the existence of any applicable professional standard of care, because nurses were deemed by *Byrd* to be sheltered from

exposure to liability for negligence when performing duties under the supervision of a physician and were only vulnerable to negligence claims due to the performance of their professional duties and responsibilities when substandard execution of such nursing expectations was obvious.

¶ 10 North Carolina was the first state in the nation to regulate the registration of practicing nurses with the creation of The Board of Examiners of Trained Nurses of North Carolina in 1903. Act of Mar. 3, 1903, ch. 359, 1903 N.C. Pub. Laws 58b (captioned An Act to Provide for the Registration of Trained Nurses). By the time that *Byrd* was decided almost thirty years later, the regulation of nursing was still confined to the examination and licensure of applicants who wished to use the title "trained," "graduate," "licensed," or "registered" nurse. N.C. Code Ann. §§ 6729, 6734, 6738 (Michie 1935). Licensure did not become a prerequisite to practice nursing generally until 1965. Act of May 18, 1965, ch. 578, § 1, 1965 N.C. Sess. Laws (Reg. Sess. 1965) 624, 624 (captioned An Act to Rewrite and Consolidate Articles 9 and 9A of Chapter 90 of the General Statutes with Respect to the Practice of Nursing). In 1932, applicants for registration with the Board, which had been renamed The Board of Nurse Examiners of North Carolina, were required to be at least twenty-one years of age, of good moral character, a high school graduate, and either a graduate of a school of nursing or one who had practiced nursing in another state under similar registration requirements. N.C. Code Ann. §§ 6731, 6733 (Michie 1935). The Board of Nurse Examiners was empowered with the authority to conduct periodic examinations "in anatomy and physiology, materia medicia, dietetics, hygiene, and elementary bacteriology, obstetrical, medical and surgical nursing, nursing of children, contagious diseases and ethics in nursing, and such other subjects as may be prescribed by the examining board." *Id.* § 6732. The examination fee totaled ten dollars, *id.*, and the Board possessed the power to revoke a registered nurse's license for cause pursuant to notice and hearing requirements, *id.* § 6737. Despite the sweeping authority which was vested in the North Carolina Board of Nurse Examiners as the importance and influence of nurses within the field of medicine grew, nonetheless the express and specific identification of a nurse's role of legal responsibility within the medical industry remained undefined by any statutory enactment of the Legislature. Consequently, by way of the *Byrd* decision, this Court filled this legal culpability vacuum with the pronouncement that a nurse could only "be held liable in damages for any failure to exercise ordinary care" when working outside of the immediate supervision of a physician or when the treatment ordered by the physician was "obviously negligent or dangerous." *Byrd*, 202 N.C. at 343.

¶ 11 The nursing profession has evolved tremendously over the ninety years since *Byrd*. Since 1965, *all* persons practicing as nurses in North Carolina must be licensed by the North Carolina Board of Nursing (the Nursing Board) as either a "registered nurse" or "licensed practical nurse." Ch. 578, § 1, 1965 N.C. Sess. Laws at 625, 628–29; N.C.G.S. § 90-171.43 (2021). The Nursing Board is empowered to adopt, amend, repeal, and interpret rules pursuant to North Carolina's Nursing Practice Act, a comprehensive enactment regulating the nursing profession found in Chapter 90, Article 9A of the North Carolina General Statutes. *See* N.C.G.S. § 90-171.23(b) (2021) (listing the Board's duties and powers).

¶ 12 With particular regard to registered nurses in the state, the Legislature has defined the "practice of nursing by a registered nurse" as having ten components:

> a. Assessing the patient's physical and mental health, including the patient's reaction to illnesses and treatment regimens.
>
> b. Recording and reporting the results of the nursing assessment.
>
> c. *Planning, initiating, delivering, and evaluating appropriate nursing acts.*
>
> d. Teaching, assigning, delegating to or supervising other personnel in implementing the treatment regimen.
>
> e. *Collaborating with other health care providers in determining the appropriate health care for a patient but, subject to the provisions of G.S. 90-18.2, not prescribing a medical treatment regimen or making a medical diagnosis, except under supervision of a licensed physician.*
>
> f. *Implementing the treatment and pharmaceutical regimen prescribed by any person authorized by State law to prescribe the regimen.*
>
> g. Providing teaching and counseling about the patient's health.
>
> h. Reporting and recording the plan for care, nursing care given, and the patient's response to that care.

> i. Supervising, teaching, and evaluating those who perform or are preparing to perform nursing functions and administering nursing programs and nursing services.
>
> j. Providing for the maintenance of safe and effective nursing care, whether rendered directly or indirectly.

Id. § 90-171.20(7) (2021) (emphases added).

¶ 13 The Nursing Board has further refined the scope of nursing practice. The profession's practice has evolved to include (1) the assessment of nursing care needs resulting in the "[f]ormulation of a nursing diagnosis," (2) developing care plans which include the determination and prioritization of nursing interventions, and (3) implementing nursing activities. Components of Nursing Practice for the Registered Nurse, 21 N.C. Admin. Code 36.0224 (2021). When a registered nurse "assumes responsibility directly or through delegation for implementing a treatment or pharmaceutical regimen," the nurse becomes accountable for "anticipating those effects that may rapidly endanger a client's life or well-being." License Required, *id.* 36.0221(c)(7) (2021). Lastly, the Nursing Board also oversees the additional licensure of certain types of registered nurses for specialized roles; namely, Certified Registered Nurse Anesthetist, Certified Nurse Midwife, Clinical Nurse Specialist, and Nurse Practitioner. These categories of advanced practice registered nurses must all obtain additional education and certifications to practice in their respective recognized, specific, and unique specialties. N.C. Bd. of Nursing, *APRN Requirements At-A-Glance*, https://www.ncbon.com/myfiles/downloads/licensure-listing/aprn/advance-practice-at-a-glance.pdf (last visited Aug. 4, 2022) (listing licensure requirements for Advanced Practice Registered Nurses); 21 N.C. Admin. Code 36.0120(6), 36.0226, 36.0228, 36.0801–.0817 (2021).

¶ 14 Pursuant to the statutory grant of rulemaking power afforded to it in N.C.G.S. § 90-171.23(b), the Nursing Board has defined the practice of a certified registered nurse anesthetist as the performance of "nurse anesthesia activities *in collaboration with a physician*, dentist, podiatrist, or other lawfully qualified health care provider." Nurse Anesthesia Practice, 21 N.C. Admin. Code 36.0226(a) (emphasis added). The rules further expound upon this collaboration as

> a process by which the certified registered nurse anesthetist works with one or more qualified health care providers, each contributing his or her respective

> area of expertise consistent with the appropriate occupational licensure laws of the State and according to the established policies, procedures, practices, and channels of communication that lend support to nurse anesthesia services and that define the roles and responsibilities of the qualified nurse anesthetist within the practice setting.

Id. 36.0226(b). Such collaboration between a physician and a registered nurse such as a CRNA is contemplated to include "participating in decision-making and in cooperative goal-directed efforts." Components of Nursing Practice for the Registered Nurse, *id.* 36.0224(g)(2). Depending on "the individual's knowledge, skills, and other variables in each practice setting," CRNAs are expressly allowed to (1) select and administer preanesthetic medications, (2) select, implement, and manage general anesthesia consistent with the patient's needs and procedural requirements, and (3) initiate and administer several palliative and emergency medical procedures. *Id.* 36.0226(c)–(d). It is clear that CRNAs must fulfill these duties under the supervision of a licensed physician. N.C.G.S. § 90-171.20(7)(e). But, it is also apparent that the independent status, the professional stature, the individual medical determinations, and the shared responsibilities with a supervising physician have grown in significance and in official recognition since *Byrd* for a nurse such as a certified registered nurse anesthetist.

B. Historical Application

¶ 15 Amidst this growing authority and influence which have been wielded by members of the nursing profession during the span of ninety years since this Court issued the *Byrd* decision, the state's appellate courts have applied *Byrd* with increasing strain. In *Blanton v. Moses H. Cone Memorial Hospital, Inc.*, this Court did not apply Byrd as a bar to a plaintiff's claims against a nurse, but utilized *Byrd* to reiterate that a plaintiff's claim against a nurse is valid "if the plaintiff can prove an agent of the hospital followed some order of the doctor which" was "so obviously negligent as to lead any reasonable person to anticipate that substantial injury would result to the patient by the execution of such order." 319 N.C. 372, 376 (1987) (quoting *Byrd*, 202 N.C. at 341).

¶ 16 Several years after *Blanton*, this Court was presented with "the opportunity to test the liability of a surgeon for the negligence of operating room personnel under the borrowed servant rule." *Harris v. Miller*, 335 N.C. 379, 388 (1994). In *Harris*, the plaintiff sued an orthopedic surgeon for medical malpractice under a theory of vicarious liability, alleging that

the physician was responsible pursuant to the doctrine of *respondeat superior* for a CRNA's negligent administration of anesthesia while the nurse was under the physician's direct supervision during a surgical procedure. *Id.* at 383. The trial court entered a directed verdict in favor of the physician after finding that the plaintiff had failed to establish a master-servant relationship between the independent physician and the CRNA who was employed by the hospital where the physician performed the surgery. The Court of Appeals affirmed the trial court's decision. Although this Court "held that the Court of Appeals erred in affirming the trial court's directed verdict for Dr. Miller on plaintiff's vicarious liability claim" and "reverse[d] and remand[ed] for a new trial on this claim," *id.* at 400, nonetheless, this Court, in its decision in *Harris*, offered observations which were not expressly focused on *Byrd* but still served to dilute the efficacy of the foundation which has undergirded *Byrd*. In examining the relevant case law concerning the existence of employer-employee relationships in the context of supervising surgeons and the operating room personnel who participate in a surgical procedure, this Court identified the pivotal nature of the application of the *Byrd* approach in the resolution of *Harris*. The seminal case on the issue presented in *Harris*—*Jackson v. Joyner*, 236 N.C. 259 (1952)[1]—had given rise to a judicially created "presumption that the surgeon in charge controls all operating room personnel," which would inure to the benefit of the plaintiff in *Harris* by establishing a per se determination of liability on the part of the physician for the negligence of the nurse under the physician's supervision. 335 N.C. at 388–89. While the Court reasoned that the presumption "may have been appropriate in an era in which hospitals undertook only to furnish room, food, facilities for operation, and attendance" and "in which only physicians had the expertise to make treatment decisions," the Court concluded that such a presumption "is no longer appropriate in this era." *Id.* at 389 (extraneity omitted) (citing *Byrd*, 202 N.C. at 341–42, for the proposition concerning the exclusive expertise of physicians making treatment decisions). The *Harris* Court in 1994 noted that since the issuance of *Jackson* in 1952, hospitals had transformed into treatment centers and now exercised "significant control over the manner in which their employees, including staff physicians, provide treatment." *Id.* at 390. With this acknowledgment, the Court opined that "it is no longer appropriate" to presume that a hospital which has hired its own employees, such as nurses, cedes control over them to a supervising physician under a traditional "borrowed employee" analysis simply because the hospital had assigned

1. *Jackson* has been effectively overruled by *Harris*. *See Harris*, 335 N.C. at 391.

the nurse to be directly supervised by an independent surgeon. *Id.* at 389–90. While *Jackson* derived its presumption "from the mere fact that [the defendant] was the 'surgeon in charge,' " this paradigm of the physician fully controlling a supervised nurse and all other medical personnel involved in a surgical procedure, resulting in the physician's ultimate responsibility for each medical contributor's actions in conjunction with the surgery, "no longer reflects . . . . [p]resent[-]day hospitals." *Id.* at 389 (quoting *Rabon v. Rowan Mem'l Hospital, Inc.*, 269 N.C. 1, 11 (1967)). The Court stressed this medical field evolution with the further recognition in *Harris*, which we find particularly relevant in the instant case which we now decide twenty-eight years later:

> [S]urgeons are no longer the only experts in the operating room. The operating team now includes *nurses*, technicians, interns, residents, *anesthetists*, anesthesiologists and other specialized physicians. *All of these are experts in their own fields, having received extensive training both in school and at the hospital.* When directed to perform their duties, they do so without further instruction from the surgeon, relying instead on their own expertise regarding the manner in which those duties are performed. Some of them, like anesthesiologists and technicians, may have expertise not possessed by the surgeon. Thus, the surgeon will in some cases be ill-equipped, if not incapable, of controlling the manner in which assisting personnel perform their duties.

Id. at 390–91 (emphases added) (citations omitted).

¶ 17 Although the Court made these observations in *Harris* concerning the antiquated view of the total subservience of a nurse and other members of a medical team to a supervising physician, nonetheless, the Court's resolution of the vicarious liability claims in *Harris* based upon the specific analysis of the tort's elements regarding the doctrine of *respondeat superior* and the accompanying "borrowed servant" doctrine allowed *Byrd* to retain its precedential status on the distinguishable legal issue of a nurse's inability to be held liable on a theory of negligence for acts performed under the supervision of a physician. With *Byrd* remaining intact as controlling authority on this issue, the Court of Appeals followed this case precedent in determining *Daniels* in 2005. In *Daniels*, the plaintiffs brought legal action against the defendant hospital upon the death of their baby who died seven months after suffering injuries which the plaintiffs alleged were sustained during their daughter's delivery at

the hospital. 171 N.C. App. at 536–37. In their lawsuit against the hospital and the mother's private physician who performed the baby's delivery, as well as other individuals that included two of the hospital's nurses who were involved in the delivery, the plaintiffs alleged that the defendants were jointly and severally liable on the bases of negligence and medical malpractice for the baby's injuries and subsequent death. *Id.* at 537. In affirming the trial court's entry of summary judgment for the hospital on the plaintiffs' claim that the delivery nurses failed to oppose the doctor's decision to perform the delivery as the physician directed, the Court of Appeals stated:

> [P]laintiffs' evidence is not sufficient to meet the standard set forth in *Byrd v. Marion Gen. Hosp.*
>
> Under *Byrd*, a nurse may not be held liable for obeying a doctor's order unless such order was so obviously negligent as to lead any reasonable person to anticipate that substantial injury would result to the patient from the execution of such order or performance of such direction. The Court stressed that the law contemplates that the physician *is solely responsible* for the diagnosis and treatment of his patient. Nurses are not supposed to be experts in the technique of diagnosis or the mechanics of treatment.
>
> Although these principles were set out more than 70 years ago, they remain the controlling law in North Carolina. Plaintiffs refer repeatedly to the responsibilities of the "delivery team" and argue for a collaborative process with joint responsibility. While medical practices, standards, and expectations have certainly changed since 1932 [when the Supreme Court of North Carolina decided *Byrd*] and even since 1987 [when the Supreme Court of North Carolina decided *Blanton*], this Court is not free to alter the standard set forth in *Byrd* and *Blanton*.

Id. at 538–39 (extraneity omitted).

¶ 18 Just as it did in its opinion in *Daniels*, the Court of Appeals in the present case likewise recognized that it was bound by the governing, albeit obsolescent, approach articulated in *Byrd* regarding a nurse's blanket lack of exposure to liability for negligence when acting under the direction of a supervising physician. In its issued opinion in this matter, the lower appellate court assessed plaintiffs' claim "that VanSoestbergen

breached the applicable standard of care by agreeing, during the anesthesia planning stage, to induce Amaya with sevoflurane using the mask induction procedure." *Connette*, 272 N.C. App. at 4. The Court of Appeals went on to further detail the specific contentions of plaintiffs:

> Plaintiffs asserted that certified registered nurse anesthetists are highly trained and have greater skills and treatment discretion than regular nurses. Moreover, they asserted, nurse anesthetists often use those skills to operate outside the supervision of an anesthesiologist. Plaintiffs also argued that VanSoestbergen was even more specialized than an ordinary nurse anesthetist because he belonged to the hospital's "Baby Heart Team" that focused on care for young children.

Id. at 4–5.

¶ 19 In its thorough analysis, the Court of Appeals began with the trial court's recognition of our decision in *Daniels*, which in turn was premised on our decision in *Byrd*, as the trial court excluded plaintiffs' proffered expert testimony in support of their claim against defendant VanSoestbergen that the CRNA "breached a standard of care by agreeing to mask inhalation with sevoflurane." *Id.* at 5. The Court of Appeals explained that "[t]he trial court concluded that a nurse may be liable for improperly administering a drug, but not for breaching a duty of care for planning the anesthesia procedure and selecting the appropriate technique or drug protocol." *Id.*

¶ 20 The lower appellate court continued its examination by citing *Byrd*, observing that "[n]early a century ago, a plaintiff sought to hold a nurse liable for decisions concerning diagnosis and treatment." *Id.* The Court of Appeals attributed guidance from *Byrd* in recalling notable principles from our opinion in that case:

> Our Supreme Court declined to recognize the plaintiff's legal claim [in *Byrd*], explaining that "nurses, in the discharge of their duties, must obey and diligently execute the orders of the physician or surgeon in charge of the patient." The Court held that the "law contemplates that the physician is solely responsible for the diagnosis and treatment of his patient. Nurses are not supposed to be experts in the technique of diagnosis or the mechanics of treatment."

Id. at 6 (quoting *Byrd*, 202 N.C. at 341–42). Upon remarking that "[s]ince *Byrd*, this [c]ourt repeatedly has rejected legal theories and claims based

on nurses' decisions concerning diagnosis and treatment of patients," *id.*, the lower appellate court replicated the type of language which it employed in *Daniels* in rendering the following observations as the Court of Appeals determined that the trial court did not commit error:

> In short, as this [c]ourt repeatedly has held in the last few decades, trial courts (and this [c]ourt) remain bound by *Byrd*, despite the many changes in the field of medicine since the 1930s. Thus, the trial court properly determined that Plaintiffs' claims based on VanSoestbergen's participation in developing an anesthesia plan for Amaya are barred by Supreme Court precedent.
>
> We acknowledge that Plaintiffs have presented many detailed policy arguments for why the time has come to depart from *Byrd*. We lack the authority to consider those arguments. We are an error-correcting body, not a policy-making or law-making one. And, equally important, *Byrd* is a Supreme Court opinion. We have no authority to modify *Byrd*'s comprehensive holding simply because times have changed. Only the Supreme Court can do that.

Id. (extraneity omitted).

C. Revisiting *Byrd*

¶ 21 Having explored the evolution of the nursing industry in North Carolina in the context of the medical field's promotion of, and deference to, the independent abilities of nurses, coupled with the North Carolina appellate courts' concomitant recognition of this shift in the nine decades since *Byrd* as a nurse's legal culpability appropriately has grown commensurate with professional responsibility, this Court deems it to be opportune to implement its observations articulated in *Harris* and to ratify the appropriateness intimated in *Daniels* and the present case by the Court of Appeals to revisit *Byrd* in light of the increased, influential roles which nurses occupy in medical diagnosis and treatment. We hold that even in circumstances where a registered nurse is discharging duties and responsibilities under the supervision of a physician, a nurse may be held liable for negligence and for medical malpractice in the event that the registered nurse is found to have breached the applicable professional standard of care. To the extent that this Court's decision in *Byrd v. Marion General Hospital* establishes a contrary principle, we reverse *Byrd*. We expressly note that our decision in the present

case does not disturb in any way the principle enunciated in *Byrd* that "nurses, in the discharge of their duties," when they "obey and diligently execute the orders of the physician or surgeon in charge of the patient," may be held liable when "such order was so obviously negligent as to lead any reasonable person to anticipate that substantial injury would result to the patient from the execution of such order or performance of such direction." 202 N.C. at 341.

¶ 22 With the reversal of this Court's holding in *Byrd* and its progeny which systematically prevented a registered nurse from being liable for the negligent execution of nursing duties and responsibilities which were performed under the auspices of a supervising physician, we are mindful to avoid any intrusion upon the exclusive authority of the Legislature to reach complex policy judgments and consequently to enact statutory laws which are consistent with these determinations with regard to the creation of new causes of action or theories of liability. While the Legislature established the standard for recovery in civil actions for damages for personal injury or death in medical malpractice claims against registered nurses through the collective enactment of N.C.G.S. §§ 90-21.11 through 90-21.19B, nonetheless, the law-making body has been silent regarding further enactments which refine or interpret this body of statutory law. As we earlier noted, the finite principle of law in *Byrd* which we overturn in the instant case was instituted by this Court in the dearth of any express and specific decree from any empowered authority which addressed the manner and extent of a registered nurse's legal culpability in situations wherein such a nurse is subject to negligence and medical malpractice claims. Because we established the legal principle at issue in *Byrd* and no intervening enactment or policy has emerged to change it, we are properly positioned to reverse *Byrd* without treading upon the Legislature's domain as we fulfill this Court's charge to interpret the law.

III. Conclusion

¶ 23 This Court recognizes the impracticalities and inconsistencies of the ongoing application of the disputed and outdated principle in *Byrd* to the realities of the advancement of the field of medicine with regard to the ascension of members of the nursing profession to statuses within the medical community which should appropriately result in an acknowledgement of their elevated station and their commensurate elevated responsibility. The expanding authority, recognition, and independence of nurses, which have steadily evolved as these professionals, exemplified by those who have achieved identified specializations and certifications, have sufficiently risen within the ranks of the field of medicine to earn

levels of autonomy and influence which formerly were fully withheld. Pursuant to N.C.G.S. § 90-171.20(7), registered nurses now have the ability, *inter alia*, to collaborate with other health care providers in determining the appropriate health care for a patient; to implement the treatment and pharmaceutical regimen prescribed by any person authorized by state law to prescribe the regimen; and to plan, initiate, deliver, and evaluate appropriate nursing acts. As a certified registered nurse anesthetist, defendant VanSoestbergen in the instant case is a beneficiary of these heightened responsibilities which have been accorded to registered nurses and, with these heightened powers and the autonomy recognized by law come heightened responsibilities recognized by law.

¶ 24 The trial record developed in this case indicates that the trial court excluded from evidence the proffered testimony of plaintiffs' witness who was available to render expert testimony concerning CRNA VanSoestbergen's alleged breach of the applicable professional standard of care. While the application of *Byrd* has previously operated to prevent the admission into evidence of such testimony pursuant to this Court's announced principle in *Byrd* that nurses cannot be held liable for the discharge of their duties when obeying and diligently executing the orders of a supervising physician due to the physician's sole responsibility for the diagnosis and treatment of the patient, our reversal of this principle, as espoused in *Byrd*, compels a new trial. Accordingly, the trial court's exclusion of plaintiffs' expert testimony is reversed, and this case is remanded to the Court of Appeals for further remand to the trial court for a new trial.

REVERSED AND REMANDED.

Justice ERVIN and Justice BERGER did not participate in the consideration or decision of this opinion.

Justice BARRINGER dissenting.

¶ 25 The issue before this Court is whether a certified registered nurse anesthetist (CRNA) who collaborates with a doctor to select an anesthesia treatment can be liable for negligence in the selection of that treatment. Since 1932, this Court has held no, and the legislature has never required otherwise. In judicially changing this standard, the three-justice majority appears to create liability without causation—allowing a nurse to be held liable for negligent collaboration in the treatment ultimately chosen by the physician. Such a policy choice should be made by the legislature, not merely three Justices of this Court. Accordingly, I respectfully dissent.

I. Factual Background

¶ 26 Plaintiffs are the guardian ad litem and the mother of the juvenile who was injured in this case. The juvenile suffered from a serious case of dilated cardiomyopathy, a heart disease. Due to the juvenile's serious heart conditions, her cardiologist recommended the juvenile undergo a radiofrequency ablation procedure to try to regulate her heart rhythm. A doctor, who is not a party to this case, prepared an anesthesia treatment plan for the procedure. The anesthesia treatment plan was to administer sevoflurane through inhalation induction and then switch to an intravenous induction after the juvenile was asleep. Defendant, a CRNA, assisted with the procedure, collaborating with the doctor on the treatment plan and helping to administer the anesthetic. The doctor testified that as the doctor "it is my responsibility" to develop and prescribe the anesthesia treatment, though he and defendant CRNA had independently reached the same conclusion regarding which anesthesia treatment plan to use.

¶ 27 After the juvenile received the sevoflurane, her heart rate started dropping significantly. The doctor provided resuscitation drugs and performed chest compressions for approximately twelve-and-a-half minutes. During that time, the juvenile suffered oxygen deprivation to her brain, resulting in cerebral palsy and global developmental delay. Plaintiffs sued defendants for negligence.

¶ 28 At trial, the trial court held that only a doctor, not a nurse, can be liable for the selection of an anesthesia treatment under *Daniels v. Durham County Hospital Corp.*, 171 N.C. App. 535 (2005). Accordingly, plaintiffs were prohibited from admitting evidence concerning whether defendant CRNA breached a duty of care by failing to recommend a different anesthetic drug or better administration technique. The trial court concluded that evidence of a better anesthesia treatment was not relevant under Rule 401 of the North Carolina Rules of Evidence because it did not make some fact material to the case more or less likely to be true. At the conclusion of the trial, the jury found that the juvenile was not injured by defendant CRNA's negligence.

¶ 29 Plaintiffs appealed, arguing that the trial court erred by granting defendants' motion to exclude the evidence of a better anesthesia treatment. However, the Court of Appeals held that the trial court properly allowed defendants' motion to exclude evidence that defendant CRNA breached the applicable standard of care by agreeing to induce the juvenile with sevoflurane using inhalation since the doctor, not the nurse, was responsible for selecting an anesthesia treatment under *Daniels*.

Connette v. Charlotte-Mecklenburg Hosp. Auth., 272 N.C. App. 1, 4–6 (2020). Further, despite plaintiffs' policy arguments that the practice of medicine had evolved beyond *Daniels*, rendering it obsolete, the Court of Appeals held that it was bound by *Daniels* because *Daniels* followed this Court's decision in *Byrd v. Marion General Hospital*, 202 N.C. 337 (1932). *Connette*, 272 N.C. App. at 6. Thus, the Court of Appeals found no error in the trial court's ruling. *Id.* at 6–7.

¶ 30 Plaintiffs then petitioned this Court, asking us to allow discretionary review of the case to address whether *Byrd* is still good law. Despite the fact that two members of this Court were recused in this case, review was allowed.

II. Standard of Review

¶ 31 "We review relevancy determinations by the trial court de novo before applying an abuse of discretion standard to any subsequent balancing done by the trial court." *State v. Triplett*, 368 N.C. 172, 175 (2015). Thus, "[a] trial court's rulings on relevancy are technically not discretionary, though we accord them great deference on appeal." *State v. Lane*, 365 N.C. 7, 27 (2011).

III. Analysis

¶ 32 "It is axiomatic that only relevant evidence is admissible at trial, while irrelevant evidence is inadmissible." *State v. Hembree*, 368 N.C. 2, 16 (2015). Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (2021).

¶ 33 Here, the trial court held that the evidence of defendant CRNA's ability to suggest an alternative anesthesia treatment was inadmissible under Rule 401 because it was not relevant to whether defendant CRNA was liable for breaching the standard of care. *Daniels* took its holding from this Court's decision in *Byrd*. *Daniels*, 171 N.C. App. at 538. *Byrd* "stressed that '[t]he law contemplates that the physician *is solely responsible* for the diagnosis and treatment of his patient,' " *id.* (alteration in original) (quoting *Byrd*, 202 N.C. at 341–42), and so held that "nurses, in the discharge of their duties, must obey and diligently execute the orders of the physician or surgeon in charge of the patient, unless . . . such order was so obviously negligent as to lead any reasonable person to anticipate that substantial injury would result to the patient from the execution of such order or performance of such direction," *Byrd*, 202 N.C. at 341. Therefore, in accordance with *Byrd*, the Court of

Appeals in *Daniels* rejected plaintiffs' request to hold the nurse liable "for a collaborative process with joint responsibility." *Daniels*, 171 N.C. App. at 539.

¶ 34 *Byrd* also recognized that obviously in the absence of instruction from a physician, a nurse who undertakes to administer treatment when the physician is not present "will be held liable in damages for any failure to exercise ordinary care." *Byrd*, 202 N.C. at 343. However, "if the physician is present and undertakes to give directions, or, for that matter, stands by, approving the treatment administered by the nurse, unless the treatment is obviously negligent or dangerous, as hereinbefore referred to, then in such event the nurse can then assume that the treatment is proper under the circumstances, and such treatment, when the physician is present, becomes the treatment of the physician and not that of the nurse." *Id.*

¶ 35 Plaintiffs do not dispute that, under *Byrd*, evidence of a better anesthesia treatment was not relevant because the doctor, not defendant CRNA, bore the sole responsibility for the selection of which treatment should be used. After all, if a doctor's inaction while observing a nurse select a treatment does not waive that doctor's sole responsibility for the selection of that treatment, *see id.*, then that doctor's collaboration with the nurse in selecting the treatment likewise cannot waive the doctor's exclusive responsibility. Nor do plaintiffs argue that the anesthesia treatment chosen in this case "was so obviously negligent as to lead any reasonable person to anticipate that substantial injury would result to the patient" from it. *Id.* Instead, plaintiffs' sole arguments are that *Byrd* and its progeny should be overturned or limited to their facts.

¶ 36 "This Court has never overruled its decisions lightly." *Rabon v. Rowan Mem'l Hosp., Inc.*, 269 N.C. 1, 20 (1967) "The salutary need for certainty and stability in the law requires, in the interest of sound public policy, that the decisions of a court of last resort affecting vital business interests and social values, deliberately made after ample consideration, should not be disturbed except for most cogent reasons." *Potter v. Carolina Water Co.*, 253 N.C. 112, 117–18 (1960) (quoting *Williams v. Randolph Hosp., Inc.*, 237 N.C. 387, 391 (1953)). Accordingly, this Court faithfully adheres to the "doctrine of stare decisis which proclaims, in effect, that where a principle of law has become settled by a series of decisions, it is binding on the courts and should be followed in similar cases." *State v. Ballance*, 229 N.C. 764, 767 (1949) (emphasis omitted).

¶ 37 Admittedly "[t]he rule of stare decisis, though one tending to consistency and uniformity of decision, is not inflexible." *Hertz v. Woodman*,

218 U.S. 205, 212 (1910) (emphasis omitted); *see also Patterson v. McCormick*, 177 N.C. 448, 456 (1919) (quoting *Hertz*, 218 U.S. at 212). For instance, "the doctrine of stare decisis should never be applied to perpetuate palpable error." *State v. Mobley*, 240 N.C. 476, 487 (1954) (emphasis omitted). "Nor should stare decisis be applied where it conflicts with a pertinent statutory provision to the contrary." *Id.* (emphasis omitted). "[W]here a statute covering the subject matter has been overlooked, the doctrine of stare decisis does not apply." *Id.* (emphasis omitted). However, no such justification exists in this case to depart from our longstanding precedent in *Byrd*.[1]

¶ 38 Plaintiffs contend that *Byrd* conflicts with a pertinent statutory provision and thus should be overruled. Specifically, plaintiffs reference N.C.G.S. § 90-21.12(a), which states, in relevant part:

> [I]n any medical malpractice action as defined in [N.C.]G.S. [§] 90-21.11(2)(a), the defendant health care provider shall not be liable for the payment of damages unless the trier of fact finds by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time of the alleged act giving rise to the cause of action . . . .

N.C.G.S. § 90-21.12(a) (2021). "Where the language of a statute is clear, the courts must give the statute its plain meaning . . . ." *Frye Reg'l Med. Ctr., Inc. v. Hunt*, 350 N.C. 39, 45 (1999). Looking to the plain language of N.C.G.S. § 90-21.12(a), nothing in the statute indicates that it is providing an exhaustive list of every situation in which a health care provider may be liable. Instead, N.C.G.S. § 90-21.12(a) functions as a general liability limitation such that, regardless of other circumstances, a health care provider cannot be liable *unless* certain criteria are met; namely, unless the provider failed to act in accordance with the standard of care set forth in the statute. However, nowhere does N.C.G.S. § 90-21.12(a) state that no other limitations might apply to certain categories of health

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1. While the majority argues that *Harris v. Miller*, 335 N.C. 379 (1994), weakened *Byrd*, *Harris* cited *Byrd* once in an offhanded comment and then did not mention it again in the opinion. *Id.* at 389. *Harris* never engaged in a serious examination of the merits or reasoning of *Byrd* or further addressed it. Thus, *Harris* cannot be interpreted as affecting *Byrd*'s precedential value.

care providers or exempt them from liability in specific situations. Thus, the holding in *Byrd*, which functions as a specific limitation on the liability of nurses when treating or diagnosing patients, does not conflict with N.C.G.S. § 90-21.12(a).

¶ 39 Furthermore, N.C.G.S. § 90-21.12(a) is a broad statute that provides a general rule applicable to all health care providers. A more specific and thus more relevant statute to the issue in this case is N.C.G.S. § 90-171.20(7), which defines the scope of practice for nurses. Subsection 90-171.20(7) sets forth the "10 components" of "[t]he 'practice of nursing by a registered nurse.' " N.C.G.S. § 90-171.20(7) (2021). The fifth and sixth components are relevant to this case. The fifth component is "[c]ollaborating with other health care providers in determining the appropriate health care for a patient but, subject to the provisions of [N.C.]G.S. [§] 90-18.2,[2] not prescribing a medical treatment regimen or making a medical diagnosis, except under supervision of a licensed physician." N.C.G.S. § 90-171.20(7)(e). The sixth component is "[i]mplementing the treatment and pharmaceutical regimen prescribed by any person authorized by State law to prescribe the regimen." N.C.G.S. § 90-171.20(7)(f).

¶ 40 Pursuant to the fifth and sixth components, a registered nurse's practice does not include prescribing or implementing a medical treatment or making a medical diagnosis unless under the supervision of a physician. The language in N.C.G.S. § 90-171.20(7)(e) and (f) thus incorporates the holding of *Byrd*, "that the physician is solely responsible for the diagnosis and treatment of his patient," *Byrd*, 202 N.C. at 341–42, but a nurse may administer treatment when the "physician . . . stands by, approving the treatment[,]" *id.* at 343. As a result, the General Statutes do not conflict with *Byrd* but are indeed consistent with it.

¶ 41 Additionally, while plaintiffs cite the regulations governing CRNAs passed by the North Carolina Board of Nursing, these regulations do not provide for a liability different than *Byrd*. A regulation passed by an administrative body cannot create a liability that is not authorized by statute. *Rouse v. Forsyth Cnty. Dep't of Soc. Servs.*, 373 N.C. 400, 407 (2020) ("[A]n administrative agency has no power to promulgate rules and regulations which alter or add to the law it was set up to administer or which have the effect of substantive law." (cleaned up)).

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2. Section 90-18.2 applies specifically to nurse practitioners but does not expand their liability beyond the limits set forth in N.C.G.S. § 90-171.20(7). While N.C.G.S. § 90-18.2 provides that nurse practitioners may take certain actions, it explicitly notes that the "supervising physician shall be responsible for authorizing" those actions. N.C.G.S. § 90-18.2 (2021).

¶ 42 Further, the regulations' language does not support plaintiffs' argument. Certainly, 21 N.C. Admin. Code 36.0226(b) recognizes that there will be collaboration, defined as "a process by which the [CRNA] works with one or more qualified health care providers, each contributing his or her respective area of expertise," and states that an "individual [CRNA] shall be accountable for the outcome of his or her actions." 21 N.C. Admin. Code 36.0226(b) (2020). Additionally, 21 N.C. Admin. Code 36.0226(c) notes that one of the responsibilities of a CRNA includes "selecting, implementing, and managing general anesthesia." 21 N.C. Admin. Code 36.0226(c). However, these clauses are limited by the scope of practice provision in the first subsection of 21 N.C. Admin. Code 36.0226(a), which provides that

> [o]nly a registered nurse who completes a program accredited by the Council on Accreditation of Nurse Anesthesia Educational Programs, is credentialed as a [CRNA] by the Council on Certification of Nurse Anesthetists, and who maintains recertification through the Council on Recertification of Nurse Anesthetists, shall perform nurse anesthesia activities in collaboration with a physician, dentist, podiatrist, or other lawfully qualified health care provider. *A [CRNA] shall not prescribe a medical treatment regimen or make a medical diagnosis except under the supervision of a licensed physician.*

21 N.C. Admin. Code 36.0226(a) (emphasis added). Once again, this regulation is consistent with the holding of *Byrd*, prohibiting CRNAs from prescribing treatments or making medical diagnoses, except under the supervision of a licensed physician.

¶ 43 Finally, plaintiffs argue that *Byrd* conflicts with the law of joint and several liability because it does not permit both a doctor and nurse to be held liable for the same injury. Joint and several liability, however, does not determine whether a defendant is liable for negligence. "To recover damages for actionable negligence, a plaintiff must establish (1) a legal duty, (2) a breach thereof, and (3) injury proximately caused by such breach." *Mozingo by Thomas v. Pitt Cnty. Mem'l Hosp., Inc.*, 331 N.C. 182, 187 (1992) (cleaned up). Joint and several liability simply determines how a plaintiff recovers once he proves that two or more defendants meet the definition of actionable negligence for the same injury. *See Beanblossom v. Thomas*, 266 N.C. 181, 186–87 (1966). Under *Byrd*, however, plaintiffs cannot establish that a nurse acts negligently in collaborating on a treatment plan with a doctor. Therefore, the threshold

requirement for reaching joint and several liability, that two or more parties be negligent, was never met. Accordingly, *Byrd* does not conflict with joint and several liability.

¶ 44 Still, plaintiffs contend that due to developments in medicine, *Byrd* is now obsolete and should be overruled. However, adhering to the principles of stare decisis, this Court should not disturb settled precedent that clearly defines the liability of doctors and nurses when treating or diagnosing patients. Of course, the legislature, which is not bound by stare decisis, could have at any time in the last ninety years enacted a different rule of liability to account for changes in the medical profession. As summarized previously, it did not. Neither the General Statutes nor the regulations governing CRNAs conflict with *Byrd*'s holding. Indeed, even the majority recognizes that under the current regulatory framework, nurses remain under the supervision of a licensed physician. Thus, even if a nurse's collaboration is negligent, the fact that the physician makes the ultimate care decision means that the nurse's negligence would not be the proximate cause of any injury. Therefore, plaintiffs' arguments that *Byrd* should be overruled or limited to its facts are not persuasive.

¶ 45 Furthermore, as we recognized in *Parkes v. Hermann*, 376 N.C. 320 (2020), creating a new form of liability involves making "a policy judgment [that] is better suited for the legislative branch of government." *Id.* at 326. In this case, departing from *Byrd* by expanding nurse liability would require us to determine which nurses' training and responsibilities are so advanced or specialized as to warrant liability and which nurses, if any, remain not liable under *Byrd*. Neither the statutes nor caselaw provide a clear guideline for making this determination. Further, dramatically expanding liability requires the type of factor weighing and interest balancing that are quintessential policy determinations for the legislature to make, not the courts. *See Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169–70 (2004). For instance, under this new standard, nurses may now need malpractice insurance. Regardless of this Court's view on whether expanding CRNA liability is a beneficial policy, "[t]he legislative department is the judge, within reasonable limits, of what the public welfare requires, and *the wisdom of its enactments is not the concern of the courts*." *State v. Warren*, 252 N.C. 690, 696 (1960) (emphasis added). "As to whether an act is good or bad law, wise or unwise, is a question for the Legislature and not for the courts — it is a political question." *Id.*

¶ 46 It appears that the majority's newly created theory holds CRNAs liable if they negligently collaborate with their supervising physician in choosing a treatment plan. Left unanswered is what constitutes adequate collaboration or what happens when the physician and CRNA

disagree. The uncertainty created by the majority's new standard highlights why such policy decisions should be left to the legislature, not this Court.

¶ 47 The legislature, as the policy making body of our government, has adopted and codified the holdings in *Byrd* in its statutes and regulations rather than supplanting them. Thus, the majority's holding not only overturns this Court's precedent without sufficient cause but also ignores the plain language of the statutes and regulations. In doing so, three Justices of this Court substitute their judgment of the public welfare for that of the General Assembly and create instability in the medical profession by striking down ninety years of precedent without providing a discernible standard.

IV. Conclusion

¶ 48 Both the General Statutes and the regulations governing CRNAs are consistent with the holdings in *Byrd*. Legal responsibility for treatment and diagnoses lies with the physician alone, not with nurses. As a result, the trial court correctly found that evidence of whether an alternative anesthetic treatment plan should have been used was not relevant to the liability of defendant CRNA. No justification exists to depart from our prior holdings, especially when doing so involves policymaking beyond the authority of this Court, creates more questions than it answers, and is adopted by less than a majority of this Court. Accordingly, I respectfully dissent.

Chief Justice NEWBY joins in this dissenting opinion.

IN RE M.B.

[382 N.C. 82, 2022-NCSC-96]

IN THE MATTER OF M.B., J.B., AND J.S.

No. 325A21

Filed 19 August 2022

Termination of Parental Rights—neglect—likelihood of future neglect—willful failure to make reasonable progress—willfulness—required findings

An order terminating a mother's parental rights in her three children based on neglect (N.C.G.S. § 7B-1111(a)(1)) and failure to make reasonable progress in correcting the conditions leading to the children's removal (N.C.G.S. § 7B-1111(a)(2)) was vacated, where the trial court failed to enter a specific finding regarding the probability of future neglect if the children were returned to the mother's care—which was a necessary finding for termination under section 7B-1111(a)(1) where the children had been separated from the mother for a period of time—and the court also failed to determine whether the mother's failure to make reasonable progress was willful. Because some of the court's findings and some evidence in the record could have supported these necessary determinations, the matter was remanded for further proceedings.

Justice BERGER dissenting.

Chief Justice NEWBY joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) (2019) from orders entered on 1 June 2021 by Judge Marion M. Boone in District Court, Surry County. This matter was calendared for argument in the Supreme Court on 1 July 2022 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

R. Blake Cheek for petitioner-appellee Surry County Department of Social Services.

James N. Freeman Jr. for appellee Guardian ad Litem.

David A. Perez for respondent-appellant mother.

HUDSON, Justice.

¶ 1 Respondent appeals from the trial court's orders terminating her parental rights in Mary[1] (born April 2010), James (born August 2011), and Joy (born September 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. Because the trial court failed to make necessary determinations to support the adjudication of grounds for termination under N.C.G.S. § 7B-1111(a)(1) and (2), we vacate the trial court's orders and remand for further proceedings not inconsistent with this opinion. *See* N.C.G.S. § 7B-1111(a)(1)–(2) (2021).

I. Factual and Procedural Background

¶ 2 On 22 March 2019, the Surry County Department of Social Services (DSS) filed juvenile petitions alleging that Mary, James,[2] and Joy[3] were neglected juveniles. The petitions alleged that the children lived in an injurious environment due to respondent's substance abuse, improper supervision, and unsanitary home conditions. DSS explained that it had been providing case management services to the family since January 2019, but that respondent failed to participate in any referred services, including Intensive Family Preservation Services and assessments for mental health and substance abuse. The petitions alleged that a DSS social worker visited respondent's home twice on 22 March 2019 to develop a safety plan for the children, but respondent refused to meet with the social worker. The social worker observed that there were "numerous bags of trash piled up on the back porch" and the home had a mouse infestation. The petition also alleged that Mary and Joy both had untreated boils on their bodies and that Mary had "blistery areas on her face." After the filing of the juvenile petitions, DSS obtained nonsecure custody of the children. The children were placed in foster care, and the trial court awarded respondent two hours of supervised visitation once per week.

¶ 3 On 17 April 2019, respondent entered into a case plan with DSS to address the issues that led to the children's removal from her home. The case plan required respondent to: obtain a substance abuse assessment and comply with recommended treatment including random drug screens, complete parenting classes, obtain and maintain suitable housing, and obtain and maintain gainful employment.

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1. Pseudonyms are used throughout the opinion to protect the identities of the children and for ease of reading.

2. Mary and James share the same father, who is deceased.

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

¶ 4 On 11 June 2019, the trial court adjudicated Mary, James, and Joy neglected juveniles and continued custody with DSS. Respondent stipulated to the factual allegations in the petition that supported the trial court's adjudication. The trial court ordered respondent to comply with the components of her case plan and set the primary permanent plan as reunification with a secondary plan of termination of parental rights and adoption.

¶ 5 Following a 31 October 2019 review hearing, the trial court entered an order on 16 December 2019 reducing respondent's visitation to two hours every other week due to her poor attendance. The court found that respondent had attended only seven of the thirteen scheduled visits. The court also found that respondent completed a comprehensive clinical assessment on 16 July 2019 and was referred to substance abuse intensive outpatient treatment. Finally, the court found that respondent was provided the opportunity to complete substance abuse treatment and parenting programs but had inconsistent attendance.

¶ 6 In an order entered on 27 October 2020, the trial court changed the children's primary permanent plan to termination of parental rights and adoption due to respondent's ongoing mental health and substance abuse issues. The court found respondent was diagnosed with opiate use disorder severe, amphetamine use disorder severe, post traumatic stress disorder, and unspecified depressive disorder. Respondent was not compliant with her substance abuse treatments and continued to struggle with her sobriety, testing positive for amphetamines and methamphetamines on 10 June 2020. The court found that respondent was not making reasonable progress on her case plan and that there remained significant barriers to reunification.

¶ 7 On 23 December 2020, DSS filed a motion to terminate respondent's parental rights in Mary, James, and Joy, alleging that grounds existed for termination based on neglect and 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. *See* N.C.G.S. § 7B-1111(a)(1)–(2).

¶ 8 On 7 April 2021, the trial court held a hearing on the motion to terminate respondent's parental rights. In a 1 June 2021 adjudication order, the trial court found that respondent had not completed substance abuse treatment as required by her case plan, had tested positive for illicit substances on six drug screens, had not maintained safe and stable housing, and was not employed. The trial court further found that respondent was not making reasonable progress under the circumstances

in correcting the conditions that led to the removal of the children and, therefore, grounds existed to terminate respondent's parental rights under N.C.G.S. § 7B-1111(a)(1) and (2). In a separate disposition order entered the same day, the court concluded that it was in the children's best interests that respondent's parental rights be terminated and terminated respondent's parental rights. Respondent timely appealed.

¶ 9 On appeal, respondent argues that the trial court failed to make certain necessary determinations regarding both grounds for termination. First, respondent contends that the trial court failed to make the necessary determination that there was a probability of repetition of neglect under N.C.G.S. § 7B-1111(a)(1). Second, respondent contends that the trial court failed to make the necessary determination that her failure to make reasonable progress was willful under N.C.G.S. § 7B-1111(a)(2).[4]

II. Analysis

¶ 10 "Our Juvenile Code provides for a two-step process for termination of parental rights proceedings consisting of an adjudicatory stage and a dispositional stage." *In re Z.A.M.*, 374 N.C. 88, 94, (2020) (citing N.C.G.S. §§ 7B-1109, 1110 (2019)). At the adjudicatory stage, the petitioner bears the burden of proving by "clear, cogent, and convincing evidence" the existence of one or more grounds for termination under N.C.G.S. § 7B-1111(a). N.C.G.S. § 7B-1109(e)–(f) (2021). We review an adjudication order "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)). "Findings 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. 403, 407 (2019). "The trial court's conclusions of law are reviewable de novo on appeal." *In re C.B.C.*, 373 N.C. 16, 19 (2019).

A. Adjudication Under N.C.G.S. § 7B-1111(a)(1)

¶ 11 First, respondent argues that the trial court erred in concluding that grounds existed to terminate her parental rights based on neglect because it failed to determine the likelihood of a repetition of neglect. We agree, and therefore vacate this portion of the trial court's orders.

¶ 12 Pursuant to N.C.G.S. § 7B-1111(a)(1), a trial court may terminate parental rights upon a finding that the parent has neglected the juvenile.

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4. Respondent does not challenge the trial court's determination that termination of her parental rights was in the best interests of the children.

Generally, "[t]ermination of parental rights based upon this statutory ground requires a showing of neglect at the time of the termination hearing." *In re L.H.*, 378 N.C. 625, 2021-NCSC-110, ¶ 10 (quoting *In re R.L.D.*, 375 N.C. 838, 841 (2020)). However, in instances where "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." *Id.* (emphasis added) (quoting *In re R.L.D.*, 375 N.C. at 841). "In such cases, a trial court may terminate parental rights based upon prior neglect of the juvenile if the trial court *finds by clear and convincing evidence a probability of repetition of neglect* if the juvenile were returned to [his or] her parents." *In re E.L.E.*, 243 N.C. App. 301, 308 (2015) (cleaned up) (emphasis added).

¶ 13 Because it lacks a crystal ball, a trial court may consider many past and present factors to make this forward-looking determination. *See In re L.H.*, ¶ 17 ("[W]hile any determination of a likelihood of future neglect is inevitably predictive in nature, the trial court's findings were not based on pure speculation."). For instance, a 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). Likewise, a trial court may consider "whether the parent has made any meaningful progress in eliminating the conditions that led to the removal of the children." *In re O.W.D.A.*, 375 N.C. 645, 654 (2020) (quoting *In re J.H.K.*, 215 N.C. App. 364, 369 (2011)). When these factors evidence "a likelihood of repetition of neglect, the trial court may reach a conclusion of neglect under [N.C.G.S.] § 7B-1111(a)(1)." *In re J.H.K.*, 215 N.C. App. at 368.

¶ 14 However, these are only *factors* within the trial court's ultimate determination of a likelihood of future neglect; noting the factors alone does not amount to making the determination itself. After noting these factors, the trial court must then distinctly determine a parent's likelihood of neglecting a child in the future. *See, e.g.*, *In re L.H.*, ¶ 11 (affirming a trial court's termination of parental rights under N.C.G.S. § 7B-1111(a)(1) because the trial court "ultimately determined there was a substantial likelihood that the children would again be neglected if returned to respondent's care *based on* [various factual] findings" (emphasis added)); *In re Reyes*, 136 N.C. App. 812, 815 (2000) ("[P]arental rights may . . . be terminated if there is a showing of a past adjudication of neglect *and* the trial court finds by clear and convincing evidence a probability of repetition of neglect if the juvenile were returned to [his or] her parents." (emphasis added)). When the trial court fails to distinctly determine that there is a likelihood of future neglect, "the ground

of neglect is unsupported by necessary findings of fact." *In re E.L.E.*, 243 N.C. App. at 308. Even when "competent evidence in the record exists to support such a finding, . . . the absence of this necessary finding [still] requires reversal." *Id.*

¶ 15 Here, the trial court found the component factors but did not make the ultimate determination. While the trial court made extensive unchallenged findings in the adjudication order regarding respondent's lack of progress on her case plan, the trial court's order is devoid of any distinct determination of whether there was a likelihood of future neglect should the children be returned to respondent's care. Because the children had been outside of respondent's care for an extended period of time, such a determination "was necessary to sustain the conclusion that respondent's parental rights were subject to termination based on neglect." *In re B.R.L.*, 379 N.C. 15, 2021-NCSC-119, ¶ 23.

¶ 16 To be sure, the trial court's findings of fact regarding respondent's lack of progress *could have* been sufficient to support a determination of a likelihood of future neglect. *See, e.g.*, *In re O.W.D.A.*, 375 N.C. at 654. For instance, the trial court's unchallenged findings of fact demonstrated that respondent "ha[d] not obtained or maintained safe, suitable, and stable housing" and "ha[d] no visible means to support herself." But as written, the trial court's order fails to make the necessary and distinct determination of a likelihood of future neglect. This failure constitutes reversible error. Accordingly, we vacate this portion of the trial court's orders and remand the matter to the trial court for consideration of whether there was a likelihood of repetition of neglect.

¶ 17 Because we conclude that termination of respondent's parental rights cannot be upheld under N.C.G.S. § 7B-1111(a)(1), we next turn to the trial court's conclusion that grounds existed for termination under N.C.G.S. § 7B-1111(a)(2).

B. Adjudication Under N.C.G.S. § 7B-1111(a)(2)

¶ 18 Second, respondent argues that the trial court erred in concluding that grounds existed under N.C.G.S. § 7B-1111(a)(2) to terminate her parental rights because it failed to make any determination that her lack of progress was willful. We agree, and therefore vacate this portion of the trial court's orders as well.

¶ 19 Subsection 7B-1111(a)(2) provides that parental rights may be terminated 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. at 95. "The willfulness of a parent's failure to make reasonable progress toward correcting the conditions that led to a child's removal from the family home is established when the parent had the ability to show reasonable progress, but was unwilling to make the effort." *In re A.S.D.*, 378 N.C. 425, 2021-NCSC-94, ¶ 10 (cleaned up).

¶ 20 This Court has previously determined that a trial court must make a finding of a parent's willfulness in relation to termination of parental rights pursuant to N.C.G.S. § 7B-1111(a)(7) for willful abandonment. *See In re K.N.K.*, 374 N.C. 50, 53 (2020) ("The willfulness of a parent's actions is a question of fact for the trial court"); *In re N.D.A.*, 373 N.C. 71, 81 (2019) (concluding that a trial court's "fail[ure] to adequately address the . . . willfulness of [respondent's] conduct" rendered the findings insufficient to support termination based on willful abandonment); *cf. In re N.M.H.*, 375 N.C. 637, 643–44 (2020) (affirming an adjudication of willful abandonment as a ground for termination despite the trial court's failure to use the statutory language because the findings "ultimately support[ed] the conclusion that respondent's conduct met the statutory criterion of willful abandonment[,]" and "when read in context, the trial court's order makes clear that the court applied the proper willfulness standard to determine that respondent willfully abandoned the child under N.C.G.S. § 7B-1111(a)(7)"). Likewise, the Court of Appeals has reversed a trial court's termination of parental rights on the ground of willful failure to make reasonable progress because the trial court's order did "not contain adequate findings of fact that respondent acted 'willfully[,]' " *In re C.C.*, 173 N.C. App. 375, 384 (2005), when the order was "devoid of any finding that respondent was 'unwilling to make the effort' to make reasonable progress in remedying the situation that led to the adjudication of neglect[,]" *id.* at 383.

¶ 21 Based on these precedents, we are persuaded that the trial court was required to make a finding of willfulness to support its termination

of respondent's parental rights under N.C.G.S. § 7B-1111(a)(2) in this case.

¶ 22 As above, the trial court's orders here falls short of this requirement: they lack any determination that respondent's conduct was willful. Although the trial court made extensive findings regarding respondent's lack of progress on her case plan, it neither found nor concluded that respondent *willfully* left the children in foster care without making reasonable progress or that respondent's lack of progress met the statutory criteria under N.C.G.S. § 7B-1111(a)(2). Accordingly, we hold that the trial court's findings are insufficient to support its conclusion that grounds existed to terminate respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(2) and vacate this portion of the trial court's orders. However, we note that evidence was presented during the adjudicatory stage from which the trial court could have made additional findings of fact addressing the willfulness of respondent's failure to make progress on her case plan. We therefore remand the matter back to the trial court for further factual findings on this ground.

III. Conclusion

¶ 23 Because the trial court failed to make necessary determinations on adjudication under N.C.G.S. § 7B-1111(a)(1) and (2), we vacate the court's orders terminating respondent's parental rights and remand the matter for further proceedings not inconsistent with this opinion, including the entry of a new order determining whether respondent's parental rights were subject to termination based on neglect and willful failure to make reasonable progress. *See In re C.L.H.*, 376 N.C. 614, 2021-NCSC-1, ¶ 17 (vacating and remanding for further proceedings "[w]here . . . the trial court's adjudicatory findings were insufficient to support its conclusion that termination of the parent's rights was warranted, but the record contained additional evidence that could have potentially supported a conclusion that termination was appropriate" (cleaned up)). The trial court may, in the exercise of its discretion, receive additional evidence on remand if it elects to do so. *See In re N.D.A.*, 373 N.C. at 84.

VACATED AND REMANDED.

Justice BERGER dissenting.

¶ 24 The majority's elevation of form over substance only serves to delay final resolution of this matter. Because the trial court entered a detailed order sufficient to terminate respondent's parental rights under N.C.G.S. § 7B-1111(a)(1) and (2), I respectfully dissent.

¶ 25 Here, the trial court's unchallenged findings of fact demonstrate respondent's inability to provide "safe, suitable, and stable housing" for the children at the time of the termination hearing. Additionally, the trial court found that respondent had reported "no stable employment" and "has no visible means of support" to provide for her children going forward. The trial court indicated that at the time of the hearing, respondent "ha[d] failed to achieve stability for herself and her children."

¶ 26 Moreover, the trial court made extensive unchallenged findings in the adjudication order regarding respondent's lack of progress on her case plan. The juveniles had been in the custody of DSS for two years, and the trial court outlined respondent's failure to complete the substance abuse treatment and parenting programs, pointing to her excessive absences, "lack of engagement," and continued "narcotic usage." Notably, the trial court found respondent "still has *ongoing* substance abuse problems and she has not completed any in-patient treatment." (Emphasis added.) Accordingly, the trial court found that respondent had not demonstrated progress in resolving the issues her case plan attempted to address.

¶ 27 These findings demonstrate that respondent lacked the ability to provide proper care to Mary, James, and Joy at the time of the termination hearing and are indicative of a likelihood of future neglect if the children were returned to respondent's care. *See In re M.A.*, 374 N.C. 865, 870, 844 S.E.2d 916, 920–21 (2020); *see also Matter of L.E.W.*, 375 N.C. 124, 136, 846 S.E.2d 460, 469 (2020) ("the willfulness of a parent's failure to make reasonable progress toward correcting the conditions that led to a child's removal from the family home 'is established when the [parent] had the ability to show reasonable progress, but was unwilling to make the effort.' "). Though the trial court could have provided additional findings in its order, those it did include support its conclusion to terminate respondent's parental rights.

Chief Justice NEWBY joins in this dissenting opinion.

MILLER v. CAROLINA COAST EMERGENCY PHYSICIANS, LLC

[382 N.C. 91, 2022-NCSC-97]

CHARLOTTE POPE MILLER, ADMINISTRATRIX OF THE ESTATE OF THE LATE JOHN LARRY MILLER

v.

CAROLINA COAST EMERGENCY PHYSICIANS, LLC; HARNETT HEALTH SYSTEMS, INC., D/B/A BETSY JOHNSON REGIONAL HOSPITAL; AND DR. AHMAD S. RANA

No. 222PA21

Filed 19 August 2022

1. Medical Malpractice—9(j) certification—expert—reasonable expectation of qualification and testimony—at time of complaint

In a medical malpractice case, the trial court properly denied defendant-hospital's motion to dismiss plaintiff's complaint for noncompliance with Evidence Rule 9(j), where the complaint facially complied with Rule 9(j)'s certification requirements but where it was later discovered that plaintiff's Rule 9(j) expert was unwilling to testify that the hospital violated the applicable standard of care in one of the ways alleged in the complaint. The record contained ample evidence that showed—when taken in the light most favorable to plaintiff—plaintiff reasonably believed at the time her complaint was filed that her expert would be willing to testify against the hospital, including the expert's affidavit expressing that willingness. Further, the record showed that the expert remained willing to testify that the hospital violated the applicable standard of care under at least one of the other theories mentioned in plaintiff's complaint.

2. Evidence—standard of review—misapplication of the law—Rule 702(a)

In a medical malpractice case, the Court of Appeals properly applied a de novo standard of review when determining that the trial court improperly excluded one of plaintiff's expert witnesses where the expert had not reviewed some of the medical records in the case. Although a trial court's ruling on a motion to exclude expert testimony is reviewable for an abuse of discretion, the issue on appeal involved a question of law: whether the trial court misapplied Evidence Rule 702(a) by implying that putative experts must base their opinions on all the facts or data available rather than on "sufficient" facts or data as prescribed by Rule 702(a)(1).

Justice BARRINGER dissenting.

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

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 277 N.C. App. 449, 2021-NCCOA-212, affirming in part, reversing in part, vacating in part, and remanding an order entered on 9 November 2015 by Judge Stanley L. Allen, an order entered on 17 January 2017 by Judge Gale M. Adams, and orders entered on 23 April 2019 and 4 October 2019 by Judge Claire V. Hill in Superior Court, Harnett County. Heard in the Supreme Court on 11 May 2022.

Hedrick Gardner Kincheloe & Garofalo LLP, by Patricia P. Shields and Linda Stephens, and Brent Adams & Associates, by Brenton D. Adams, for plaintiff-appellee Charlotte Pope Miller.

Yates, McLamb, & Weyher, L.L.P., by Maria P. Wood and Madeleine M. Pfefferle, for defendant-appellant Harnett Health Systems, Inc. d/b/a/ Betsy Johnson Regional Hospital.

EARLS, Justice.

¶ 1 To bring a medical malpractice claim in North Carolina, a plaintiff must comply with Rule 9(j) of the North Carolina Rules of Civil Procedure. Rule 9(j) provides in relevant part that a plaintiff's pleadings must "specifically assert[ ] that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person who [(1)] is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and [(2)] who is willing to testify that the medical care did not comply with the applicable standard of care." N.C.G.S. § 1A-1, Rule 9(j)(1) (2021). The question in this case is whether a trial court must dismiss a complaint that facially complies with Rule 9(j) when it is subsequently determined that the plaintiff's Rule 9(j) witness is unwilling to testify that the defendant in a medical malpractice action violated the applicable standard of care in one (but only one) of the numerous ways alleged in the plaintiff's complaint.

¶ 2 When a defendant files a motion to dismiss a complaint that facially complies with Rule 9(j), the dispositive question is whether, taking the evidence in the light most favorable to the plaintiff, it was reasonable for the plaintiff to believe that at the time the complaint was filed the witness would be willing to testify against the defendant. *See Preston v. Movahed*, 374 N.C. 177, 189 (2020). The inquiry is necessarily focused

on the information available to the plaintiff at the time the Rule 9(j) certification was tendered, not information that came to light after the complaint was filed. In this case, there is ample evidence in the record to support the conclusion that the plaintiff, Charlotte Pope Miller, reasonably believed that her Rule 9(j) witness was willing to testify that defendant Harnett Health Systems, Inc. (Harnett Health) violated the applicable standard of care in the ways alleged in her complaint. Therefore, we hold that the Court of Appeals properly affirmed the trial court's denial of Harnett Health's motion to dismiss for failure to comply with Rule 9(j). The Court of Appeals also utilized the correct standard of review in examining the trial court's grant of Harnett Health's motion to exclude another witness under Rule 702 of the North Carolina Rules of Evidence. Accordingly, we affirm the decision of the Court of Appeals.

I. Background

¶ 3 On 8 March 2010, John Larry Miller complained of a painful, distended stomach and being unable to urinate. John's wife, Charlotte, drove him to the emergency room at Betsy Johnson Regional Hospital in Dunn. At the time, Betsy Johnson Regional Hospital was operated by Harnett Health. At the hospital, John was seen by Dr. Ahmad S. Rana, an emergency room physician, who examined John and ordered placement of a catheter and a urinalysis. Dr. Rana prescribed antibiotics and discharged John that evening, against Charlotte's wishes. The following evening, John was still experiencing significant pain and remained unable to urinate, so Charlotte called an ambulance to take him back to Betsy Johnson Regional Hospital, where he was again seen by Dr. Rana. Dr. Rana ordered blood work, which indicated renal failure. John was pronounced dead at midnight. Throughout John's stay at the hospital, Charlotte took handwritten notes documenting her view of the treatment Dr. Rana and emergency room nurses provided to her husband.

¶ 4 On 30 September 2011, Charlotte Miller filed a medical malpractice complaint as the administrator of John's estate against Harnett Health, Dr. Rana, and Carolina Coast Emergency Physicians, LLC. Plaintiff took a voluntary dismissal and timely refiled the complaint underlying these proceedings on 6 February 2014. In her 2014 complaint, plaintiff certified that all relevant materials had been reviewed by "a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the professional care rendered by the defendants to [John] did not comply with the applicable standard of care and that such failure to comply with the appropriate standard of care was a cause of the death of [John]." That person was subsequently identified as Dr. Robert Leyrer, a board-certified emergency medicine physician then practicing in Florida.

¶ 5 In her complaint, plaintiff alleged that Harnett Health violated the standard of care applicable to John at the time he was treated through its employment of nurses who "failed to exhibit the knowledge and skill and experience of practitioners with similar training and experience practicing in the Dunn, North Carolina community." The complaint also alleged that Harnett Health was negligent in various other ways not relating to its nursing staff. For example, plaintiff alleged that Harnett Health also violated the applicable standard of care through its employment of Dr. Rana as an apparent agent of Harnett Health and by "fail[ing] to insure through its policies and procedures that [John] receive[d] the requisite degree and standard of hospital care and treatment regularly experienced at similar hospitals," among numerous other assertions. In an affidavit submitted shortly after the 2014 complaint was filed, Dr. Leyrer attested that before the complaint was filed, he had spoken with plaintiff's attorneys and "expressed [his] opinion that the Defendants violated the appropriate standard of care in the ways specified in the Complaint." In the affidavit, Dr. Leyrer also stated that he had communicated his "willingness to come to NC and testify in this case as to the negligence of the Defendants and the various violations of the appropriate standard of care by the Defendants which are set out in the Complaint, and copy of which is attached hereto and incorporated by reference."

¶ 6 Dr. Leyrer sat for a deposition on 29 May 2015. During the deposition, Dr. Leyrer explained why he believed Dr. Rana's treatment of John fell short of the applicable standard of care. Dr. Leyrer was not specifically asked for his opinion regarding the adequacy of the treatment rendered by Harnett Health's nursing staff. However, at various times during the deposition, Dr. Leyrer indicated that his criticisms of the treatment John received were limited to his criticisms of Dr. Rana. When counsel for Harnett Health asked Dr. Leyrer whether "outside of what you told me with regard to the care and treatment provided by Dr. Rana . . . the remaining treatment would have been within the standard of care, correct?", Dr. Leyrer responded that "[a]t this time I can't think of anything else, correct." When asked whether he would "agree . . . that with regard to the other care and treatment set forth in the medical records for March 9 that care and treatment was within the standard of care outside of the deviations that you described for us," Dr. Leyrer replied that "[a]t this time I believe it was." Dr. Leyrer also disclosed that he did not consider himself "an emergency nursing expert." Elsewhere, Dr. Leyrer agreed that he had not previously "expressed any opinions to Plaintiff's counsel outside of those [he had] just listed [concerning Dr. Rana] . . . regarding deviations from the standard of care[.]"

¶ 7 Following the deposition, Harnett Health filed a motion to dismiss pursuant to Rule 9(j), asserting that plaintiff "could not have reasonably expected Dr. Leyrer to qualify as an expert witness against Harnett Health" and that Dr. Leyrer "is also not willing to testify that the care rendered by Harnett Health did not comply with the applicable standard of care." Specifically, Harnett Health argued that dismissal was warranted because Dr. Leyrer "testified that he did not have any opinions regarding any care provided by nurses or other personnel at Harnett Health."

¶ 8 As part of its response in opposition to Harnett Health's motion to dismiss, plaintiff's counsel submitted an affidavit stating that "prior to filing the initial complaint," Dr. Leyrer communicated to counsel "his ability and willingness to testify that the defendant hospital did not comply with the appropriate standard of care and that the violation of this standard of care by the defendant hospital caused the death of the late John Miller." On 9 November 2015, the trial court denied Harnett Health's motion to dismiss based on its determination that

> [a]t the time [plaintiff's attorney] made his original 9(j) Certification in his filing of the complaint on September 30, 2011, and his filing of the subsequent complaint on February 6, 2014 . . . [plaintiff's attorney] exercised reasonable care and diligence and reasonably expected Dr. Leyrer to qualify as an expert witness under Rule 702 . . . and . . . he reasonably expected Dr. Leyrer to testify in court that the medical care rendered to the plaintiff's decedent by the defendant hospital did not comply with the applicable standard of care.

The trial court later granted Harnett Health's motion to exclude Dr. Leyrer's testimony on the grounds that he failed to express standard of care opinions against Harnett Health and was not sufficiently familiar with the relevant medical community at the time John was treated.

¶ 9 In addition to Dr. Leyrer, plaintiff also designated Dr. Gary B. Harris as an expert on the topic of emergency medicine. Dr. Harris was a practicing emergency room physician who had experience supervising and instructing nurses. Prior to his deposition, Dr. Harris signed an affidavit detailing his efforts to become familiar with the medical community in Dunn and the facilities at Betsy Johnson Regional Hospital. According to Dr. Harris, these efforts included reviewing demographic data for Harnett County from 2010 to 2015, reviewing Betsy Johnson Regional Hospital's renewal application completed in 2010 which contained information regarding hospital staff, facilities, and its patient population, and

establishing and maintaining professional contacts with emergency physicians who practice in communities similar to Dunn. In his deposition, Dr. Harris testified that he was familiar with the standard of care for nurses and emergency room physicians practicing in Dunn, and that Dr. Rana and the nurses who treated John when he visited Betsy Johnson Regional Hospital violated that standard of care in multiple ways.

¶ 10 Harnett Health moved to disqualify and exclude Dr. Harris "on the grounds that [he] do[es] not qualify as [a] standard of care expert[ ] under Rule 702 of the North Carolina Rules of Evidence and N.C.G.S. § 90-21.12." In the same motion, Harnett Health requested an order granting judgment in its favor and dismissing plaintiff's case against Harnett Health with prejudice "in its entirety." On 4 October 2019, the trial court granted Harnett Health's motion, finding that Dr. Harris was "unqualified under Rule 702(a) to render an opinion in this case . . . because [he] has not sufficiently demonstrated through his depositions or affidavits that he is familiar with the local standards at the time of this incident as required by [N.C.G.S.] § 90-21.12." In addition, the trial court noted that Dr. Harris "did not review the plaintiff's handwritten notes, certain EMT records, or certain prior medical records before forming his opinions in this case. Additionally, he had not reviewed the documents prior to his depositions." Based on its conclusion that there existed "no genuine issues of material fact . . . as to the applicable standard of care, liability, proximate causation, plaintiff's contributory negligence, damages and agency," the trial court entered summary judgment in favor of Harnett Health and dismissed all claims against Harnett Health with prejudice.

II. The Court of Appeals opinion

¶ 11 Plaintiff filed a timely notice of appeal from the trial court's order excluding Dr. Harris and granting summary judgment in Harnett Health's favor. Harnett Health subsequently gave notice of cross-appeal from the 9 November 2015 order denying its motion to dismiss on Rule (9)(j) grounds.[1] In a unanimous opinion, the Court of Appeals affirmed the order denying Harnett Health's motion to dismiss and reversed the order excluding Dr. Harris's testimony. *See Miller v. Carolina Coast Emergency Physicians, LLC*, 277 N.C. App. 449, 2021-NCCOA-212.

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1. Plaintiff also filed timely notice of appeal from various other orders entered by the trial court throughout the proceedings, including orders adjudicating motions filed by Dr. Rana. Although the Court of Appeals resolved questions arising from these orders, only the order denying Harnett Health's motion to dismiss and the order granting Harnett Health's motion to exclude Dr. Harris are presently before us. Accordingly, our summary of facts and the proceedings below is limited to the facts and legal issues relating to these two orders.

¶ 12 With respect to the motion to dismiss, the Court of Appeals explained that consistent with Rule 9(j)'s function as "a gatekeeper . . . to prevent frivolous malpractice claims . . . trial courts determining compliance with Rule 9(j) should examine the facts and circumstances known or those which should have been known to the pleader *at the time of filing*." *Id.* ¶ 46 (cleaned up) (emphasis in the original). The question before the court was whether "considering the facts and circumstances at the time Plaintiff filed her Complaint—viewed in the light most favorable to Plaintiff . . . she reasonably believed Dr. Leyrer was willing to testify against Harnett Health." *Id.* ¶ 50–51. In the court's view, notwithstanding the "reservations" Dr. Leyrer ultimately expressed at his deposition, there existed "no evidence indicating Dr. Leyrer informed counsel that [he] was unwilling to testify against Harnett Health prior to his pre-deposition affidavit." *Id.* ¶ 51. Thus, based in part on plaintiff's counsel's affidavit "asserting Dr. Leyrer stated he was willing to testify against all Defendants in a phone conversation prior to filing the 2011 Complaint," the court concluded that "the Record indicates at the time Plaintiff filed her Complaint, she reasonably believed Dr. Leyrer was willing to testify against Harnett Health." *Id.*

¶ 13 With respect to the motion to exclude Dr. Harris, the Court of Appeals concluded that the trial court "misapplied Rule 702(a)." *Id.* ¶ 77. Specifically, the Court of Appeals held that in excluding Dr. Harris "because he had not reviewed Plaintiff's notes, Decedent's EMT records, and Decedent's 'certain prior medical records,' " the trial court had erroneously "concluded Dr. Harris could not satisfy Rule 702(a)(1)'s requirement [that] his testimony be based on sufficient facts or data." *Id.* ¶ 79. According to the court, the fact that Dr. Harris had not reviewed certain information "affect[ed] only the *weight to be assigned* [his] opinion rather than its *admissibility*." *Id.* (quoting *Pope v. Bridge Broom, Inc.*, 240 N.C. App. 365, 374 (2015)). Therefore, the court held that the trial court "erred in concluding Dr. Harris's opinions were inadmissible" because "questions as to the weight to be given to his opinions should be resolved by a jury." *Id.* ¶ 80. Separately, however, the court affirmed the order granting Harnett Health's motion to exclude Dr. Leyrer's testimony as against Harnett Health directly. *Id.* ¶ 86.

¶ 14 Subsequently, Harnett Health filed a petition for discretionary review pursuant to N.C.G.S. § 7A-31. On 14 December 2021, this Court issued a special order allowing review as to the following issues: Whether the Court of Appeals (1) "err[ed] in affirming the trial court's order denying Harnett Health's Motion to Dismiss pursuant to Rule 9(j)" and (2) "err[ed] in applying a de novo standard of review instead of an abuse of discretion standard in its exclusion of Dr. Harris."

III. Harnett Health's motion to dismiss on Rule 9(j) grounds

¶ 15 **[1]** Rule 9(j) provides in relevant part that:

> Any complaint alleging medical malpractice by a health care provider pursuant to [N.C.]G.S. 90-21.11(2)a[ ] in failing to comply with the applicable standard of care under [N.C.]G.S. 90-21.12 shall be dismissed unless:
>
> > (1) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care . . . .

N.C.G.S. § 1A-1, Rule 9(j). The rule "serves as a gatekeeper, enacted by the legislature, to prevent frivolous malpractice claims by requiring expert review *before* filing of the action." *Moore v. Proper*, 366 N.C. 25, 31 (2012). "Because Rule 9(j) requires certification at the time of filing that the necessary expert review has occurred, compliance or noncompliance with the Rule is determined at the time of filing." *Id.* When a defendant later files a motion to dismiss a complaint that facially complied with Rule 9(j), "a court should look at 'the facts and circumstances known or those which should have been known to the pleader' at the time of filing." *Id.* (quoting *Trapp v. Maccioli*, 129 N.C. App. 237, 241, *disc. rev. denied*, 348 N.C. 509 (1998)). An appellate court reviews a trial court's allowance or denial of a defendant's motion to dismiss de novo, taking "the evidence . . . in the light most favorable to [the] plaintiff." *Preston v. Movahed*, 374 N.C. 177, 186 (2020).

¶ 16 Harnett Health raises two arguments in support of its contention that the Court of Appeals erred in affirming the trial court's denial of its motion to dismiss. Their first argument is that plaintiff has failed to comply with Rule 9(j) because Dr. Leyrer stated in his deposition testimony that he was unwilling to testify to the quality of the care rendered by nurses employed by Harnett Health. As a predicate to this argument, Harnett Health asserts that a reviewing court conducts one inquiry when evaluating compliance with Rule 9(j)'s first requirement (the requirement that the plaintiff identify a person who is "reasonably expected to qualify as an expert witness under Rule 702") but a different inquiry when evaluating compliance with Rule 9(j)'s second requirement (the

requirement that the plaintiff identify a person who is "willing to testify that the medical care did not comply with the applicable standard of care"). According to Harnett Health, when assessing compliance with the first requirement, the question is whether the plaintiff had a "reasonable belief" that the person would qualify as an expert witness under Rule 702; when assessing compliance with the second requirement, the question is whether the person is or is not presently willing to testify that the defendant's medical treatment failed to comport with the applicable standard of care.

¶ 17 This argument is untenable in light of the precedent we established in *Preston*. In that case, the defendant filed a motion to dismiss pursuant to Rule 9(j), asserting that the plaintiff had failed to identify a person "willing to testify against defendant at the time of filing." 374 N.C. at 185. On review, and quoting extensively from *Moore*, we expressly adopted the same analytical approach utilized to review a challenge to a plaintiff's compliance with the "reasonably expected to qualify as an expert witness" requirement. *See id*. at 183 ("While the Rule 9(j) issue in *Moore* . . . focused specifically on whether the plaintiff's expert was reasonably expected to qualify as an expert witness, we conclude that the analytical framework set forth in *Moore* applies equally to other Rule 9(j) issues in which a complaint facially valid under Rule 9(j) is challenged on the basis that the certification is not supported by the facts." (cleaned up)).

¶ 18 We then explained that:

> [W]here, as here, a defendant files a motion to dismiss under Rule 12(b)(6) challenging a plaintiff's facially valid certification that the reviewing expert was willing to testify at the time of the filing of the complaint, the trial court must examine *the facts and circumstances known or those which should have been known to the pleader at the time of filing*, and to the extent there are reasonable disputes or ambiguities in the forecasted evidence, the trial court should draw all reasonable inferences in favor of the nonmoving party at this preliminary stage.

Id. at 183–84 (cleaned up) (emphasis added). *Preston* conclusively establishes that courts analyze a motion to dismiss on Rule 9(j) grounds in the exact same way when a defendant challenges a plaintiff's compliance with Rule 9(j)(1)'s first requirement as when a defendant challenges a plaintiff's compliance with Rule 9(j)(1)'s second requirement. In evaluating the second requirement, just as with the first Rule 9(j) requirement,

what matters is what was known or what reasonably should have been known *at the time of the filing*. The dispositive question is whether "taking the evidence in the light most favorable to plaintiff, the factual record . . . demonstrates that . . . [the Rule 9(j) expert] was willing at the time of the filing of the [complaint] to testify against [the] defendant . . . . on the basis that [the] defendant failed to meet the standard of care[.]" *Id.* at 190 (emphasis added).

¶ 19 Nonetheless, Harnett Health contends that the test set forth in *Moore* and *Preston* does not control because "[a]s specified by the language of the statute, the 'reasonable belief' language modifies the proposed expert's qualifications under Rule 702, not the proposed expert's willingness to testify." Harnett Health appears to be referring to the legislature's use of the phrase "*reasonably expected* to qualify" in describing the first Rule 9(j) requirement; the legislature uses the phrase "*is willing* to testify" in describing the second. But the reason courts assess compliance with Rule 9(j) based on what a plaintiff knew or reasonably should have known at the time the complaint was filed is not the fact that the legislature used the phrase "reasonably expected." Instead, courts assess Rule 9(j) compliance at the time a complaint is filed because "the legislature intended Rule 9(j) to control *pleadings* in medical malpractice claims." *Thigpen v. Ngo*, 355 N.C. 198, 203, (2002) (emphasis added); *see id.* ("The legislature specifically drafted Rule 9(j) to govern the *initiation* of medical malpractice actions and to require physician review as a condition for filing the action." (emphasis added)). Moreover, the statutory reference in Rule 9(j)(1) to "is willing to testify," when read in context, clearly refers to a witness who has reviewed the pleading prior to the time of filing rather than to a witness who is testifying in a subsequent deposition or trial. It is illogical to assess a plaintiff's compliance with Rule 9(j) based on what a proposed expert witness says months or years after a complaint is filed. We decline Harnett Health's implicit invitation to overrule *Preston* and depart from *Moore*.

¶ 20 Harnett Health's second argument is that even if plaintiff's compliance with Rule 9(j) should be assessed at the time her complaint was filed (as it must), plaintiff "could not have reasonably believed when she filed her Complaint that Dr. Leyrer was willing to testify against Harnett Health." This argument is unavailing for multiple reasons.

¶ 21 At the outset, this argument ignores evidence in the record that plainly supports the conclusion that Dr. Leyrer was willing to testify that Harnett Health violated the applicable standard of care at the time plaintiff filed her complaint. Contrary to Harnett Health's assertion that "the source of Plaintiff's belief that [Dr. Leyrer] was willing to testify [against

Harnett Health] remains unclear," the record is clear: the record contains an affidavit signed by Dr. Leyrer shortly after the second complaint was filed stating that he had "examined all medical records pertaining to the negligence of the defendants, Carolina Coast Emergency Physicians, LLC; *Harnett Health Systems, Inc., d/b/a Betsy Johnson Regional Care* and Dr. Ahmad S. Rana" and "[t]hat on the 26th day of September, 2011, I had a telephone conversation with [Charlotte's counsel] during which *I expressed my opinion that the Defendants violated the appropriate standard of care in the ways specified in the complaint*, a copy of which is attached hereto and incorporated by reference." In the same affidavit, Dr. Leyrer also recounted that "[s]ometime prior to the second complaint being filed, I again expressed my willingness to come and testify in this case as to the negligence of the Defendants *which are set out in the complaint*." Although Dr. Leyrer later indicated he would not be willing to testify that Harnett Health violated the standard of care with respect to its nursing staff, this does not negate the evidence in the record establishing that Dr. Leyrer told plaintiff's counsel he was willing to testify that Harnett Health "violated the appropriate standard of care in the ways specified in the complaint" on multiple occasions prior to the filing of plaintiff's amended complaint.

¶ 22 It may be possible that Dr. Leyrer misunderstood the allegations contained in plaintiff's complaint, failed to thoroughly vet the complaint, misrepresented what he was willing to testify to, or intended to communicate only that he was willing to testify to the negligence of the defendants other than Harnett Health. But Dr. Leyrer was a qualified emergency room physician with decades of professional experience. There is no evidence in the record suggesting plaintiff had reason to doubt Dr. Leyrer's competence, thoroughness, or honesty at the time of filing. Absent such evidence, it would have been unreasonable for plaintiff's counsel to presume that Dr. Leyrer meant something other than what he said in multiple pre-filing conversations with counsel as documented in Dr. Leyrer's affidavit. When Dr. Leyrer told plaintiff's counsel he had reviewed the relevant medical records and was willing to testify that the defendants named in the complaint had violated the applicable standard of care in the ways set forth in the complaint, plaintiff's counsel formed "a[ ] reasonable belief" that Dr. Leyrer would be willing to testify against Harnett Health "based on the exercise of reasonable diligence under the circumstances." *Preston*, 374 N.C. at 188 (quoting *Moore*, 366 N.C. at 31). Regardless, even if we were to credit Harnett Health's contention that the meaning of Dr. Leyrer's affidavit is ambiguous because he "only expressed willingness to testify against 'the Defendants' generally and lacked any criticisms of Harnett Health specifically," we

reiterate that "to the extent there are reasonable disputes or ambiguities in the forecasted evidence, the trial court should draw all reasonable inferences in favor of the nonmoving party at this preliminary stage." *Id.* at 189 (quoting *Moore*, 366 N.C. at 32).

¶ 23 Furthermore, Harnett Health's assertion that Dr. Leyrer's deposition testimony demonstrates he "was never critical of Harnett Health" overstates the significance of Dr. Leyrer's deposition testimony. At most, Dr. Leyrer's deposition testimony revealed that he would be unwilling to testify that the nurses who treated John violated the applicable standard of care. Harnett Health does not dispute the fact that Dr. Leyrer's deposition testimony included numerous detailed criticisms of the treatment provided by Dr. Rana. And Harnett Health acknowledges that plaintiff's 2014 complaint "asserts liability against Harnett Health based on . . . liability for Dr. Rana's alleged negligence as an apparent agent." Thus, as Harnett Health implicitly concedes, the record establishes that Dr. Leyrer has at all times during this litigation remained willing to testify that Harnett Health violated the standard of care in a manner consistent with at least one of the theories set out in plaintiff's complaint.

¶ 24 Finally, Harnett Health contends that plaintiff's complaint should be dismissed for failure to comply with Rule 9(j) for a separate reason: because the record demonstrates that plaintiff could not have reasonably believed that Dr. Leyrer would "qualify as an emergency nursing expert under Rule 702 of the North Carolina Rules of Evidence."[2] Once again, Harnett Health relies primarily on its characterization of Dr. Leyrer's deposition testimony. As explained above, the salient question is what plaintiff reasonably believed *at the time the complaint was filed*. As the Court of Appeals correctly noted, " '[t]he preliminary, gatekeeping question of whether a proffered expert witness is reasonably expected to qualify as an expert witness under Rule 702 is a different inquiry' than whether the witness [ultimately] qualifies." *Miller*, 2021-NCCOA-212, ¶ 52 (quoting *Moore*, 366 N.C. at 31).

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2. It is not entirely clear if Harnett Health intended to bring this question before the Court. In its opening brief, Harnett Health argues that "even if Plaintiff could have reasonably expected that Dr. Leyrer was willing to testify against Harnett Health, which is expressly denied, she could not have reasonably expected that [Dr.] Leyrer would qualify as an emergency nursing expert under Rule 702 of the North Carolina Rules of Evidence." Yet in its reply brief, Harnett Health states that "[n]otwithstanding that the reasonableness of Plaintiff's expectation of Dr. Leyrer's qualification is not at issue in this Discretionary Review, Plaintiff-Appellee raises this issue in their response brief." Regardless, because the special order allowing discretionary review could fairly be read to encompass this question, and because the parties both provide arguments in support of their respective positions, we assume this question is properly before the Court.

¶ 25 North Carolina Rule of Evidence 702(d) provides for the qualification of a physician "who by reason of active clinical practice . . . has knowledge of the applicable standard of care for nurses, nurse practitioners, certified registered nurse anesthetists, certified registered nurse midwives, physician assistants, or other medical support staff . . . with respect to the standard of care of which he is knowledgeable of . . . ." N.C.G.S § 8C-1, Rule 702(d) (2021). In this case, the record indicates that at the time plaintiff filed her complaint and certified compliance with Rule 9(j), she was aware that Dr. Leyrer was a practicing emergency room physician who had served for more than two decades as the Director of Emergency Medicine at a regional medical center. Thus, as the Court of Appeals correctly concluded, plaintiff reasonably expected Dr. Leyrer to qualify as an expert witness under Rule 702 because "Rule 702(d) only requires that a physician have knowledge of the standard for nursing care by means of the physician's clinical practice [and] Dr. Leyrer was a practicing emergency physician at the time Plaintiff filed the Complaint." *Miller*, 2021-NCCOA-212, ¶ 52. Accordingly, we uphold the Court of Appeals' affirmance of the trial court's denial of Harnett Health's motion to dismiss on Rule 9(j) grounds.

IV. The standard of review on appeal from a Rule 702 decision

¶ 26 **[2]** In addition to challenging the Court of Appeals' decision regarding its motion to dismiss on Rule 9(j) grounds, Harnett Health also challenges the Court of Appeals' decision to reverse the trial court's order excluding Dr. Harris, plaintiff's other expert witness, under Rule 702. As defined in its petition for discretionary review and this Court's special order allowing the petition in part, this challenge is limited to the question of whether the Court of Appeals utilized the correct standard of review in examining the trial court's order. Specifically, Harnett Health contends that the Court of Appeals "erroneously applied a *de novo* standard of review . . . despite longstanding precedent requiring adherence to the abuse of discretion standard."

¶ 27 Rule 702(a) provides that

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.

> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C.G.S. § 8C-1, Rule 702(a). In reviewing the trial court's order excluding Dr. Harris under Rule 702, the Court of Appeals explained that

> [g]enerally, we review a trial court's ruling on a motion to exclude expert testimony for an abuse of discretion. *Crocker v. Roethling*, 363 N.C. 140, 143 (2009). "However, when the pertinent inquiry on appeal is based on a question of law—such as whether the trial court properly interpreted and applied the language of a statute—we conduct de novo review." *Da Silva v. WakeMed*, 375 N.C. 1, 5 (2020).

Miller, 2021-NCCOA-212, ¶ 68. This is an entirely correct statement of the law. The trial court's determination that "proffered expert testimony meets Rule 702(a)'s requirements of qualification, relevance, and reliability . . . will not be reversed on appeal absent a showing of abuse of discretion." *State v. McGrady*, 368 N.C. 880, 893 (2016). But the trial court's articulation and application of the relevant legal standard is a legal question that is reviewed de novo. *See*, *e.g.*, *Nay v. Cornerstone Staffing Sols.*, 380 N.C. 66, 2022-NCSC-8, ¶ 26 ("In the event that the issue before the Court is whether the [lower tribunal's] determination rests upon a misapplication of the applicable legal standard, that determination is . . . a question of law subject to de novo review."). And, whatever the standard of review, "an error of law is an abuse of discretion." *Da Silva*, 375 N.C. at 5 n.2.

¶ 28 Of course, the fact that the Court of Appeals accurately described the standard of review does not necessarily mean the Court of Appeals actually utilized the correct standard of review. If the Court of Appeals had accurately described the standard of review but proceeded to assess the merits in a manner flatly inconsistent with its description, Harnett Health's arguments might have some force. That is not what happened in this case. Here, after accurately describing the standard of review, the Court of Appeals utilized that standard of review in reaching the conclusion that the trial court erred when it "excluded Dr. Harris because he had not reviewed Plaintiff's notes, Decedent's EMT records, and Decedent's 'certain prior medical records.' " *Miller*, 2021-NCCOA-212, ¶ 79.

¶ 29 The record demonstrates that Dr. Harris was a practicing emergency room physician who worked alongside of and was familiar with physicians who practiced in communities similar to Harnett County. Dr. Harris also undertook an extensive review of facts and data elicited from various sources to develop an understanding of the standards of care and standards of practice at Betsy Johnson Regional Hospital in 2010. In addition, Dr. Harris "examined the medical records from Harnett Health for the two hospital visits in question as well as at least some of Decedent's prior medical records. In fact, Dr. Harris was familiar with Decedent's medical history and certain medical conditions relevant to his care on the days in question." *Miller*, 2021-NCCOA-212, ¶ 80. As the Court of Appeals correctly noted, Rule 702(a) requires that expert testimony be based upon "*sufficient* facts or data," not upon all the facts or data in existence at the time a putative expert testifies. *Id.* ¶ 79. Thus, even if Dr. Harris did not review certain documents produced during John Miller's treatment that might have been relevant to assessing Harnett Health's negligence, Dr. Harris's testimony was still "based upon sufficient facts or data," including John's medical records.

¶ 30 Similarly, the Court of Appeals did not err in reviewing the basis for Dr. Harris's familiarity with the medical community in Harnett County. As we have previously explained, "[n]othing in our statutes or case law . . . prescribe[s] any particular method by which a medical doctor must become 'familiar' with a given community. Many methods are possible, and our jurisprudence indicates our desire to preserve flexibility in such proceedings." *Crocker v. Roethling*, 363 N.C. 140, 147 (2009). Certainly, a physician like Dr. Harris whose knowledge comes from "his [or her] equivalent skill and training, familiarity with the equipment and techniques used by [the allegedly negligent doctor], first-hand investigation of [the community where the treatment occurred] and its hospital, and his testimony as to the similarity in the communities where he has practiced and [the community where the treatment occurred]" can satisfy the requirements of Rule 702(a). *Pitts v. Nash Day Hosp., Inc.*, 167 N.C. App. 194, 199 (2004), *aff'd per curiam*, 359 N.C. 626 (2005). The Court of Appeals' ultimate conclusion that Dr. Harris did enough to familiarize himself with the Harnett County medical community in no way suggests that the Court of Appeals utilized the wrong standard of review.

¶ 31 In light of our precedents establishing the nature and quantity of information necessary to satisfy Rule 702, the trial court either abused its discretion in choosing to disregard the uncontroverted record evidence detailing Dr. Harris's professional background and the steps he undertook to familiarize himself with Harnett County, or the trial court

committed an error of law in imposing a requirement not found in Rule 702 that putative experts review *all* potentially relevant facts or data. In either case, the Court of Appeals did not err in how it approached the question of whether the trial court's exclusion order warranted reversal. We affirm the Court of Appeals' reversal of the trial court's order granting Harnett Health's motion to exclude Dr. Harris.

V. Conclusion

¶ 32 Rule 9(j) was introduced by the General Assembly as part of legislation entitled "An Act to Prevent Frivolous Medical Malpractice Actions by Requiring that Expert Witnesses in Medical Malpractice Cases Have Appropriate Qualifications to Testify on the Standard of Care at Issue and to Require Expert Witness Review as a Condition of Filing a Medical Malpractice Action." Act of June 20, 1995, ch. 309, 1995 N.C. Sess. Laws 611. This legislative intent as expressed in the text of Rule 9(j) demands that complaints alleging medical malpractice "receive strict consideration." *Thigpen*, 355 N.C. at 202. Nevertheless, Rule 9(j) need not and cannot be interpreted in a manner that precludes litigants who have complied with all statutory requirements from bringing colorable medical malpractice claims. An overly expansive interpretation of Rule 9(j) would leave patients who have been wronged without a legal remedy and confer a judicially created immunity upon hospitals and medical staff. It would override the General Assembly's careful judgment regarding how to balance the competing interests of protecting competent healthcare professionals from frivolous lawsuits and ensuring just compensation for patients wrongfully injured by the negligent acts of those they have entrusted with their lives.

¶ 33 Here, the Court of Appeals did not err in affirming the trial court's denial of Harnett Health's motion to dismiss. The Court of Appeals utilized the correct standard of review in examining the trial court order allowing Harnett Health's motion to exclude one of plaintiff's expert witnesses. Accordingly, we affirm the decision of the Court of Appeals.

AFFIRMED.

Justice BARRINGER dissenting.

¶ 34 At issue in this case is whether this Court will enforce North Carolina Rule of Civil Procedure 9(j)—the gatekeeping rule enacted by our legislature "to prevent frivolous malpractice claims by requiring expert review *before* filing of the action," *Moore v. Proper*, 366 N.C. 25, 31 (2012)—and whether the Court of Appeals applied the undisputed

standard of review, abuse of discretion, to a trial court's exclusion of expert testimony for failing to satisfy North Carolina Rule of Evidence 702(a). The plain language of Rule 9(j) provides that a plaintiff in a medical malpractice action must have an expert witness willing to testify that each defendant health care provider breached the statutory standard of care. Further, to find that a trial court abused its discretion in excluding testimony under Rule 702(a), an appellate court must examine whether the decision was manifestly unsupported by reason. Since the trial court did not examine whether plaintiff's selected expert was willing to testify, the case should be remanded for a proper application of Rule 9(j). In the alternative, since the Court of Appeals did not apply proper abuse of discretion review, the case should be remanded to the Court of Appeals for a correct analysis. I respectfully dissent.

I. Analysis

A. Rule 9(j) of the North Carolina Rules of Civil Procedure

¶ 35 Rule 9(j) requires, in pertinent part, that

> [a]ny complaint alleging medical malpractice by a health care provider pursuant to [N.C.]G.S. [§] 90-21.11(2)a. in failing to comply with the applicable standard of care under [N.C.]G.S. [§] 90-21.12 shall be dismissed unless:
>
> (1) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care[.]

N.C.G.S. § 1A-1, Rule 9(j) (2021).

¶ 36 Harnett Health moved to dismiss plaintiff's complaint for not complying with Rule 9(j) because Dr. Leyrer was not willing to testify against Harnett Health. Yet neither the trial court nor the Court of Appeals addressed Harnett Health's argument that the complaint should be dismissed because Dr. Leyrer was not actually willing to testify. The trial court's findings, for instance, simply stated:

> [Plaintiff's counsel] exercised reasonable care and diligence and reasonably expected Dr. Leyrer to

> qualify as an expert witness under Rule 702 of the Rules of Evidence and that he reasonably expected Dr. Leyrer to testify in court that the medical care rendered to the plaintiff's decedent by [Harnett Health] did not comply with the applicable standard of care.

Likewise, the trial court's conclusion stated:

> That prior to making the Rule 9(j) Certifications in the complaint filed September 30, 2011 and in the subsequent complaint filed February 6, 2014 the plaintiff's counsel . . . exercised reasonable care and diligence to satisfy himself that those certifications were true and that his expectations set out in the Rule 9(j) Certifications in both complaints were reasonable.

As for the Court of Appeals, though it acknowledged Harnett Health's argument that "Dr. Leyrer was not willing to specifically critique Harnett Health," it still affirmed the trial court's order because "the [r]ecord indicates at the time [p]laintiff filed her [c]omplaint, she *reasonably believed* Dr. Leyrer was willing to testify against Harnett Health." *Miller v. Carolina Coast Emergency Physicians, LLC*, 277 N.C. App. 449, 2021-NCCOA-212, ¶¶ 50–51 (emphasis added).

¶ 37 Rule 9(j)'s requirement that an expert be willing to testify is not dependent on plaintiff's reasonable belief that the expert is willing to testify. Instead, Rule 9(j) contains two distinct requirements. First, the medical care and all medical records pertaining to the alleged negligence must "have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence." N.C.G.S. § 1A-1, Rule 9(j). Second, that expert witness must be "willing to testify that the medical care did not comply with the applicable standard of care." N.C.G.S. § 1A-1, Rule 9(j).

¶ 38 "When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute . . . ." *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387 (2006). In addition, "[o]rdinary rules of grammar apply when ascertaining the meaning of a statute." *Dunn v. Pac. Emps. Ins. Co.*, 332 N.C. 129, 134 (1992). Here, the term "reasonable expectation" is absent from the dependent clause of the second requirement: the expert must be someone "who is willing to testify that the medical care did not comply with the applicable standard of care." N.C.G.S. § 1A-1, Rule 9(j)(1). In contrast, the dependent clause of the first requirement includes the qualification "reasonably expected": the expert must be someone "who is *reasonably expected* to qualify as

an expert witness under Rule 702 of the Rules of Evidence." N.C.G.S. § 1A-1, Rule 9(j)(1) (emphasis added).

¶ 39 When a legislative body "includes particular language in one section of a statute but omits it in another section of the same [a]ct, it is generally presumed that the legislative body acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. U.S.*, 464 U.S. 16, 23 (1983); *see also N.C. Dep't of Revenue v. Graybar Elec. Co.*, 373 N.C. 382, 390 n.3 (2020) (per curiam). This Court has also recognized that it must "give every word of the statute effect, . . . ensure that . . . two questions are not collapsed into one," and not ignore terms the legislature chose to use in the statute. *Moore*, 366 N.C. at 31 (cleaned up). Here, if the legislature wished the term "reasonable expectation" to apply to both requirements, it would have positioned it to modify both clauses, for instance: "a person who is reasonably expected to qualify as an expert witness and testify that the medical care did not comply with the applicable standard of care." Instead, the legislature, placed the term "reasonable expectation" within its own individual clause modifying a distinct prepositional phrase—a person "who is *reasonably expected* to qualify as an expert witness"—and then included an entirely new clause, with a different distinct prepositional phrase—"and who is willing to testify that the medical care did not comply with the applicable standard of care"—that did include the term "willing" but not "reasonably expected." N.C.G.S. § 1A-1, Rule 9(j)(1) (emphasis added).

¶ 40 In accordance with these instructions, Rule 9(j)'s requirement that an expert be willing to testify does not depend on plaintiff's reasonable expectation but rather simply requires that plaintiff's proffered witness actually be willing to testify. Discerning whether an expert is qualified to testify requires the exercise of professional judgment; determining whether an expert is willing to testify does not. Rather, it is simply a matter of yes or no.

¶ 41 The requirement that a proffered witness actually be willing to testify is an important statutory element of Rule 9(j). As we have previously recognized, Rule 9(j) "operates as a preliminary qualifier to 'control pleadings' rather than to act as a general mechanism to exclude expert testimony." *Id.* To "avert[ ] frivolous actions," Rule 9(j) "preclude[s] any filing in the first place by a plaintiff who is unable to procure an expert who both meets the appropriate qualifications and, after reviewing the medical care and available records, is willing to testify that the medical care at issue fell below the standard of care." *Vaughan v. Mashburn*, 371 N.C. 428, 435 (2018).

¶ 42 Accordingly, the courts of this State should uphold their gatekeeping role and dismiss actions covered by Rule 9(j) when the plaintiff's proffered expert was not willing to testify at the time the complaint was filed. Certainly, when analyzing whether an expert was actually willing to testify at the time the complaint was filed,

> the trial court must examine the facts and circumstances known or those which should have been known to the pleader at the time of filing, and to the extent there are reasonable disputes or ambiguities in the forecasted evidence, the trial court should draw all reasonable inferences in favor of the nonmoving party at this preliminary stage.

Preston v. Movahed, 374 N.C. 177, 189 (2020) (cleaned up). But this standard of review does not change the text of the statute itself, which requires that an expert be willing to testify at the time the complaint is filed, nor does it make that inquiry dependent on a plaintiff's "reasonable expectation."

¶ 43 Since the trial court did not examine whether Dr. Leyrer was actually willing to testify against the remaining defendants at the time the complaint was filed, this case should be remanded for the trial court to properly apply the second requirement of Rule 9(j).

¶ 44 Yet even if Rule 9(j) only requires a plaintiff to reasonably expect that an expert is willing to testify, plaintiff's attorney should have known that Dr. Leyrer was not willing to testify against Harnett Health. In determining whether the requirements of Rule 9(j) are met, courts look to "the facts and circumstances known or *those which should have been known* to the pleader at the time of filing." *Preston*, 374 N.C. at 189 (emphasis added). As the pleader's representative, it is the responsibility of plaintiff's attorney to confirm that the selected expert focused on every cause of action in the complaint and is willing to testify regarding each of the claims. "A complaint facially valid under Rule 9(j) may be dismissed if subsequent discovery establishes that the certification is not supported by the facts." *Moore*, 366 N.C. at 31. Here, subsequent discovery revealed that plaintiff's attorney should have known Dr. Leyer was unwilling to testify.

¶ 45 A close reading of the record demonstrates that Dr. Leyer made known his reservations to plaintiff's attorney before either of the complaints were filed. Dr. Leyer testified under oath that he conveyed his opinions to plaintiff's counsel in telephone conversations shortly after being contacted and that his opinions, which did not include any

standard of care opinion concerning health care providers other than Dr. Rana, had not changed. Specifically, the deposition transcript of Dr. Leyer reflects the following:

> Q I take it that you're not offering any standard of care opinions as to any other health care providers other than Dr. Rana; is that correct?
>
> A That is correct.
>
> Q So you're not offering any standard of care opinions as to the nurses or any other personnel from the hospital or anyone associated with Carolina Coast Emergency Physicians, LLC; is that correct?
>
> A That is correct.
>
> Q And I take it you've never had any such opinions against anyone else other than Dr. Rana prior to today; is that correct?
>
> A In this case, no.
>
> Q Is that correct?
>
> A Yes.
>
> . . . .
>
> Q Back on the record.
>
> Dr. Leyrer, in finishing up I just have a few questions for you. I just want to clarify earlier when you were giving us dates you said you were initially contacted about the case at the end of August of 2011 and then after your review of some records you received shortly thereafter you would have had several telephone conversations with [p]laintiff's counsel in September; is that correct?
>
> A Correct.
>
> Q And it was during those telephone conferences that you provided your opinions in this case to [p]laintiff's counsel; is that correct?
>
> A Correct.
>
> Q And your opinions have not changed since that time, correct?
>
> A Correct.

¶ 46 Even in the light most favorable to plaintiff, the record at best demonstrates that any statements made by Dr. Leyrer to plaintiff's counsel indicating that he would testify against Harnett Health referred only to the actions of Dr. Rana, which were allegedly attributable to Harnett Health through a theory of respondeat superior. In contrast, Dr. Leyrer's subsequent deposition made clear that he never expressed a willingness to testify against Harnett Health for the actions of its nurses. Plaintiff's counsel, as the pleader's representative, bore the responsibility of ensuring Dr. Leyrer was willing to testify to every claim against every defendant. Plaintiff's counsel failed to do so. Therefore, plaintiff cannot meet the standard in *Preston* because plaintiff should have known that Dr. Leyrer was not willing to testify against Harnett Health.

¶ 47 Thus, though this case should be remanded to the trial court for a proper application of Rule 9(j), even under a reasonable expectation standard, plaintiff's attorney should have known that Dr. Leyrer was not willing to testify.

B. Rule 702 of the North Carolina Rules of Evidence

¶ 48 Furthermore, regardless of the Rule 9(j) issue, the Court of Appeals applied the wrong standard of review to the trial court's exclusion of Dr. Harris[1] pursuant to Rule 702(a).[2] Rule 702(a) provides that:

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training,

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1. While the trial court excluded the testimony of both Dr. Leyrer and Dr. Harris, the trial court's exclusion of Dr. Leyrer is not before this Court.

2. This Court only allowed review of two of the issues listed in Harnett Health's Petition for Discretionary Review:

> Issue I – Did the Court of Appeals err in affirming the trial court's order denying Harnett Health's Motion to Dismiss pursuant to Rule 9(j) of the North Carolina Rules of Civil Procedure when [plaintiff's] Rule 9(j) expert testified that he had never been critical of Harnett Health; and,
>
> Issue II – Did the Court of Appeals err in applying a de novo standard of review instead of an abuse of discretion standard in its exclusion of Dr. Harris.

However, this Court did not allow review of the additional issues in the petition, including whether "the Court of Appeals err[ed] in reversing the trial court's exclusion of Dr. Harris under Rules 702(a) and 702(b) of the North Carolina Rules of Evidence." Thus, to the extent the majority affirms the outcome of the Court of Appeals' Rule 702 analysis, it addresses an issue not properly before this Court.

> or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C.G.S. § 8C-1, Rule 702(a) (2021).

¶ 49 In ruling on plaintiff's motion to exclude Dr. Harris, the trial court found and concluded that:

> Dr. Harris did not review the plaintiff's handwritten notes, certain EMT records, or certain prior medical records before forming his opinions in this case. Additionally, he had not reviewed the documents prior to his depositions. Further, he has not rendered any causation opinions considering the events and actions as set forth [in] those documents. Therefore, he is unqualified under Rule 702(a) to render an opinion in this case. Furthermore, I find that because Dr. Harris has not sufficiently demonstrated through his depositions or affidavits that he is familiar with the local standards at the time of this incident as required by N.C.[G.S.] § 90-21.12, he is not qualified to render standard of care opinions in this case.

¶ 50 Yet in this case, the Court of Appeals' analysis did not address why the trial court's conclusion on Rule 702(a) was manifestly unsupported by reason. Nor did it conclude that no evidence supported the trial court's finding. Instead, the Court of Appeals appears to have conducted a de novo review and reached its own conclusion.

> As the trial court excluded Dr. Harris because he had not reviewed [p]laintiff's notes, Decedent's EMT records, and Decedent's "certain prior medical records," it would appear the trial court concluded Dr. Harris could not satisfy Rule 702(a)(1)'s requirement [that] his testimony be based on sufficient facts or data. [A]s a general rule, questions relating to the bases and sources of an expert's opinion affect only

> the *weight to be assigned* that opinion rather than its *admissibility*.
>
> . . . . Dr. Harris examined the medical records from Harnett Health for the two hospital visits in question as well as at least some of Decedent's prior medical records. In fact, Dr. Harris was familiar with Decedent's medical history and certain medical conditions relevant to his care on the days in question. Therefore, the trial court misapplied Rule 702(a) by concluding Dr. Harris's opinions were not based on sufficient data when his opinions were supported by evidence in the Record. Consequently, the trial court erred in concluding Dr. Harris's opinions were inadmissible and, instead, questions as to the weight to be given to his opinions should be resolved by a jury.

Miller, ¶¶ 79–80 (cleaned up).

¶ 51 By freely substituting its own interpretation of the evidence, rather than determining if the trial court's interpretation of the evidence and the conclusions drawn from it were manifestly unsupported by reason or that there was no evidence to support the trial court's finding, the Court of Appeals failed to apply a true abuse of discretion analysis. *See State v. Moore*, 245 N.C. 158, 164 (1956) ("[T]his Court has uniformly held that the competency of a witness to testify as an expert is a question primarily addressed to the [trial] court, and his discretion is ordinarily conclusive, that is, unless there be no evidence to support the finding, or unless the judge abuse[d] his discretion.").

II. Conclusion

¶ 52 The legislature has established specific requirements around the filing of a medical malpractice suit to preclude frivolous actions. *See Vaughan v. Mashburn*, 371 N.C. 428, 434–35 (2018). It is the duty of this Court to uphold those requirements, in accordance with the text the legislature chose to enact. *See State v. Bell*, 184 N.C. 701, 705 (1922) ("Scrupulously observing the constitutional separation of the legislative and the supreme judicial powers of the government, we adhere to the fundamental principle that it is the duty of the Court, not to make the law, but to expound it, and to that end to ascertain and give effect to the intention of the Legislature . . . .").

¶ 53 The second requirement of Rule 9(j) is clear: at the time of filing, a plaintiff must have secured an expert willing to testify that each

defendant health care provider breached the statutory standard of care. That requirement does not depend on a plaintiff's reasonable expectation. The trial court and Court of Appeals failed to properly apply that requirement. Thus, this case should be remanded to the trial court for a proper application of Rule 9(j).

¶ 54 The Court of Appeals also applied the wrong standard of review to the trial court's decision to exclude Dr. Harris pursuant to Rule 702(a), violating this Court's "uniform[ ]" holdings that abuse of discretion applies. *See Crocker v. Roethling*, 363 N.C. 140, 143 (2009). As a result, I respectfully dissent.

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

NATION FORD BAPTIST CHURCH INCORPORATED D/B/A NATIONS FORD COMMUNITY CHURCH, PLAINTIFF
v.
PHILLIP RJ DAVIS, DEFENDANT / THIRD-PARTY PLAINTIFF
v.
JOSEPH DIXON, CHARLES ELLIOT AND DOUGLAS WILLIE, THIRD-PARTY DEFENDANTS

No. 390A21

Filed 19 August 2022

Churches and Religion—subject matter jurisdiction—ecclesiastical abstention doctrine—termination of pastor's employment

In a lawsuit arising from an employment dispute between a church and one of its former pastors, the ecclesiastical entanglement doctrine of the First Amendment did not bar the trial court from reviewing the pastor's claim seeking a declaratory judgment establishing that his employment relationship with the church was not "at-will" and that the church's procedure for firing him violated the church's then-controlling bylaws, since the court could apply neutral principles of law to resolve the claim. In contrast, First Amendment principles required dismissal of the pastor's claim for injunctive relief allowing him to resume his employment, the resolution of which would necessarily require the court to second-guess the board's evaluation of the pastor's job performance. Similarly, the pastor's claims alleging that the church's board of directors breached a fiduciary duty owed to him, tortiously interfered with his employment

relationship, and misappropriated church funds required dismissal where each claim would require the court to examine whether the board's actions advanced the church's religious mission.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 279 N.C. App. 599, 2021-NCCOA-528, affirming an order entered on 22 July 2020 by Judge Carla N. Archie in Superior Court, Mecklenburg County. Heard in the Supreme Court on 10 May 2022.

Knox, Brotherton, Knox & Godfrey, by Lisa G. Godfrey, H. Edward Knox, and J. Gray Brotherton, for plaintiff-appellant and third-party defendant-appellants.

Nexsen Pruet, PLLC, by James C. Smith, for defendant/third-party plaintiff-appellee.

EARLS, Justice.

¶ 1 Churches exist primarily for the spiritual edification of the adherents of a faith tradition. They are established and operated in accordance with religious precepts. *See Bd. of Provincial Elders v. Jones*, 273 N.C. 174, 188 (1968) ("[C]hurches are established for the promulgation of faith under the regulations of definite religious organizations . . . " (cleaned up)). Churches may build sites to house worship, fellowship, community, and teaching. They simultaneously have a secular existence. Many are registered with the state as nonprofit corporations and, by virtue of their status, enjoy exemption from state and federal taxes. They may enter into contracts, dispose of property, seek financing, and make employment decisions. Unsurprisingly, disagreements arise over matters both spiritual and secular. Occasionally, parties seek resolution in civil court. *See, e.g.*, *Atkins v. Walker*, 284 N.C. 306 (1973) (examining a dispute over who was entitled to possession of church property). The role of the court under these circumstances is dictated by the nature of the dispute.

¶ 2 When the resolution of a dispute requires the interpretation of religious doctrines or spiritual practices, the court must abstain from deciding purely religious questions. "The constitutional prohibition against court entanglement in ecclesiastical matters is necessary to protect First Amendment rights identified by the 'Establishment Clause' and the 'Free Exercise Clause.' " *Harris v. Matthews*, 361 N.C. 265, 270 (2007) (citing

Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 1218 n.129 (2d ed. 2002)).

¶ 3 By contrast, when disputes arise which can be resolved solely through the application of "neutral principles of law" that are equally applicable to non-religious institutions and organizations, a court's involvement in such a dispute does not "jeopardize[ ] values protected by the First Amendment." *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969). But spiritual and secular matters are often intertwined. When they are, identifying the boundary between impermissible judicial entanglement and permissible judicial adjudication is a difficult but necessary task. The First Amendment requires us to preserve the exclusive autonomy of religious authorities to answer religious questions, but the State, the public, and religious organizations themselves all have an interest in the courthouse remaining open for the resolution of certain civil claims.

¶ 4 The issue in this appeal is whether any aspects of the claims brought by Pastor Phillip R.J. Davis (Pastor Davis or RJ) against Nation Ford Baptist Church Incorporated (Church), and Nation Ford's Board of Directors (Board) require delving into ecclesiastical matters in violation of the First Amendment. According to Pastor Davis, the Board exceeded its authority under the Church's corporate bylaws when it purported to terminate him by vote of the Board; Pastor Davis contends that the governing bylaws allowed termination only by vote of the Church's congregation at a "Special General Meeting." The Church and the Board assert that the bylaws upon which Pastor Davis relies are not actually the governing bylaws; instead, the Church and the Board contend that pursuant to the terms of the *real* bylaws, Pastor Davis was an at-will employee who could be terminated by the Board at any time.

¶ 5 Which set of corporate bylaws were in effect at the relevant time, whether the Church and Board followed the procedures set forth in the bylaws, and whether there was a contract of employment between Pastor Davis and the Church that was breached are factual and legal questions that are appropriately answered by reference to neutral principles of corporate, employment, and contract law. Thus, the Court of Appeals was correct to affirm the trial court's denial of the Church's motion to dismiss with respect to Pastor Davis's claim for a declaratory judgment. Nonetheless, other claims raise questions that cannot be answered without considering spiritual matters. These claims must be dismissed for lack of subject matter jurisdiction. Accordingly, for the

following reasons, we affirm in part and reverse in part the decision of the Court of Appeals affirming the trial court's denial of the Church's motion to dismiss.

I. Background

¶ 6 In 1988, Nation Ford Baptist Church was created as a North Carolina nonprofit corporation. The Church's Elders and the Church's Senior Pastor, Phillip M. Davis (Pastor Davis's father), were installed as the Church's Board of Directors. The Church's Articles of Incorporation expressly prohibited the Church from having corporate members. Instead, the Articles gave the Board the exclusive authority to represent the Church's congregation. In 1997, the Board adopted a set of bylaws that reserved for itself sole governing authority over the Church, including employment matters. The Church contends that these bylaws remain in effect to this day.

¶ 7 After Phillip Davis's death in August 2015, his son, RJ, was hired to serve as Senior Pastor. The offer letter accepted by Pastor Davis stated that he was an "at-will" employee. Specifically, the letter provided that

> [a]n "at[-]will" employment relationship has no specific duration. This means that an employee can resign their employment at any time, with or without reason or advance notice. The [C]hurch has the right to terminate employment at any time, with or without reason or advance notice as long as there is no violation of applicable state or federal law.

Pastor Davis concedes that at the time he was hired by the Church, he believed that the controlling bylaws gave the Board "total control over the governance and operation of the Church." Yet Pastor Davis alleges that, at some point between 2004 and 2008, the Board adopted new bylaws which it later attached to an application for a bank loan it submitted in 2008. The purported second set of bylaws provided that the Bishop of the Church could be dismissed only by a 75% vote of the congregation attending a Special General Meeting called for that purpose.

¶ 8 According to the Church, Pastor Davis's tenure was not a successful one: church attendance reportedly fell by approximately 60% and the Board received numerous complaints about him from churchgoers. On 17 June 2019, the Board voted unanimously to terminate Pastor Davis's employment. Nevertheless, over the next few months and against the wishes of the Board, Pastor Davis continued to conduct services in church facilities. He allegedly collected and retained tithe money and,

when the Church attempted to bar his entry, broke the locks to access the sanctuary in order to conduct unauthorized services.

¶ 9 On 17 September 2019, the Church filed suit in Superior Court, Mecklenburg County seeking a preliminary injunction prohibiting Pastor Davis from entering the Church or speaking with staff. In response, Pastor Davis filed an answer, counterclaim, third-party complaint, and motion for injunctive relief seeking (1) a declaratory judgement establishing that he remained the "Bishop, Senior Pastor, and spiritual leader" of the Church, that he "was not an 'at-will' employee," that the bylaws included in the 2008 loan application controlled the terms of his employment, that his termination was unlawful, and that his appearances on church property were lawful; (2) injunctive relief allowing him to resume his employment; (3) damages arising from the Board's breach of a fiduciary duty it owed him; (4) damages resulting from the Board's tortious interference with his employment relationship; and (5) access to the Church's financial records and establishment of a constructive trust for funds the Board had allegedly misappropriated.

¶ 10 The trial court granted the Church's preliminary injunction on 30 October 2019. On 22 April 2020, the Church filed a motion to dismiss Pastor Davis's counterclaim and third-party complaint, arguing that the trial court lacked subject matter jurisdiction because resolving Pastor Davis's claims would require the court to impermissibly review ecclesiastical matters. The Church also alleged that Pastor Davis had violated the terms of the preliminary injunction by "bully[ing] and harass[ing]" church employees and continuing to conduct unsanctioned services. Shortly thereafter, Pastor Davis filed a motion to amend his answer, counterclaim, and third-party complaint. His amended filing largely mirrored its previous iterations but added defenses based on quasi estoppel and ratification. Pastor Davis also added a request for back pay from the date of his termination, removed his request to be recognized as the Church's "spiritual leader," and included a new claim based on allegations that the Board had engaged in a civil conspiracy.

¶ 11 On 22 July 2020, the trial court entered an order denying the Church's motion to dismiss and granting Pastor Davis's motion to amend his counterclaim and third-party complaint. The Church appealed. *See Nation Ford Baptist Church Inc. v. Davis*, 279 N.C. App. 599, 2021-NCCOA-528, ¶ 1. A majority of the Court of Appeals panel affirmed. *Id.* ¶ 2.

¶ 12 The principal issue before the Court of Appeals was "whether the resolution of [Pastor] Davis's claims would require our [c]ourts to interpret religious matters in violation of the ecclesiastical abstention

doctrine which stems from the First Amendment to the United States Constitution." *Id.* Without deciding whether the trial court would have jurisdiction to fully resolve all the claims Pastor Davis asserted, the majority reasoned that because "there is no *guarantee* that our [c]ourts will be forced to weigh ecclesiastical matters at this stage of the proceedings," the trial court properly denied the Church's motion to dismiss. *Id.* (emphasis added).

¶ 13 According to the majority, "[t]he core tenet upon which all of Davis's claims depend is the determination of which bylaws governed the Church at the relevant time." *Id.* ¶ 18. In the majority's view, a two-part inquiry would be required to resolve this "employment dispute." *Id.* First, the trial court would need to determine "which bylaws were governing authority at the relevant time, and whether Davis's termination was in accordance with the proper bylaws." Second, the trial court would need to determine "whether the Elders properly determined that Davis was unfit to serve as Senior Pastor of the Church." *Id.* ¶19. The majority concluded that answering the first question of which set of bylaws applied could be accomplished "by applying neutral principles of law without engaging in ecclesiastical matters," specifically by applying "solely . . . contract and business law." *Id.* ¶ 20.

¶ 14 The majority added that if the trial court determined that "the Church's method of terminating Davis did not comply with the requirements of the controlling bylaws," then his termination would be "void." *Id.* But if the trial court determined that "the Church's method of terminating [Pastor] Davis *did* comply with the requirements of the controlling bylaws, then our [c]ourts would be required to assess whether the Church, through its Elders, properly determined that [Pastor] Davis was unfit to serve as Senior Pastor." *Id.* ¶ 21. While acknowledging that this latter question "may require an impermissible engagement with ecclesiastical matters," the majority reiterated that the trial court could proceed at this time because resolution of Pastor Davis's claim might not *require* the trial court to "be forced to answer this second question." *Id.*[1]

¶ 15 Judge Murphy dissented from the majority's conclusion that the trial court possessed subject matter jurisdiction over any of Pastor Davis's claims at this stage of the proceedings. *Id.* ¶ 33 (Murphy, J., concurring in part and dissenting in part). According to the dissent, the trial court lacked subject matter jurisdiction over Pastor Davis's original

1. The Court of Appeals also concluded that Pastor Davis had standing to bring the claims raised in his counterclaim and third-party complaint. *Nation Ford*, 2021-NCCOA-528, ¶ 23. That issue is not presently before this Court.

counterclaim because that claim "repeatedly requested judicial recognition that he is 'the Bishop, Senior Pastor and *spiritual leader* of the Church.' " *Id.* The dissent reasoned that even if the trial court properly granted Pastor Davis leave to amend his counterclaim, "the removal of 'spiritual leader' [from the initial counterclaim] underscores the religious nature of the 'Bishop' and 'Senior Pastor' terms, as well as the similarity and connectedness of all three terms." *Id.* Furthermore, even if the second set of bylaws controlled, the dissent contended that the trial court could not assess whether Pastor Davis's termination was improper because "[w]hat constitutes [ ] a special meeting to dismiss [Pastor] Davis from [his] role, as well as the definition of congregants or members of the Church, are ecclesiastical matters, which courts may not analyze and where we may not exercise the authority of the State." *Id.* ¶ 35. Thus, the dissent would have held that "judicial analysis of [Pastor] Davis's original counterclaim requires impermissible entanglement in this dispute, as no neutral principles of law can be applied to determine whether Davis is the spiritual leader of the Church, whether a special meeting was held to dismiss him from that role, and who constituted a congregant or member of the Church." *Id.* ¶ 36.

II. Analysis

¶ 16 This litigation involves both the Church's original complaint for injunctive relief and monetary damages against Pastor Davis, and Pastor Davis's counterclaim and third-party complaint against the Church. The instant interlocutory appeal relates only to the trial court's 22 July 2020 Order Denying Plaintiff's and Third-party Defendants' Motion to Dismiss Defendant's Counterclaim and Third-party Complaint and Granting Defendant's Motion to Amend Counterclaim and Third-Party Complaint, and only to the extent that the trial court concluded that it had subject matter jurisdiction to proceed. "We review Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction de novo and may consider matters outside the pleadings." *Harris*, 361 N.C. at 271.

¶ 17 The principle that civil courts lack subject matter jurisdiction to resolve disputes involving "purely ecclesiastical questions and controversies" has long been recognized by this Court. *Braswell v. Purser*, 282 N.C. 388, 393 (1972); *see also Melvin v. Easley*, 52 N.C. 356, 365 (1860) (Manly, J., concurring) ("The State confesses its incompetency to judge in spiritual matters between men or between man and his Maker, and leaves in all a perfect religious liberty to worship God as conscience dictates, or not to worship Him at all, if they can so content themselves."). This doctrine is rooted in the First Amendment's goal of fostering "a

spirit of freedom for religious organizations, an independence from secular control or manipulation–in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). It safeguards interests protected by both the Free Exercise and Establishment Clauses. *See, e.g.*, *Crowder v. S. Baptist Convention*, 828 F.2d 718, 721 (11th Cir. 1987) ("By adjudicating religious disputes, civil courts risk affecting associational conduct and thereby chilling the free exercise of religious beliefs. Moreover, by entering into a religious controversy and putting the enforcement power of the state behind a particular religious faction, a civil court risks 'establishing' a religion.").

¶ 18 However, "the First Amendment does not provide religious organizations absolute immunity from civil liability." *Johnson v. Antioch United Holy Church, Inc.*, 214 N.C. App. 507, 511 (2011). When the State has a legitimate interest in resolving a secular dispute, "civil court is a proper forum for that resolution." *Presbyterian*, 393 U.S. at 445; *see also Reid v. Johnston*, 241 N.C. 201, 204 (1954) ("[T]he courts do have jurisdiction, as to civil, contract and property rights which are involved in, or arise from, a church controversy."). The State's interest in providing a neutral forum for resolving disputes involving religious organizations engaged in secular activities is obvious: the State would be unable to maintain "[t]he course of constitutional neutrality" towards religion that the First Amendment demands if religious organizations could define for themselves the laws to which they are subject. *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970). The public at large and religious organizations also have an interest in the courthouse remaining open for the resolution of civil disputes: the contractors, vendors, lenders, and employees upon whom religious organizations depend to assist in the more prosaic elements of operating a nonprofit corporation might think twice about providing their services if there were no neutral forum for resolving the kinds of disputes that inevitably arise in the course of everyday business. *Cf. Reid*, 241 N.C. at 204 ("This principle may be tersely expressed by saying religious societies have double aspects, the one spiritual, with which legal courts have no concern, and the other temporal, which is subject to judicial control.").

¶ 19 Consistent with these First Amendment principles, the impermissible entanglement doctrine precludes judicial involvement only in circumstances involving "disputes [that] implicate controversies over church doctrine and practice." *Presbyterian*, 393 U.S. at 445. We have previously identified such ecclesiastical matters to include those concerning

(1) religious doctrines or creeds; (2) the church's form of worship; (3) the adoption of regulations concerning church membership; and (4) the power to exclude from membership or association those whom duly authorized church officials deem unworthy of membership. *See E. Conf. of Original Free Will Baptists v. Piner*, 267 N.C. 74, 77 (1966), *overruled in part on other grounds by Atkins*, 284 N.C. 306. In addition, impermissible entanglement may arise either when a court resolves an underlying legal claim or when it issues a form of relief. *See W. Conf. of Original Free Will Baptists v. Creech*, 256 N.C. 128, 141–42 (1962) (modifying preliminary injunctions which granted relief in excess of the trial court's jurisdiction in dispute between two factions of a church over who was the pastor).

¶ 20 Still, "[c]ivil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property." *Atkins*, 284 N.C. at 316 (quoting *Presbyterian*, 393 U.S. at 449). Thus, to determine whether a civil court has jurisdiction to entertain a dispute, "[t]he dispositive question is whether resolution of the legal claim requires the court to interpret or weigh church doctrine." *Smith v. Privette*, 128 N.C. App. 490, 494 (1998) (citation omitted). If a claim can be resolved solely by applying neutral principles of law, there is no impermissible entanglement. *Cf. Johnson*, 214 N.C. App. at 512 ("[A]pplying a secular standard of law to secular tortious conduct by a church is not prohibited by the Constitution . . . ."); *see also Presbyterian*, 393 U.S. at 449 ("[T]here are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded."). In general, "[w]here civil, contract[ ] or property rights are involved, the courts [can] inquire as to whether the church tribunal acted within the scope of its authority and observed its own organic forms and rules." *Creech*, 256 N.C. at 140–41.

¶ 21 In this case the Court of Appeals reasoned that Pastor Davis's claim was "analogous" to the wrongful termination claim at issue in an earlier Court of Appeals decision, *Tubiolo v. Abundant Life Church, Inc.*, 167 N.C. App. 324 (2004). We agree that the claims are similar and that the Court of Appeals' reasoning in *Tubiolo* is persuasive and applies in this case. In *Tubiolo*, several one-time church members claimed that their church's governing council violated the church's bylaws by improperly terminating their membership. 167 N.C. App. at 325–26. While the Court of Appeals forbade the trial court from involving itself in deciding whether the "grounds for termination of church membership are doctrinally or scripturally correct," the Court of Appeals explained that the trial court could address the members' claim that "their membership

was improperly terminated [because] the persons purporting to terminate their membership were without authority to take that action." *Id.* at 328. The church's bylaws dictated who within the church structure possessed the authority to terminate membership; the one-time members argued that these bylaws "were [not] properly adopted by the [church]." *Id.* at 329. The Court of Appeals concluded that whether the bylaws were properly adopted and who was authorized to terminate membership were inquiries that could "be made without resolving any ecclesiastical or doctrinal matters." *Id.*

¶ 22 The same basic logic dictates the outcome of this case. Some of Pastor Davis's claims and the relief he seeks thereunder are predicated on his assertion that the Board lacked the authority to terminate his employment under the Church's governing bylaws. Specifically, paragraphs 35(b) and 35(c) of his first claim for relief in the amended counterclaim seeking a declaratory judgment that his employment relationship was not "at-will," that his employment was governed by the new bylaws, and that the Church did not follow the procedure required by those bylaws are appropriately resolved by application of secular, neutral legal principles. North Carolina law gives courts the authority "to declare rights, status, and other legal relations, whether or not further relief is or could be claimed." N.C.G.S. § 1-253 (2021). To resolve these questions, the trial court will need to determine which set of corporate bylaws applied to Pastor Davis's employment contract, who had the authority to act on behalf of the Church in employing Pastor Davis, who could terminate his employment, and whether the 27 January 2016 letter signed by three Elders and the business manager and signed as "agreed" by Pastor Davis established an at-will employment relationship or created certain contractual rights. If the trial court determines that the Board acted outside the scope of the authority afforded to it under the governing bylaws, then Pastor Davis will be entitled to declaratory relief to that effect. This inquiry does not require engaging any doctrinal or ecclesiastical matters. The answer to the question of whether members of a religious organization "acted within the scope of [their] authority and observed [the organization's] own organic forms and rules" is found in neutral principles of secular law, at least "[w]here civil, contract[ ] or property rights are involved." *Creech*, 256 N.C. at 140. Still, when "undertaking such an examination, a civil court must take special care to scrutinize the document in purely secular terms, and not to rely on religious precepts in determining [the document's meaning]." *Jones v. Wolf*, 443 U.S. 595, 604 (1979). And, as the United States Supreme Court has recognized, "there may be cases where the [document] incorporates religious concepts in the [relevant] provisions," such that "the interpretation of

the [documents] would require the civil court to resolve a religious controversy;" when this occurs, "the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body." *Id.*

¶ 23 But in all other respects the first claim for relief goes too far, particularly in the remedy sought,[2] because the court can neither declare Pastor Davis the spiritual leader of the Church nor require that he be allowed to conduct services. Addressing this controversy would entangle the court in religious matters such as whether Pastor Davis adequately performed his duties as a pastor as that role is understood in accordance with the Church's faith and religious traditions. In contrast to the all-or-nothing approach urged by the Church—and, to be fair, the approach implicitly adopted by the trial court and Court of Appeals—a claim-by-claim analysis is required. *Tubiolo*, 167 N.C. App. at 328–29 (independently examining the plaintiffs' three separate bases for their claim challenging the termination of their church membership).

¶ 24 A court is never permitted to examine "the church's view of the role of the pastor, staff, and church leaders . . . . [b]ecause a church's religious doctrine and practice affect its understanding of each of these concepts." *Harris*, 361 N.C. at 273. Thus, a court cannot assess Pastor Davis's third claim for relief for breach of fiduciary duties because a court cannot answer the question of whether the Board "in good conscience . . . act[ed] honestly, in good faith and *in the best interests of the Church*." Similarly, a court cannot assess whether the Board acted "*without justification*" in seeking the termination of Pastor Davis's employment as he asserts in his tortious interference claim, the fourth claim for relief, or whether certain funds were "*properly devoted to the Church's benefit*" as he asserts in his fifth claim for relief alleging misappropriation of church funds.[3] These claims are not predicated on an assertion that the Board acted in excess of its authority under the Church's

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2. In addition to the declarations referenced here, the amended counterclaim also added a request for back pay under the first claim for relief which goes beyond declaratory relief. It is discussed below.

3. In concluding that Pastor Davis's claim alleging that the Board misused funds must be dismissed, we do not imply that all disputes arising from the appropriation of funds by the directors of religious organizations necessarily involve ecclesiastical matters. For example, if Pastor Davis had alleged that the Board was using certain funds to operate a summer camp, notwithstanding a provision of the bylaws dictating that these same funds were set aside to be used only for building a new sanctuary, it is plausible that a court could have jurisdiction to resolve such a claim. However, examining Pastor Davis's general assertion that the funds were misappropriated because they were not "properly devoted to the Church's benefit" would require comparing the amount of "benefit" produced by various possible activities, a judgment that can be made by Church authorities but not by the courts.

corporate bylaws—rather, they are predicated on an assertion that the substantive reasons the Board chose to exercise its purported authority did not advance the mission of the Church. Resolving these claims would necessarily require a court to examine whether the Board's actions could be justified in light of Church doctrine.[4] This is a function the First Amendment forbids courts from performing. *Cf. Atkins*, 284 N.C. at 318 ("What is forbidden by the First Amendment . . . is a determination of rights . . . on the basis of a judicial determination that one group of claimants has adhered faithfully to the fundamental faiths, doctrines and practices of the church . . . .").

¶ 25 The most difficult claim to assess is Pastor Davis's second claim for relief seeking a preliminary and permanent injunction requiring the Church to allow him to (1) "resume his role and duties as the Bishop and Senior Pastor of the Church, with full compensation and benefits, until such time as the Church's congregation may vote to remove Pastor RJ in accordance with the requirements of the New Bylaws of the Church" and (2) allow him to enter Church premises. Although not clearly stated, Pastor Davis's request for injunctive relief appears to be based on a breach of employment contract theory.[5] This type of claim may be susceptible to resolution by application of neutral principles of law. But even if, as Pastor Davis alleges, third-party defendants breached an employment contract they made with him, there is nothing to indicate that his requested relief of reinstatement "with full compensation and benefits" is the appropriate remedy. Similarly, whether "back pay from the date of the purported termination" as requested in the amended counterclaim's first claim for relief is an available remedy depends on whether there was, in fact, an employment contract and what the terms of that contract or general contract law provide in the event of a breach. At this stage our review is limited to whether the claims or the relief sought raise issues of inappropriate entanglement of secular courts in religious matters.

¶ 26 On the other hand, if Pastor Davis's second claim for relief is based on a theory that the third-party defendants tortiously interfered with

4. We note that our analysis of the trial court's *jurisdiction* to adjudicate a dispute under the ecclesiastical abstention doctrine is distinct from the First Amendment ministerial exception doctrine, which "operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar" and is not at issue in this case. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 195 n.4 (2012).

5. Paragraph 34 of the second claim for relief asserts that third party defendants have "interfered" with Pastor Davis' employment relationship, which appears to imply they have breached their contract with him in that third-party defendants are three of the four individuals who signed the 27 January 2016 offer of employment.

the employment relationship by criticizing his leadership, as referenced in paragraphs 25 and 26 of the amended counterclaim, this claim for relief is barred on First Amendment grounds. A secular court cannot second-guess the Board's evaluation of Pastor Davis's job performance. In short, the trial court can decide any matters of civil law that relate to whether an employment contract exists, what its terms might be, what bylaws might govern, and whether procedures required by those bylaws were followed.[6] Thus, to the extent Pastor Davis' second claim for relief is based on a breach of employment contract theory, the trial court can proceed to answer these purely civil law questions. However, the trial court cannot review the substance of decisions made by duly authorized Church officials regarding doctrinal matters; on these matters, a civil court cannot substitute its judgment for that of the Church. Thus, to the extent Pastor Davis' second claim for relief is based on a tortious interference claim, the trial court cannot proceed because doing so would engender impermissible entanglement with ecclesiastical matters.

¶ 27 As with any ruling on a motion to dismiss, our decision to affirm the trial court's denial of the Church's motion to dismiss with respect to certain claims does not mean dismissal of those same claims might not be required at a later stage on other grounds. Still, the Church is wrong to suggest that the trial court lacks subject matter jurisdiction over *all* claims entirely if *any* "condition or element of a cause of action" involves ecclesiastical matters. The specific relief a plaintiff seeks does not dictate a court's jurisdiction to adjudicate a claim. Rather, a court must have jurisdiction over "the *nature* of the case and the *type* of relief sought in order to decide a case," not over every possible fact pattern and legal issue connected to a complaint. *Catawba County ex rel. Rackley v. Loggins*, 370 N.C. 83, 88 (2017) (cleaned up) (emphases added). At this stage a court must only assure itself that *any* of the plaintiff's claims can possibly be adjudicated and that *any* form of relief can possibly be granted—if so, the court has jurisdiction to proceed on those claims.[7] The trial court was correct to deny the Church's motion to dismiss with respect to the claim for declaratory relief as described above.

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6. To the extent church bylaws give the Elders discretion to exercise certain authority that is limited by doctrinal considerations, a civil court will have no ability to second guess whether the Elders exercised that authority consistently with those doctrinal considerations.

7. The Church also argues that the trial court erred in granting Pastor Davis leave to amend his answer, counterclaim, and third-party complaint. To the extent the dissent disagreed with the majority's decision to affirm the trial court's allowance of Pastor Davis's motion for leave to amend his filings, his dissent was based solely on his contention that

III. Conclusion

¶ 28 The impermissible entanglement doctrine limits a court's authority to resolve disputes involving religious organizations. Courts possess jurisdiction over only those claims that can be resolved through application of neutral principles of secular law that govern all similar organizations and entities. A court must carefully distinguish between claims that will necessarily require it to become entangled in spiritual matters and those that can potentially be resolved purely on civil grounds. Essentially, if the issues raised in a claim can be "resolved on the basis of principles of law equally applicable to" an "athletic or social club," then the court has jurisdiction to proceed. *Atkins*, 284 N.C. at 319. If the issue raised in a claim requires the court to "determine ecclesiastical questions" or wade into "a controversy over church doctrine," then a court may not proceed because doing so would be "wholly inconsistent with the American concept of the relationship between church and state." *Presbyterian*, 393 U.S. at 445–46.

¶ 29 In this case, Pastor Davis's claim for a declaratory judgment establishing which bylaws apply, whether the Church procedurally followed those bylaws, and whether there was an employment contract between Pastor Davis and the Church incorporating the applicable bylaws can potentially be resolved solely by application of neutral principles of corporate, contract, and employment law. At this stage of the litigation, that conclusion is sufficient to allow him to proceed. By contrast, First Amendment principles require the dismissal of Pastor Davis's other claims, including portions of the first and second claims for relief and all of the third, fourth, and fifth claims for relief in the amended counterclaim, which challenge the Board's judgment on grounds necessarily implicating Church doctrine and practice. Accordingly, we affirm in part and reverse in part the Court of Appeals' decision affirming the trial court's denial of the Church's motion to dismiss and remand this case to the Court of Appeals for further remand to the Superior Court, Mecklenburg County for proceedings not inconsistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

"the original counterclaim should have been dismissed as requiring impermissible judicial entanglement in ecclesiastical matters." *Nation Ford*, 2021-NCCOA-528, ¶ 37 (Murphy, J., concurring in part and dissenting in part). Because we have concluded that the trial court did not err in denying the Church's motion to dismiss—and because, as the Church acknowledges, its argument regarding the motion to amend is "congruent to and inseverable from the issues regarding subject matter jurisdiction"—we also affirm the portion of the decision below affirming the trial court's allowance of the motion to amend.

NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

v.

TIM MOORE, IN HIS OFFICIAL CAPACITY, AND PHILIP BERGER, IN HIS OFFICIAL CAPACITY

No. 261A18-3

Filed 19 August 2022

1. Legislature—authority to propose constitutional amendments—political question doctrine—justiciability analysis

Where some state legislators were determined to have been elected from illegally gerrymandered districts, the question of whether their authority to propose amendments to the North Carolina Constitution was limited was not purely a political question because it involved the interpretation and application of constitutional provisions, and therefore was properly before the Supreme Court.

2. Legislature—authority to propose constitutional amendments—members from illegally gerrymandered districts—limitations

After some state legislators were determined to have been elected from illegally gerrymandered districts, their authority as de facto officers could be used to pass ordinary legislation but did not automatically extend to the proposal of amendments to the North Carolina Constitution (in this instance, regarding an income tax cap and voter identification), which must follow heightened procedural requirements. Further, the subsequent ratification of the amendments by popular vote did not cure the deficiencies of the unconstitutional election process. In order to determine whether these constitutional amendments may stand, the matter was remanded for the trial court to conduct an evidentiary hearing and to enter findings of fact and conclusions of law addressing multiple factors, including whether the votes of the unconstitutionally elected legislators could have been decisive in passing the proposed amendments and whether those amendments could have a significant impact on democratic accountability in or access to the election process going forward.

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, 273 N.C. App. 452 (2020), reversing an order entered on 22 February 2019 by Judge G. Bryan Collins, Jr. in Superior Court, Wake County. Heard in the Supreme Court on 14 February 2022.

Southern Environmental Law Center, by Kimberley Hunter and David Neal; and Irving Joyner; and Forward Justice, by Daryl V. Atkinson, Caitlin Swain, and Kathleen E. Roblez, for plaintiff-appellant.

Nelson Mullins Riley & Scarborough LLP, by D. Martin Warf and Noah H. Huffstetler, III, for defendant-appellees.

ACLU of North Carolina Legal Foundation, by Jaclyn Maffetore, Leah J. Kang, and Kristi L. Graunke, for American Civil Liberties Union of North Carolina, amicus curiae.

Paul Hastings, LLP, by Lindsey W. Dieselman, for Brennan Center for Justice at New York University School of Law, amicus curiae.

Appellate Advocacy Clinic, Wake Forest University School of Law, by John J. Korzen, for Democracy North Carolina, amicus curiae.

Womble Bond Dickinson (US) LLP, by Pressly M. Millen, for Former Chairs of the North Carolina Judicial Standards Commission, amici curiae.

Abrams & Abrams, by Douglas B. Abrams and Noah B. Abrams; and Whitfield Bryson LLP, by Matthew E. Lee, for North Carolina Advocates for Justice, amicus curiae.

Jeanette K. Doran for North Carolina Institute for Constitutional Law and John Locke Foundation, amici curiae.

Robinson, Bradshaw & Hinson, P.A., by Robert E. Harrington, Adam K. Doerr, Erik R. Zimmerman, and Travis S. Hinman, for North Carolina Legislative Black Caucus, amicus curiae.

Wallace & Nordan, L.L.P., by John R. Wallace and Lauren T. Noyes; and Freshfields Bruckhaus Deringer US LLP, by Aaron R. Marcu,

pro hac vice, and Shannon K. McGovern, pro hac vice, for North Carolina Legislative Black Caucus, amicus curiae.

Tharrington Smith, LLP, by Colin A. Shive and Robert F. Orr, for North Carolina Professors of Constitutional Law, amici curiae.

Stam Law Firm, PLLC, by R. Daniel Gibson; and John V. Orth, pro se, for Professor John V. Orth, amicus curiae.

Ellen Murphy for North Carolina Professors of Professional Responsibility, amici curiae.

Michael G. Schietzelt for Robert H. Edmunds Jr., Barbara A. Jackson, and Mark Martin, Retired Former Justices of the Supreme Court of North Carolina, amici curiae.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Daniel F. E. Smith, Jim W. Phillips, Jr., Eric M. David, and Kasi W. Robinson, for Roy Cooper, Governor of the State of North Carolina, amicus curiae.

Law Office of Christopher J. Heaney, PLLC, by Christopher J. Heaney, for Scholars of Judicial Ethics and Professional Responsibility, amici curiae.

EARLS, Justice.

¶ 1 This case involves completely unprecedented circumstances that give rise to a novel legal issue directly implicating two fundamental principles upon which North Carolina's constitutional system of government is predicated: the principles of popular sovereignty and democratic self-rule. The issue is whether legislators elected from unconstitutionally racially gerrymandered districts possess unreviewable authority to initiate the process of changing the North Carolina Constitution, including in ways that would allow those same legislators to entrench their own power, insulate themselves from political accountability, or discriminate against the same racial group who were excluded from the democratic process by the unconstitutionally racially gerrymandered districts.

¶ 2 In the final week of the final regular legislative session preceding the 2018 general election, a General Assembly that was composed of a substantial number of legislators elected from districts that the United

States Supreme Court had conclusively determined to have resulted from unconstitutional racial gerrymandering enacted legislation presenting six constitutional amendments to North Carolina voters. Some of these measures passed in the General Assembly by notably narrow margins. By this time, it had already been established that twenty-eight legislative districts were drawn in a manner that violated the Equal Protection Clause of the United States Constitution, *see Covington v. North Carolina*, 316 F.R.D. 117, 124 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017), and many other districts had also already been redrawn to remedy this unconstitutional racial gerrymander, *see North Carolina v. Covington*, 138 S. Ct. 2548 (2018) (per curiam). The two amendments at issue in this case—Session Law 2018-119 (the Tax Cap Amendment) and Session Law 2018-128 (the Voter ID Amendment)—cleared the required three-fifths supermajority threshold by one and two votes in the House and by four and three votes in the Senate, respectively. Both amendments were ultimately ratified by a majority of North Carolina voters. In that same election, conducted using newly drawn legislative districts, the voters denied to any political party a three-fifths supermajority in either the North Carolina House or Senate.

¶ 3 What is extraordinary about these events is not that a legislative body was composed in part of legislators elected from unconstitutional districts. That has occurred on numerous occasions in recent years just in North Carolina alone. *See*, *e.g.*, *Stephenson v. Bartlett*, 357 N.C. 301, 314 (2003) (affirming trial court's determination that the 2002 revised legislative redistricting plans were unconstitutional); *Harris v. McCrory*, 159 F. Supp. 3d 600, 604 (holding that two North Carolina Congressional districts were unconstitutional racial gerrymanders) (M.D.N.C. 2016), *aff'd sub nom. Cooper v. Harris*, 137 S. Ct. 1455 (2017). Rather, what makes this case so unique is that the General Assembly, acting with the knowledge that twenty-eight of its districts were unconstitutionally racially gerrymandered and that more than two-thirds of all legislative districts needed to be redrawn to achieve compliance with the Equal Protection Clause, chose to initiate the process of amending the state constitution at the last possible moment prior to the first opportunity North Carolinians had to elect representatives from presumptively constitutional legislative districts. Indeed, neither of the parties, nor any of the amici curiae, have identified a single previous instance of a legislative body composed of a substantial number of legislators elected from unconstitutional districts attempting to exercise powers relating to the passage of constitutional amendments after it had been conclusively established that numerous districts were unconstitutional.

¶ 4 The precise legal question before us is whether a General Assembly composed of a substantial number of legislators elected due to unconstitutional gerrymandering may exercise the sovereign power delegated by the people of North Carolina to the legislature under article XIII, section 4 of the North Carolina Constitution, which authorizes the General Assembly to propose constitutional amendments "if three-fifths of all the members of each house shall adopt an act submitting the proposal to the qualified voters of the State for their ratification or rejection." The broader question is whether there are any limits on the authority of legislators elected due to unconstitutional racial gerrymandering to alter or abolish "the fundamental law of the State [that] defines the form and concept of our government." *Bazemore v. Bertie Cnty. Bd. of Elections*, 254 N.C. 398, 402–03 (1961). These questions cut to the core of our constitutional system of government: if legislators who assumed power in a manner inconsistent with constitutional requirements possess unreviewable authority to initiate the process of altering or abolishing the constitution, then the fundamental principle that all political power resides with and flows from the people of North Carolina would be threatened.

¶ 5 We conclude that article I, sections 2 and 3 of the North Carolina Constitution impose limits on these legislators' authority to initiate the process of amending the constitution under these circumstances. Nonetheless, we also conclude that the trial court's order in this case invalidating the two challenged amendments swept too broadly. Because the legislators elected due to unconstitutional racial gerrymandering retained the authority needed to avoid "chaos and confusion in government," the trial court should have considered whether invalidating both the Voter ID Amendment and the Tax Cap Amendment was necessary "upon balancing the equities" of the situation. *Dawson v. Bomar*, 322 F.2d 445, 447 (6th Cir. 1963).

¶ 6 In particular, the trial court should have examined as a threshold matter whether the legislature was composed of a sufficient number of legislators elected from unconstitutionally gerrymandered districts—or from districts that were made possible by the unconstitutional gerrymander—such that the votes of those legislators could have been decisive in passing the challenged enactments. If not, no further inquiry is necessary, and the challenged amendments must be left undisturbed. In this case, however, the record is clear that votes of legislators from unconstitutionally gerrymandered districts could have been decisive. Therefore, the trial court needed to also consider three additional questions: whether there was a substantial risk that each challenged constitutional amendment would (1) immunize legislators elected due to

unconstitutional racial gerrymandering from democratic accountability going forward; (2) perpetuate the continued exclusion of a category of voters from the democratic process; or (3) constitute intentional discrimination against the same category of voters discriminated against in the reapportionment process that resulted in the unconstitutionally gerrymandered districts. Accordingly, we reverse the decision of the Court of Appeals that reversed the trial court's order declaring the Voter ID and Tax Cap Amendments void and remand to the superior court for further proceedings consistent with the guidance set forth in this opinion.

I. Background

¶ 7 In January 2011, the General Assembly began the process of conducting a statewide redistricting of the North Carolina House of Representatives and Senate based on the 2010 federal decennial census, pursuant to article II, sections 3 and 5 of the North Carolina Constitution. Six months later, the General Assembly approved and enacted House and Senate redistricting plans largely drafted in secret by the General Assembly's private counsel. *See Covington v. North Carolina* (*Covington I)*, 316 F.R.D. 117, 126 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017); *see also* S.L. 2011-402, 2011 N.C. Sess. Laws 1804; S.L. 2011-404, 2011 N.C. Sess. Laws 1936. At the time, North Carolina was still subject to Section Five of the Voting Rights Act, so the General Assembly sought and obtained preclearance from the United States Department of Justice. *Covington I*, 316 F.R.D. at 127.

¶ 8 On 19 May 2015, a group of registered North Carolina voters brought suit in the Middle District of North Carolina alleging that nine Senate districts and nineteen House districts were unconstitutional racial gerrymanders in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. A three-judge panel of the federal district court agreed with the plaintiffs that all twenty-eight districts were unconstitutional. *See id.* at 177. The court found "overwhelming and consistent evidence" that the drafters of the enacted plans intentionally prioritized race over traditional neutral districting criteria. *Id.* at 130. The court also concluded that the legislative defendants "have not carried their burden to show that each of the challenged districts was supported by a strong basis in evidence and narrowly tailored to comply with either Section 2 or Section 5." *Id.* at 176. Nevertheless, the court denied the plaintiffs' request for immediate injunctive relief postponing the upcoming 2016 general elections and instead ordered the General Assembly "to draw remedial districts in their next legislative session." *Id.* at 177. On appeal, the United States Supreme Court affirmed. *North Carolina v. Covington*, 137 S. Ct. 2211 (2017).

¶ 9 Following the 2016 elections, the three-judge district court panel shortened the terms of all sitting legislators and directed the legislature to hold special elections under redrawn constitutionally compliant district maps in 2017. *Covington v. North Carolina*, 2016 WL 7667298, at *2–3 (M.D.N.C. Nov. 29, 2016) (order). The United States Supreme Court vacated the district court's remedial order on the grounds that the court had "addressed the balance of equities in only the most cursory fashion" and failed to "adequately grapple[ ] with the interests on both sides." *North Carolina v. Covington*, 137 S. Ct. 1624, 1626 (2017) (per curiam). On remand, the district court permitted the legislators elected in 2016 to complete their terms. *Covington v. North Carolina* (*Covington II*), 270 F. Supp. 3d 881, 902 (M.D.N.C. 2017). The court noted that it was "undisputed that this violation requires redrawing nearly 70% of the state House and Senate districts, affecting over 80% of the state's voters. This constitutes one of the most widespread racial gerrymanders ever held unconstitutional by a federal court . . . ." *Id.* at 896–97.

¶ 10 The district court also considered the plaintiffs' argument that the legislators elected due to the unconstitutional apportionment were "usurpers" who could not validly exercise legislative powers under North Carolina law. The court agreed with the plaintiffs that

> [t]he widespread scope of the constitutional violation at issue—unjustifiably relying on race to draw lines for legislative districts encompassing the vast majority of the state's voters—also means that the districting plans intrude on popular sovereignty. . . . By unjustifiably relying on race to distort dozens of legislative district lines, and thereby potentially distort the outcome of elections and the composition and responsiveness of the legislature, the districting plans interfered with the very mechanism by which the people confer their sovereignty on the General Assembly and hold the General Assembly accountable.

Id. at 897. Still, the court concluded that there existed "no authority from [North Carolina] courts definitively holding that a legislator elected in an unconstitutionally drawn district is a usurper." *Id.* at 901. Thus, the court declined to resolve the plaintiffs' usurpers argument, explaining that because the theory "implicates an unsettled question of state law, [it] is more appropriately directed to North Carolina courts, the final arbiters of state law." *Id.*

¶ 11 Just before the legislators elected in 2016 left office, the General Assembly initiated the process of amending the North Carolina Constitution. Article XIII, section 4 authorizes the General Assembly to put constitutional amendments on the ballot for approval by the voters "if three-fifths of all the members of each house shall adopt an act submitting the proposal to the qualified voters of the State for their ratification or rejection." The plaintiff in this case—the North Carolina State Conference of the National Association for the Advancement of Colored People (NC NAACP)—filed suit in state court. Plaintiff claimed that this particular General Assembly could not invoke the legislature's authority under article XIII, section 4 because it was illegally composed of and tainted by usurpers who could not legitimately exercise the people's sovereign power.[1]

¶ 12 As described in unchallenged findings of fact contained in the trial court order giving rise to this appeal:

> 12. In the final two days of the 2018 regular legislative session, the General Assembly passed six bills that would place six constitutional amendments before the voters: Session Laws 2018-96 (Right to Hunt and Fish Amendment), 110 (Victim's Rights amendment), 117 (First Board of Elections Amendment), 118 (First Judicial Vacancies Amendment), 119 (Tax Cap Amendment), and 128 (Voter ID amendment).
>
> 13. Session Law 2018-128 (Voter ID amendment) passed the North Carolina House of Representatives by a vote of 74–43 and the North Carolina Senate by a vote of 33–12. In the House, the total number of aye votes was just two votes over [the] three-fifths majority required for a constitutional amendment, and in the Senate the number was just three votes over the required margin.
>
> 14. Session Law 2018-119 (Tax Cap amendment) passed the North Carolina Senate by a vote of 34–13 and passed the North Carolina House of Representatives by a vote of 73–45. In the House, the number was just one vote over the three-fifths

1. Clean Air Carolina (CAC) was also initially a plaintiff in this case; however, the trial court allowed the defendants' motion to dismiss CAC for lack of standing, and that ruling is not before this Court on appeal.

majority required for a constitutional amendment, and in the Senate the number was just four votes over the required margin.

15. On August 6, 2018, the NC NAACP and CAC filed suit against the leadership of the North Carolina General Assembly in their official capacities ("Legislative Defendants") and the North Carolina Bipartisan State Board of Elections and Ethics Enforcement and all Board members in their official capacities ("State Board of Elections") challenging four of the amendment proposals: the First Board of Elections Amendment, the First Judicial Vacancies Amendment, the Tax Cap Amendment, and the Voter ID Amendment. . . .

. . . .

21. On November 2, 2018, Plaintiffs filed a motion for partial summary judgment only as to their claim that the illegally-constituted General Assembly lacks the authority to propose constitutional amendments.

22. On November 6, 2018, an election was held in North Carolina, and the four constitutional amendments challenged in the Second Amended Complaint were on the ballot.

23. The Second Judicial Vacancies Amendment, proposed in Session Law 2018-132, and the Second Board of Elections Amendment, proposed in Session Law 2018-133, did not attain the required majority of votes to pass into law.

24. The Voter ID amendment, proposed in Session Law 2018-128, passed.

25. The Tax Cap amendment, proposed in Session Law 2018-119, passed.

26. The November 6, 2018 election was the first to be held under the remedial maps approved by the federal courts to correct the 2011 unconstitutional racial gerrymander. *Covington v. North Carolina*, 283 F. Supp. 3d 410, 458 (M.D.N.C. 2018), *aff'd in part*, *rev'd in part*, 138 S. Ct. 2548 (U.S. 2018).

> 27. On December 28, 2018, Plaintiffs voluntarily dismissed their claims against Defendant State Board of Elections. Plaintiffs also voluntarily dismissed as moot their claims related to the Second Judicial Vacancies Amendment, proposed in Session Law 2018-132, and the Second Board of Elections Amendment, proposed in Session Law 2018-133.

After determining that NC NAACP had standing to bring suit, the trial court entered the following conclusions of law:

> 3. Whether an unconstitutionally racially-gerrymandered General Assembly can place constitutional amendments onto the ballot for public ratification is an unsettled question of state law and a question of first impression for North Carolina courts.
>
> . . . .
>
> 5. N.C. Const art I sec. 3 states that the people of North Carolina "have the *inherent, sole, and exclusive right of regulating the internal government and . . . of altering . . . their Constitution* and form of government whenever it may be necessary to their safety and happiness" *Id.* § 3 (emphasis added). N.C. Const. art XIII mandates that this may be accomplished only when a three-fifths supermajority of both chambers of the General Assembly vote to submit a constitutional amendment for public ratification, and the public then ratifies the amendment. The requirements for amending the state Constitution are unique and distinct from the requirements to enact other legislation. The General Assembly has the authority to submit proposed amendments to the Constitution only insofar as it has been bestowed with popular sovereignty.
>
> 6. On June 5, 2017, it was adjudged and declared by the United States Supreme Court that the General Assembly was an illegally gerrymandered body. At that time, following "the widespread, serious, and longstanding . . . constitutional violation—among the largest racial gerrymanders ever encountered by a federal court—" the General Assembly lost its claim to popular sovereignty. *Covington*, 270 F. Supp. 3d at 884. The three-judge panel in [*Covington*] ruled that,

under the illegal racial gerrymander, "a large swath of North Carolina citizens . . . lack a constitutionally adequate voice in the State's legislature . . . ." *Covington v. North Carolina*, 1:15CV399, 2017 WL 44840 (M.D.N.C. Jan. 4, 2017) (order for special elections vacated and remanded, *North Carolina v. Covington* 137 S. Ct. 1624 (June 5, 2017)).

7. Curing this widespread and sweeping racial gerrymander required that over two-thirds of the North Carolina House and Senate districts be redrawn. Thus, the unconstitutional racial gerrymander tainted the three-fifths majorities required by the state Constitution before an amendment proposal can be submitted to the people for a vote, breaking the requisite chain of popular sovereignty between North Carolina citizens and their representatives.

8. Accordingly, the constitutional amendments placed on the ballot on November 6, 2018 were approved by a General Assembly that did not represent the people of North Carolina. Indeed, "[b]y unjustifiably relying on race to distort dozens of legislative district lines, and thereby potentially distort the outcome of elections and the composition and responsiveness of the legislature, the districting plans [under which that General Assembly had been elected] interfered with the very mechanism by which the people confer their sovereignty on the General Assembly and hold the General Assembly accountable." [*Covington II*,] 270 F. Supp. 3d at 897. The November 2018 general elections under remedial legislative maps were "needed to return the people of North Carolina to their sovereignty." *Id.*

9. Defendants argue that, even following the *Covington* decision, the General Assembly maintained authority to enact legislation so as to avoid "chaos and confusion." *See Dawson v. Bomar*, 322 F.2d 445 (6th Cir. 1963). It will not cause chaos and confusion to declare that Session laws 2018-119 and 2018-128 and their corresponding amendments to the constitution are void *ab initio*.

> 10. An illegally constituted General Assembly does not represent the people of North Carolina and is therefore not empowered to pass legislation that would amend the state's Constitution.
>
> 11. N.C. Session Laws 2018-119 and 2018-128, and the ensuing constitutional amendments, are therefore void *ab initio*.

The trial court entered partial summary judgment in plaintiff's favor, invalidating the two challenged constitutional amendments. Legislative Defendants appealed.

¶ 13 On appeal, a majority of the Court of Appeals reversed. The two judges in the majority wrote separately. In the majority opinion, Judge Dillon held that plaintiff's usurpers theory was deficient on multiple grounds, including that (1) the judiciary lacked authority under separation-of-powers principles to preclude elected members of the General Assembly from exercising a legislative power; (2) plaintiff's claim was nonjusticiable; and (3) legislators elected to represent districts subsequently deemed unconstitutional were, at a minimum, de facto officers entitled to exercise all powers delegated to the legislative branch. *N.C. State Conf. of NAACP v. Moore* (*NC NAACP*), 273 N.C. App. 452, 461–64 (2020).

¶ 14 Judge Stroud wrote separately to "reach the same result on a more limited basis." *Id.* at 466 (Stroud, J., concurring in the result). In Judge Stroud's view, the trial court erred because the decisions of the Middle District of North Carolina and the United States Supreme Court in the *Covington* litigation placed "no limitations on the General Assembly's authority to act" and there was "no North Carolina law to support the trial court's legal conclusions." *Id.* Judge Stroud also predicted that the trial court's order would engender chaos, because there was "no law" and "no logical way to limit the effect of the electoral defects noted in *Covington* to one, and only one, type of legislative action, and more specifically to just these two particular amendments which plaintiff opposes." *Id.* at 475. She concluded that no provisions of the North Carolina Constitution "support [the trial court's] conclusion that an illegally gerrymandered General Assembly lacks either *de facto* or *de jure* authority to approve a bill for submission of constitutional amendments to popular vote . . . [while retaining the] full authority to pass any other kind of legislation." *Id.* at 478.

¶ 15 Judge Young dissented. According to the dissent, the case "present[ed] a compelling issue of first impression" centered on "a narrow question,

but one vital to our democracy: Can a legislature, which has been held to be unconstitutionally formed due to unlawful gerrymandering, act to amend the North Carolina Constitution?" *Id.* at 479 (Young, J., dissenting). In the dissent's view, the answer was no:

> The ramifications of such an act are clear. If an unlawfully-formed legislature could indeed amend the Constitution, it could do so to grant itself the veneer of legitimacy. It could seek, by offering amendments for public approval, to ratify and make lawful its own unlawful existence. Such an act would necessarily be abhorrent to all principles of democracy.

Id. Instead, the dissent reasoned that, post-*Covington*, the General Assembly was only "permitted to engage in the ordinary business of drafting and passing legislation, regardless of any issues of gerrymandering, as to require otherwise would create 'chaos and confusion.' " *Id.* at 482. But amending the constitution "is not an ordinary matter—it is a most extraordinary matter, and one which goes beyond the day-to-day affairs of the General Assembly." *Id.* Therefore, the dissent would have held that "the General Assembly, found to be unconstitutionally formed based on unlawful gerrymandering, could not attempt to amend our Constitution without first comporting itself to the requirements thereof." *Id.* at 483.

II. Justiciability

¶ 16 **[1]** At the outset, we address the Court of Appeals' conclusion, advanced by Legislative Defendants before this Court, that plaintiff's claim is nonjusticiable. Courts do not resolve claims raising "purely political question[s]." *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 618 (2004). As we recently explained, these kinds of claims

> 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").

Harper v. Hall, 380 N.C. 317, 2022-NCSC-17, ¶ 100.[2]

¶ 17 In support of the conclusion that this case presented only nonjusticiable political questions, the Court of Appeals relied principally on *Leonard v. Maxwell*, 216 N.C. 89 (1939).[3] In *Leonard* a litigant challenged the validity of a statute on various grounds including that the General Assembly which enacted the statute "was not properly constituted because no reapportionment was made at the first session after the last census as required by Art. II, secs. 4, 5, and 6 of the Constitution." *Id.* at 98. This Court explained that we would not reach the merits of this argument because the question it presented "is a political one, and there is nothing the courts can do about it," as courts "do not cruise in nonjusticiable waters." *Id.* Although it addressed a claim relating to the validity of a statute passed by a malapportioned legislature, *Leonard* is inapposite here for two reasons.

¶ 18 First, *Leonard* predates the United States Supreme Court's decision in *Baker v. Carr*, 369 U.S. 186 (1962), which established that claims challenging a legislature's failure to reapportion itself were justiciable in federal court. While *Leonard* was articulating this Court's own justiciability doctrine, it is apparent that *Leonard* reflected the then-existing

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2. The United States Supreme Court granted a petition for writ of certiorari to review claims relating to North Carolina's congressional districts, but the issue in that case is unrelated to the question of the justiciability of state legislative redistricting claims as decided in *Harper*. *See Moore v. Harper*, 595 U.S. ____ (Jun. 30, 2022) (No. 21-1271).

3. In addition to *Leonard*, the Court of Appeals majority opinion also appears to have relied upon various cases in which this Court "declared a district to be illegally gerrymandered based on race . . . . [but] did not enjoin our General Assembly, nor the representative elected from the illegally-drawn district, from exercising legislative authority." NC NAACP, 273 N.C. App. at 462 (citing *Pender County v. Bartlett*, 361 N.C. 491 (2007) and *Stephenson v. Bartlett*, 355 N.C. 354 (2002)). The Court of Appeals also noted its view that "[t]he federal panel in *Covington* did not believe that the 2017-18 Session of our General Assembly lost legitimacy, ordering the body it declared to be illegally gerrymandered to redraw the districts." *Id.* (citing *Covington*, 267 F. Supp. 3d at 665). But these cases, to the extent they are relevant, speak to the potential merits of the plaintiff's arguments or the factors a court might weigh when entering a remedial order—none of these cases in any way support the notion that the type of claim plaintiff has brought is nonjusticiable in state court.

consensus that all claims relating to a legislature's authority to reapportion itself were categorically nonjusticiable. Indeed, the cases the Court cites in *Leonard* in support of its justiciability holding are largely irreconcilable with the modern redistricting jurisprudence of the United States Supreme Court and this Court.[4] Since *Baker v. Carr*, this Court has routinely reviewed claims asserting that legislative districts violate the United States and North Carolina Constitutions, and we have routinely entered judgments or affirmed orders designed to remedy proven constitutional deficiencies. *See*, *e.g.*, *Harper*, 2022-NCSC-17, ¶ 113; *Stephenson v. Bartlett*, 355 N.C. 354 (2002). Of course, the claim at issue in this case is not a claim that the General Assembly is unconstitutionally apportioned—that question was definitively answered by the *Covington* decisions. Nevertheless, because *Leonard* was predicated on a view of judicial authority that has since been thoroughly repudiated, *Leonard* has limited relevance and is not persuasive authority with respect to justiciability.

¶ 19 Second, the nature of the claim at issue in *Leonard* was not analogous to the claim presented in this case. In the Court of Appeals' assessment, *Leonard* rejected the argument that the judiciary is empowered "to declare retroactively that our General Assembly lacked the authority to pass bills simply because some legislators were elected from unconstitutionally-designed districts, stating, '[q]uite a devastating argument, if sound.' " *NC NAACP*, 273 N.C. App. at 461 (quoting *Leonard*, 216 N.C. at 89). But the argument that this Court deemed "devastating . . . if sound" in *Leonard* was not the argument that a court possesses the authority to retroactively invalidate a statute because the legislature that enacted the statute was malapportioned; rather, it was the argument that because the constitution required the General Assembly to reapportion itself "at the first regular session convening after the return of every decennial census of population taken by order of Congress," N.C. Const. art II, §§ 3, 5, the General Assembly's failure to reapportion

4. Two of the three cases the Court relied upon in *Leonard* adopt the premise that courts lack authority to remedy an unconstitutional reapportionment scheme. *See People ex rel. Fergus v. Blackwell*, 342 Ill. 223, 225 (1930) ("We have held that this court has no power, under the Constitution, to compel the Legislature to reapportion the state, as required by the Constitution."); *State ex rel. Cromelien v. Boyd*, 36 Neb. 181 (1893) ("It would seem but justice that [the constitutionally mandated reapportionment] should take effect in the succeeding congress, and we may confidently trust to that spirit of fairness so characteristic of the American people to correct the wrong. The courts, however, have no authority to [issue a remedy]."). The third case held that the question of whether a state adhered to the "proper procedure" in ratifying a proposed constitutional amendment was a nonjusticiable political question. *Coleman v. Miller*, 307 U.S. 433, 458 (1939) (Black, J., concurring).

itself during the first regular session after the decennial census meant there could not be a legitimately constituted General Assembly unless and until the North Carolina Constitution was amended to provide for another manner of reapportionment. *See Leonard*, 216 N.C. at 98–99 ("In other words, as the first session of the General Assembly after the 1930 census was the session directed by the Constitution to make the reapportionment, and failed to do so, it is suggested that no other session is competent to make the reapportionment . . . and that henceforth no *de jure* or legally constituted General Assembly can again be convened under the present Constitution. Quite a devastating argument, if sound."). An analogous claim in the context of this case would be the assertion that a constitutional amendment is necessary to create a new apportionment process in order to reconstitute the General Assembly as a legitimate body that can exercise legislative powers because the legislature failed to enact lawful reapportionment statutes immediately following the 2010 census. That is not an argument made by any party that is presently before this Court.

¶ 20 Absent precedent directly addressing the justiciability of the precise claim advanced by NC NAACP, we turn to general justiciability principles. This Court has previously

> 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, 82 S. Ct. 691 (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)).

Harper, 2022-NCSC-17, ¶ 112 (alteration in original). Legislative Defendants have failed to demonstrate that either circumstance is present here.

¶ 21 As a general matter, this Court has routinely reviewed and resolved claims alleging that an individual who purports to exercise the powers assigned to a particular governmental office may not legitimately do so. *See, e.g.*, *State v. Porter*, 272 N.C. 463 (1968); *Smith v. Town of Carolina Beach*, 206 N.C. 834 (1934); *People ex rel. Norfleet v. Staton*, 73 N.C. 546 (1875); *Keeler v. City of Newbern*, 61 N.C. 505 (1868). In these types of cases, the question is whether the individual claiming the powers of an

office assumed that office in a manner satisfying the legal prerequisites for holding office, and if not, whether parties are nonetheless bound by prior actions of the putative officeholder. Once it has been conclusively determined that an officeholder did not assume office through a procedure that complied with all legal prerequisites, courts consider the applicability and scope of common law doctrines like the de facto officer doctrine to determine the validity of actions undertaken by the putative officeholder. *See*, *e.g.*, *Porter*, 272 N.C. at 467. The scope and applicability of a common law doctrine is a quintessential legal question this Court has long been tasked with resolving.

¶ 22 The fact that this case involves legislators and legislative authority does not convert plaintiff's claim into one that requires us to make "policy choices and value determinations." The question presented in this case is not which theory of government should be adopted and which institutional design implemented to ensure that power is exercised in an effective and responsive manner—those are quintessentially political questions, and ones that have been answered by the people of North Carolina through their adoption of the North Carolina Constitution. Instead, the question is whether legislators elected due to an unconstitutional racial gerrymander could, consistent with the North Carolina Constitution, legitimately exercise the sovereign power assigned to the legislature to initiate the process of amending the constitution. This issue, at its core, is one involving the interpretation and application of constitutional provisions. *See* N.C. Const. art. I, §§ 2-3. Answering this question requires us to examine the constitutional provisions enacting a system of government founded on principles of popular sovereignty and democratic self-rule and to then determine if those provisions limit the authority of legislators who assumed office in a manner violative of the United States and North Carolina Constitutions. That is a question that this Court may, and indeed must, answer. *See*, *e.g.*, *Corum v. Univ. of N.C.*, 330 N.C. 761, 783 (1992) ("This Court is the ultimate interpreter of our State Constitution."); *State ex rel. McCrory v. Berger*, 368 N.C. 633, 638 (2016) ("This Court construes and applies the provisions of the Constitution of North Carolina with finality.").

III. Analysis

¶ 23 **[2]** Although plaintiff's claim is novel, our standard of review is familiar. We review a trial court's order granting or denying summary judgment de novo. *See*, *e.g.*, *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337 (2009). The sole question presented on appeal is a pure question of constitutional law, which we also review de novo. *See State ex rel. McCrory*, 368 N.C. at 639. We presume that when the General Assembly

acts, it acts within constitutional boundaries, and we will only strike down an act of the General Assembly if the constitutional violation is "plain and clear." *Id.* To determine whether a constitutional violation has occurred, "we look to the text of the constitution, the historical context in which the people of North Carolina adopted the applicable constitutional provision, and our precedents." *Id.*

¶ 24 The North Carolina Constitution itself provides guidance to this Court when we are called upon to interpret constitutional provisions protecting the people of North Carolina's fundamental rights: "A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. Const. art. I, § 35. This "solemn warning" has long informed our interpretation of the "fundamental guaranties" contained in our constitution's Declaration of Rights. *State v. Ballance*, 229 N.C. 764, 768 (1949). Thus, in examining plaintiff's claim, we begin and end with the principles codified in numerous provisions of our constitution that function as the beating heart of North Carolina's system of government: the principles of popular sovereignty and democratic self-rule.

A. The principles of popular sovereignty and democratic self-rule.

¶ 25 In North Carolina, our constitution is "the framework for democracy." *Bazemore*, 254 N.C. at 403. Under our constitution, "[a]ll 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 constitution also reserves to the "people of this State . . . the inherent, sole, and exclusive right . . . of altering or abolishing their Constitution and form of government." *Id.*, art. I, § 3. These provisions of the North Carolina Constitution express and safeguard the people of North Carolina's "revolutionary faith in popular sovereignty" as the theory of government that best promotes the liberty and equality of all persons. John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 48 (2d ed. 2013). In short, they establish that there is no source of political power other than the people of North Carolina; nobody but the people of North Carolina possesses the authority to redefine the purpose and structure of North Carolina's system of government.

¶ 26 In the system of government our constitution prescribes, the legislature "represent[s] the untrammeled will of the people" and "the expression of the people's will can only be made by legislation." *State ex rel. Abbott v. Beddingfield*, 125 N.C. 256, 270 (1899). Yet there is no legislative power independent of the people. Instead, the constitution defines and

structures political processes that allow individuals to assume offices to which the people of North Carolina have delegated sovereign power. *See Harper*, 2022-NCSC-17, ¶ 130 ("[U]nder 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." (citing N.C. Const. art I, § 2)). These processes enable the "sovereign power" to be "*exercised* by [the People's] representatives in the General Assembly," but at all times the sovereign power "*resides* with the people." *State ex rel. Ewart v. Jones*, 116 N.C. 570, 570 (1895) (emphases added).

¶ 27 The principles of popular sovereignty and democratic self-rule as embodied in article I, sections 2 and 3 mean that individuals can only exercise the sovereign power that the people have transmitted to the legislature if they validly hold legislative office. The constitution defines and structures the processes by which individuals assume offices that permit them to exercise sovereign power, and sovereign power can only be lawfully exercised by individuals who have come into office through the processes established by the constitution for that very purpose. *See Burke v. Elliott*, 26 N.C. 355, 361 (1844) ("[A] party taking upon himself to execute process must be a *legal* officer for that purpose . . . ."). The legitimacy of any individual officer's claim to exercise sovereign power depends upon the legitimacy of the process by which that individual came to assume the office to which sovereign power has been delegated.

B. The process of amending the North Carolina Constitution.

¶ 28 Consistent with the principles of popular sovereignty and democratic self-rule, only the people can change the way sovereign power is allocated and exercised within North Carolina's system of government. *See* N.C. Const. art. XIII, § 2 ("The people of this State reserve the power to amend this Constitution and to adopt a new or revised Constitution."). And, through their constitution, the people assigned the General Assembly a vital role in the amendment process. Specifically, the constitution authorizes the General Assembly to initiate the process of enacting constitutional amendments by "adopt[ing] an act submitting the propos[ed] [constitutional amendments] to the qualified voters of the State for their ratification or rejection," provided that "three-fifths of all the members of each house shall adopt [the] act." *Id.*, art. XIII, § 4. It is undisputed that three-fifths of the members of each house adopted acts submitting the proposals to add the Voter ID and Tax Cap Amendments to the North Carolina Constitution, and that a majority of voters ratified both amendments in 2018. The sole question before us is whether the legislators who passed the bills submitting these two

amendments to the voters could validly exercise the authority conferred upon the legislature by the people in article XIII, section 4.

¶ 29 As Judge Young noted, our answer to this question has profound implications for the principles of popular sovereignty and democratic self-rule that undergird our system of government. Both parties advance plausible arguments as to why these principles demand a ruling in their favor. We agree with Legislative Defendants that respect for the people's choice to delegate sovereign power to the legislature requires upholding the validity of legislators' actions unless it is palpably clear that their actions violate the North Carolina Constitution. We agree with NC NAACP that respect for the people's reservation of their exclusive authority to amend the constitution requires closely scrutinizing the actions of those who purport to exercise this authority under contested circumstances. Thus, in approaching the legal question presently before us, we heed the foundational commitment to the principles of popular sovereignty and democratic self-rule that are embodied in the text, structure, and purpose of the constitution the people have adopted and reaffirmed.[5]

C. The significance of voter ratification of the challenged amendments.

¶ 30 Before examining the legislators' authority to initiate the process of amending the North Carolina Constitution, we note the argument that this question is practically irrelevant because a majority of North Carolina voters ratified the Voter ID and Tax Cap Amendments. This argument has some superficial appeal: if what matters is safeguarding our constitutional commitment to popular sovereignty and democratic self-rule, the fact that a majority of voters approved the challenged amendments could indicate that the amendments reflected the people's will. Yet this argument is misguided in ways that illustrate the stakes at issue in this case.

¶ 31 First, this argument overlooks the fact that constitutional provisions defining the procedures elected officials must utilize in order to exercise the people's sovereign power reflect the people's conscious choices regarding how, and under what circumstances, their power may be exercised by elected representatives. These choices have meaning—they reflect the people's best efforts to structure a political system that would facilitate effective governance without fostering tyranny. *See Harriss v. Wright*, 121 N.C. 172, 178–79 (1897) ("Under our system, it is said that

5. These principles are not unique to North Carolina's Constitution. *See generally* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859 (2021).

sovereign power resides with the people . . . . They have divided and subdivided the powers of government, with such power in each division or department or branch as they deemed expedient for the good of the public . . . ."). For this reason, we have held that when governmental entities fail to adhere to constitutional procedural requirements, their resulting actions are void. *See, e.g.*, *Allen v. City of Raleigh*, 181 N.C. 453, 455 (1921) (holding "invalid" a statute involving debt and taxation because it failed to comply with "mandatory" procedural requirements set forth in article II, section 14).

¶ 32 We have also recognized that majority approval by the voters does not cure the deficiency resulting from a violation of a legal prerequisite for presenting someone (or something) to the voters. For example, in *People ex rel. Duncan v. Beach*, we held that a judicial candidate who "was ineligible to hold office prior to and at the time of the [ ] election due to his age" could not serve as a district court judge, even though the candidate had been elected by a majority of the voters in his district, because "[t]he votes cast for an ineligible candidate [are] not effective to entitle him to the office." 294 N.C. 713, 718 (1978). Similarly, ratification by the voters does not render the procedural requirements of article XIII, section 4 constitutionally extraneous. To conclude otherwise would flagrantly disregard the people of North Carolina's choice not to permit constitutional amendment by citizen initiative or popular referendum, in contrast to the choices made by the citizens of certain other states. *See* Nat'l Conference of State Legislatures, *Initiative and Referendum States*, https://www.ncsl.org/research/elections-and-campaigns/chart-of-the-initiative-states.aspx (last visited 3 August 2022).

¶ 33 Second, embracing this argument would also flagrantly ignore the purpose of the people's choice to structure the amendment process to require something more than ratification by the voters. The legislative supermajority requirement is not a mere procedural nicety; it is a means of safeguarding the system of government created in the North Carolina Constitution by ensuring that the people's fundamental law is not altered or abolished rashly in response to the whims of a particular moment. As we explained in *State ex rel. Attorney-General v. Knight*,

> the people, then agreeing upon the fundamental law for the present and the future, and knowing that times of agitation and popular clamor would come, while reserving the power of amendment, in their wisdom imposed a restraint upon themselves, by making the powers of amendment slow enough to give time for reflection before final action.

169 N.C. 333, 347–48 (1915); *cf. Allen*, 181 N.C. at 455 (explaining that a constitutional provision imposing heightened procedural requirements for the passage of bills addressing debt and taxation was imposed for the purpose "of obtaining more careful deliberation on these important subjects"). If we were to conclude that all questions regarding a legislator's authority to initiate the amendment process are irrelevant because voters subsequently approved the proposal, we would be ignoring the people's view of the way their power should be exercised and replacing it with our own.

¶ 34 We reject the contention that we do not need to examine the authority of legislators to propose the Voter ID and Tax Cap Amendments because a majority of North Carolinians who participated in the 2018 elections subsequently ratified both amendments. Simply put, the fact that a majority of voters ratified a constitutional amendment is insufficient to ensure adherence to the principles that animate our constitutional system of government as defined by the people of North Carolina. *See Reade v. City of Durham*, 173 N.C. 668 (1917) ("No one can read . . . our Constitution without concluding at once that no alteration is permitted by it without the joint action of the Legislature and the people. Amendment of the organic law of the State *does not depend upon a popular vote alone*, but before the people have a right to express their choice as to whether or not there shall be a change the Legislature must by a three-fifths vote of each house thereof consent and provide that the amendment shall be submitted to the people . . . ." (emphasis added)). The constitution, which "contains the permanent will of the people," incorporates the adoption of a particular procedural mechanism for exercising the people's sovereign power to alter or abolish their chosen form of government. *Knight*, 169 N.C. at 348. Respecting the people's will means respecting the processes they saw fit to include in their fundamental law. Adherence to constitutional procedural requirements is especially warranted when considering constitutional amendments which, in contrast to ordinary statutes and other governmental actions, have the potential to redefine the way sovereign power is channeled and exercised, the basic structure and organization of our government, and the aims our constitution seeks to realize.

D. De jure officers, de facto officers, and usurpers.

¶ 35 We next consider the status of the legislators who were elected from districts that were either unconstitutionally racially gerrymandered or from districts that needed to be redrawn to cure those racial gerrymanders. The crux of the parties' dispute in this case centers on competing assertions regarding those individuals' entitlement to exercise power

assigned to the legislature and the status of the acts they undertook post-*Covington*. Our resolution of this dispute requires us to interpret and apply cases defining three categories of individuals who purport to hold elected offices established by the North Carolina Constitution: de jure officers, de facto officers, and usurpers.

¶ 36 A de jure officer is one who "exercises the office . . . as a matter of right." *People ex rel. Duncan*, 294 N.C. at 719. To be a de jure officer, an individual must (1) "possess the legal qualifications for the . . . office in question;" (2) "be lawfully chosen to such office;" and (3) "have qualified . . . to perform the duties of such office according to the mode prescribed by law." *Id.* at 720. De jure officers may legitimately exercise all the powers assigned to an office because they have assumed office in accordance with all legal requirements. *See In re Wingler*, 231 N.C. 560, 563 (1950) ("These things being true, [the officeholder] has a complete title to his office; his official acts are valid; and he cannot be ousted.").

¶ 37 Based on the constitutional principles described above, it would be reasonable to presume that any individual other than a de jure officer lacks the capacity to exercise the authority assigned to a governmental office. However, this Court—and other federal and state courts—long ago concluded that such a rule would lead to chaos, undermine the orderly administration of government, and unfairly burden individuals who reasonably relied on the acts of apparent officeholders. *See, e.g.*, *Porter*, 272 N.C. at 467 ("The *de facto* doctrine was introduced into the law as a matter of policy and necessity, to protect the interests of the public and individuals, where those interests were involved in the official acts of persons exercising the duties of an office, without being lawful officers."); *cf. EEOC v. Sears, Roebuck & Co.*, 650 F.2d 14, 17 (2d Cir. 1981) ("The *de facto* officer doctrine was developed to protect the public from the chaos and uncertainty that would ensue if actions taken by individuals apparently occupying government offices could later be invalidated by exposing defects in the officials' titles."). Under the common law de facto officer doctrine, an individual "who occupies a[n]. . . office under some color of right, and for the time being performs its duties with public acquiescence, though having no right in fact" may exercise the powers attendant to that office in ways that bind third parties and the public. *In re Wingler*, 231 N.C. at 563.

¶ 38 As we explained in *State v. Porter*,

> A *de facto* officer may be defined as one whose title is not good in law, but who is in fact in the unobstructed possession of an office and discharging its duties in

> full view of the public, in such manner and under such circumstances as not to present the appearance of being an intruder or usurper. When a person is found thus openly in the occupation of a public office, and discharging its duties, third persons having occasion to deal with him in his capacity as such officer are not required to investigate his title, but may safely act upon the assumption that he is a rightful officer.

272 N.C. at 465 (quoting *Waite v. Santa Cruz*, 184 U.S. 302, 323 (1902)). A paradigmatic example of a de facto officer is someone who is validly elected to an office, but who is later determined to have been ineligible to assume that office for failure to satisfy all legal prerequisites for holding office. *See*, *e.g.*, *People ex rel. Duncan*, 294 N.C. at 719. Until it is conclusively determined that the officeholder is not a de jure officer, the officeholder is a de facto officer whose acts "are valid in law in respect to the public whom he represents and to third persons with whom he deals officially." *Porter*, 272 N.C. at 465–66.

¶ 39 Still, not all individuals who claim to hold an office may exercise the powers of that office. North Carolina law recognizes a third category of putative officeholders: usurpers. In contrast to a de facto officer who "goes in [to office] under *color* of authority," a usurper is an individual "who takes possession [of an office] without any authority." *People ex rel. Norfleet*, 73 N.C. at 550; *see also People ex rel. Duncan*, 294 N.C. at 720 ("A usurper in office is distinguished from a *de facto* officer in that a usurper takes possession of office and undertakes to act officially without any authority, either actual or apparent."). Essentially, a usurper is someone who purports to exercise the powers of an office that the individual has no legitimate claim to hold, provided that the invalidity of the putative officeholder's claim is readily apparent to the public. *Cf. Ellis v. N.C. Inst.*, 68 N.C. 423, 426–27 (1873) (concluding that individuals were de facto officers because they acted "under the color of an act of the Legislature" rather than usurpers who "were in without any color of title to the office"). In contrast to the acts of a de jure or de facto officer, all acts undertaken by a usurper "are absolutely void, and can be impeached at any time in any proceeding." *In re Wingler*, 231 N.C. at 564.

¶ 40 These precedents make clear that until the United States Supreme Court conclusively determined that twenty-eight legislative districts were unconstitutional racial gerrymanders, legislators elected as a result of unconstitutional racial gerrymandering were de facto officers. These legislators were not de jure officers because they were not "lawfully

chosen to such office." *People ex rel. Duncan*, 294 N.C. at 719–20. Article I, section 3 establishes that "[t]he people of this State have the inherent, sole, and exclusive right of regulating the internal government . . . but every such right shall be exercised in pursuance of law and consistently with the Constitution of the United States." Our Declaration of Rights further provides that "no law or ordinance of the State in contravention or subversion [of the United States Constitution] can have any binding force." N.C. Const. art. I, § 5. The statutes creating the legislative districts from which these legislators were elected violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. *See Covington I*, 316 F.R.D. at 124, 176. Nonetheless, at least until *Covington* was decided, these legislators were "in the unobstructed possession of an office and discharging its duties in full view of the public, in such manner and under such circumstances as not to present the appearance of being an intruder or usurper." *Porter*, 272 N.C. at 465 (quoting *Waite*, 184 U.S. at 323). Accordingly, they were de facto officers, and the validity of their actions undertaken during this time is not subject to collateral attack.

¶ 41 The status of these legislators after *Covington* was decided is less certain. Plaintiff argues that these legislators were nothing more than usurpers, such that the Voter ID and Tax Cap Amendments are necessarily void. Legislative Defendants argue that, at a minimum, these legislators remained de facto officers who were entitled to exercise all the powers assigned to the legislature. Our cases, and cases from other jurisdictions interpreting these doctrines as articulated in other sources of law, do not conclusively answer this question.

¶ 42 Although we have held that an individual who assumes office "under color of an election or appointment by or pursuant to a public unconstitutional law" is a de facto officer "*before* the [law] is adjudged to be [unconstitutional]," *State v. Lewis*, 107 N.C. 967, 971 (1890) (emphasis added), we have not previously addressed a circumstance in which a party challenged actions undertaken by an officeholder *after* the law under which that official assumed office was conclusively determined to be unconstitutional. Similarly, federal cases examining the de facto officer doctrine have also centered on official acts undertaken *before* the determination that an individual's claim to an office was deficient. *See Ryder v. United States*, 515 U.S. 177, 180 (1995) ("The *de facto* officer doctrine confers validity upon acts performed by a person acting under the color of official title even though it is *later* discovered that the legality of that person's appointment or election to office is deficient." (emphasis added)). The Middle District of North Carolina was correct in

stating that the question of whether the General Assembly was "empowered to act" as a legislature was and is "an unsettled question of state law." *Covington II*, 270 F. Supp. 3d at 901.

¶ 43 Plaintiff's argument that post-*Covington*, legislators elected from unconstitutionally racially gerrymandered districts became usurpers is straightforward. To validly hold an office established by the North Carolina Constitution, an individual must assume that office in a manner consistent with the legal requirements of the United States and North Carolina Constitutions. If the individual assumes office in a manner inconsistent with those legal requirements, that individual is not a de jure officer. Plaintiff contends that once it is conclusively (and publicly) determined that an individual lacks a valid claim to an office, that individual becomes a usurper.

¶ 44 The problem with this theory is that it invites the exact problem the de facto officer doctrine was created to avoid: the chaos and confusion that would result from declaring that the people lacked any representatives empowered to exercise any legislative authority for more than a year. Conceptually, plaintiff has no answer to the question of why, if its theory is correct, *any* actions undertaken by the challenged legislators post-*Covington* can be upheld. Plaintiff emphasizes that its legal challenge is limited to these two constitutional amendments, but a usurper's actions are not just voidable in a collateral proceeding; *all* of a usurper's actions "are absolutely void." *In re Wingler*, 231 N.C. at 564.

¶ 45 In response, Legislative Defendants advance three main arguments in support of the notion that all members of the General Assembly retained their authority to exercise all legislative powers even after *Covington* was decided. In essence, Legislative Defendants contend that the legislators remained de facto officers post-*Covington*, and that de facto officers must be permitted to exercise all of the powers delegated to a constitutional office. We agree with the first premise, but not the second.

¶ 46 Legislative Defendants' first argument is that all legislators were at a minimum de facto officers because they were "elected in 2016 before any final judgment regarding the validity or constitutionality of the districts from which they were elected; they were sworn into office; they served continually and openly; and they were recognized as members of the General Assembly until their terms expired at the end of 2018." This argument relies heavily on the fact that the federal courts overseeing the *Covington* litigation permitted the legislators to finish their terms, even though the federal courts possessed the remedial authority to order mid-term special elections. In support of this argument, Legislative

Defendants cite Justice Douglas's concurrence in *Baker v. Carr*, in which he stated that a "recent ruling by the Iowa Supreme Court that a legislature, though elected under an unfair apportionment scheme, is nonetheless a legislature empowered to act . . . is plainly correct." 369 U.S. at 250 n. 5 (Douglas, J., concurring) (citations omitted). This argument posits that if a court has concluded that a legislature is unconstitutionally gerrymandered, but permits the legislature to exercise its authority to enact a remedial redistricting plan (as courts routinely do), then it would be illogical to also conclude that members of that same legislative body were usurpers whose actions were void ab initio.

¶ 47 This argument has some force. In general, an individual remains a de facto officer as long as that individual "maintain[s] an appearance of right to [an] office." *EEOC v. Sears*, 650 F.2d at 17. The Middle District of North Carolina was correct in noting that at the time *Covington* was being litigated, there was "no authority from [North Carolina] courts definitively holding that a legislator elected in an unconstitutionally drawn district is a usurper." *Covington II*, 270 F. Supp. 3d at 901. Absent such authority, it was not unreasonable for the public to believe that, even after *Covington*, the legislators elected as a result of unconstitutional racial gerrymandering could continue exercising legislative authority until they were replaced or retained through the electoral process.

¶ 48 Historically, legislators who were determined to have been elected as a result of an unconstitutional apportionment have been permitted to continue serving in office until after the conclusion of the next general election, following which impacted districts would be redrawn in preparation for the next election cycle. *See*, *e.g.*, *Pender County v. Bartlett*, 361 N.C. 491 (2007). Here, no attempt was made to oust the legislators from their offices via a quo warranto action. *See* N.C.G.S. § 1-515 ("An action may be brought by the Attorney General in the name of the State, upon his own information or upon the complaint of a private party, against the party offending . . . [w]hen a person usurps, intrudes into, or unlawfully holds or exercises any public office . . . ."). There is also a longstanding public policy against leaving public offices vacant. *See State ex rel. Markham v. Simpson*, 175 N.C. 135, 137 (1918) (noting the "sound public policy which is against vacancies in public offices and require[es] that there should always be some one [sic] in position to rightfully perform . . . important official duties for the benefit of the public . . . .").

¶ 49 At the same time, adopting this argument in full would allow the federal courts to dictate the answer to a novel question of state law. As a result, we would be compelled to read *Covington*, a case in which a federal

district court expressly declined to rule on the question of whether legislators were empowered to act as a matter of North Carolina law, as establishing that the challenged legislators were empowered to exercise all legislative powers as a matter of North Carolina law. *See Covington II*, 270 F. Supp. 3d at 901 ("Given that [the argument that the legislature lacked authority to act] implicates an unsettled question of state law, [this] argument is more appropriately directed to North Carolina courts, the final arbiters of state law."). Yet questions involving the interpretation of the North Carolina Constitution and North Carolina law can be resolved conclusively only by this Court. *See*, *e.g.*, *Unemp. Comp. Comm'n v. Jefferson Standard Life Ins. Co.*, 215 N.C. 479, 486 (1939) (explaining that questions of state law are "to be interpreted finally by this Court").

¶ 50 Moreover, the federal courts in *Covington* did not affirmatively and proactively conclude that the unconstitutionally elected members of the General Assembly could exercise all legislative authority until they were replaced after the next election, as other courts have done.[6] Absent an express indication that a federal court considered the legislature's continued authority to act as a matter of state law, a federal court's decision to afford an unconstitutionally gerrymandered legislature the first opportunity to reapportion itself as an exercise of its remedial powers might reflect federalism interests, principles of institutional comity, or practical exigencies. Regardless, establishing legislative districts is an ordinary legislative act; recognizing the necessity of enacting remedial maps is not necessarily the same as recognizing the authority of legislators to initiate the process of changing a state's fundamental law. *Cf. Petuskey v. Rampton*, 307 F. Supp. 235, 253–54 (C.D. Utah 1969) ("Based [u]pon ideas of practicality, the ordinary, customary legislation needed to keep a state government going, has been held valid though the legislature is unconstitutionally apportioned. There isn't the same practical problem in holding void the legislators' attempt to continue themselves in their illegal state of unconstitutional apportionment."), *rev'd on other grounds*, 431 F.2d 378 (10th Cir. 1970); *City of Chicago v. Reeves*, 220 Ill.

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6. In contrast, the Michigan Supreme Court specifically noted that legislators elected from unconstitutionally apportioned districts could "function as *de facto* officers for all valid purposes" until they were "legally succeeded" by new legislators, relying on its own precedent examining the scope of the de facto officer doctrine. *Scholle v. Hare*, 367 Mich. 176, 192 (1962); *see also Long v. Avery*, 251 F. Supp. 541, 559 (D. Kan. 1966) (supplemental opinion) ("[W]e hold that the present State Senate should be permitted to a continuance of its powers during the current term for which the members of the State Senate were elected."). Regardless, as noted above, a federal court cannot conclusively resolve a pure question of state law such as the one presented in this case.

274, 288 (1906) ("The right to propose amendments to the Constitution is not the exercise of legislative power by the General Assembly in its ordinary sense . . . .").

¶ 51 Legislative Defendants' second argument is that recognizing all legislators' authority to exercise all legislative powers even after *Covington* was decided is necessary to avoid "chaos and confusion." This argument relates to the basic justification for the de facto officer doctrine, which is to avoid the "[e]ndless confusion and expense [that] would ensue if the members of society were required to determine at their peril the rightful authority of each person occupying a public office before they invoked or yielded to his official action." *In re Wingler*, 231 N.C. at 565–66. According to Legislative Defendants, retroactively examining a particular legislator's authority to exercise any power constitutionally assigned to the legislature would fundamentally destabilize North Carolina law. In their view, it would both call into question all the legislative acts enacted by legislators subsequently determined to be elected due to unconstitutional apportionment statutes—which, given North Carolina's history with gerrymandering, is potentially many acts—and engender profound uncertainty whenever legislators elected in accordance with facially valid apportionment statutes attempt to exercise legislative powers.

¶ 52 This argument is compelling, to an extent. The de facto doctrine is indeed "indispensable to the prompt and proper dispatch of governmental affairs." *In re Wingler*, 231 N.C. at 565. Applying it here ensures that North Carolinians continue to be governed by a legislature that can continue to function. We agree with Legislative Defendants that, as a prudential matter, it would be intolerable to hold that the people of North Carolina were left without any body capable of exercising legislative authority in the aftermath of *Covington*.

¶ 53 But while the de facto officer doctrine is properly invoked to stave off the possibility of "[e]ndless confusion and expense," *id.*, it does not change the fact that individuals exercising the power of an office assumed that office through unlawful means. Reflexively applying the de facto officer doctrine runs the risk of degrading the importance of the constitutionally prescribed processes through which individuals assume governmental office, processes which structure and legitimize the delegation of the people's sovereign power to elected representatives. The de facto officer doctrine may be necessary "to ensure the orderly administration of government," *State v. Oren*, 160 Vt. 245, 247 (1993), but it also threatens principles of popular sovereignty and democratic self-rule by requiring the public to be bound by the actions of an individual who, under the theory and structure of government adopted by

the people of North Carolina in their constitution, lacked authority to legitimately exercise sovereign power.

¶ 54 As the United States Supreme Court long ago explained, courts should exercise "caution" when considering "claims which, if not founded in violence or in mere might, . . . refer us for their origin certainly not to regular unquestioned legal or political authority;" rather, "claims founded upon the acts of a government *de facto* must be sustained, if at all, by *the nature and character of such acts themselves*." *United States v. Reynes*, 50 U.S. (9 How.) 127, 153 (1850) (emphasis added). If concern for the orderly administration of government requires us to apply the de facto officer doctrine to shield actions undertaken *after* it was established that certain legislators assumed office through legally deficient means, the constitution also requires us to closely scrutinize those actions in view of their "nature and character" to avoid requiring the people to be governed by individuals who lack a legitimate claim to rule.

¶ 55 Legislative Defendants' final argument is that there is no principled way to distinguish between the constitutional amendments plaintiff has challenged in this litigation and all the other legislative acts the challenged legislators undertook after *Covington* and before their terms expired. In their view, if the legislature lost its claim to represent the people's will, then it could not exercise *any* legislative authority consistent with the principles of popular sovereignty and democratic self-rule, and *all* actions undertaken by the legislature after *Covington* would be subject to retroactive invalidation. In support of this argument, Legislative Defendants rely primarily on *Dawson v. Bomar*, in which the Sixth Circuit rejected a state prisoner's claim that a statute authorizing the death penalty for certain criminal offenses was void because the legislature that enacted the statute was unconstitutionally malapportioned. 322 F.2d at 447–48. In rejecting the prisoner's effort to have the death penalty statute—but not other statutes—nullified, the Sixth Circuit refused to draw a distinction between statutes addressing different subjects based upon "the Court's opinion as to the wisdom, morality, or appropriateness of such laws." *Id.* at 448.

¶ 56 The Sixth Circuit's interpretation of federal common law does not, of course, control this Court's interpretation and application of state law. Regardless, Legislative Defendants misread *Dawson*, which held only that in applying the de facto officer doctrine, courts should not draw distinctions between categories of *ordinary* statutes addressing different subjects based solely on judicial views of the relative importance of those subjects. *Dawson* says nothing about how courts should approach categorically different types of legislative acts.

¶ 57 To the extent that Legislative Defendants' reliance on *Dawson* also suggests that no justification besides judicial caprice exists to distinguish between ordinary statutes and bills proposing constitutional amendments, Legislative Defendants overlook that the North Carolina Constitution itself draws precisely this distinction. The North Carolina Constitution expressly reserves to the people the right to "alter[ ] or abolish[ ] their Constitution and form of government." N.C. Const. Art. I, § 3. The legislature must satisfy different, heightened procedural requirements as part of that process, requirements that do not apply when the legislature enacts ordinary statutes. N.C. Const. art. XIII, § 4. Constitutional amendments, unlike ordinary statutes, have the potential to transform North Carolina's theory of government and restructure its political processes. Clearly, the distinction between constitutional amendments and ordinary statutes was not invented by the trial court in this case; it was established by the people themselves as inscribed in the North Carolina Constitution. We cannot, and need not, blind ourselves to the chaos that would ensue if a body composed of a substantial number of officeholders who assumed office in violation of the United States and North Carolina Constitutions was afforded free reign to initiate the process of transforming North Carolina's fundamental law.

¶ 58 In sum, Legislative Defendants' arguments persuade us that the legislature, writ large, did not entirely lack authority to exercise legislative powers—legislators elected due to unconstitutional racial gerrymandering did not, as plaintiff argues, lack any colorable claim to exercise the powers delegated to the legislature. Accordingly, actions undertaken by legislators post-*Covington* are presumptively valid as the actions of de facto officers. But we are unconvinced that recognizing the challenged legislators' status as de facto officers compels the conclusion that these legislators possessed the authority to initiate the process of amending the North Carolina Constitution. As we have explained, the de facto officer doctrine is a creation of the common law, introduced for prudential and practical reasons in response to issues that arise when a putative officeholder exercises the powers of an office. *See*, *e.g.*, *Porter*, 272 N.C. at 467; *cf. Goral v. Dart*, 2020 IL 125085, ¶ 71 ("The *de facto* officer doctrine is a common-law equitable doctrine that confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment to office is deficient."). Although we agree with Legislative Defendants that the de facto officer doctrine applies in this case, we conclude that we must define its scope in view of the interests the doctrine was designed to advance and the relevant constitutional provisions and principles the amendment process implicates.

E. The validity of Session Law 2018-119 and Session Law 2018-128.

¶ 59 The unique circumstances giving rise to this dispute require us to apply the common law de facto officer doctrine and to refine its terms. It is correct that we have never applied the de facto officer doctrine to shield actions undertaken after the legal deficiency in a putative officeholder's claim to office has been conclusively established. But replacing legislators elected due to an unconstitutional racial gerrymander is a more complex and time-intensive process than replacing a single individual who is ineligible to hold a particular office. *Cf. People ex rel. Duncan*, 294 N.C. at 717 (examining de facto officer doctrine in claim challenging actions of district court judge who was too old to hold judicial office). Because remedying even a single unconstitutionally gerrymandered district may require altering the boundaries of numerous other districts—and because courts must evaluate many different interests and equities when considering how to remedy an unconstitutional gerrymander—it is almost inevitable that legislators elected as a result of unconstitutional gerrymandering will continue serving in office for some amount of time after the illegality of the districts they were elected from has been conclusively established. Even though the de facto officer doctrine has traditionally only applied to actions undertaken before an individual's claim to an office has been proven deficient, we believe the doctrine should be applied to legislators who remain in office even after it has been determined that they were elected due to unconstitutional gerrymandering.

¶ 60 It is also correct that, generally, the de facto officer doctrine has been understood to shield all the actions undertaken by a de facto officer, without concern for the subject matter or nature of the act. *See, e.g.*, *Hinson v. Britt*, 232 N.C. 379, 381 (1950) ("The acts of a *de facto* officer are valid in law in respect to the public, whom he represents, and to third persons, with whom he deals officially."). We agree that the core insight justifying the de facto officer doctrine—the need to avoid chaos and confusion—amply justifies shielding all ordinary legislative enactments from ex post facto collateral attack. With respect to ordinary legislation, application of the de facto officer doctrine is necessary to ensure the people of North Carolina are served by a body empowered to respond to the urgent, complex challenges of the day. *See Burke*, 26 N.C. at 359–60 ("It is a settled principle that the acts of officers *de facto* are as effectual, as far as the rights of third persons or the public are concerned, as if they were officers de jure. The business of life could not go on, if it were not so."). Furthermore, the risk that ordinary legislation

will undermine fundamental constitutional principles is limited—ordinary legislation must comport with the North Carolina Constitution and is subject to judicial review. *See Bayard v. Singleton*, 1 N.C. (1 Mart.) 5, 3 (Super. Ct. 1787). Ordinary legislation can be repealed (or not) by a simple majority of the legislators elected from new districts after an unconstitutional gerrymander is remedied.

¶ 61 By contrast, the same prudential considerations do not justify applying the de facto officer doctrine to completely shield proposed constitutional amendments from collateral review when some number of legislators who voted on the amendment had already been determined to lack de jure status. As described above, the North Carolina Constitution itself draws a distinction between ordinary legislation and legislation initiating the process of altering or abolishing North Carolina's fundamental law. N.C. Const. art. XIII, § 4. The constitution imposes heightened procedural requirements for enacting constitutional amendments precisely because the people did not wish to see their fundamental law altered or abolished in response to everyday exigencies. *See Knight*, 169 N.C. at 347 ("The Constitution is intended to be permanent, and was adopted not only to meet conditions then existing, but for the future . . . . It is not an enemy to progress, but as it is the result of deliberate consideration and mature judgment, first expressed in convention, and then approved by the people, it is so framed that it cannot be changed in a day . . . ."). Preserving de facto legislators' authority to initiate the amendment process in all circumstances is not only unnecessary to achieve the doctrine's goal of preventing chaos and maintaining the orderly administration of government, but it is also contrary to the theory and structure of government enacted by the North Carolina Constitution.

¶ 62 Constitutional amendments can work dramatic changes to our system of government that cannot easily be revisited. The people's power to alter or abolish the North Carolina Constitution is limited only by the United States Constitution under the terms of the Supremacy Clause. *See* U.S. Const. art. VI, cl. 2. Unlike ordinary legislation, a new constitutional amendment can fundamentally change or repudiate then-existing constitutional provisions and principles. *See Leandro v. State*, 346 N.C. 336, 352 (1997) ("It is axiomatic that the terms or requirements of a constitution cannot be in violation of the same constitution—a constitution cannot violate itself."). If a legislator's de facto authority is unlimited, legislators who do not lawfully represent the will of the people could exercise legislative powers to evade democratic accountability and entrench themselves and their chosen policies by redefining how the people's sovereign power is allocated and exercised.

¶ 63 For example, legislators could present a proposed amendment constitutionalizing a particular policy alongside another amendment providing that, going forward, the constitution can only be amended with the unanimous consent of all legislators and approval by a ninety-nine percent majority of voters. Legislators could present a proposed amendment overruling a judicial decision conclusively establishing that the districts they were elected from violated the North Carolina Constitution and extending their own terms in office. Legislators could present a proposed amendment targeting a group of citizens who had been unconstitutionally excluded from the democratic process with particular burdens or devaluing the voice of that same group of citizens in the political process. Again, the fact that these proposed amendments must subsequently garner approval from a majority of voters does not assure that an amendment is an expression of the people's will as defined under the North Carolina Constitution as it currently exists—while the people reserved for themselves the awesome power to fundamentally change North Carolina's theory of government and basic political structure, they also chose to involve the legislature in the amendment process in order to avoid allowing such profound changes to be effectuated by a potentially fleeting majority of voters at any single moment in time.

¶ 64 For these reasons, we believe the trial court was correct to draw a distinction between ordinary legislation on the one hand and legislation initiating the process of amending the North Carolina Constitution on the other. Still, further inquiry is needed before invalidating a challenged constitutional amendment. Given the risk of confusion that may arise when a court retroactively examines a constitutional amendment that has recently been approved by a majority of North Carolina voters, a constitutional amendment enacted by a legislature composed of unconstitutionally elected members should only be invalidated when the threat to popular sovereignty and democratic self-rule is substantial. While the North Carolina Constitution demands that courts scrutinize legislation proposing constitutional amendments when the authority of legislators to do so is challenged, prudential considerations demand that courts exercise "this most important and delicate power of holding legislation invalid" only when doing so is clearly necessary. *Bickett v. State Tax Comm'n*, 177 N.C. 433, 433 (1919). A court must consider the following questions when determining whether to apply the de facto officer doctrine to uphold legislation proposing constitutional amendments enacted under these circumstances.

¶ 65 First, as a threshold matter, a court must consider whether the votes of legislators who were elected as a result of unconstitutional

gerrymandering were potentially decisive. This inquiry is necessary because it is individual *legislators* whose claim to office is constitutionally deficient; the *legislature* as a whole has not lost its authority to exercise the people's sovereign power. When a sufficient number of legislators elected in a manner consistent with the constitution approve a bill, there is little reason to doubt that the bill reflects the will of the people as expressed by individuals specifically and properly authorized to exercise the powers delegated to the legislature. Although we recognize that the overall composition of the legislature influences the actions of the legislature in ways other than a raw vote count—for example, the presence of any single legislator, lawfully elected or not, might shape the body's deliberative process and the terms of a debate—when there is no meaningful chance that a lawfully constituted body "would produce a different outcome, [courts should] apply the *de facto* officer doctrine and uphold the validity of the" challenged enactment. *Vroman v. City of Soldotna*, 111 P.3d 343, 349 (Alaska 2005).

¶ 66 In this case, there is no doubt that the votes of legislators elected as a result of unconstitutional gerrymandering—that is, those elected directly from unconstitutionally gerrymandered districts and those elected in districts that needed to be redrawn in order to implement a constitutionally compliant districting plan—could have been decisive in passing Session Laws 2018-119 and 2018-128. Approving a bill to present a constitutional amendment to the voters requires a supermajority of three-fifths, and Legislative Defendants do not challenge the trial court's finding that "[c]uring th[e] widespread and sweeping racial gerrymander required that over two-thirds of the North Carolina House and Senate districts be redrawn." It is indisputable that plaintiff will satisfy this threshold inquiry. Nonetheless, under different circumstances—for example, if the bills proposing the amendments had passed by a margin larger than the number of legislators who were not de jure officers—no further inquiry would be required, and the prudential considerations justifying the de facto officer doctrine would require leaving the legislature's actions undisturbed.

¶ 67 However, when as in this case the unconstitutionally elected legislators were sufficient in number to be decisive in the vote on a bill proposing a constitutional amendment, three further factors must be examined to determine if a challenged constitutional amendment so gravely threatens principles of popular sovereignty and democratic self-rule as to require retroactive invalidation. Courts must consider whether there is a substantial risk that a challenged constitutional amendment will immunize legislators from democratic accountability going forward or

perpetuate the ongoing exclusion of a category of voters from the political process. When either of these situations occur, a legislature that did not fully represent the people of North Carolina has sought to entrench itself by redefining who "the people" are and how they govern themselves–the legislature has attempted to legitimate and perpetuate an otherwise legally deficient claim to exercise the people's political power and, in the process, sought to preempt the people's capacity to reassert their will consistent with the terms of their fundamental law. Under these circumstances, judicial intervention is necessary in light of "the importance of giving effect to already stated expressions of the popular will." *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 218 (1996).

¶ 68 In general, if a constitutional amendment does not immunize legislators from democratic accountability or perpetuate the ongoing exclusion of a category of voters, the risk of chaos and confusion arising from retroactively examining the validity of an act proposing a constitutional amendment outweighs the threat to constitutional principles that arises from allowing the amendments to remain in place.[7] Amendments that constitutionalize a particular policy choice, but do not alter the way the people's sovereign power is allocated, channeled, and exercised by the people's representatives, do not typically threaten principles of popular sovereignty and democratic self-rule. Although these policy choices will be more difficult to revoke than policy choices enacted through ordinary legislation, the people can choose to revisit these choices by engaging in the political processes they have already structured and adopted.

¶ 69 There is, however, one exception to this general rule: policy choices that intentionally discriminate against a particular category of citizens who were also discriminated against in the drawing of the districts from which the legislators who initiated the amendment process were elected. In this circumstance, principles of popular sovereignty and democratic self-rule are threatened because it is reasonable to presume that the initial diminishment of the political power of a group of citizens directly enabled the passage of an amendment that lawmakers responsive to that group would likely have opposed. Under our system of government, groups of citizens who do not constitute a majority of voters are, of course, bound by laws they personally oppose, but the legitimacy of

7. The likelihood that invalidating a challenged constitutional amendment will engender significant confusion varies depending on the circumstance. For example, the magnitude of the potential confusion will vary depending on whether the constitutional amendment has been implemented through enabling legislation that has already taken effect, whether the public has relied upon changes in the law introduced by the amendment, and whether there was a significant lapse in time between passage of the constitutional amendment and the successful challenge to the legislators' authority.

those laws is predicated on "the operation of those political processes ordinarily to be relied upon to protect minorities." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938). Requiring persons to be bound by a constitutional amendment which specifically targets a group to which they belong for disfavored treatment, and which was enacted by a legislature formed through a political process designed to deprive them of an equal voice, is repugnant to the principles of popular sovereignty and democratic self-rule. It is a form of tyranny that would engender the very "chaos" the de facto officer doctrine was designed to avoid.

¶ 70 Thus, when the votes of legislators elected due to an unconstitutional gerrymander could have been decisive in enacting a bill proposing a constitutional amendment, courts must assess whether there is a substantial risk that the challenged amendment will (1) immunize legislators from democratic accountability; (2) perpetuate the ongoing exclusion of a category of voters from the political process; or (3) intentionally discriminate against a particular category of citizens who were also discriminated against in the political process leading to the legislators' election. If any of these factors are present, then the balance of equities requires the court to invalidate the challenged amendment. If these factors are not present—or if the legislators elected due to an unconstitutional gerrymander were not so numerous as to be potentially decisive in the vote to put a proposed amendment to the people—the challenged amendment must be left in place.

¶ 71 In this case, the trial court did enter some findings of fact that are relevant to these factors. Specifically, in addressing NC NAACP's standing to challenge the two amendments, the trial court found as follows:

> 31. Members of the NC NAACP, who include African-American and Latino voters in North Carolina, and the NAACP itself are directly harmed by the proposed Voter ID constitutional amendment. Members will be effectively denied the right to vote or otherwise deprived of meaningful access to the political process as a result of the proposed Voter ID requirement. The proposed Voter ID amendment will also impose costs and substantial and undue burdens on the right to vote for those and other members.
>
> . . . .
>
> 33. The income tax cap constitutional amendment harms the NC NAACP, its members, and the

> communities it serves, and its ability to advocate for its priority issues. Because the amendment places a flat, artificial limit on income taxes, it prohibits the state from establishing graduated tax rates on higher-income taxpayers and, over time, will act as a tax cut only for the wealthy. This tends to favor white households and disadvantage people of color, reinforcing the accumulation of wealth for white taxpayers and undermining the financing of public structures that have the potential to benefit non-wealthy people, including people of color and the poor. For example, historically in North Carolina, decreased revenue produced by income tax cuts in the state has resulted in significant spending cuts that disproportionately hurt public schools, eliminated or significantly reduced funding for communities of color, and otherwise undermined economic opportunity for the non-wealthy.

However, the trial court did not engage these factual questions in the context of a proper understanding of the law governing the novel legal question presented in this case, and the parties did not have the opportunity to present all evidence that may be relevant to resolution of this inquiry. Therefore, we reverse the decision of the Court of Appeals and remand to the trial court solely for an evidentiary hearing and the entry of additional findings of fact and conclusions of law addressing whether, in light of the factors identified in this opinion, the de facto officer doctrine should be applied to shield the acts proposing the Voter ID and / or Tax Cap Amendments from retroactive invalidation. On remand, the parties otherwise remain bound by the trial court's unchallenged findings of fact as contained in its prior order.

¶ 72 The dissent disagrees with our resolution of the novel legal issues presented in this case. Registering disagreement is, of course, the prerogative of dissenting Justices and the very purpose of a dissenting opinion. But the language the dissent chooses to register its disagreement goes well beyond language typically used to express the kind of good-faith disputes about the thorny legal questions that inevitably arise when this Court is called upon to answer novel legal issues. In a caustic and unprecedented manner, the dissent suggests that our resolution of this case can only have resulted from pure partisan bias and intellectual dishonesty. This accusation is beneath the dignity of this Court. The suggestion that no neutral, honest jurist could possibly resolve this case

differently than the way the dissent would have resolved it impugns the integrity of the federal judges who initially considered the issue raised in this appeal and determined it to implicate weighty and unsettled questions of state law, the trial court judge who ruled in plaintiff's favor, the dissenting Court of Appeals judge who disagreed with his colleagues' decision to reverse the Superior Court's order, and the many dedicated advocates who advanced nuanced and deeply-researched arguments in the course of these proceedings. Within our legal system, lawyers, judges, and Justices who endeavor to answer difficult legal questions arising from novel circumstances can reach different conclusions based on different interpretations of the relevant law and different understandings of the proper role of the judiciary. If the answers to these questions were easy, there would be no need for lawyers, judges, and Justices. To the extent the dissent advances a competing interpretation of the constitutional provisions and principles at issue in this case, we rest on the legal reasoning expressed in this opinion that led to the ultimate conclusion we arrived at; to the extent the dissent asserts that our ultimate conclusion is driven by anything other than our best efforts to interpret and apply the relevant sources of legal authority, we reject the dissent's specious and unfounded accusation in the most forceful terms.

IV. Conclusion

¶ 73 "We should ever be mindful that the Constitution to a great extent is the rudder to keep the ship of state from off the rocks and reefs." *Hinton v. Lacy*, 193 N.C. 496 (1927). Although the questions raised in this appeal are novel, the answers can be found in the principles that are the foundation of North Carolina's system of government as expressed in multiple provisions of the North Carolina Constitution, the people's fundamental law. The people have reserved to themselves the power to amend or replace these principles and provisions. While they have assigned the legislature a role in the amendment process, the potentially transformative consequences of amendments that could change basic tenets of our constitutional system of government warrant heightened scrutiny of amendments enacted through a process that required the participation of legislators whose claim to represent the people's will has been disputed. Consistent with these constitutional principles and provisions, we conclude that acts proposing constitutional amendments passed by a legislature composed of a substantial number of legislators elected from unconstitutionally racially gerrymandered legislative districts, after the unlawfulness of those districts has been conclusively established, are not automatically shielded by application of the de facto officer doctrine. We reverse the decision of the Court of Appeals and instruct that

court to remand this matter to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Justice BERGER dissenting.

¶ 74 At issue today is not what our constitution says. The people of North Carolina settled that question when they amended the constitution to include the Voter ID and Tax Cap Amendments. These amendments were placed on the November 2018 ballot by the constitutionally required three-fifths majority in the legislature. On November 6, 2018, the citizens of North Carolina voted overwhelmingly to approve the North Carolina Voter ID Amendment and the North Carolina Income Tax Cap Amendment. More than 2,000,000 people, or 55.49% of voters, voted in favor of Voter ID, while the Tax Cap Amendment was approved by more than 57% of North Carolina's voters.[1]

¶ 75 Instead, the majority engages in an inquiry that is judicially forbidden — what *should* our constitution say? This question is designated solely to the people and the legislature. The majority concedes that constitutional procedures were followed, yet they invalidate more than 4.1 million votes and disenfranchise more than 55% of North Carolina's electorate. Unwilling to accept the results of a procedurally sound election that enshrined the Voter ID and Tax Cap Amendments in our state constitution, the majority nullifies the will of the people and precludes governance by the majority. In so doing, my colleagues extend the reach of their judicial power beyond mere judicial review of actions under our constitution; instead, they have determined that certain provisions of the constitution itself are objectionable.[2]

¶ 76 The majority concludes that our constitution should not include Voter ID or a lower tax ceiling, claiming that the legislature lacked authority to perform a constitutionally designated duty and that the people

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1. While only two amendments are the focus of plaintiffs' action, a total of six amendments were proposed to the people of North Carolina in November 2018. The additional amendment proposals were: Session Law 2018-96 (Protect the Right to Hunt, Fish, and Harvest Wildlife Amendment), Session Law 2018-110 (Strengthening Victims' Rights Amendment), Session Law 2018-117 (Legislative Appointments to Elections Board and Commissions Amendment), and Session Law 2018-118 (Judicial Selection for Midterm Vacancies Amendment). Session Laws 117 and 118 were the only two amendments not approved by voters.

2. While the case is technically being remanded to the trial court, the desired outcome is clear from the tone and required test announced today.

of this State had no legal right to amend their constitution. Certainly, the majority cannot rightfully declare that there are, or have been, periods of time in which the people of North Carolina have lacked authority to amend their constitution. Such a reading would be contrary to N.C. Const. art. I, §§ 2, 3, and 36.

¶ 77 Voiding constitutional authority is far more egregious than picking and choosing which category of laws to invalidate. *See Dawson v. Bomar*, 322 F.2d 445, 448 (6th Cir. 1963) (declining to separate and void only certain legislation enacted by malapportioned legislature, as doing so would "circumvent legal principles in order to substitute the Court's opinion as to the wisdom, morality, or appropriateness of such laws."). Striking at the very heart of our form of government, the majority unilaterally reassigns constitutional duties and declares that the will of the judges is superior to the will of the people of North Carolina. At what point does the seizure of popular sovereignty by this Court violate the federal constitution?

¶ 78 One could argue that this Court has circumvented the will of the people and subverted our republican form of government guaranteed in Article IV, Section 4 of the United States Constitution through its "systematic frustration of the will of a majority of the electorate of the State." *Lucas v. Forty-Fourth Gen. Assembly of State of Colo.*, 377 U.S. 713, 753–54, 84 S. Ct. 1459, 1483, 12 L. Ed. 2d 632 (1964) (Stewart, J., dissenting). In Federalist No. 39, James Madison stated that a republic is "a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior." The Federalist No. 39 at 194 (James Madison) (Gideon ed. 2001).[3]

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3. Madison, in discussing Article IV Section 4 in Federalist 43, notes that

> [i]n a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchial innovations. . . .
>
> If the interposition of the general government should not be needed, the provision for such an event will be a harmless superfluity only in the Constitution. . . . As long, therefore, as the existing republican forms are continued by the States, they are guaranteed by the federal Constitution. Whenever the States may choose to substitute other republican forms, they have a right to do so, and to claim the federal guaranty for the latter. The only restriction imposed on them is, that they shall not exchange republican for antirepublican Constitutions; a

Anti-Federalist author Centinel stated that, in a republican government, "the people are the sovereign, and their sense or opinion is the criterion of every public measure. When this ceases to be the case, the nature of the government is changed . . . ." Centinel Letter I, The Essential Antifederalist, p. 100.

¶ 79 Moreover, one could also argue that this Court has violated the Fourteenth Amendment. The assumption of popular sovereignty to the exclusion of the people implicates the most fundamental rights. "To the extent that a citizen's right to vote is debased, he is that much less a citizen." *Reynolds v. Sims*, 377 U.S. 533, 567, 84 S. Ct. 1362, 1384, 12 L. Ed. 2d 506 (1964). The United States Supreme Court has dealt extensively with various redistricting and apportionment actions taken by state legislatures. Moreover, actions by members of the executive branch are routinely the subject of Fourteenth Amendment inquiries. It cannot then be inconceivable that the action by members of this Court to unilaterally invalidate the votes of millions of citizens of this State, thereby wholly prohibiting the "free exercise and enjoyment of their right and privilege," violates the Constitution. *United States v. Mosley*, 238 U.S. 383, 385, 35 S. Ct. 904, 905, 59 L. Ed. 1355 (1915).

¶ 80 The question before this Court is a simple one: under the North Carolina Constitution, what is the authority of the legislature to perform constitutionally prescribed acts? The answer seems obvious — our legislature has the authority to act consistent with the terms of our state's constitution. Importantly, the Constitution of North Carolina is not a grant of power, but rather, a limitation; power not surrendered remains with the people and is exercised through the General Assembly, which functions as the arm of the electorate. *Pope v. Easley*, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001) (per curiam); *Sugar Creek Charter Sch., Inc. v. State*, 214 N.C. App. 1, 18, 712 S.E.2d 730, 741 (2011), *appeal dismissed and disc. rev. denied*, 366 N.C. 227, 726 S.E.2d 849 (2012). "[U]nder 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." *Harper v. Hall*, 380 N.C. 317, 370–71, 2022-NCSC-17, ¶ 130, 868 S.E.2d 499, 538–39, *cert. granted sub nom. Moore v. Harper*, 2022 WL 2347621 (U.S. June 30, 2022) (No. 21-1271); *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 612, 2021-NCSC-6, ¶ 92,

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> restriction which, it is presumed, will hardly be considered as a grievance.

The Federalist No. 43 at 225 (James Madison) (Gideon ed. 2001).

853 S.E.2d 698, 736 (2021) (Newby, C.J., concurring) ("[T]he sovereign power resides with the people and is exercised by their representatives in the General Assembly." (alteration in original) (quoting *State ex rel. Ewart v. Jones*, 116 N.C. 570, 570, 21 S.E. 787, 787 (1895)). It follows then that courts are not to look to the constitution of our state to determine whether the people, via the legislature, are authorized to act, but only to see if such action is prohibited.

¶ 81 More than eighty years ago in *Leonard v. Maxwell*, 216 N.C. 89, 3 S.E.2d 316 (1939), this Court rejected as nonjusticiable the same argument plaintiffs ask us to address today. Specifically, this Court declined to interject itself in such a dispute, and we noted that the General Assembly's knowing failure to abide by constitutional directives in apportionment did not prevent the legislature from performing constitutional functions designated exclusively to that branch. *Id.* at 98–99, 3 S.E.2d at 324.

¶ 82 The majority, however, eschews clear precedent and abandons constitutional order to remove the Voter ID and Tax Cap Amendments from our constitution, instead imposing its policy preferences on the people of North Carolina. As the Court of Appeals correctly stated, "overwhelming, if not universal, authority" runs counter to the Court's decision today. *N.C. State Conf. of NAACP v. Moore*, 273 N.C. App. 452, 461, 849 S.E.2d 87, 94 (2020).

¶ 83 My colleagues confess that they must "refine" precedent to achieve their result. What the majority is actually saying is that inclusion of the Voter ID and Tax Cap Amendments in our constitution is not acceptable, so they disguise radical arguments as judicial reasoning to justify their political outcome.

¶ 84 As Justice Benjamin Curtis noted in his famous dissent:

> Political reasons have not the requisite certainty to afford rules of juridical interpretation. They are different in different men. They are different in the same men at different times. And when a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean. When such a

> method of interpretation of the Constitution obtains, in place of a republican Government, with limited and defined powers, we have a Government which is merely an exponent of the . . . individual political opinions of the members of this court.

Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 620–21, 15 L. Ed. 691 (1857), *superseded by Constitutional Amendment*, U.S. Const. amends. XIII, XIV. (1868) (Curtis, J., dissenting). Such is the case here.

¶ 85 "[T]he people . . . are the fountain of all power, to whom alone it of right belongs to make or unmake constitutions or forms of government at their pleasure." Brutus, Essay I, *The Essential Antifederalist* 106. Our state constitution recognizes this fundamental principle that all political power ultimately resides in the people. N.C. Const. art. I, § 2. The North Carolina Constitution guarantees that "[t]he people of this State have the inherent, sole, and exclusive right of regulating the internal government and police thereof, and of altering or abolishing their Constitution and form of government whenever it may be necessary to their safety and happiness[.]" *Id.* art. I, § 3; *see also Dickson v. Rucho*, 366 N.C. 332, 344–45, 737 S.E.2d 362, 371 (2013). This provision reflects the right of the people to organize their government for the protection of fundamental rights; relevant here, the right to vote in fair elections and the right to enjoy the fruits of one's own labor free from oppressive taxation. These rights are manifestations of the "principles of popular sovereignty and democratic self-rule." Seizure of this power from the people runs counter to the very ideals upon which our government is predicated.

¶ 86 It is ironic that the majority finds the ultimate safeguard for the will of the people to be four individuals on this Court, not the more than 4.1 million votes cast for the Voter ID and Tax Cap Amendments. The gatekeeping function for inclusion of any such proposals into our constitution rests solely with the people and the political process, not this Court. Because "the people of North Carolina never intended to give this power to the judges," *State ex rel. Abbott v. Beddingfield*, 125 N.C. 256, 269, 34 S.E. 412, 422–23 (1899) (Clark, J., dissenting), I respectfully dissent.

I. Justiciability

¶ 87 "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803); *see also Bayard v. Singleton*, 1 N.C. (1 Mart.) 5 (Super. Ct. L. & Eq. 1787). Courts are limited to answering questions that are "historically viewed as capable of resolution through the judicial

process." *Flast v. Cohen*, 392 U.S. 83, 95, 88 S. Ct. 1942, 1950, 20 L. Ed. 2d. 947 (1968). "Sometimes, however, 'the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights.' " *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494, 204 L. Ed. 2d 931 (2019) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 277, 124 S. Ct. 1769, 1776, 158 L. Ed. 2d 546 (2004) (plurality opinion)).

¶ 88 Certain claims, like the one at issue today, cannot be judicially entertained as they present a nonjusticiable political question. *See Harper v. Hall*, 380 N.C. at 413, 2022-NCSC-17, ¶ 237, 868 S.E.2d at 566 (Newby, C.J., dissenting) ("[C]ourts must refuse to review issues that are better suited for the political branches; these issues are nonjusticiable."); *accord Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691, 710, 7 L. Ed. 2d 663 (1962) (emphasizing that courts must not involve themselves in "policy determination[s] of a kind clearly for nonjudicial discretion"); s*ee also Bacon v. Lee*, 353 N.C. 696, 716–17, 549 S.E.2d 840, 854 (2001); *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 639, 599 S.E.2d 365, 391 (2004). Claims introducing a political question are said to be "outside the courts' competence and therefore beyond the courts' jurisdiction." *Rucho*, 139 S. Ct. at 2494, 204 L. Ed. 2d at 931 (2019).

¶ 89 At its root, a question is political in nature if it invokes an issue that (1) showcases "a textually demonstrable constitutional commitment of the issue to a coordinate political department," *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195, 132 S. Ct. 1421, 1427, 182 L. Ed. 2d 423 (2012) (quoting *Nixon v. United States*, 506 U.S. 224, 228, 113 S. Ct. 732, 735, 122 L. Ed. 2d 1 (1993)), or (2) results in "policy choices and value determinations." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230, 106 S. Ct. 2860, 2866, 92 L. Ed. 2d 166 (1986). The foundational purpose of this doctrine is to prevent the judiciary from entering political disputes and undertaking questions of policy that are constitutionally committed to the other branches and better resolved by the people and their representatives.[4]

¶ 90 Our constitution instructs that "[t]he 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; John V. Orth & Paul

4. Some legal observers are critical of the purported politicization of the judiciary across the country. One could argue that the failure to follow the political question doctrine is a chief reason judges are perceived as being increasingly political. Quite simply, there are some pools we should not swim in. Unfortunately, judicial restraint yields to the excitement with which some judges approach the opportunity to make the law, or here, to remake our constitution.

M. Newby, The North Carolina State Constitution 50 (G. Alan. Tarr ed., 2d ed. 2013) [hereinafter, Orth, N.C. State Const.]. ("In the exercise of their right to regulate the state's internal government, North Carolinians separated political power into its constituent parts: legislative, executive, and judicial."). Indeed, "the separation of powers doctrine is well established under North Carolina law." *Cooper v. Berger* (*Cooper II*), 376 N.C. 22, 44, 852 S.E.2d 46, 63 (2020) (quoting *Bacon*, 353 N.C. at 715, 549 S.E.2d at 853). The independent exercise of each department is "[t]he very genius of our tripartite government." *In re Dist. Ct. Admin. Ord.*, 365 N.C. 417, 417, 721 S.E.2d 225, 225 (2012) (per curiam order) (quoting *In re Alamance Cnty. Ct. Facilities*, 329 N.C. 84, 99–100, 405 S.E.2d 125, 133 (1991)). Built into this genius is a necessary prohibition against one branch of government preventing another from executing its primary duties. *Cooper v. Berger* (*Cooper I*), 370 N.C. 392, 410, 809 S.E.2d 98, 108 (2018); *see also Dickson*, 366 N.C. at 345, 737 S.E.2d at 371 ("[T]he fundamental law" ensures the inherent right of the General Assembly to fulfill its responsibilities "without interference by any other department of the government." (cleaned up)); *Person v. Doughton*, 186 N.C. 723, 725, 120 S.E. 481, 482–23 (1923) ("The courts have no direct supervisory power over the Legislature. The two are separate and distinct, though co-ordinate branches of the same government."). Failure to adhere to such principles results in a violation of "a cornerstone of our state and federal governments." *State ex rel. McCrory v. Berger*, 368 N.C. 633, 649, 781 S.E.2d 248, 258 (2016) (citing *State ex rel. Wallace v. Bone*, 304 N.C. 591, 601, 286 S.E.2d 79, 84 (1982)).

¶ 91 The doctrine operates to constrain judicial action, and our nation's highest court has "identif[ied] [justiciability] as essentially a function of [ ] separation of powers." *Baker*, 369 U.S. at 217, 82 S. Ct. at 710, 7 L. Ed. 2d 663. This Court has recognized that "the Constitution of North Carolina includes an express separation of powers provision." *Bacon*, 353 N.C. at 716, 549 S.E.2d at 853–54 (emphasis omitted). "Judicial review of a political question itself violates separation of powers because the Court asserts a power it does not have to prevent the exercise of a specific power held by a political branch." *Cooper I*, 370 N.C. at 434–35, 809 S.E.2d at 124 (Newby, J., dissenting.).

¶ 92 By the plain text of our constitution, the legislature alone is granted the power to propose amendments to the constitution. N.C. Const. art. XIII, § 4; *see id.*, art I, § 6. Our constitution provides that:

> [a] proposal of a new or revised Constitution or an amendment or amendments to this Constitution may be initiated by the General Assembly, but only

> if three-fifths of all the members of each house shall adopt an act submitting the proposal to the qualified voters of the State for their ratification or rejection. The proposal shall be submitted at the time and in the manner prescribed by the General Assembly.

Id., art. XIII, § 4. In addition, legislative initiation must follow the following procedure:

> (2) Every bill proposing a new or revised Constitution or an amendment or amendments to this Constitution or calling a convention of the people of this State, and containing no other matter, shall be submitted to the qualified voters of this State after it shall have been read three times in each house and signed by the presiding officers of both houses.

Id., art. II, § 22(2). If the required majority of each house of the legislature favorably vote on a constitutional proposal or proposals, "it or they shall become effective January first next after ratification by the voters unless a different effective date is prescribed in the act submitting the proposal or proposals to the qualified voters." *Id.*, art. XIII, § 4.[5]

¶ 93 Despite stating multiple times in its opinion that the legislature initiates the process of amending the state constitution, the majority inexplicably concludes that "[l]egislative [d]efendants have failed to demonstrate that" Article XIII presents a textually demonstrable constitutional commitment of the issue to the sole discretion of a coordinate branch of government. This simply strains credibility. If initiation of the amendment process is not constitutionally committed to the General Assembly, the majority declines to answer the glaring question—who possesses that authority?

¶ 94 As we have found in other instances involving a "textually demonstrable constitutional commitment of the issue to a coordinate political department," "judicial review of the exercise of [legislative amendment] power would unreasonably disrupt a core power of the [legislature]." *Bacon*, 353 N.C. at 717, 549 S.E.2d at 854 (quoting *Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691, 710, 7 L. Ed. 2d 663, 686 (1962)). Only express constitutional provisions act to limit the powers of another branch of government, and absent such provisions in the constitution itself, this Court presumes valid legislative power. *State ex rel. Martin v. Preston*,

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5. In addition to legislative initiation, constitutional amendments may be proposed by a "Convention of the People." N.C. Const. art. XIII, § 3.

325 N.C. 438, 448–49, 385 S.E.2d 473, 478 (1989); *e.g.*, *Hart v. State*, 368 N.C. 122, 126, 774 S.E.2d 281, 284 (2015). The majority's signal that it must "examine the constitutional provisions to determine if those provisions limit the authority" of the 2018 General Assembly is a question not proper for consideration as the amendment process is wholly within the province of our legislature. *See* N.C. Const. art. XIII, § 4.

¶ 95 The majority also seems to suggest that the legislature was *unqualified* to act. Indeed, the majority identifies the sole question before it as "whether the legislators who passed the bills submitting these two amendments to the voters could validly exercise the[ir] authority."

¶ 96 The legislature alone is textually granted the power to determine the qualifications of its members. N.C. Const. art. II, § 20. The judiciary does not and has never had the ability to judge a legislator's qualifications, until now. *See State ex rel. Alexander v. Pharr*, 179 N.C. 699, 699, 103 S.E. 8, 8 (1920) ("This Court is without jurisdiction, because the action is to try the title to a seat in the General Assembly of North Carolina, and the Constitution . . . provides, 'Each house (of the General Assembly) shall be judge of the qualifications and elections of its own members,' thereby withdrawing [such] inquiry from the consideration of the courts." (quoting N.C. Const. of 1868, art. II, § 22)); *see also Nixon v. U.S.*, 506 U.S. 224 (1993) (As the U.S. Constitution expressly grants the Senate the sole power to try impeachments, the Court could not review whether a Senate impeachment rule violated the U.S. Constitution. Thus, the question was nonjusticiable.).

¶ 97 Additionally, the instant case raises a political question that forces this court to make value determinations and policy choices. "The General Assembly is the 'policy-making agency' because it is a far more appropriate forum than the courts for implementing policy-based changes to our laws." *Cooper I*, 370 N.C. at 429–30, 809 S.E.2d at 121 (Newby, J., dissenting) (quoting *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169, 594 S.E.2d 1, 8 (2004)); *see Lexington Insulation Co. v. Davidson County*, 243 N.C. 252, 254, 90 S.E.2d 496, 497 (1955); *see also Wachovia Bank & Tr. Co. v. Green*, 236 N.C. 654, 659, 73 S.E.2d 879, 883 (1953) ("The public policy of the state is a matter for the legislative branch of government and not for the courts."). To ensure this, the legislature is guaranteed "the inherent right to discharge its functions and to regulate its internal concerns in accordance with law without interference by any other department of the government." *Dickson*, 366 N.C. at 345, 737 S.E.2d at 371 (quoting *Person v. Bd. of State Tax Comm'rs*, 184 N.C. 499, 503, 115 S.E. 336, 339 (1922)). Further, "respect for separation of powers requires a court to refrain from . . . making a policy determination of a kind clearly suited

for nonjudicial discretion." *Harper*, 380 N.C. at 413–414, 2022-NCSC-17, ¶ 237, 868 S.E.2d (Newby, C.J., dissenting).

¶ 98 This Court's decision in *Leonard v. Maxwell* illustrates the judiciary's reluctance to tackle questions related to the authority of the legislature to exercise constitutionally committed powers. There, presenting a nearly identical argument to the one in the instant case, the plaintiff challenged legislation enacted by an illegally constituted General Assembly. Specifically, the plaintiff, a merchant, challenged an audit completed under the Emergency Revenue Act of 1937 (the Act), seeking to have the Act declared void by alleging, *inter alia*, that the 1937 General Assembly that passed the Act was unconstitutionally constituted based on the plain text of the North Carolina Constitution.

¶ 99 At the time, the last census had occurred in 1930, so the General Assembly was required to reapportion legislative districts during its first session following the 1930 census. *See Leonard*, 216 N.C. at 98, 3 S.E.2d at 324. Because the legislature failed to follow express constitutional directives, the plaintiff argued that the 1937 General Assembly was unconstitutionally constituted, and the Act, therefore, was not validly enacted. *See id.* at 98, 3 S.E.2d at 324. This Court summarized this argument as follows:

> The third ground upon which the plaintiff assails the validity of the act is, that the General Assembly of 1937 was not properly constituted because no reapportionment was made at the first session after the last census as required by Art. II, secs. 4, 5, and 6 of the Constitution, and that *none of the legislation attempted at this session can be regarded as possessing the sanctity of law*.

Id., at 98, 3 S.E.2d at 324 (emphasis added).

¶ 100 In response, despite the fact that the General Assembly knowingly ignored a clear constitutional directive, the defendant in *Leonard* cited several cases from other states repudiating the plaintiff's argument and holding that even when the legislature is elected under decidedly malapportioned maps, it continues to possess the full extent of its legislative powers. As an example, the defendant pointed to *People v. Clardy*, in which a criminal defendant unsuccessfully argued that the statute under which he was indicted was "unconstitutional and void for the reason that the Constitution required a reapportionment of the General Assembly after each Federal census, which had not been done" and thus the legislature "had no legal existence." *See* Defendant Appellee's Brief

at 4, *Leonard*, 216 N.C. 89 (No. 744) (citing *People v. Clardy*, 334 Ill. 160, 161–62, 165 N.E. 638, 638–39 (1929)). The Illinois Supreme Court rejected this argument as meritless because their state constitution could not be read to punish citizens by forfeiture of popular sovereignty for failure of the legislature to reapportion. *Clardy*, 334 Ill. at 167, 165 N.E. at 640–41. In addition, the court determined that the failure of prior legislatures to properly reapportion does not prevent subsequent members of the legislature from holding office. *Id.* at 167, 165 N.E. at 640. Ultimately, the Illinois Supreme Court held that it was "not authorized by the Constitution of Illinois to declare that the General Assembly that passed the [ ] Act [ ] was not a de jure legislative body and the members thereof de jure members and officers of that General Assembly." *Id.* at 167, 165 N.E. at 640–41.

¶ 101 Plaintiffs in the current case make the same arguments presented in *Leonard*. The *Leonard* Court posited that—when taken to its logical conclusion—the plaintiff's argument meant that

> [if] the first session of the General Assembly after the 1930 census was the session directed by the Constitution to make the reapportionment, and [the General Assembly] failed to do so, it is suggested that no other session is competent to make the reapportionment *or to enact any valid legislation* and that henceforth no *de jure* or legally constituted General Assembly can again be convened under the present Constitution.

Leonard, 216 N.C. at 98–99, 3 S.E.2d at 324 (emphasis added). In other words, the plaintiff's argument required the conclusion that the 1937 General Assembly lacked not only the authority to pass legislation, but lacked all power constitutionally committed to the legislative branch.

¶ 102 This Court concluded that such was "[q]uite a devastating argument, if sound." *Id.* at 99, 3 S.E.2d at 324. Accordingly, we determined that the plaintiff's questioning of legislative authority posed a nonjusticiable political question. *Id.* at 99, 3 S.E.2d at 324. ("The question is a political one, and there is nothing the courts can do about it . . . . They do not cruise in nonjusticiable waters." (cleaned up)).

¶ 103 In reaching this conclusion, this Court cited another Illinois case from the defendant's brief, *People ex rel. Fergus v. Blackwell*, in which Illinois voters instituted a *quo warranto* action against the members of the Fifty-Sixth Illinois General Assembly. 342 Ill. 223, 223–24, 173 N.E. 750, 751 (1930). In *Fergus* the plaintiffs asserted that:

> every General Assembly since 1911, including the [current] General Assembly, had failed to reapportion the state into districts on the basis of population, as required by section 6 of article 4 of the Constitution of 1870, and that every General Assembly since 1911, including the [current one] . . . was illegal, unconstitutional, and void, and that the defendants are therefore not eligible and qualified to act as members of the General Assembly to represent the respective districts for which they were elected.

Id. at 224, 173 N.E. at 751.

¶ 104 The Illinois Supreme Court declined to address the scope of the Illinois General Assembly's authority:

> We have held that this court has no power, under the Constitution, to compel the Legislature to reapportion the state, as required by the Constitution. What this court cannot do directly in this respect it cannot do indirectly. The sole basis for the present proceeding is the claim that, because of the failure of the Legislature to make the necessary reapportionment, no General Assembly since 1911 has had any *de jure* existence or validity. . . . On appellants' theory, neither the Legislature as now composed nor any succeeding Legislature elected prior to a new reapportionment of the state would be a de jure body. It would therefore be impossible for the present or any succeeding Legislature to reapportion the state, since, on the theory of this proceeding, there could be no de jure Legislature until after a reapportionment has been made. But, since re-apportionment can be made only by the Legislature, *it is apparent that on appellants' theory, which is the foundation of this proceeding, reapportionment can never be made.* Moreover, on the same theory, all laws enacted since 1911 would be invalid and no new laws could be enacted. . . . The matters complained of are solely within the province of the General Assembly, and the courts have no power to coerce or direct its action.

Id. at 225–26, 173 N.E. at 751–52 (emphasis added) (citations omitted).

¶ 105 Our Court in *Leonard* looked to such support in holding that the question of whether the Act was void, based on a lack of legitimate legislative authority, was nonjusticiable. *See Leonard*, 216 N.C. at 98–99, 3 S.E.2d at 324. The Court in *Leonard* accepted that the legislature failed to engage in reapportionment following the 1930 census, yet wholly rejected the argument [as non-justiciable] that the legislature lacked authority to engage in constitutionally committed functions.[6] The Court reasoned that precedent was against such a determination. *Id.* at 98–99, 3 S.E.2d at 324.

¶ 106 This Court in *Leonard* did not reach its conclusion because the issue of *apportionment* was a political question, as the majority here claims. To be clear, the plaintiff in *Leonard* was not asking the Court to order reapportionment of the 1930 legislature. Rather, the plaintiff contended that the invalidity of the malapportioned legislature limited the power of that body. The Court in *Leonard* recognized, however, that it was not constitutionally authorized to review such an issue. Here, according to the majority's revisionist view, however, *Leonard* presented the limited question of whether "the General Assembly's failure to reapportion itself during the first regular session after the decennial census meant that there could never be a legitimately constituted General Assembly unless and until the North Carolina Constitution was amended to provide for another manner of reapportionment." This was *not* the question that was before the *Leonard* Court—it was simply part of the legal reasoning used by this Court in determining that the issue in *Leonard* was nonjusticiable.

¶ 107 Taken to its logical end, the plaintiff's argument in *Leonard*, if accepted by this Court, would have resulted in a powerless legislature. Additionally, all legislation passed by the subsequent sitting General Assemblies of 1932, 1934, 1936, 1938, and 1940 would have lacked the "sanctity of law." *Id.* at 98, 3 S.E.2d. at 324. Over the span of these years affected by malapportionment, the General Assembly proposed nine constitutional amendments to the people of North Carolina, ranging in subject matter from, ironically, increasing the maximum income tax rate to establishing the Department of Education, and even enlarging

6. Contrary to the majority's dismissive analysis concerning de jure authority to act discussed further below, *Leonard* suggests that the malapportioned General Assembly had de jure authority.

the number of justices on this Court.[7] North Carolina voters approved all nine amendments. *See* N.C. Sec'y State, *North Carolina Government 1585-1979: A Narrative and Statistical Analysis*, 920–27 (John L. Cheney, Jr. ed., 2d ed. 1981). Under the majority's reasoning in the current case, these amendments are potentially voidable.

¶ 108 Despite acknowledging that *Leonard* similarly involved validity of an action by a malapportioned legislature, the majority further disregards *Leonard*, claiming its applicability is limited because *Baker v. Carr* is more instructive and that the issue in *Leonard* was not completely "analogous to the claim presented in this case." Curiously, however, and despite noting that "the claim at issue in this case is not a claim that the General Assembly is unconstitutionally apportioned," the majority chooses to take guidance from a case that solely deals with reapportionment, i.e., *Baker*, rather than from a decision of this Court which is directly on point. *See Leonard*.

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7. The 1935 General Assembly proposed five amendments that 1) authorized classification of property for purposes of taxation, 2) increased the maximum tax rate from six percent to ten percent, 3) limited the power of state and local governments to borrow money without a vote of the people, 4) authorized the General Assembly to enlarge the Supreme Court from five to seven members, and 5) authorized the General Assembly to exempt up to $1,000 in value of property held in a homestead from taxation. *See* An Act to Amend the Constitution to Permit Classification of Property for Taxation, Encouragement of Home Ownership, to Increase the Limit for Income Taxation and to Limit the Power of State and Local Government to Borrow Money Without a Vote of the People, ch. 248, §§ 1–3, 1935 N.C. Pub. [Sess.] Laws 270, 270–71; An Act to Amend Section Six of Article Four of the Constitution of North Carolina Relating to the Supreme Court, and to Amend Section Five of Article Five of the Constitution of North Carolina Authorizing the General Assembly to Pass Laws Exempting From Taxation Not Exceeding One Thousand Dollars ($1,000.00) in Value of Property Held and Used as Place of Residence of the Owner, ch. 444, §§ 1–2, 1935 N.C. Pub. [Sess.] Laws 745, 745.

In 1937 the General Assembly proposed two more amendments—one increasing the term of sheriffs and coroners from two years to four years and one authorizing the General Assembly to establish the Department of Justice. *See* An Act to Amend Section Twenty-Four of Article Four of the Constitution of North Carolina Relative to Sheriffs, ch. 241, § 1, 1937 N.C. Pub. [Sess.] Laws 457, 457; An Act to Amend the Constitution to Permit the General Assembly to Create a Department of Justice in Order to Secure the Uniform and Adequate Administration of the Criminal Laws of the State, ch. 447, § 1, 1937 N.C. Pub. [Sess.] Laws, 908, 908.

Finally, the General Assembly of 1941 proposed two constitutional amendments. One created and organized the State Board of Education, and the other provided for twenty-one solicitorial districts through the State. *See* An Act to Amend the Constitution Providing for the Organization of the State Board of Education and the Powers and Duties of the Same, ch. 151 §§ 1–3, 1941 N.C. Pub. [Sess.] Laws, 240, 240–41; An Act to Amend Section Twenty-Three of Article Four of the Constitution of North Carolina, Relating to Solicitors, ch. 261, § 1, 1941 N.C. Pub. [Sess.] Laws 376, 376.

¶ 109 The majority's dismissal of our precedent here is deeply troublesome, yet increasingly unsurprising. Nothing in *Baker*[8] operates to change the analysis this Court applied in *Leonard*, and the majority's refusal to follow this Court's previous decision has no jurisprudential explanation.

¶ 110 In addition, the new test devised by the majority not only raises political question concerns, but it requires policy choices. While the majority assures us that nothing "convert[s] plaintiff's claim into one that requires us to make 'policy choices and value determinations,' " these are hollow words. The fact that the majority's chosen remedy is an ideational test *calling for* policy choices and value determinations clues one into the political nature of the question at hand.

¶ 111 Based on this test, we must look at the legislature to "consider whether the votes of legislators who were elected as a result of unconstitutional gerrymandering were potentially decisive." If there is "no meaningful chance that a lawfully constituted body 'would produce a different outcome,' " legislative action is presumptively valid under the de facto officer doctrine. However, if there is a chance a different outcome could result, courts must inspect each legislative action to consider whether the enacted constitutional amendment "threatens principles of popular sovereignty and democratic self-rule." The majority orders the lower court to discern whether an amendment "will immunize legislators from democratic accountability," "perpetuate the ongoing exclusion of a category of voters from the political process," or "intentionally discriminate against a particular category of citizens who were also discriminated against in the political process leading to the legislators' election." "If any of these factors are present," the majority goes on to say, a court must "invalidate the challenged amendment."

¶ 112 How do we know if there is a chance for a different outcome? What data should the lower courts utilize to make this determination? Is the majority suggesting that votes in the legislature are, or should be, monolithic? How would the Tax Cap Amendment immunize legislators from democratic accountability, perpetuate the continued exclusion of

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8. Making the majority's reliance on such even more interesting, *Baker* offers a proposition in direct conflict with the majority's position: "a legislature, though elected under an unfair apportionment scheme, is nonetheless a legislature empowered to act . . . ." *Baker v. Carr*, 369 U.S. at 250 n.5, 82 S. Ct. at 727 n.5, 7 L. Ed. 2d 663 (1962) (Douglas, J., concurring).

a category of voters, or constitute intentional discrimination?[9] Or, does this test only apply to Voter ID?[10]

¶ 113 Determining which laws would be valid based on the majority's newly created test would inherently require courts to look into the substance of each legislative action and weigh the policy implications of those actions. Without an express provision in our constitution on such an issue, the majority here uses its self-defined terms of "democratic self-rule" and "popular sovereignty" as an "unrestricted license to judicially amend our constitution." *Harper v. Hall*, 380 N.C. at 421, 2022-NCSC-17, ¶ 244, 868 S.E.2d at 570 (Newby, C.J., dissenting). The majority's test "inherently requires policy choices and value determinations and does not result in a neutral, manageable standard." *Id.* at 433–34, 2022-NCSC-17, ¶ 267, 868 S.E.2d at 577. This is true because the majority's decision is not rooted in the constitution but in political considerations.

¶ 114 Proposing amendments to our state constitution is a power clearly granted to the General Assembly. The majority here egregiously violates separation of powers, and, based on state and federal precedent, this case presents a nonjusticiable political question.

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9. To the extent that one would believe that a tax cap falls into this third category, studies in other states suggest the opposite. *See* Leah Byers, *The Effects of Georgia's 6 Percent Income Tax Cap* (2018), https://www.nccivitas.org/2018/effects-georgias-6-percent-income-tax-cap/ (finding that following the 2014 ratification of a 6% income cap amendment by Georgia voters, subsequent years showed (1) an increase in education spending by $2.5 billion from fiscal years 2014 to 2019 (Georgia Budget and Policy Institute, July 1, 2018 (citing Georgia Department of Instruction and Georgia's 2019 Fiscal Year Budget (HB 684)); and (2) the state's high bond rating, which has been maintained for almost 20 years (Gov. Kemp: Georgia Secures AAA Bond Rating in 2022, June 13, 2022) (https://gov.georgia.gov/press-releases/2022-06-13/gov-kemp-georgia-secures-aaa-bond-rating-2022).

10. The National Bureau of Economic Research released a nationwide study concluding that "[s]trict ID laws' overall effects [on minority voter participation] do not increase over time, they remain close to zero and non-significant whether the election is a midterm or presidential election, and whether the laws are the more restrictive type that stipulate photo IDs." Enrico Cantoni & Vincent Pons, *Strict ID Laws Don't Stop Voters*: *Evidence from a U.S. Nationwide Panel, 2008-2018* 2 (NBER Working Paper No., 25522, 2021), https://www.nber.org/system/files/working_papers/w25522/w25522.pdf. Moreover, research found that strict ID laws have "no significant negative effect on registration or turnout, overall or for any subgroup defined by age, gender, race, or party affiliation." *Id.* at 1-2. Pertinent here, "strict ID requirements do not decrease the participation of ethnic minorities relative to whites." *Id.* at 2.

II. De Facto and De Jure Authority

¶ 115 A governmental official either has the authority to act, or he does not. Consistent with this fact, well-established judicial doctrines have emerged. Specifically, courts have recognized instances in which governmental officials maintain the full power of their office, and other occasions when individuals attempt to occupy an office but have no power to act. The former may be either de jure or de facto officers; the latter are known as usurpers. None of these recognized legal distinctions, however, have ever limited or hybridized legislative power as the majority does here. Imagining its creation as the "best" for the situation at hand, the majority excises from legislative authority those actions it deems out of the "ordinary." To be sure, there is no legal basis for this judicial limitation on legislative authority, and the majority throws settled law into confusion.

¶ 116 "[A] legislature, though elected under an unfair apportionment scheme, is nonetheless a legislature empowered to act . . . ." *Baker v. Carr*, 369 U.S. at 250 n.5, 82 S. Ct at 727 n.5, 7 L. Ed. 2d 663 (Douglas, J., concurring); *see also Buckley v. Valeo*, 424 U.S. 1, 142, 96 S.Ct. 612, 693, 46 L. Ed. 2d 659 (1976) (per curiam); *Ryder v. United States*, 515 U.S. 177, 180, 115 S. Ct. 2031, 2034, 132 L. Ed. 2d (1995); *Martin v. Henderson*, 289 F. Supp. 411, 414 (E.D. Tenn. 1967); *Everglades Drainage League v. Napoleon B. Broward Drainage Dist.*, 253 F. 246, 252 (S.D. Fla. 1918).

¶ 117 A de jure officer is one who has the legal right or title to the office. *People ex rel. Duncan v. Beach*, 294 N.C. 713, 719–20, 242 S.E.2d 796, 800 (1978). Essentially, an individual possessing de jure authority is one rightfully elected or otherwise appointed to the office he holds, who thus may exercise all rights and responsibility associated with that office. *See In re Wingler*, 231 N.C. 560, 563, 58 S.E.2d 372, 374 (1950). North Carolina courts have never suggested that our General Assembly could not otherwise "continue exercising the powers granted to our state's legislative branch," *N.C. State Conf. of NAACP v. Moore*, 273 N.C. App. at 462, 849 S.E.2d at 94, under de jure authority despite issues regarding malapportioned districts. *See Pender County v. Bartlett*, 361 N.C. 491, 649 S.E.2d 364 (2007), *aff'd sub nom. Bartlett v. Strickland*, 556 U.S. 1, 129 S. Ct. 1231, 173 L. Ed. 2d 173 (2009). Moreover, the legislature involved here was never judicially stripped of any authority. *Cf. Butterworth v. Dempsey*, 237 F. Supp. 302, 311 (D. Conn. 1964) (enjoining the Connecticut legislature from passing any additional legislation unless reconstituted in constitutionally drawn districts). Accordingly, it appears that the 2018 General Assembly would be better

classified as a legislature with de jure authority. *See Leonard*, 216 N.C. at 98–99, 3 S.E.2d at 324.

¶ 118 Even assuming, however, that the members of the 2018 General Assembly were not de jure officers, those legislators certainly possessed full de facto authority. "A *de facto* officer may be defined as one whose title is not good in law, but who is in fact in the unobstructed possession of an office and discharging its duties in full view of the public, in such manner and under such circumstances as not to present the appearance of being an intruder or usurper." *Waite v. Santa Cruz*, 184 U.S. 302, 323, 22 S. Ct. 327, 334, 46 L. Ed 552 (1902). A de facto officer's official acts are categorically valid, even if that individual is found to lack de jure legal authority.

¶ 119 In application, the acts of a de facto officer are as concretely binding as those of a de jure officer. *See Phillips v. Payne*, 92 U.S. 130, 132, 23 L. Ed. 649 (1875) ("The acts of an officer *de facto*, within the sphere of the powers and duties of the office he assumes to hold, are as valid and binding with respect to the public and third persons as if they had been done by an officer *de jure*."); *Burke v. Elliott*, 26 N.C. (4 Ired.) 355, 359–60 (1844) ("[T]he acts of officers *de facto* are as effectual, as far as the rights of third persons or the public are concerned, as if they were officers *de jure*."); *Joseph v. Cawthorn*, 74 Ala. 411, 415 (1883) ("There is no distinction in law between the official acts of an officer *de jure*, and those of an officer *de facto*. So far as the public and third persons are concerned, the acts of the one have precisely the same force and effect as the acts of the other."). The Supreme Court has described the rationale for not disturbing the official acts of de facto officers:

> The *de facto* officer doctrine confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient. The *de facto* doctrine springs from the fear of the chaos that would result from multiple and repetitious suits challenging every action taken by every official whose claim to office could be open to question, and seeks to protect the public by insuring the orderly functioning of the government despite technical defects in title to office.

Ryder, 515 U.S. at 180, 115 S. Ct. at 2034 (cleaned up). The power of de facto officers has been repeatedly affirmed both by the courts of this state and their federal counterparts.

¶ 120 Nothing in the de facto doctrine speaks of any limitation on authority. To the contrary, and ultimately to ensure stability, a de facto legislator enjoys the same scope of authority, and his or her actions the same validity, as a de jure legislator. *See In re Wingler*, 231 N.C. at 565, 58 S.E.2d at 376 ("The *de facto* doctrine is indispensable to the prompt and proper dispatch of governmental affairs.").

¶ 121 Courts are "not allowed to range so far afield as to hamstring state legislatures and deprive States of effective legislative government." *Fortson v. Toombs*, 379 U.S. 621, 625–26, 85 S. Ct. 598, 601, 13 L. Ed. 2d 527 (per curiam) (Harlan, J., concurring in part and dissenting in part), *amended by* 380 U.S. 929, 85 S. Ct. 932, 13 L. Ed. 2d 819 (1965). Until today, no court, federal or state, has concluded that a legislative body which has de facto authority at a minimum should undergo individual ex post evaluations of constitutionally prescribed actions. Moreover, no court, federal or state, has excised individual legislative responsibilities after determining that legislators possess de facto authority, as the majority does here. In essence, the majority has so restricted legislative authority that it has effectively dissolved the legislature regarding its constitutionally defined role in proposing constitutional amendments.

¶ 122 Finally, when no de jure or de facto authority exists, an individual holding office is designated a usurper. "A usurper is one who undertakes to act officially without any actual or apparent authority. Since he is not an officer at all or for any purpose, his acts are absolutely void, and can be impeached at any time in any proceeding." *In re Wingler*, 231 N.C. at 564, 58 S.E.2d at 375 (citing *State v. Shuford*, 128 N.C. 588, 38 S.E. 808 (1901); *State ex rel. Van Amringe v. Taylor*, 108 N.C. 196, 12 S.E. 1005 (1891); *People ex rel. Norfleet v. Staton*, 73 N.C. 546, 21 Am.Rep. 479 (1875); *Keeler v. City of Newbern*, 61 N.C. 505 (1868)). This usurper category is the final of the three judicially recognized types of authority that one may possess.

¶ 123 The majority knows that its unprecedented approach has no basis in existing law. Understanding that the members were not usurpers, but unwilling to accept that the de facto doctrine legitimizes *all* actions of the 2018 General Assembly, even those contested in the instant case, the majority claims that North Carolina's Constitution suddenly requires carving out a fourth category of authority. The reality is that well-established law is simply insufficient to reach the majority's desired result.

¶ 124 Indeed, the majority expressly acknowledges that members of the 2018 General Assembly were de facto legislators under the "belie[f] [that] the [de facto] doctrine should be applied to legislators who

remain in office even after it has been determined they were elected pursuant to unconstitutional gerrymandering." Specifically, the majority refuses to accept plaintiff's argument that "the General Assembly . . . lack[ed] any colorable claim to exercise the powers delegated to the legislature," recognizing instead that the "actions undertaken by the legislators post-*Covington* are presumptively valid as the actions of de facto officers." However, the majority uses this as a pivot point to state that it cannot permit full approval of the acts of the 2018 General Assembly because doing so "require[es] the public to be bound by the actions of an individual who . . . lacked authority to legitimately exercise sovereign power."

¶ 125 To be sure, this is not a novel legal situation requiring the unprecedented actions by the majority. Courts have declared officers, including elected officials, to incorrectly hold office numerous times. These doctrines have been developed to minimize any resulting chaos and to maintain order. *See EEOC v. Sears, Roebuck & Co.*, 650 F.2d 14, 17 (2d Cir. 1981) ("The de facto officer doctrine was developed to protect the public from the chaos and uncertainty that would ensue if actions taken by individuals apparently occupying government offices could later be invalidated by exposing defects in the officials' titles."). The majority's approach defeats the very purpose for which these doctrines on authority have developed.

¶ 126 Important here, and despite the majority's assertion to the contrary, the decision in *Covington* did nothing to disturb the authority of the 2018 legislature. Specifically, no action by any court tied the legislators' hands or truncated their terms of office. The decision in *Covington* to allow the 2018 General Assembly to remain in office is constitutionally significant. While it appears that the plaintiffs may have argued to the *Covington* court that the legislature's authority to act was an unsettled question of state law, article VI, section 10 of our State's constitution instructs that "in the absence of any contrary provision, all officers in this State, whether appointed or elected, shall hold their positions until other appointments are made or, if the offices are elective, until their successors are chosen and qualified." N.C. Const. art. VI, § 10. This constitutional provision, in tandem with the decision in *Covington*, mandates that the 2018 General Assembly members "hold their offices" until replaced, with all commensurate authority attached. Thus, the question was not unsettled, just not fully explored.

¶ 127 Legislators in the 2018 General Assembly post-*Covington* continued in office to serve out the remainder of their terms. During that time, the General Assembly passed various pieces of legislation, from laws dealing with election integrity to those dealing with law enforcement stops. The

General Assembly also proposed several constitutional amendments be brought before the people of this state for ratification. Operating pursuant to our state's constitution, each member of the General Assembly had the full authority to perform his or her duties. No restrictions were, or have been placed upon that body, until today. It would be nonsensical for a legislator at that time to believe that she, on the one hand, had the constitutional authority to vote on one piece of legislation, yet lacked the authority to vote on another bill; it is equally confounding for the majority to conclude as much.

¶ 128 At least until today, this Court has stressed that "[e]ndless confusion and expense would ensue if the members of society were required to determine at their peril the rightful authority of each person occupying a public office before they invoked or yielded to his official action." *In re Wingler*, 231 N.C. at 565–66, 58 S.E.2d at 376. Now, despite electing their legislators to office, North Carolinians are no longer able to trust that a legislator, or the legislature as a whole, has the requisite authority to act. And being that the legislature is merely a law-enacting agent of the true sovereign, i.e., the people, it is the authority of the people that is truly at risk.

¶ 129 This does not even begin to speak of the chaos and confusion that this case, and others like it, have caused. The people of North Carolina understand that they approved the Voter ID and Tax Cap Amendments by overwhelming majorities. Multiple lawsuits in state and federal courts seem to be the norm for politically charged issues. The varied and inconsistent rulings from our courts only adds to the confusion surrounding the status of these provisions. And this all stems, as stated above, from judges who are unwilling to engage in judicial restraint and yield to the political question doctrine.

¶ 130 Further contrary to the majority's assertion that this case presents "completely unprecedented circumstances," several examples from North Carolina's redistricting jurisprudence in which a General Assembly elected pursuant to malapportioned maps enacted legislation to propose a constitutional amendment are pertinent here. In each of these cases, the invalidly constituted General Assembly was directed to redraw its maps while the invalidly elected legislators finished their respective terms. In none of these cases did the court retroactively nullify acts of the malapportioned General Assembly or "impose limits" on the General Assembly's constitutionally committed legislative authority. With this decision, the majority ignores these cases and creates an entirely new and unprecedented remedy.

¶ 131 Most notably, the majority ignores this Court's decision in *Pender County v. Bartlett*, in which we declared a legislative reapportionment plan unconstitutional and then crafted an appropriate remedy. *See* 361 N.C. at 510, 649 S.E.2d at 376. In November 2003, the General Assembly enacted a plan to reapportion the House of Representatives (the 2003 House Plan). *See* An Act to Establish House Districts, Establish Senatorial Districts, and Make Changes to the Election Laws and to Other Laws Relating to Redistricting, S.L. 2003-434, §§ 1–2, 2003 N.C. Sess. Laws (1st Extra Sess. 2003) 1313, 1313–92. Five county commissioners challenged the 2003 House Plan as unconstitutional in violation of the Whole County Provision (WCP) of article II, section 5 of the North Carolina Constitution because the Plan divided Pender County among House Districts 16 and 18. *Pender County*, 361 N.C. at 495, 649 S.E.2d at 367. This Court held the division of Pender County between two districts violated the WCP. *Id.* at 493, 649 S.E.2d. at 366.

¶ 132 Having held the 2003 House Plan unconstitutional, we ordered the General Assembly to redraw the affected House districts to comply with the WCP. *Id.* at 510, 649 S.E.2d at 376. When our decision in *Pender County* was filed in August 2007, however, the unconstitutional 2003 House Plan had been used in both the 2004 and 2006 election cycles to elect legislators to the House of Representatives. N.C. Gen. Assembly, https://www.ncleg.gov/redistricting (last visited Aug. 14, 2022). Accordingly, our remedy required a General Assembly consisting of some number of unconstitutionally elected members to exercise its constitutional authority to "revise the representative districts and the apportionment of Representatives among those districts." N.C. Const. art. II, § 5; *see Pender County*, 361 N.C. at 510, 649 S.E.2d at 376. We expressed no doubt that the General Assembly could exercise this authority, despite being elected under the unconstitutional plan.

¶ 133 Additionally, we chose to stay our order to redraw the House map until after the 2008 election cycle:

> We are cognizant that the General Assembly will need time to redistrict not only House District 18 but also other legislative districts directly and indirectly affected by this opinion. The North Carolina General Assembly is now in recess and is not scheduled to reconvene until 13 May 2008, after the closing of the period for filing for elective office in 2008. We also realize that candidates have been preparing for the 2008 election in reliance upon the districts as presently drawn. Accordingly, to minimize disruption to

> the ongoing election cycle, the remedy explained above shall be stayed until after the 2008 election. . . . At the conclusion of the 2008 election, House District 18 and other impacted districts must be redrawn.

Pender County, 361 N.C. at 510, 649 S.E.2d at 376 (citation omitted).

¶ 134 In determining it was appropriate to permit another election under the unconstitutional 2003 House Plan, we relied on guidance from one of the Supreme Court's landmark apportionment cases. *See id.* at 510, 649 S.E.2d at 376 (citing *Reynolds v. Sims*, 377 U.S. 533, 585, 84 S. Ct. 1362, 1394, 12 L. Ed. 2d 506 (1964)). In *Reynolds*, the Supreme Court held that Alabama's legislative reapportionment plans violated the Equal Protection Clause of the Fourteenth Amendment. 377 U.S. at 568–70, 84 S. Ct. at 1384–86. In addressing "proper remedial devices" in state legislative apportionment cases, the Supreme Court explained that

> under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree.

Id. at 585, 84 S. Ct. at 1393–1394. In providing this guidance, the Supreme Court did not indicate that a state legislature elected under a malapportioned legislative map might be powerless or semi-powerless. Likewise, in applying this guidance in *Pender County*, we were not concerned that requiring the next election cycle to proceed under the unconstitutional 2003 House Plan would result in an impotent General Assembly. Indeed, the legislators elected in 2008 served full terms and the validity of their legislative actions has never been retrospectively questioned. Notably, like in the instant case, the malapportioned General Assembly elected

in 2008, knowing that it was malapportioned, proposed a constitutional amendment that was eventually enacted.[11]

¶ 135 Similarly, in *Drum v. Seawell* a North Carolina voter challenged article II, sections 5 and 6 of the North Carolina Constitution and the enacted House, Senate, and congressional reapportionment plans as violative of his rights under the Equal Protection Clause of the Fourteenth Amendment. *Drum v. Seawell*, 249 F. Supp. 877, 879 (M.D.N.C. 1965) (*Drum I*), *aff'd per curiam*, *3*83 U.S. 831, 86 S. Ct. 1237, 16 L. Ed. 2d 298 (1966). At the time, article II, sections 5 and 6 of the North Carolina Constitution governed apportionment of the House and provided that the House would have one hundred twenty members with each county receiving at least one representative. *See id.* at 880, N.C. Const. of 1868, art. II, § 5 (1875). The court held that this apportionment scheme violated the Equal Protection Clause because it "requir[ed] that each county be afforded at least one Representative regardless of its population" and declared the constitutional provisions "null and void." *Id.*, 249 F. Supp. at 880. In addition to invalidating the challenged House reapportionment plan, which had been enacted in 1961 (the 1961 House Plan), the court found the disparities in population among the fifty Senate districts, which had been enacted in 1963 (the 1963 Senate Plan), were also null and void. *Id.* at 880–81. Finally, the court held that the statute creating the State's eleven congressional districts was unconstitutionally discriminatory. *Id.* at 880.

¶ 136 Having thus determined all three plans were unconstitutional, the court ordered the existing General Assembly to reapportion the State "as nearly equally as possible on a population based representation." *Id.* at 881. This mandate required a substantial, if not total, overhaul of the 1961 House Plan and the 1963 Senate Plan. By the time the court filed its *Drum I* opinion on November 30, 1965, however, the 1963 Senate Plan had been used in the 1964 election cycle, and the 1961 House Plan had been used in both the 1962 and 1964 election cycles. Thad Eure, N.C. Sec'y of State, *North Carolina Government* 1585-1979: A Narrative

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11. The General Assembly elected in 2008 enacted House Bill 1307, which proposed an amendment to Article VII, section 2 of the North Carolina Constitution to prohibit felons from serving as sheriffs. *See* An Act to Amend the Constitution of North Carolina to Provide that No Person Convicted of a Felony is Eligible to be Elected Sheriff, S.L. 2010-49, § 1, 2010 N.C. Sess. Laws 255, 255–56. It was approved by 84.96% of North Carolina voters. N.C. State Bd. of Elections, https://er.ncsbe.gov/?election_dt=11/02/2010&county_id=0&office=REF&contest=0 (last visited August 1, 2022); *see also* John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 170 (2d ed. 2013) ("In 2010 the voters approved an amendment that prevents convicted felons from serving as sheriff . . . .").

and Statistical History 534, 536 (John L. Cheney, Jr. ed., 2d ed. 1981). Accordingly, most, if not all, of the 1965 General Assembly ordered by *Drum I* to reapportion the state's House, Senate, and congressional seats hailed from unconstitutional districts. Nonetheless, like this Court's decision in *Pender County*, the court in *Drum I* expressed no concern that the unconstitutionally constituted 1965 General Assembly could exercise its authority to apportion legislative districts or otherwise utilize its legislative power. The court simply ordered the malapportioned General Assembly to redraw all three apportionment maps in time for the 1966 election cycle and permitted the incumbent legislators to finish their terms. 249 F. Supp. at 881. The General Assembly at issue there continued to exercise its legislative authority completely unfettered; again, a constitutional amendment was proposed that was subsequently approved by the voters of North Carolina.[12]

¶ 137 In accord with the remedial order in *Drum I*, the 1965 General Assembly reapportioned its House, Senate, and congressional districts before the 1966 primaries, but the same plaintiff, representing a group of North Carolina litigants, again challenged all three remedial plans. *Drum v. Seawell* (*Drum II)*, 250 F. Supp. 922, 923–24 (M.D.N.C. 1966). After examining the remedial plans, the Middle District of North Carolina determined that the new House and Senate plans met "the minimum federal constitutional standards," but the redrawn congressional plan was still "constitutionally invalid." *Id.* at 924, 925. Nevertheless, in ordering a remedy, the court chose to permit the 1966 congressional elections to proceed under the unconstitutional remedial map:

> While we feel bound to reject the [congressional] plan, we nevertheless recognize the good faith effort of the Legislature to bridge the tremendous gulf which existed between the status quo and the constitutional requirements. We also recognize the obligation of the federal courts to defer to the prerogative of the legislative branch of the State in this field. Recognizing also the imminence of the 1966 primaries, we, in the

12. The 1965 General Assembly successfully proposed an amendment to the North Carolina Constitution that authorized the creation of the Court of Appeals. *See* An Act to Amend Article IV of the Constitution of North Carolina to Authorize Within the Appellate Division of the General Court of Justice an Intermediate Court of Appeals, ch. 877 § 1, 1965 N.C. Sess. Laws 1173, 1173–74. On 2 November 1965, 73.61% of voters approved the amendment, Thad Eure, N.C. Sec'y of State, *North Carolina Manual 1967*, at 328, and the General Assembly enacted legislation establishing the Court of Appeals in 1967. *See* An Act to Create a Court of Appeals, ch. 108, § 1, 1967 N.C. Sess. Laws 144, 144–55. Since its establishment, the existence of the Court of Appeals has never been questioned.

> exercise of our equitable discretion, will stay our mandate further and permit the congressional elections of 1966 to take place under the [remedial congressional plan].

Id. at 925. Similar to *Pender County* and *Reynolds*, the *Drum II* opinion expressed no concern that permitting an election under the unconstitutional congressional plan might result in a congressional delegation that lacked the power to legislate.

¶ 138 Once again, in 1984, the Eastern District of North Carolina mandated the exact same remedy when it declared North Carolina's legislative maps invalid under the Voting Rights Act (VRA) and ordered the General Assembly to redraw them. *See Gingles v. Edmisten*, 590 F. Supp. 345, 350, 376 (E.D.N.C. 1984). In April 1982, the General Assembly enacted new House and Senate redistricting maps based on the 1980 decennial census (the 1982 Legislative Plans). *Id.* at 351. A group of registered voters in North Carolina challenged the 1982 Legislative Plans as violative of Section 2 of the VRA, alleging that, in designing and enacting these plans, the legislature strategically "ma[d]e[ ] use of multi-member districts" in certain parts of the state to "dilute[ ] the voting strength" of black voters. *Id.* at 349. In January 1984, the court determined that the challenged districts—five multi-member House districts, one multi-member Senate district, and one single-member Senate district—all violated Section 2 of the VRA and had to be redrawn. *Id.* at 349–50. However, by the time the court reached its decision, the 1982 Legislative maps had already been used in the 1982 election cycle, *see* Thad Eure, N.C. Sec'y of State, *North Carolina Manual 1983-1984*, at 199–200, 287–89, 949–54 (John L. Cheney, Jr. ed.), meaning the 1983 General Assembly was malapportioned.

¶ 139 In designating a remedy, in *Gingles* the court simply ordered the malapportioned 1983 General Assembly to redraw the problematic maps by March 1984, writing that "[i]n deference to the primary jurisdiction of state legislatures over legislative reapportionment, we will defer further action to allow the General Assembly of North Carolina an opportunity to exercise that jurisdiction in an effort to comply with § 2 [of the VRA] in the respects required." *Gingles*, 590 F. Supp. at 376 (citation omitted). The Supreme Court affirmed the *Gingles* holding, including its remedy, as to all but one challenged district. *Thornburg v. Gingles*, 478 U.S. 30, 80, 106 S. Ct. 2752, 2781, 92 L. Ed. 2d 25 (1986). Just as the courts in *Pender County*, *Reynolds*, and *Drum I* had done, neither the Eastern District of North Carolina nor the United States Supreme Court restricted the authority of the malapportioned 1983 General Assembly to redraw the legislative maps or otherwise exercise legislative authority.

The 1983 General Assembly continued to exercise the full scope of its legislative authority, successfully proposing two constitutional amendments that were approved by North Carolinians in 1984.[13] The validity of those amendments has never been questioned.

¶ 140 Without explanation, the majority overlooks these cases and extends the remedial authority of this Court further than ever before. This majority's avoidance of our jurisprudence is not, however, an isolated incident. In recent weeks, this same majority acted to expedite oral argument in another case that, like this one, implicates this Court's power to police the General Assembly. *See Harper v. Hall*, No. 413PA21, 2022 WL 2982880 (N.C. July 28, 2022) (Order on Motion for Expedited Hearing and Consideration). As explained by the dissent to that order, the majority chose to expedite the pending appeal in *Harper*, which involves the validity of legislative and congressional redistricting maps, despite "the absence of any identifiable jurisprudential reason." *Harper*, 2022 WL 2982880, at *1 (Barringer, J., dissenting). The same is true here.

¶ 141 The majority clearly appreciates that the idea of voiding all legislative authority would inevitably result in the chaos and confusion courts have heretofore protected against. The problem with this conclusion, however, is that this exercise of judicial selectivity creates *greater* chaos and confusion. If authority is ephemeral, how does one truly know when the General Assembly possesses the power to act? What about members of Congress elected from unlawful districts—would they also lose the power to vote on proposed federal constitutional amendments?

¶ 142 The majority attempts to position its decision as a narrow one only related to constitutional amendments. It is unclear, however, why the logic applied here would not apply to other actions taken by the legislature—or that legislatures may take in the future.

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13. The 1983 General Assembly proposed a constitutional amendment to permit "the General Assembly [to] enact general laws to authorize the creation of an agency to issue revenue bonds to finance the cost of capital projects consisting of agricultural facilities." *See* An Act to Amend Article V of the Constitution of North Carolina to Authorize the General Assembly to Create an Agency to Issue Revenue Bonds to Finance Agricultural Facilities Projects, Subject to the Approval of the Electorate, ch. 765, § 1, 1983 N.C. Sess. Laws 885, 885. On May 8, 1984, 53.87% of voters approved this amendment. N.C. Sec'y of State, *North Carolina Manual 1985-1986* at 174–75 (John L. Cheney, Jr. ed.). The same General Assembly also proposed a constitutional amendment requiring that the Attorney General and District Attorneys to be duly authorized to practice law. *See* An Act to Amend the North Carolina Constitution to Require that District Attorneys and the Attorney General be Licensed to Practice Law, ch. 298, §§ 1-2, 1983 N.C. Sess. Laws 225, 225. Over seventy-five percent of North Carolina voters approved this amendment on November 6, 1984. N.C. Sec'y of State, *North Carolina Manual 1985-1986* at 176–77 (John L. Cheney, Jr. ed.).

¶ 143 Indeed, overriding a governor's veto similarly requires three-fifths of the members of both chambers of the General Assembly's approval. N.C. Const. art. II, § 22. In the same 2018 session and within weeks of the constitutional amendments being proposed, the legislature overrode the governor's veto three times.[14] The majority declines to answer why veto overrides are not similar in kind to the issue here, but individuals or groups who advocated against the veto overrides would almost certainly seize upon the Court's reasoning to apply this decision to other actions of the legislature.

¶ 144 Further, if constitutional amendments are the sole focus, would ratifying amendments to the federal Constitution be within the purview of this decision? Votes to ratify such amendments only require a simple majority in the legislature. A malapportioned legislature ratified the Twentieth Amendment on January 5, 1933. Under the majority's reasoning here, is this ratifying vote voidable?

¶ 145 To suggest that legislation passed by the 2018 General Assembly, which is not reviewable by the people, is beyond the reach of this decision, while acts of the legislature which are passed upon by the people are suspect, defies logic. Legislative defendants argue as much, contending that there is "no principled way to distinguish between the constitutional amendments the plaintiffs have challenged in this litigation and all the other legislative acts the challenged legislators undertook." Judges should "believe in the validity of the reasons given for [their] decision at least in the sense that [they are] prepared to apply them to a later case in which [they] cannot honestly distinguish." Louis L. Jaffe, *English and American Judges as Lawmakers*, 38 (1969). In limiting their analysis, my colleagues demonstrate just how ill-founded their reasoning is.

¶ 146 In discussing legislative defendants' argument regarding this point, the majority specifically focuses on the case of *Dawson v. Bomar*. Interestingly, the majority dedicates two pages to *Dawson* simply to conclude its inapplicability to the instant case. Whether this is an attempt by the majority to convince the public, or frankly themselves, of *Dawson*'s irrelevance, an objective look at the case leads us to a different conclusion.

¶ 147 In *Dawson*, the petitioner, a prisoner, filed a habeas corpus action against the warden of the Tennessee State Penitentiary. 322 F.2d 445, 446 (6th Cir. 1963). The petitioner challenged the authority of the Tennessee Legislature, which was allegedly malapportioned at the time, to enact capital punishment legislation. *Id.* Specifically, and eerily similar to the

14. Interestingly enough, one of these pieces of vetoed legislation was the state budget.

instant case, the petitioner in *Dawson* requested that the court draw a distinction between ordinary, routine laws, which must be allowed to stand to prevent chaos, and the challenged capital punishment laws enacted by the legislature due to their "unique nature." *Id.* at 447. The *Dawson* court began by explaining, however, that "[c]ourts will refrain from declaring legislative acts unconstitutional, even though the legislature may itself have been adjudicated to have been unconstitutionally constituted by reason of malapportionment, where the result would be to create chaos and confusion in government." *Id.* The *Dawson* court went on to point out that "courts have uniformly held that otherwise valid enactments of legislatures will not be set aside as unconstitutional by reason of their passage by a malapportioned legislature." *Id.* at 447–48.

¶ 148 Moreover, in addressing the petitioner's argument that a carved-out exception should be made for the challenged legislation specifically, the court properly declined to treat one type of legislation different from any other. Indeed, the *Dawson* court emphasized the danger such judicial intrusion would breed:

> For the Court to select any particular category of laws and separate them from other laws for the purpose of applying either the *de facto* doctrine or the doctrine of avoidance of chaos and confusion would in fact circumvent legal principles in order to substitute the Court's opinion as to the wisdom, morality, or appropriateness of such laws. The personal views of members of the court with regard to [the substance of a law] should not be grounds for withdrawing such laws from the operation of established principles of law. The purpose of both the *de facto* doctrine and the doctrine of avoidance of chaos and confusion would be defeated if the judiciary could be called upon to adjudicate respective equities between the public and the complaining party as to any specific act. Both doctrines must have *overall application* validating the otherwise valid acts of a malapportioned legislature, with a judicial severance of specific acts and a weighing of equities as to those specific acts precluded, if a government of laws and not of men is to remain the polar star of judicial action.

Id. at 448 (emphasis added). Understanding that courts may not handpick legislation to legitimize, the court concluded that the plaintiff's argument was without merit.

¶ 149 The majority "misread[s] *Dawson*," claiming that it "held only that in applying the de facto officer doctrine, courts should not draw distinctions between categories of *ordinary* statutes" and remained silent on "how courts should approach categorically different types of legislative acts." The *Dawson* court, however, never once made such a distinction, if one even exists.[15] Reaching the same conclusion as countless other federal and state decisions, *Dawson* simply calls for "overall application" of the *de facto* doctrine to "the otherwise valid acts of a malapportioned legislature." *Id.* No exceptions.

¶ 150 Today, the Court's actions are directed at state constitutional amendments. The door has been opened, however, for judicial dissolution of legislative authority in the future. This is a far cry from judicial restraint and thwarts the idea that "there is no room for a judicial hegemony." *Walser ex rel. Wilson v. Jordan*, 124 N.C. 683, 705, 33 S.E. 139, 151 (1899) (Clark, J., dissenting). This Court's "authority is limited, and the acceptance of that limitation is a public trust we are bound to keep in the promotion of a properly aligned government." *Rhyne v. K-Mart Corp.*, 149 N.C. App. 672, 680, 562 S.E.2d 82, 89 (2002), *aff'd*, 358 N.C. 160, 594 S.E.2d 1 (2004).

¶ 151 That the majority has injected chaos and confusion into our political structure is self-evident. Equipped with a few paragraphs of instruction, our state's courts may now decide if and when constitutional authority may be exercised by another branch of our government. It takes minimal effort to imagine the ways that this could ultimately "preempt the people's capacity to [ ] assert their will consistent with the terms of their fundamental law" following their approval of a constitutional amendment. "The idea of . . . the judiciary [] preventing . . . the legislature, through which the people act, from exercising its power is the most serious of judicial considerations." *State ex rel. McCrory v. Berger*, 368 N.C. at 650, 781 S.E.2d at 259 (2016) (Newby, J., concurring in part and dissenting in part).

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15. Notably absent from our constitution is the categorization of constitutional functions as "ordinary" or "extraordinary." Further, and contrary to the majority's view of our constitution, there is nothing extraordinary about any duties or obligations set forth therein. The constitution sets forth the rights enjoyed by the people and provides the framework for action by our government. There is no hierarchy of constitutional rights, and nothing concerning operation of our government is designated ordinary or extraordinary. The majority has taken it upon itself to rank governmental functions based solely on its own opinion. What happens then when they decide to take the same approach to the freedoms and liberties secured in the Declaration of Rights?

III. Conclusion

¶ 152 Our constitution clearly states that amending the constitution is a duty designated to the General Assembly and the people of this State. The General Assembly acted within its constitutional authority when it proposed the Voter ID and Tax Cap Amendments to the people of North Carolina. The people overwhelmingly ratified these provisions which they believed important to safeguard elections and protect their wallets.

¶ 153 This decision is a radical departure from mere judicial review as this Court expands its reach beyond constitutional guardrails and unilaterally amends the constitution for its own reasons. The majority restructures power constitutionally designated to the legislature, plainly violates the principles of non-justiciability, and wrests popular sovereignty from the people.

¶ 154 When does judicial activism undermine our republican form of government guaranteed in Article IV, Section 4 of the United States Constitution such that the people are no longer the fountain of power? At what point does a court, operating without any color of constitutional authority, implicate a deprivation of rights and liberties secured under the Fourteenth Amendment?

¶ 155 The sober people of this state will be left to wonder why, if they amended the constitution, those provisions are not in effect. The negative fallout of today's decision will be felt most by the people of this state and the confidence they have in this institution. Sadly, they will experience the chaos and confusion courts seek to avoid.

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

PROVIDENCE VOLUNTEER FIRE DEP'T, INC. v. TOWN OF WEDDINGTON

[382 N.C. 199, 2022-NCSC-100]

PROVIDENCE VOLUNTEER FIRE DEPARTMENT, INC.,
A NORTH CAROLINA NON-PROFIT CORPORATION
v.
THE TOWN OF WEDDINGTON, A NORTH CAROLINA MUNICIPAL CORPORATION, PETER WILLIAM DETER, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS MAYOR, AND WESLEY CHAPEL VOLUNTEER FIRE DEPARTMENT, INC., A NORTH CAROLINA NON-PROFIT CORPORATION

No. 47PA21

Filed 19 August 2022

1. Immunity—governmental—fire protection services—acquisition of fire station—allegations of fraud

Where plaintiff volunteer fire department filed claims against defendant town based on the town's actions involving three contracts with plaintiff—for the provision of fire protection services for town residents, renovations to plaintiff's fire station, and the town's purchase and lease-back of the fire station to plaintiff—the contracts constituted one indivisible transaction, and the town was protected from plaintiff's fraud-related claims based on the doctrine of governmental immunity. Although plaintiff alleged that defendant's acquisition of the fire station from plaintiff was accomplished with fraud and was a proprietary action, defendant's acquisition of the fire station was for the provision of fire services for the town and thus was a governmental action rendering it immune from plaintiff's fraud claims.

2. Immunity—legislative—mayor—town council meeting—termination of fire department contracts

Where plaintiff volunteer fire department filed claims against defendant mayor based on the mayor's role in bringing about the termination of the town's contracts with plaintiff, the Supreme Court recognized legislative immunity as a bar to claims against public officials and held that the mayor's actions—beginning with actions before his election and culminating with his calling and setting the agenda for the town council meeting during which the council voted to terminate the contracts with plaintiff—were legislative actions entitled to legislative immunity.

Justice EARLS concurring in part and dissenting in part.

Justice BARRINGER concurring in part and dissenting in part.

Chief Justice NEWBY joins in this concurring in part and dissenting in part opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31(a) from a unanimous decision of the Court of Appeals, No. COA19-203, 2020 WL 7974274 (N.C. Ct. App. Dec. 31, 2020), affirming in part and reversing in part an order entered on 27 November 2018 by Judge Daniel A. Kuehnert in Superior Court, Union County, and remanding the case to the trial court. Heard in the Supreme Court on 21 March 2022.

Christopher Duggan for plaintiff-appellant.

Andrew J. Santaniello for defendant-appellee Town of Weddington.

Sumrell Sugg, P.A., by Scott C. Hart and Frederick H. Bailey, III, for defendant-appellee Peter William Deter.

No brief for defendant-appellee Wesley Chapel Volunteer Fire Department, Inc.

ERVIN, Justice.

¶ 1 The issue before us in this case is whether actions taken by defendant Town of Weddington, which include entering into three contracts with plaintiff Providence Volunteer Fire Department, Inc., in order to (1) procure fire protection services for its residents; (2) effectuate renovations to Providence's fire station; and (3) purchase and lease the fire station back to Providence, constituted governmental, rather than proprietary, actions for purposes of the doctrine of governmental immunity with respect to the fraud-related claims that Providence has asserted against the Town. In addition, this case requires us to address whether actions taken by defendant Mayor Peter William Deter, which include the scheduling of a town council meeting and preparing the agenda for that meeting, at which the council voted to terminate the Town's contracts with Providence, were legislative in nature such that Mayor Deter is shielded from liability with respect to Providence's fraud-related claims based upon the doctrine of legislative immunity. After a careful review of the record that is before us in this case in light of the applicable law, we hold that the Town is protected from Providence's fraud-related claims based upon the doctrine of governmental immunity and that Mayor Deter is protected from those claims based upon the doctrine of legislative immunity, so that the trial court erred by failing to dismiss Providence's

fraud-related claims. As a result, the decision of the Court of Appeals is affirmed, with this case being remanded to the Court of Appeals for further remand to Superior Court, Union County, for additional proceedings not inconsistent with this opinion.

I. Substantive and Procedural History

A. Substantive Facts

¶ 2 Providence provided fire services to the Town and surrounding areas between 1954 and 2015. On 14 October 2013, Providence and the Town entered into a pair of agreements pursuant to which Providence agreed to continue to provide fire protection services to the Town and its residents: (1) the Fire Suppression Agreement and (2) the Interlocal Agreement.[1] A third agreement contemplated as part of the overall arrangement between Providence and the Town, known as the Sale and Lease-back Agreement, was entered into in August of 2014, after a "lengthy delay" that was intended to ensure that certain Town-funded improvements could be made to Providence's fire station, with the trial court having described these three agreements as "so integrated, one with the other, as to arguably constitute a single, integrated agreement." The Fire Suppression Agreement, which was made a part of the Interlocal Agreement and attached to that document, provided that

> WHEREAS, the Town desires to provide fire protection to its citizens through the resources of the Department, and
>
> WHEREAS, the Department has undertaken the renovation and improvements of its 8,329 square foot and 1500 square foot volunteer fire station buildings located on its 1.259 acres ("the Property") and has incurred certain debt to effect the renovations and improvements; and
>
> WHEREAS, the Town intends to participate in funding the renovations and improvements of the Property

1. The factual statements set forth above are based upon the allegations contained in Providence's complaint, which must be viewed in the light most favorable to Providence given that this case is before us based upon the trial court's rulings with respect to the Town's and the Mayor's motions 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 Est. of Long v. Fowler*, 378 N.C. 138, 2021-NCSC-81, ¶ 12 (stating that this Court "accept[s] the allegations in the complaint as true and view[s] them in the light most favorable to the non-moving party" when reviewing the trial court's rulings upon a motion to dismiss for failure to state a claim for which relief can be granted (quoting *Corwin v. British Am. Tobacco PLC*, 371 N.C. 605, 611 (2018))).

> and the Department intends to sell and convey all rights and interests in the Property to the Town as security for its participation; and
>
> WHEREAS, the Town desires to insure the stability of the Department through this Agreement; and
>
> WHEREAS, the Department has the ability to provide fire protection to the citizens of the Town and agrees to provide fire protection and fire suppression services throughout the incorporated limits of the Town and its fire district.

The Fire Suppression Agreement further provided that Providence would provide fire protection and emergency medical services to the Town for a period of ten years beginning on 14 October 2013, with this period subject to extension for an additional five-year period in the event that Providence gave notice to the Town six months prior to the date upon which the agreement was to expire. The Fire Suppression Agreement could only be terminated "for cause," which was defined as "the failure of either party to perform the material provisions of this Agreement and [which] shall include, but not be limited to, the failure to meet the required service levels and transparency requirements of the Agreement."

¶ 3 In accordance with the Interlocal Agreement, substantial improvements were to be made to Providence's fire station, Providence was required to satisfy the Town's increased demand for fire protection services, and the Town would assume the debts incurred by Providence in connection with the improvements to be made to its fire station. Finally, the Sale and Lease-back Agreement provided that Providence's fire station would be sold to the Town for approximately $935,000.00 and leased back to Providence for use as a fire station for a fee of one dollar ($1.00) per year.

¶ 4 In November of 2013, Mayor Deter was elected to serve as the Town's mayor. Providence alleges that, during his campaign, Mayor Deter "concealed [his] intent to terminate the fire district and the [Fire Suppression Agreement] and w[as] supported by [a rival fire department] in order to bring about the termination of the contracts between [Providence] and the town." In addition, Providence alleges that Mayor Deter took a number of actions, including working with Wesley Chapel Volunteer Fire Department, to "create financial instability" for Providence "in order to set up a claim that the [Fire Suppression Agreement] could be terminated 'with cause' based upon manufactured financial instability claims." Among other things, Mayor Deter allegedly acted during 2014

and 2015 to undermine Providence by, among other things, "unilaterally chang[ing] the interpretation of the Interlocal Agreement to reduce the purchase price" of the fire station; creating, and then concealing, a " 'Decision Tree' which contemplated terminating the Interlocal Agreement and [Fire Suppression Agreement] and transferring the property to" Wesley Chapel Volunteer Fire Department; and directing the Town's attorney "to examine ways to dissolve the Fire District" in order to avoid paying damages to Providence. According to Providence,

> the Town's fraud was designed to (1) first encourage [Providence] to deed its long-owned Property, including the fire department building, to the Town since [Providence] would get its Property back anyway via a long term (and previously contemplated by the 2013 Interlocal Agreement) lease. This was done when the Town in reality was surreptitiously planning how best to (2) break the lease after it was entered into (together with the other agreements) rather than honor the lease and the other contracts. . . .
>
> [Providence] contends the Town's actions at this time, guided by Mayor Deter, were intended to put the Town in the best position to most easily terminate the lease (and Interlocal Agreement) together with the Fire Suppression Agreement as soon as possible, and with the ultimate goal and intent of:
>
> i. putting [Providence] out of its non-profit fire suppression and emergency medical services business;
>
> ii. having the Town end up owning all, or substantially all, of [Providence]'s real estate and other personal property;
>
> iii. all without paying just compensation to [Providence] for said property; and then,
>
> iv. transferring [Providence]'s property and service agreement to Defendant Wesley Chapel Volunteer Fire Department.

¶ 5 On 20 August 2014, the Town paid approximately $935,000.00 for the property upon which the fire station was located and obtained title to that property by means of a quitclaim deed. On 28 April 2015, a special meeting of the town council was held during which the council voted

to terminate the Fire Suppression Agreement, a decision which had the effect of terminating the Interlocal Agreement as well. According to Providence, the Town "terminated the Lease, forced [Providence] from the [fire station] property, forced [Providence] out of business, and . . . leased with an option to purchase the [fire station] by deed to Wesley Chapel Volunteer Fire Department."

B. Procedural History

¶ 6 On 4 June 2015, Providence filed a complaint asserting various claims for relief against the Town. On 25 August 2015, the trial court entered orders allowing Providence to amend its complaint; denying, in part, the Town's motion to dismiss Providence's complaint based upon governmental immunity; and granting a preliminary injunction in favor of Providence. The Town noted an appeal to the Court of Appeals from the trial court's orders.

¶ 7 On 18 April 2017, the Court of Appeals filed an opinion in which it affirmed the trial court's decision to allow Providence to amend its complaint; affirmed the trial court's decision to deny the Town's dismissal motion based upon governmental immunity; and reversed the trial court's decision to grant Providence's preliminary injunction motion. *Providence Volunteer Fire Dep't v. Town of Weddington*, 253 N.C. App. 126, 140–41 (2017). On 6 September 2017, Providence filed another motion to amend its complaint, which the trial court denied. On 26 March 2018, Providence voluntarily dismissed its complaint against the Town without prejudice pursuant to Rule 41 of the North Carolina Rules of Civil Procedure. *See* N.C.G.S. § 1A-1, Rule 41(a) (2021).

¶ 8 On 27 March 2018, Providence filed a new complaint asserting multiple claims against the Town, Mayor Deter, and the Wesley Chapel Volunteer Fire Department sounding in breach of contract, fraud in the inducement and actual fraud, deprivation of property and liberty without due process, and tortious interference with contract. On 1 June 2018, Mayor Deter filed a motion to dismiss and an answer to Providence's complaint in which he asserted that Providence's claims against him should be dismissed on the grounds that (1) Providence did not state a claim upon which relief could be granted; (2) Providence failed to allege facts tending to show that Mayor Deter had deprived Providence of a federal right; (3) Mayor Deter was not a real party in interest to the contracts at issue in this case; (4) Providence's claims were barred by res judicata, collateral estoppel, and the law of the case doctrine; and (5) Mayor Deter was protected by governmental immunity, legislative immunity, public official immunity, and qualified immunity. On 16 July 2018, the Town filed a motion to dismiss and an amended answer to

Providence's complaint in which it asserted that Providence's complaint was subject to dismissal pursuant to N.C.G.S. § 1A-1, Rules 12(b)(1), 12(b)(2), 12(b)(6) and 54, on the grounds that (1) the Town was entitled to governmental immunity; (2) the assertion of Providence's claims was precluded by the law of the case doctrine; (3) Providence's claims were barred by the doctrine of qualified immunity; and (4) Providence had failed to state a claim for which relief could be granted. On 1 November 2018, Providence filed a motion seeking leave to amend its complaint and presented a proposed amended complaint to the trial court.

¶ 9 On 27 November 2018, the trial court entered an order addressing Providence's request to amend its complaint, the Town's dismissal motion, and Mayor Deter's dismissal motion. Among other things, the trial court found that Providence's complaint stated a claim for relief against the Town, but not Mayor Deter, for breach of contract. In addition, the trial court found that Providence's complaint stated a claim for relief sounding in fraud against the Town and that its fraud-related claims were not barred by the doctrine of governmental immunity given that the Town was acting in a proprietary, rather than a governmental, capacity, stating that

> 13. The [c]ourt . . . determines that the weight and sufficiency of the evidence shows that the alleged tortious conduct of Defendant Town, under the particular circumstances of this action, arose from an activity that was proprietary in nature.
>
> a. . . . [T]his proprietary nature of the Town's activity herein includes: the allegedly-fraudulent negotiation and execution of Defendant Town's purchase of the Property and lease-back of the Property to [Providence], which included the insertion of a key provision or provisions making a breach of the [Fire Suppression Agreement] also a breach of the lease, designed to open the door for Defendant Town to, shortly after execution of the deed and lease-back, manufacture an unsubstantiated and subjective breach. This alleged a breach of the [Fire Suppression Agreement] and thus the lease was subjective enough to possibly allow the Town to obtain the real and personal property of [Providence], having substantial value,

i. without just compensation as provided for under our state and federal constitutions;

ii. without payment of adequate consideration; and,

iii. in laymen's terms, allowing the town to fraudulently obtain all this long-standing fire department property.

14. The Court is not persuaded that this specific transaction . . . has been designated as governmental by the General Assembly or that the undertaking is one in which only a governmental agency could engage. At first glance this activity might appear to be all about fire suppression and emergency services, and thus governmental in nature, by virtue of Chapter 69 of our General Statutes or even N.C.G.S. § 160A-291 which authorizes, but does not require a town to provide for its own fire protection. Yet, in this case, [Providence]'s allegations are not that Defendant Town was entering the lease for a legitimate governmental purpose, but rather the Town was attempting to obtain significant and valuable property in a proprietary manner, by way of a sale and lease back, of [Providence]'s property in a fraudulent manner. Indeed, the purchase and lease-back of any real property can be performed both privately and publicly. But if a Town is to acquire private property, it must do so properly, legally, and in accord with applicable law, not fraudulently, as alleged by [Providence]. Furthermore, the affidavits submitted by Defendant Town do not provide sufficient evidence controverting [Providence]'s allegations that the specific actions . . . were proprietary in nature.

15. The Court is also not persuaded that this action must follow the same result as that in *Meinck v. City of Gastonia*, [371 N.C. 497 (2018)]. . . .

16. The Court therefore concludes that the factors espoused in *Estate of Williams v. Pasquotank County Parks & Rec. Dep't*, 366 N.C. 195, 198–203 . . . (2012), have been met, . . . and Defendant Town is

> not entitled to dismissal of [Providence]'s fraud claim based upon governmental immunity at this stage of the proceedings.

After determining that Providence's fraud-related claims against the Town were not barred by the doctrine of governmental immunity, the trial court reached the same result with respect to the legislative immunity defense that Mayor Deter had asserted against Providence's fraud-related claims, stating that:

> 20. The Court concludes that [Mayor] Deter in his individual capacity, at this early stage of the litigation, is not entitled to the protection afforded by legislative immunity. . . . [Providence]'s allegations show that [Mayor] Deter was not engaged in the process of adopting prospective, legislative-type rules, but instead was engaged in activities wherein his alleged actions served to single out [Providence] for termination of the contractual agreements[.]

Finally, in addressing Providence's substantive due process claims alleging deprivation of property in violation of 42 U.S.C. § 1983 and the North Carolina Constitution, the trial court allowed those claims to move forward against the Town and against Mayor Deter in his individual capacity. The Town, Mayor Deter, and Providence noted appeals from the trial court's order to the Court of Appeals.

¶ 10 On 31 December 2020, the Court of Appeals filed an opinion in which it held, among other things, that the trial court had erred by denying the Town's motion to dismiss Providence's fraud-related claims against the Town because the Town was entitled to governmental immunity and that the trial court had erred by denying Mayor Deter's motion to dismiss the fraud-related claims that Providence had asserted against him on the basis of legislative immunity. *Providence Volunteer Fire Dep't, Inc. v. Town of Weddington*, No. COA19-203, 2020 WL 7974274, at **3–4 (N.C. Ct. App. Dec. 31, 2020). As an initial matter, the Court of Appeals noted that governmental immunity "covers *only* the acts of a municipality or a municipal corporation *committed pursuant to its governmental functions*," *Providence*, 2020 WL 7974274, at **3 (quoting *Evans ex rel. Horton v. Hous. Auth.*, 359 N.C. 50, 53 (2004)), and concluded that "the act of a town entering into contracts for the provision of firefighting services is governmental in nature[,]" *id.* The Court of Appeals based its determination that entering into contracts for the provision of fire protection services was governmental, rather

than proprietary, in nature upon N.C.G.S. § 69-25.6, which empowers municipal corporations "to make contracts to carry out the purposes of this Article [concerning rural fire protection]" and upon N.C.G.S. § 69-25.8, which allows any county or municipal corporation that is "performing any of the services authorized by this Article" to "be subject to the same authority and immunities as . . . a municipal corporation would enjoy in the operation of a fire department within its corporate limits." *Id.*; *see* N.C.G.S. §§ 69-25.6, -25.8 (2021). Finally, the Court of Appeals noted that, while the Town was immune from Providence's fraud-related claims, the same was not true with respect to the breach of contract claim that Providence had asserted against the Town. *Providence*, 2020 WL 7974274, at **3.

¶ 11 Similarly, the Court of Appeals held that the trial court should have dismissed the fraud-related claims that Providence had lodged against Mayor Deter in light of the fact that those claims rested upon actions that Mayor Deter had taken in a legislative capacity following his election as Mayor. *Providence*, 2020 WL 7974274, at **4. After pointing out that it had previously held that elected officials enjoy legislative immunity if (1) "they were acting in a legislative capacity at the time of the alleged incident; and (2) their acts were not illegal acts," *Providence*, 2020 WL 7974274, at **3 (quoting *Vereen v. Holden*, 121 N.C. App. 779, 782 (1996)), and that this "immunity may extend to 'voting, . . . and . . . every other act resulting from the nature, and in the execution, of the office,' " (alterations in original) (quoting *Stephenson v. Town of Garner*, 136 N.C. App. 444, 450 (2000)), the Court of Appeals cited *Bogan v. Scott-Harris*, 523 U.S. 44 (1998), in which the United States Supreme Court held that elected city council members were entitled to legislative immunity when they voted for an ordinance which terminated the plaintiff's employment, with this action being "undoubtedly legislative" given that it constituted "a discretionary, policymaking decision implicating the budgetary priorities of the city and the services the city provides to its constituents[,]" *Providence*, 2020 WL 7974274, at **4 (quoting *Bogan*, 523 U.S. at 55–56). In deciding that Mayor Deter's allegedly tortious acts had occurred while he was acting in a legislative capacity, the Court of Appeals held that, even though "some of the alleged actions happened before the Mayor's election," Providence's fraud-related claims also rested upon "the legislative actions that occurred after his election," a series of events that included the town council's vote to terminate the Town's fire services contract with Providence. *Id.* (emphasis omitted). This Court allowed Providence's request for discretionary review of the Court of Appeals' decision.

II. Analysis

A. Standard of Review

¶ 12 Interlocutory orders such as those at issue in this case are not immediately appealable unless they affect a substantial right. N.C.G.S. § 7A-27(b)(3)(a) (2021). An interlocutory appeal from an order addressing a governmental entity's immunity claim is immediately appealable "because [immunity] represents a substantial right." *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 338 (2009). This Court reviews a trial court's decision to grant or deny a motion to dismiss based upon the doctrine of governmental or legislative immunity using a de novo standard of review. *See White v. Trew*, 366 N.C. 360, 362–63 (2013) (reviewing an appeal from a trial court order denying "a motion to dismiss that raises sovereign immunity as grounds for dismissal" utilizing a de novo standard of review).

B. Governmental Immunity for the Town of Weddington

¶ 13 **[1]** In attempting to persuade us to reverse the Court of Appeals' decision in this case, Providence begins by arguing that the Town is not shielded from the fraud-related claims that Providence has asserted against it on the basis of governmental immunity on the grounds that the challenged actions in which the Town allegedly engaged were proprietary, rather than governmental, in nature. According to Providence, the Town would be "hard pressed to provide to this Court an action which is more 'proprietary' then [sic] the bargain and exchange of real property," with the Town's actions being clearly proprietary given that it received a "significant economic benefit" by "acquir[ing] an asset worth over $1,595,000.00 for an investment of only $935,000.00." In Providence's view, the trial court correctly found that the complaint adequately alleged that the Town's actions in executing an agreement providing for the sale and lease-back of the fire station was proprietary in nature, with the Town's "insertion of a key provision . . . making a breach of the [Fire Services Agreement] also a breach of the lease [being] designed to open the door for Defendant Town to, shortly after execution of the deed and lease-back, manufacture an unsubstantiated and subjective breach."

¶ 14 Providence argues that a governmental action is proprietary in the event that the governmental entity operates as a private corporation or, in other words, when "the activity is commercial or chiefly for the private advantage of the compact community," citing *Britt v. City of Wilmington*, 236 N.C. 446, 450 (1952). According to Providence, the acquisition of the fire station was "chiefly for the benefit of the compact community of the Town of Weddington" rather than for the benefit of "the State as a whole"

and that, "regardless of whether the ultimate result [wa]s some public purpose, i.e., fire safety, if the activities . . . are done through the Town's commercial function, the said actions are proprietary."

¶ 15 In addition, Providence asserts that, in evaluating whether a municipality's actions are proprietary, rather than governmental, in nature, a reviewing court must examine each aspect of the municipality's interactions with a private entity individually in the course of determining which aspects of the transaction are proprietary and which are governmental. *See City of Gastonia v. Balfour Beatty Constr. Corp.*, 222 F. Supp. 2d 771, 774 (W.D.N.C. 2002). In support of this assertion, Providence directs our attention to *Town of Sandy Creek v. E. Coast Contracting, Inc.*, 226 N.C. App. 576, 581–82 (2013), in which the Court of Appeals distinguished between the initial steps involved in constructing a sewer system, which included making governmental decisions such as "whether to construct a sewer system or where to locate the sewer system," and the latter stages of that process, which included entering into and administering a construction contract, before holding that "a local governmental unit acts in a proprietary function when it contracts with engineering and construction companies, regardless of whether the project under construction will be a governmental function once it is completed." In Providence's view, the trial court in this case correctly applied the factors enunciated in *Estate of Williams ex rel. Overton v. Pasquotank Cnty. Parks & Recreation Dep't*, 366 N.C. 195, 196 (2012), in the course of determining that "the purchase and lease back of any real property can be performed both privately and publicly" and that nothing in the relevant statutory provisions suggests that the General Assembly intended to designate the purchase and lease-back of the property upon which a fire station is situated as a governmental function. Finally, Providence contends that, in the event that we believe that we must look to "additional factors" in order to determine whether the Town's actions were proprietary, rather than governmental, in nature, it should consider that the function of "entering into purchase and lease back documents is not one traditionally provided by the government," that "the Town's actions were done to obtain a significant and valuable property," and that "the Town failed to provide any evidence to rebut [Providence]'s allegations."

¶ 16 In seeking to persuade us to affirm the Court of Appeals' decision, the Town begins by arguing that the purchase and lease-back of the fire station cannot be "viewed in a vacuum as a standalone property purchase" and that the contractual provisions relating to the fire station constituted "an integral part of a larger agreement for the provision

of fire protection services" that was "necessary for [the Town] to provide fire protection to its citizens" and that the ultimate purpose of the overall transaction was governmental, rather than proprietary, in nature. The Town argues that, if its actions are viewed as the provision of fire protection services, a proper application of the test enunciated in *Estate of Williams* establishes that it was acting in a governmental, rather than a propriety, manner in the course of its dealings with Providence given that the General Assembly has designated the provision of fire protection services as a governmental action and given that the Town does not charge a separate fee for providing such services.

¶ 17 In the Town's view, the sale and lease-back of the property upon which the fire station is located cannot be separated out from the rest of the agreements between the Town and Providence, with it being necessary to examine the relationship between the parties as a single governmental action, citing *Meinck v. City of Gastonia*, 371 N.C. 497, 517 (2018), in which this Court held that the municipality's action in "leasing . . . property to the Art Guild so as to promote the arts for the purpose of redeveloping and revitalizing the downtown area was a governmental[,]" rather than a proprietary, function. According to the Town, the Court in *Meinck* "examined the larger picture and the lease as part of a governmental function" rather than "narrowly describ[ing the town's] actions as a commercial property lease." As a result, the Town posits that the Fire Suppression Agreement, the Interlocal Agreement, and the Sale and Lease-back Agreement constituted integrated agreements that were necessary in order for the Town to carry out the governmental function of providing fire protection services and that, "[w]hen the relationship between the parties is viewed in its entirety as in *Meinck*," the purchase of the fire station cannot be fairly seen as a standalone proprietary real estate transaction and should be understood as part of an overall arrangement for providing fire suppression services.

¶ 18 This Court has recently held that the doctrine of governmental immunity

> renders local governments such as counties and municipal corporations "immune from suit for the negligence of [their] employees in the exercise of governmental functions absent waiver of immunity." *Meyer v. Walls*, 347 N.C. 97, 104 . . . (1997) (quoting *State ex rel. Hayes v. Billings*, 240 N.C. 78, 80 . . . (1954)). Although "[t]he State's sovereign immunity applies to both its governmental and proprietary functions," the "more limited governmental immunity

> covers only the acts of a municipality or a municipal corporation committed pursuant to its governmental functions." *Evans v. Hous. Auth. of City of Raleigh*, 359 N.C. 50, 53 . . . (2004) (quoting *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 533 . . . (1983)). In other words, while governmental immunity protects units of local government from suit for "acts committed in [their] governmental capacity," if the entity in question "undertakes functions beyond its governmental and police powers and engages in business in order to render a public service for the benefit of the community for a profit, it becomes subject to liability for contract and in tort as in case of private corporations." *Id.* (quoting *Town of Grimesland v. City of Washington*, 234 N.C. 117, 123 . . . (1951)).

State v. Kinston Charter Acad., 379 N.C. 560, 2021-NCSC-163, ¶ 22 (first, fourth, and seventh alterations in original). In *Estate of Williams*, this Court took the "opportunity to restate our jurisprudence of governmental immunity[,]" 366 N.C. at 196, and began that process by reciting the rule set out in *Britt v. City of Wilmington*, 236 N.C. 446, 450 (1952), to the effect that governmental immunity "covers only the acts of a municipality or a municipal corporation committed pursuant to its governmental functions[,]" *Est. of Williams*, 366 N.C. at 199 (emphasis omitted) (quoting *Evans*, 359 N.C. at 53), and does not "apply when the municipality engages in a proprietary function[,]" *id.* at 199. In addition, we noted that this Court has "long held that a 'governmental' function is an activity that is 'discretionary, political, legislative, or public in nature and performed for the public good in behalf of the State rather than for itself,' " while a proprietary function "is one that is 'commercial or chiefly for the private advantage of the compact community.' " *Id.* (quoting *Britt*, 236 N.C. at 450). In other words, we stated that,

> [w]hen a municipality is acting "in behalf of the State" in promoting or protecting the health, safety, security, or general welfare of its citizens, it is an agency of the sovereign. When it engages in a public enterprise essentially for the benefit of the compact community, it is acting within its proprietary powers.

Id. at 200 (quoting *Britt*, 236 N.C. at 450–51).

¶ 19 Our opinion in *Estate of Williams* adopted a three-step method of analysis for use in determining whether a municipality's action was

governmental or proprietary in nature. The first step, or "threshold inquiry[,] in determining whether a function is proprietary or governmental is whether, and to what degree, the legislature has addressed the issue." *Id.* If an action "has been designated as governmental or proprietary in nature by the legislature," that is the end of the inquiry; if not, the second step is to determine whether the activity "is one in which only a governmental agency could engage" or provide, in which case "it is perforce governmental in nature." *Id.* at 202 (emphasis omitted). As we noted, the second step in the required analysis

> has limitations in our changing world. Since we first declared in *Britt*, over half a century ago, that an activity is governmental in nature if it can only be provided by a governmental agency, many services once thought to be the sole purview of the public sector have been privatized in full or in part. Consequently, it is increasingly difficult to identify services that can only be rendered by a governmental entity.
>
> Given this reality, when the particular service can be performed both privately and publicly, the inquiry involves consideration of a number of additional factors, of which no single factor is dispositive. Relevant to this inquiry is whether the service is traditionally a service provided by a governmental entity, whether a substantial fee is charged for the service provided, and whether that fee does more than simply cover the operating costs of the service provider. We conclude that consideration of these factors provides the guidance needed to identify the distinction between a governmental and proprietary activity. Nevertheless, we note that the distinctions between proprietary and governmental functions are fluid and courts must be advertent to changes in practice. We therefore caution against overreliance on these four factors.

Id. at 202–03 (footnotes omitted).

¶ 20 We applied the test enunciated in *Estate of Williams* in *Meinck*, in which the plaintiff sued the City of Gastonia for injuries that she sustained after falling on the steps of a City-owned building that had been purchased in an attempt to revitalize the downtown area and that was being leased to nonprofit art groups and the Gaston County Art Guild for the purpose of "bring[ing] artists into the downtown" area on the

theory that "that the downtown area would thus become more attractive for businesses and people." 371 N.C. at 498. The Art Guild, in turn, subleased portions of the building to individual artists, with the City being "responsible for maintaining the exterior of the premises" and having "the right to inspect the property at any time." *Id.* at 499. Although the City retained 90% of rental payments made by the artists, it did not make a profit on the building or seek "to make a profit from the lease with the Art Guild." *Id.*

¶ 21 In applying the test enunciated in *Estate of Williams* to the facts at issue in *Meinck*, we began by undertaking the "threshold inquiry" of determining whether the General Assembly had deemed actions such as those in which the City had engaged to be governmental or proprietary in nature and noted that the legislature had authorized municipalities to engage in redevelopment projects in blighted areas in accordance with the "Urban Redevelopment Law," Article 22 of Chapter 160A of the General Statutes. *Id.* at 504–05. The Urban Redevelopment Law authorized and encouraged "the acquisition, preparation, sale, sound replanning, and redevelopment" of "blighted areas" by local governments and encouraged municipalities "to purchase, obtain options upon, acquire by gift, grant, devise, eminent domain or otherwise, any real or personal property or any interest therein, together with any improvements thereon, necessary or incidental to a redevelopment project." *Id.* at 507–08 (quoting N.C.G.S. § 160A-502 (2017)). This Court noted that,

> even when the legislature has not directly resolved whether a specific activity is governmental or proprietary in nature, a legislative provision addressing the activity may still be relevant—in conjunction with the other *Williams* factors—to a determination of whether an activity is governmental, particularly if the statutory language suggests a significant statutory indication that the activity is a governmental function.

Id. at 512 (cleaned up).

¶ 22 On the other hand, we also concluded that the General Assembly "ha[d] not deemed all urban redevelopment and downtown revitalization projects governmental functions that are immune from suit" or "directly resolved" the issue of whether the City's lease of the building was governmental, rather than proprietary, in nature. *Id.* at 513. For that reason, we went on to address the additional factors mentioned in *Estate of Williams*. *Id.* First, the Court addressed whether the governmental action at issue in *Meinck* was one "in which only a governmental agency

could engage" and held that North Carolina law did "not preclude private entities from engaging in redevelopment projects and downtown revitalization activities," so that a private entity "could conceivably engage in the same activity." *Id.* at 514 (emphasis omitted). In examining "whether the service is traditionally [one] provided by a governmental entity," we found no evidence that the service was not traditionally performed by the government. *Id.* at 514–15. In addition, in examining "whether a substantial fee is charged for the service provided and whether that fee does more than simply cover the operating costs of the service provider," we determined that the City sustained net losses of $11,489.03 and $18,072.56, respectively, during the first two years in which it owned and operated the building and concluded that the building was not providing the City with a profit. *Id.* (quoting *Est. of Williams*, 366 N.C. at 202–03). Finally, we noted the "decidedly noncommercial nature of defendant's undertaking" and the fact that "[a]rt occupies a unique role in our society and our state." *Id.* at 516.

¶ 23 At the conclusion of our analysis, we held that the City's action in "leasing the property to the Art Guild so as to promote the arts for the purpose of redeveloping and revitalizing the downtown area" was governmental, rather than proprietary, in nature based upon an analysis of all of the relevant factors, particularly given "the statutory indications that urban redevelopment activities undertaken to promote the health, safety, and welfare of North Carolina citizens are governmental functions, and the legislative determination that urban blight 'cannot be effectively dealt with by private enterprise' alone." *Id.* at 517. As part of this process, we emphasized that "the proper designation of a particular action of a county or municipality" as governmental or proprietary "is a fact intensive inquiry . . . and may differ from case to case." *Id.* at 517–18 (alteration in original).

¶ 24 In applying the test enunciated in *Estate of Williams* to the facts before us in this case, the "threshold inquiry" that we must undertake is whether the General Assembly has defined the relevant municipal action as governmental or proprietary in nature. According to the parties, four statutory provisions appear to have some bearing upon this aspect of the required analysis. First, the parties discuss N.C.G.S. § 69-25.5, which governs "[m]ethods of providing fire protection" services in Rural Fire Protection Districts and provides that "the board of county commissioners shall . . . provide fire protection for the district—(1) [b]y contracting with any incorporated city or town, with any incorporated nonprofit volunteer or community fire department, or with the Department of Agriculture and Consumer Services to furnish fire protection." Secondly,

the parties refer to N.C.G.S. § 69-25.6, which appears in the same article as N.C.G.S. § 69-25.5 and provides that "[m]unicipal corporations are hereby empowered to make contracts to carry out the purposes of this Article." Thirdly, the parties address N.C.G.S. § 69-25.8, which governs the "[a]uthority, rights, privileges and immunities of counties" or other local government entities which perform services within Rural Fire Protection Districts and provides that

> [a]ny county, municipal corporation or fire protection district performing any of the services authorized by this Article shall be subject to the same authority and immunities as a county would enjoy in the operation of a county fire department within the county, or a municipal corporation would enjoy in the operation of a fire department within its corporate limits[.]

N.C.G.S. § 69-25.8. Finally, the parties mention N.C.G.S. § 160A-291, which provides that a municipality "is authorized to appoint a fire chief; to employ other [firefighters]; to establish, organize, equip, and maintain a fire department; and to prescribe the duties of the fire department."

¶ 25 The trial court and the Court of Appeals reached opposite conclusions about the degree to which the relevant statutory provisions address whether the function of entering into contracts, including one involving the sale, lease-back, and purchase of real estate, for the ultimate purpose of providing fire protection services is a governmental or proprietary activity. On the one hand, the trial court was "not persuaded that this specific transaction . . . has been designated as governmental by the General Assembly or that the undertaking is one in which only a governmental agency could engage." In reaching this conclusion, the trial court determined that the Town's conduct in entering into the relevant contracts as alleged in the complaint was proprietary on the theory that, while, "[a]t first glance this activity might appear to be all about fire suppression and emergency services . . . by virtue of Chapter 69 of our General Statutes or even N.C.G.S. § 160A-291," Providence had alleged "not that Defendant Town was entering the lease for a legitimate governmental purpose, but rather [that] the Town was attempting to obtain significant and valuable property in a proprietary manner, by way of a sale and lease back, of [Providence]'s property in a fraudulent manner." The Court of Appeals, on the other hand, determined that, in light of its reading of N.C.G.S. § 69-25.6 and N.C.G.S. § 69-25.8, the General Assembly had intended that "entering into contracts for the provision of firefighting services" would be a governmental, rather than a proprietary, action.

¶ 26 Assuming, without deciding, that the initial step of the analysis required by *Estate of Williams* is not determinative of the inquiry that we must undertake in this case, we proceed to the next step, at which we are required to determine whether the activity "is one in which only a governmental agency could engage." 366 N.C. at 202 (emphasis omitted). Although private fire departments such as Providence are authorized to provide fire protection services to rural fire districts, it is also clear that such arrangements are often organized and funded by a town or other local government entity. As a result, at an absolute minimum, it is clear that, while private entities are authorized to provide fire service within municipal boundaries, they are frequently acting on behalf of local governmental entities when they do so.

¶ 27 In examining the "additional factors" mentioned in *Estate of Williams*, including "whether the service is traditionally . . . provided by a governmental entity, whether a substantial fee is charged for the service provided, and whether that fee does more than simply cover the operating costs of the service provider," 366 N.C. at 202 (footnotes omitted), we hold that each of these factors clearly tends to suggest that the activities in which the Town was engaged in the course of its dealings with Providence were governmental, rather than proprietary, in nature. Fire protection services are traditionally provided by the government, either directly or through contractual arrangements with private entities as authorized by N.C.G.S. § 160A-291 and Chapter 69 of the General Statutes. In addition, the Town does not currently charge a fee to its residents for fire protection services and does not make a profit in connection with the provision of such services.

¶ 28 As a result, as was the case in *Meinck*, we hold that, even if the General Assembly has not "directly resolved" the issue of whether entering into contractual arrangements for the provision of fire protection services is governmental or proprietary in nature, 371 N.C. at 512 (quoting *Est. of Williams*, 366 N.C. at 202), N.C.G.S. § 160A-291 and Chapter 69 of the General Statutes represent "a significant 'statutory indication' " that the activity is governmental, *id.* (quoting *Est. of Williams*, 366 N.C. at 200). In addition, as was the case with the downtown revitalization process at issue in *Meinck*, the provision of fire protection services is "decidedly noncommercial" in nature given that, rather than being an activity that tends to generate a significant profit, such services have traditionally been provided by governmental entities for the purpose of protecting the safety and well-being of local residents. *Id.* at 516 (quoting *Est. of Williams*, 366 N.C. at 203). Finally, as was the case in *Meinck*, we decline to differentiate between the purchasing and leasing of real

estate for the purpose of providing fire protection services from the other activities involved in the provision of such services, given that both actions were part of the same transaction and had the effect of accomplishing the same governmental purpose.

¶ 29 In reaching the last of these conclusions, we decline Providence's invitation to divide the activity in which the Town was engaged into multiple, separate pieces and to treat the sale and lease back provisions of the contracts between the parties as a standalone real estate transaction that must be considered separate and apart from the remainder of the agreement between the parties. As the trial court recognized, even though the Fire Suppression Agreement, the Interlocal Agreement, and the Sale and Lease-back Agreement were "delineated as separate contracts and executed at different times," they were, "in actuality, so integrated, one with the other, as to arguably constitute a single, integrated agreement." In essence, the contracts between the parties reflect the undisputed fact that the fire station that Providence intended to utilize to provide fire protection services to the residents of the Town needed renovation, that the Town had agreed to pay for those renovations and assume a portion of Providence's debt, and that the Town had entered into the sale and lease back arrangement with Providence for the purpose of securing its investment. As a result, given that Providence would need a fire station in order to provide service to the Town and given that the transaction reflected in the Sale and Lease-Back Agreement set out the manner in which the needed fire station would be provided, we are unable to divorce the provisions of the Sale and Lease-Back Agreement from the remainder of the overall transaction between the parties, which was clearly intended to ensure that the residents of the Town received fire protection services.

¶ 30 A municipality cannot provide fire suppression services without some degree of preparation, such as ensuring that the facilities and equipment needed to permit effective fire suppression functions to be performed by Town directly or an entity with which the Town had contracted are available. Put another way, more is necessarily involved in the provision of fire protection services than the immediate act of fire suppression. Under the logic of Providence's position, a municipality's decision to purchase fire protection equipment, such as fire trucks, hoses, and turnout gear, on the commercial market would be rendered proprietary even though the resulting costs were necessarily incurred for the purpose of making a service that units of local government have traditionally provided, that benefits all residents, and that does not provide an economic return to the municipality, available. Obtaining a fire

station for use in providing fire suppression services is not, in our opinion, any different than the procurement of vehicles, hoses, and turnout gear. As a result, for all of these reasons, we hold that the Town's conduct in entering into the Fire Suppression Agreement, the Interlocal Agreement, and the Sale and Lease-back Agreement for the provision of fire protection services was a governmental action that rendered it immune from Providence's fraud-based claims.

C. Legislative Immunity for the Mayor

¶ 31 **[2]** In arguing that Mayor Deter was not entitled to the protection of legislative immunity from its fraud-related claims, Providence asserts that the trial court correctly determined that Mayor Deter "was not engaged in the process of adopting prospective, legislative-type rules, but instead was engaged in activities wherein his alleged actions served to single out [Providence] for termination of the contractual agreements." In Providence's view, the Court of Appeals erred in relying upon *Vereen v. Holden*, 121 N.C. App. 779 (1996), in holding that legislative immunity applies to circumstances such as those at issue here, with the burden resting upon Mayor Deter to prove that he is entitled to legislative immunity in light of the relevant facts. In addition, Providence argues that the Court of Appeals failed to analyze the specific facts alleged in its complaint and that its holding that, "because [Mayor] Deter operated in his legislative capacity when he added items to an agenda and abstained from voting on the action he was acting in his legislative capacity," ignores Providence's allegation that Mayor Deter's "fraudulent actions occurred outside of the legislative setting." Providence maintains that its allegations that Mayor Deter concealed "his intent to fraudulently induce [Providence] into transferring the real property, in exchange for a 10-Year Fire Service Agreement and to only later cancel said Agreements and transfer the [Fire Suppression Agreement] and property to [Wesley Chapel Volunteer Fire Department]" were consistently stated throughout the complaint, and described actions that are not legislative in nature.

¶ 32 In arguing that the Court of Appeals correctly held that he was shielded from Providence's fraud-related claims on the basis of legislative immunity, Mayor Deter begins by arguing that an "overwhelming body of law" as well as "public policy considerations" would support a decision on the part of this Court to recognize the existence of the doctrine of legislative immunity. Mayor Deter also argues that there would be "*no fraud claim* [*in this case*] w*ithout the legislative actions that occurred after* [*Mayor Deter's*] *election*," citing the Court of Appeals decision, *Providence*, 2020 WL 7974274, at **4, given that the "controlling event" around which Providence's fraud claims center is the 28 April

2015 town council vote to terminate the contracts, with this event being clearly legislative in nature. In support of this assertion, Mayor Deter cites *Stephenson*, in which the Court of Appeals held that, "[s]o long as the acts are legislative in nature, [legislative] immunity may extend to voting, and every other act resulting from the nature, and in the execution, of the office," 136 N.C. App. at 450 (cleaned up), and posits that his actions in "call[ing] the special meeting and set[ting] the agenda" for the 28 April 2015 town council meeting fall squarely within the grant of legislative authority vested in his office.

¶ 33 Although this Court has not directly addressed the doctrine of legislative immunity to date, both the United States Court of Appeals for the Fourth Circuit and the North Carolina Court of Appeals have recognized its existence. Similarly, the United States Supreme Court has determined that "state and regional legislators" and "local legislators" are entitled to federal legislative immunity, since "the rationales for such immunity are fully applicable to local legislators[,]" *Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998), and "the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability[,]" *id.* at 52. Finally, Providence has not contended that we should refrain from recognizing the doctrine of legislative immunity. As a result, we hold that legislative immunity is a recognized bar to claims against North Carolina public officials.

¶ 34 According to the Court of Appeals, local officials are immune from suit if "(1) . . . they were acting in a legislative capacity at the time of the alleged incident; and (2) their acts were not illegal acts." *Vereen*, 121 N.C. App. at 782 (citing *Scott v. Greenville County*, 716 F.2d 1409, 1422 (4th Cir. 1983)). An elected official may, however, be held liable in his or her individual capacity if his or her actions were malicious, corrupt or outside the scope of his or her official duties, even if they were legislative in nature. *See Epps v. Duke Univ., Inc.*, 122 N.C. App. 198, 204–05 (1996). "Whether an action is legislative or administrative has been determined on a case by case basis," with the Fourth Circuit having treated "eliminating a position for budgetary reasons" as legislative, while treating decisions involving "hiring, firing and other employment decisions [as] administrative and not deserving of legislative immunity." *Vereen*, 121 N.C. App. at 783. In addition, the Fourth Circuit has held that governmental officials cannot claim legislative immunity for "acts such as bribery which are obviously not in aid of legislative activity." *Scott*, 716 F.2d at 1422 (cleaned up). Finally, in *Bogan*, the United States Supreme Court held that a city council-member's decision to vote for the adoption of a particular ordinance was "quintessentially legislative"

and that a mayor's "introduction of a budget and signing into law an ordinance also were formally legislative," despite the fact that the mayor "was an executive official," given that "officials outside the legislative branch are entitled to legislative immunity when they perform legislative functions." 523 U.S. at 55.

¶ 35 After carefully reviewing the record, we hold that Mayor Deter's actions in calling the 28 April 2015 town council meeting and setting the agenda for that meeting constituted legislative actions. Like the activities held to be protected in *Bogan*, Mayor Deter's acts were "formally legislative" in that they were within his discretion as an elected official, they were undertaken as a part of the execution of his mayoral duties, and they were related to the making of legislative decisions. *See Bogan*, 523 U.S. at 55. Although certain of the allegations that Providence has made in support of its fraud-related claims describe events that occurred before Mayor Deter's election, his alleged conduct would not have resulted in any injury to Providence in the absence of the legislative acts of calling a town council meeting to vote to terminate the contracts, placing the issue of contract termination on the agenda, and calling for a vote on that issue. As a result, we hold that the trial court erred when it denied Mayor Deter's motion to dismiss the fraud-related claims that had been lodged against him on the basis of legislative immunity.

III. Conclusion

¶ 36 Thus, for the reasons set forth above, we hold that the Court of Appeals did not err in deciding that the Town was shielded from Providence's fraud-related claims on the basis of governmental immunity given that the Town's actions in entering into the Fire Suppression Agreement, the Interlocal Agreement, and the Sale and Lease-back Agreement involved the governmental activity of providing fire protection services and cannot be separated into multiple segments for the purpose of determining whether the Town was performing a governmental or proprietary function. In addition, we hold that the Court of Appeals did not err in holding that Mayor Deter was shielded from Providence's fraud-related claims on the basis of legislative immunity given that his actions during the period leading up to and during the 28 April 2015 town council meeting were undertaken as part of his discretionary legislative duties as mayor. On the other hand, as we have already noted, Providence's claims for breach of contract and claims alleging deprivation of property in violation of due process remain pending before the trial court. As a result, the Court of Appeals' decision is affirmed, with this case being remanded to the Court of Appeals for further remand to

Superior Court, Union County, for further proceedings not inconsistent with this opinion.

AFFIRMED.

Justice EARLS concurring in part and dissenting in part.

¶ 37 Firefighting is a hallmark governmental function. In North Carolina, "[m]unicipal corporations are specifically authorized to organize and maintain fire departments," and "[t]he organization and operation of a fire department is a governmental, not a private or proprietary function." *Great Am. Ins. Co. v. Johnson*, 257 N.C. 367, 370 (1962). A municipality, or the entity it contracts with, is thus "entitled to governmental immunity for *conduct performed in the course of fighting a fire*." *Pruett v. Bingham*, 238 N.C. App. 78, 85 (2014), *aff'd*, 368 N.C. 709 (2016) (emphasis added). But not everything a municipality does that is related to firefighting is "*conduct performed in the course of fighting a fire*." Indeed, the basic premise of the governmental immunity doctrine, which hinges on the distinction between governmental and proprietary functions, is that certain actions undertaken by a governmental entity that are at least tangentially connected to a public purpose are, nevertheless, not governmental functions. A town purchasing a copier for use at the fire station is not the same legally as firefighters rushing to the scene of a blaze.

¶ 38 In this case, the Town of Weddington (the Town) asserts that its acquisition of a fire station from Providence Volunteer Fire Department (Providence) is a governmental function because firefighting is a governmental function. The majority takes this self-interested assertion at face value. Yet purchasing a fire station is not necessarily "conduct performed in the course of fighting a fire." Nor is it, as the majority proposes, necessarily the same as "entering into contractual arrangements for the provision of firefighting services," *ante*, at ¶ 28. The fact that the Town's conduct is firefighting-adjacent is not enough to demonstrate its entitlement to governmental immunity when Providence has "allege[d] facts that, if taken as true, are sufficient to establish a waiver . . . [of] immunity." *Wray v. City of Greensboro*, 370 N.C. 41, 48 (2017) (second and third alterations in original) (emphasis omitted). Accordingly, while I agree with the majority that the mayor of the Town is entitled to legislative immunity, I dissent from the portion of the majority opinion affirming the Court of Appeals' reversal of the trial court's order denying the Town's motion to dismiss Providence's fraud-based claims on governmental immunity grounds.

I. General sovereign and governmental immunity principles

¶ 39 A municipality's governmental immunity from tort liability is a "judge-made doctrine" deriving from the State of North Carolina's sovereign immunity. *Steelman v. City of New Bern*, 279 N.C. 589, 594 (1971). Sovereign immunity "originated with the feudal concept that the king could do no wrong" under English common law. *Corum v. Univ. of N.C. Through Bd. of Governors*, 330 N.C. 761, 785 (1992). But neither sovereign immunity nor governmental immunity were "a part of the common law of England" that North Carolina "adopted . . . in 1776." *Id.* Rather, the doctrine of governmental immunity appears to have first been recognized by this Court in a nineteenth century decision, *Moffit v. City of Asheville*, 103 N.C. 237 (1889). *See* Trey Allen, *Local Government Immunity to Lawsuits in North Carolina* 3 n.8 (2018). Presaging modern-day applications of the doctrine, *Moffit* involved a municipality's assertion that it was immune from suit in an action brought by a plaintiff who alleged he was kept in sub-standard conditions in a jail operated by the city. *Moffit*, 103 N.C. at 237. Since *Moffit*, the doctrine has been recognized and repeatedly reaffirmed "on grounds of sound public policy." *Smith v. Hefner*, 235 N.C. 1, 6 (1952).

¶ 40 What those "grounds of sound public policy" actually entail has frequently been left unsaid. We have posited that the doctrine "seems to rest on a respect for the positions of two coequal branches of government—the legislature and the judiciary. Thus, courts have deferred to the legislature the determination of those instances in which the sovereign waives its traditional immunity." *Corum*, 330 N.C. at 785. However, on the whole, we have not much improved on the United States Supreme Court's tautological pronouncement that "[i]t is an axiom in politics, that a sovereign and independent State is not liable to the suit of any individual, nor amenable to any judicial power, without its own consent." *Cohens v. Virginia*, 19 U.S. 264, 303 (1821). We have never explained why it should be an "axiom" that a doctrine so deeply rooted in a pre-Independence understanding of sovereignty and the royal prerogative should be a fixture in the jurisprudence of courts operating in a representative democracy. *Cf. Donahue v. United States*, 660 F.3d 523, 526 (1st Cir. 2011) (Mem.) (Torruella, J., concerning the denial of en banc review) ("[T]he establishment in this country of a republican form of government, in which sovereignty does not repose on any single individual or institution, made it clear that neither the government nor any part thereof could be considered as being in the same infallible position as the English king had been, and thus immune from responsibility for harm that it caused its citizens.").

¶ 41 Nevertheless, the doctrines of sovereign and governmental immunity have been recognized and implicitly ratified by the legislature. *See* N.C.G.S. § 160A-485(a) (2021) ("Any city is authorized to waive its immunity from civil liability in tort by the act of purchasing liability insurance."); *see also* N.C.G.S. § 115C-42 (2021) ("Any local board of education . . . is hereby authorized and empowered to waive its governmental immunity . . . ."). These doctrines are now "firmly established in our law today, and by legislation ha[ve] been recognized by the General Assembly as the public policy of the State." *Steelman*, 279 N.C. at 594. I do not dispute the continued viability of the doctrines of sovereign and governmental immunity or their availability as a general matter to governmental actors as a defense to certain claims.

¶ 42 Yet the General Assembly has left it largely to the courts to define the circumstances under which a municipality is understood to have waived its governmental immunity in the absence of an express waiver. As the majority correctly explains, this case turns on our application of another judge-made rule: the distinction between private or proprietary functions (for which a municipality is not entitled to governmental immunity) and governmental functions (for which immunity does apply). Our case law provides some guidance in approaching this question, though we have candidly admitted that "the distinction may be difficult to distinguish at times." *Bynum v. Wilson County*, 367 N.C. 355, 358 (2014). Yet to the extent our recognition and application of the doctrine of governmental immunity is rooted in "sound public policy," those policy considerations should inform our reasoning when we are called upon to apply the doctrine.

¶ 43 I have already noted the relative paucity of legal and policy justifications for the doctrines of sovereign and governmental immunity in our precedents. When asked at oral argument for a "good public policy reason" to allow municipalities to invoke governmental immunity to defend against fraud claims involving the purchase of a building, counsel for the Town responded that withholding governmental immunity would dissuade qualified individuals from serving in government, "chill" the government's ability to make decisions on difficult policy issues, and open up the floodgates to litigation challenging every governmental decision that any citizen disagrees with. Addressing the federal doctrine of sovereign immunity, one prominent scholar noted a variety of plausible policy justifications including "protecting government treasuries from the costs of damage suits," Erwin Chemerinsky, *Against Sovereign Immunity*, 53 Stan. L. Rev. 1201, 1217 (2001), "protect[ing] the government from undue interference by the judiciary," *id.* at 1218, the existence of "adequate

alternatives" as a remedy for harms in many cases, *id.* at 1219, "curb[ing] bureaucratic power," *id.* at 1222, and "tradition[,]" *id.* at 1223. In a dissent, Justice Lake defended the doctrine of sovereign immunity as "not an un-American concept" emanating from the fundamental principle "that the courts, including this Court, are not the sovereign but the mere instruments of the sovereign, having no inherent powers by Divine Right nor by virtue of superior wisdom or purer ethics, but having only the jurisdiction conferred upon them by the sovereign." *Smith v. State*, 289 N.C. 303, 341–42 (1976) (Lake, J., dissenting).

¶ 44 Whatever water these explanations may hold, there are also countervailing legal and policy reasons for limiting the scope of these doctrines, as this Court has previously acknowledged. For example, in *Corum*, we rejected an effort to invoke sovereign immunity to defend against a claim arising directly under our state constitution. 330 N.C. at 786. We explained that it was "the judiciary's responsibility to guard and protect those rights" enumerated by the North Carolina Constitution, *id.* at 785, and that

> [i]t would indeed be a fanciful gesture to say on the one hand that citizens have constitutional individual civil rights that are protected from encroachment actions by the State, while on the other hand saying that individuals whose constitutional rights have been violated by the State cannot sue because of the doctrine of sovereign immunity.

Id. at 786. Although addressing a constitutional claim rather than the tort claim at issue here, *Corum*'s reasoning illustrates how expansive interpretations of immunity doctrines conflict with "the principle that for every injury there is a remedy." *Jackson v. Bumgardner*, 318 N.C. 172, 181 (1986). This principle is enshrined in Article 1, § 18 of the North Carolina Constitution, which proclaims that "[a]ll courts shall be open; every person for an injury done him in his lands, good, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." Immunity has the effect of shutting the courthouse door to injured parties.

¶ 45 Similarly, in *Smith*, we noted the following arguments against sovereign immunity, a doctrine we acknowledged "often results in injustice":

> [S]ince the public purpose involves injury-producing activity, injuries should be viewed as an activity cost which must be met in the furtherance of public enterprise; that [there] is no control of government activity

> involved in the typical law suit; it is better to distribute the cost of government caused injuries among the beneficiaries of government than entirely on the hapless victims; although the government does not profit from its activities, the taxpayers do, so the taxpayers should bear the cost of governmental tort liability.

289 N.C. at 313 (quoting Kenneth Culp Davis, *Sovereign Immunity: The Liability of Government and its Officials* 17 (1975)). Because of sovereign immunity and its derivatives, North Carolinians' "rights can be violated, but individuals are left with no remedies." Chemerinsky, *Against Sovereign Immunity* at 1213. The judiciary must grapple with the "inherent tension" between ensuring that rights can be vindicated and legal injuries remedied "while also respecting the doctrine of sovereign [and governmental] immunity." *Craig ex rel. Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 339 (2009).

¶ 46 The upshot of this recap of the origins of sovereign and governmental immunity is that reflexively expanding the scope of these doctrines whenever they are invoked comes at a cost. When courts are called upon to examine an assertion of immunity in a new context, we should be mindful that recognizing an immunity defense may diminish the judiciary's capacity to protect North Carolinians' rights and ensure that legal injuries can be remedied. Unfortunately, for the reasons explained below, the majority's imprecise application of the test used to distinguish between governmental and proprietary functions ignores these considerations and leads it to the erroneous conclusion that the Town is immune from suit under the circumstances of this case.

II. Distinguishing between governmental and proprietary functions

¶ 47 If the Town had been engaged in a governmental function when it acquired the property from Providence, then it could successfully assert immunity as a defense to Providence's fraud claims; if the Town was engaged in a proprietary function, it could not. *See, e.g.*, *Meinck v. City of Gastonia*, 371 N.C. 497, 502–03 (2018). A governmental function is "[a]ny activity of the municipality which is discretionary, political, legislative, or public in nature and performed for the public good [o]n behalf of the State rather than for itself." *Britt v. City of Wilmington*, 236 N.C. 446, 450 (1952). By contrast, an "activity" that "is commercial or chiefly for the private advantage of the compact community . . . is private or proprietary." *Id.*

¶ 48 To distinguish between governmental and proprietary functions, courts consider three factors. First, as a threshold matter, we ask "whether

our legislature has designated the *particular* function at issue as governmental or proprietary." *Est. of Williams ex rel. Overton v. Pasquotank Cnty. Parks & Recreation Dep't*, 366 N.C. 195, 200 (2012) (emphasis added). If the legislature has designated the "*particular* function" as governmental, the inquiry ends; if not, we proceed to the second factor, whether "the undertaking is one in which *only* a governmental agency could engage." *Id.* at 202. Third, if a "*particular* service can be performed both privately and publicly, the inquiry involves consideration of a number of additional factors, of which no single factor is dispositive," including "whether the service is traditionally a service provided by a governmental entity, whether a substantial fee is charged for the service provided, and whether that fee does more than simply cover the operating costs of the service provider." *Id.* at 202–03 (footnotes omitted).

¶ 49 The majority correctly recounts the three-part test established in *Estate of Williams*. But the majority goes astray in applying it. Specifically, the majority's analysis rests on a critical elision that confuses the general activity the Town was engaged in, providing fire services to its residents, with the specific activity that forms the basis for Providence's complaint, acquiring property. In addition to being factually inaccurate, the majority's substitution of the general for the specific is in significant tension with the guidance this Court provided in its most recent case applying the *Estate of Williams* test, *Meinck v. City of Gastonia*.

¶ 50 The majority largely adopts the Town's characterization of the general activity it was engaged in—providing fire services to its residents—and makes the Town's characterization the linchpin of its analysis. While the majority notes the difference of opinion between the trial court and the Court of Appeals regarding the level of generality at which to assess the conduct at issue in this case, the majority ultimately chooses to describe the Town's activities as "fire protection services," *ante*, at ¶ 25, or "entering into contractual arrangements for the provision of fire protection services," *id.*, at ¶ 28, or "the provision of fire protection services," *id.* In support of this characterization, the majority relies on the trial court's finding that the Fire Suppression Agreement, the Interlocal Agreement, and the Sale and Lease-back Agreement were "in actuality, so integrated, one with the other, as to arguably constitute a single, integrated agreement." *Id.* at ¶ 29. The interlocking nature of these agreements does, admittedly, make this a closer case. But governmental functions and proprietary functions are often intertwined, and courts must drill down to assess the particular "nuanced action" at issue when considering an immunity defense. *Williams*, 366 N.C. at 202.

Here, the specific "nuanced action" at issue is the Town's acquisition of Providence's property: that is the action contemplated by the Sale and Lease-back Agreement and the action during which Providence alleges the Town acted fraudulently.

¶ 51 As we explained in *Meinck*, "even when the legislature has designated a *general* activity to be 'a governmental function by statute, the question remains whether the *specific* [activity at issue], in this case and under these circumstances, is a governmental function.' " 371 N.C. at 513–14 (alteration in original) (emphasis added) (quoting *Williams*, 366 N.C. at 201). Close examination of the *specific* activity a municipality is engaged in is necessary to preserve the distinction between governmental and proprietary functions because, at a certain remove, almost every activity a municipality undertakes is connected to a governmental function in some way. Thus, in *Meinck*, immunity was available not simply because the legislature had authorized municipalities to engage in "urban redevelopment activities undertaken to promote the health, safety, and welfare of North Carolina citizens" but also because "the uncontroverted evidence" established that "that defendant's lease of the historic property to the nonprofit Art Guild in order to promote the arts in the downtown area was a valid urban redevelopment and downtown revitalization activity." *Id.* at 517. The specific activity (leasing property) was indisputably and in actuality closely connected to a general activity (urban redevelopment) that was a governmental function.

¶ 52 By contrast, in this case, it is very much disputed that the Town's specific activity of acquiring property was closely connected to the general activity of providing fire services. Providence alleges that the Town did not need to acquire its fire station in order to contract with a volunteer fire department to provide fire protection services to its residents because until the challenged acquisition, the Town was able to contract for fire protection services without owning its own fire station. Providence also alleges that the purpose of the Sale and Lease-back Agreement was to allow the Town to obtain a "significant economic advantage" by acquiring a property that was valued at $1,595,000.00 for $935,000.00. Of course, as the trial court noted, "attempting to obtain significant and valuable property . . . by way of a sale and lease back" is the kind of activity that "can be performed both privately and publicly."

¶ 53 The majority responds that "[u]nder the logic of Providence's position, a municipality's decision to purchase fire protection equipment, such as fire trucks, hoses, and turnout gear, on the commercial market would be rendered proprietary even though the resulting costs were necessarily incurred for the purpose of making a service that units of

local government have traditionally provided, that benefits all residents, and that does not provide an economic return to the municipality, available." *Ante*, at ¶ 30. That is a misstatement of Providence's argument. If, as in *Meinck*, the "uncontroverted evidence" established that the Town purchased "fire trucks, hoses, and turnout gear" that was used by firefighters employed by the Town or an entity it contracted with for the provision of fire services, then I would agree that the Town was engaged in a governmental function. Yet if a plaintiff alleged that the Town had provided fire protection services to its residents for fifty years without ever itself purchasing "fire trucks, hoses, and turnout gear" and that the Town was reselling the goods it had purchased to another municipality at a significant markup, then the Town could not win dismissal of the plaintiff's claims simply by asserting that "fire trucks, hoses, and turnout gear" are generally things related to fire protection services.

¶ 54 Ultimately, the majority's choice to describe the Town's actions at a higher level of generality dictates the outcome of its application of the *Estate of Williams* factors. The majority is correct that there are numerous statutory and other indicia demonstrating that providing fire protection services or contracting for the provision of fire protection services is a governmental rather than proprietary function. Once the majority decides that the Town is engaged in providing fire protection services, the conclusion that it was performing a governmental function is inevitable. *See, e.g.*, *State ex rel. E. Lenoir Sanitary Dist. v. City of Lenoir*, 249 N.C. 96, 100–01 (1958) ("In operating a water system to provide fire protection and kindred services it is acting in a governmental capacity."); *cf. Valevais v. City of New Bern*, 10 N.C. App. 215, 219 (1970) (describing "the furnishing of fire protection" as a "governmental function").

¶ 55 Yet Providence has alleged that the specific act the Town engaged in was part of a savvy but pretextual real estate investment scheme, rather than part of a genuine effort to provide residents with a vital governmental service. Providence has "allege[d] facts that, if taken as true, are sufficient to establish a waiver . . . [of] immunity." *Wray*, 370 N.C. at 48 (second and third alterations in original) (quoting *Fabrikant v. Currituck County*, 174 N.C. App. 30, 38 (2005)). At this stage of the proceedings, there is a disputed factual question regarding why the Town chose to engage in the specific activity of acquiring property from Providence. Accordingly, I would reverse the Court of Appeals' reversal of the trial court's denial of the Town's motion to dismiss. The majority's decision to credit the Town's naked assertion that the challenged acquisition was necessary to achieve a governmental function allows a municipality to obtain governmental immunity simply by

claiming governmental immunity, without establishing the necessary factual prerequisite.

III. Conclusion

¶ 56 While the majority is correct that Mayor Deter was entitled to legislative immunity, the majority errs in concluding that the Town was entitled to governmental immunity at this stage of the case. In my view, the requisite "fact intensive inquiry" has not been conducted and the allegations of the complaint, if true, are sufficient to demonstrate that the Town was engaged in a proprietary function when it acquired the fire station from Providence. *Williams*, 366 N.C. at 203. The majority's application of *Meinck* and *Williams* risks swallowing the rule those cases articulated by shielding all conduct relating to a governmental function from tort liability, no matter how tenuous and tangential the connection between the particular activity and a general governmental function. Extending the doctrine of governmental immunity to protect the Town under these circumstances at this stage of the proceedings is both inconsistent with our precedents and with the broader considerations that should inform our consideration of "this judge-made doctrine." *Steelman*, 279 N.C. at 594. As Justice Blackmun sagely noted, "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV." *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting) (alteration in original) (quoting Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897)). The majority errs in unnecessarily expanding such a rule here. Accordingly, I respectfully dissent from that part of the majority's opinion.

Justice BARRINGER concurring in part and dissenting in part.

¶ 57 I agree with the majority that the mayor's actions were protected by legislative immunity. However, I disagree with the majority's interpretation of Providence's complaint. Instead, I join Section II of Justice Earls' opinion, which explains why, when the complaint is viewed in the light most favorable to Providence, the Town is not entitled to governmental immunity. According to the complaint, the reason the Town committed fraud was not for the purpose of obtaining fire services but rather for the purpose of acquiring Providence's real property and then leasing and selling that real property to a different entity. Accepting that allegation as true, the Town's alleged fraud was a proprietary act, not a governmental one. Accordingly, I respectfully concur in part and dissent in part.

¶ 58 I write separately to stress an important point. Integrity in government is vital for building and maintaining citizens' trust and confidence in their governing bodies. When a governmental entity exercises proprietary functions without the requisite integrity, shielding it in immunity produces a serious injustice. A municipality that chooses to participate in a proprietary function must be held to the same standard as any other business, acting in good faith and free from fraud.

¶ 59 Looking to the allegations in the complaint,[1] Providence alleged that:

> 147. What wasn't disclosed by the Defendant[ ] Town and Defendant Deter to either P[rovidence] or the general public during the lease negotiations was the ongoing development by the Defendant Deter in his individual and official capacities, of a plan to terminate the [Fire Services Agreement (FSA)] and acquire the property free and clear so that the Defendants could put into action their plan to remove P[rovidence] and replace them, not only in service, but [as] title holder to the property on Hemby Road. . . . .
>
> . . . .
>
> 149. . . . At the time the Town acquired the Hemby Station, it realized a significant economic benefit by acquiring a property appraised at $1,596,000.00 for an investment of approximately $935,000.00. Moreover, at the time of the termination of the FSA, the Defendant Mayor claimed that said termination was purely financial, further evidencing the proprietary action of the Town.
>
> . . . .
>
> 156. Had P[rovidence] known of the Defendants['] actual intent, P[rovidence] would have never transferred its ownership of Hemby Station to the Defendant Town.

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1. While this Court reviews motions to dismiss de novo, *Sykes v. Health Network Sols., Inc.*, 372 N.C. 326, 332 (2019), including motions to dismiss on the basis of governmental immunity, *see White v. Trew*, 366 N.C. 360, 362–63 (2013), it still "accept[s] the allegations in the complaint as true and view[s] them in the light most favorable to the non-moving party," *Est. of Long v. Fowler*, 378 N.C. 138, 2021-NCSC-81, ¶ 12 (cleaned up).

Further, after obtaining the property, the Town did "lease[ ] with an option to purchase the Hemby Fire Station by deed to Wesley Chapel Volunteer Fire Department."

¶ 60 In short, viewed in the light most favorable to Providence, the complaint alleges that the Town's purpose in fraudulently inducing Providence to transfer ownership of the Hemby Station property was not for the purpose of obtaining fire services for the public. Instead, the complaint alleges that the Town's purpose was to cease Providence's ownership and presence on the Hemby Station property in order to lease and provide an option to purchase the property to a different entity and that in doing so the Town realized a significant economic benefit.

¶ 61 Accepting this allegation as true, the next question is whether the Town's alleged tortious conduct "arose from an activity that was governmental or proprietary in nature" since governmental immunity "covers only the acts of a municipality or a municipal corporation committed pursuant to its governmental functions." *Est. of Williams ex rel. Overton v. Pasquotank Cnty. Parks & Recreation Dep't*, 366 N.C. 195, 199 (2012) (cleaned up). This Court follows a three-step analysis to determine whether an action is governmental or proprietary in nature. *See id.* at 200, 202–03.

¶ 62 In the first step, this Court examines "whether, and to what degree, the legislature has addressed the issue." *Id.* at 200. Here, the Town does not direct this Court to any statute by the legislature designating the acquisition of property for the purpose of selling or leasing it to be a governmental as opposed to a proprietary act. Thus, the Town does not qualify for governmental immunity under this threshold inquiry.

¶ 63 In the next step, this Court examines whether the activity is one that "can only be provided by a governmental agency or instrumentality." *Id.* at 202. Here, acquiring property and then attempting to sell or lease it is certainly not one that can only be provided by a governmental agency or instrumentality. Instead, acquiring property and then selling or leasing it is a commercial act, one common among businesses in the real estate sector. Thus, accepting the allegations in the complaint as true, the Town's actions do not qualify as governmental under the second step.

¶ 64 Finally, if an activity is one that can be undertaken by both public and private entities, this Court examines additional factors, "of which no single factor is dispositive," such as "whether the service is traditionally a service provided by a governmental entity, whether a substantial fee is charged for the service provided, and whether that fee does more than simply cover the operating costs of the service provider." *Id.* at

202–03 (footnotes omitted). This third step "focuses primarily on revenue, which . . . strongly indicates that an activity runs a high risk of being deemed proprietary if it yields substantial income for a unit of local government." Trey Allen, *Local Government Immunity to Lawsuits in North Carolina*, 28 (2018). After all, this Court has

> long held that a governmental function is an activity that is discretionary, political, legislative, or public in nature and performed for the public good in behalf of the State rather than for itself. A proprietary function, on the other hand, is one that is commercial or chiefly for the private advantage of the compact community.

Williams, 366 N.C. at 199 (cleaned up).

¶ 65 Relevant to this third step are the allegations in the complaint that the Town "realized a significant economic benefit" from this transaction and then leased that valuable property to another entity, Wesley Chapel Volunteer Fire Department, with the option to purchase it. These actions, in the light most favorable to Providence, indicate the Town was acting for commercial or private gain for itself and a third party rather than acting for the public good on behalf of the state. Thus, the factors in the third step support that the alleged fraud arose from a proprietary act by the Town. Because no step has been satisfied, the trial court correctly denied the Town's motion to dismiss.

¶ 66 The allegations in Providence's complaint of the Town's proprietary acts cannot be ignored simply because the contract also happened to be part of the Town obtaining fire services. Admittedly, protecting property from destruction by fire has generally been provided by a governmental agency and promotes the public good. However, even if "an activity may be classified in general as a governmental function, liability in tort may exist as to certain of its phases." *Id.* at 203 (cleaned up). In this case, the phase of fire services that Providence is contesting is the Town's acquisition of the Hemby Station from Providence. According to Providence, the Town's purpose in doing so was not to obtain fire services, but rather was "purely financial" and part "of a plan to . . . acquire the property free and clear so that the Defendants could put into action their plan to remove P[rovidence] and replace them, not only in service, but in title holder to the property on Hemby Road."

¶ 67 Thus, this case is easily distinguishable from *Meinck v. City of Gastonia*, 371 N.C. 497 (2018), where the plaintiff never alleged that the defendant city's stated purpose of revitalizing its downtown area was simply a cover for an otherwise commercial venture. *Id.* at 516. Here,

Providence specifically alleged that the Town's stated purpose of obtaining fire services was pretextual and that its real purpose was financial. Indeed, the complaint indicates that if the Town was truly trying to obtain fire services for its citizens, it would have maintained its relationship with Providence instead of terminating it. Complying with the correct standard of review, this Court must accept these allegations as true. *See Est. of Long v. Fowler*, 378 N.C. 138, 2021-NCSC-81, ¶ 12. It cannot blindly adopt the explanation offered by the Town while ignoring the allegations in Providence's complaint, which directly contradict the Town's explanation.

¶ 68 If "a municipal corporation undertakes functions beyond its governmental and police powers and engages in business in order to render a public service for the benefit of the community for a profit, it becomes subject to liability for contract and in tort as in case of private corporations." *Town of Grimesland v. City of Washington*, 234 N.C. 117, 123 (1951). Given the allegations in Providence's complaint, the Town's acquisition of the Hemby Station was a proprietary act, not a governmental one. The trial court properly denied the Town's motion to dismiss, and the Court of Appeals erred in reversing that part of the trial court's decision. Accordingly, I respectfully concur in part and dissent in part.

Chief Justice NEWBY joins in this concurring in part and dissenting in part opinion.

STATE v. OGLESBY

[382 N.C. 235, 2022-NCSC-101]

STATE OF NORTH CAROLINA
v.
JAAMALL DENARIS OGLESBY

No. 683A05-3

Filed 19 August 2022

Constitutional Law—effective assistance of counsel—Miller resentencing—counsel's failure to raise legal issue—prejudice analysis

On appeal from the denial of defendant's motion for appropriate relief (MAR) (which sought re-sentencing of his convictions for murder, kidnapping, and two counts of robbery), the Court of Appeals properly denied defendant's claim that his counsel's performance at the MAR hearing was deficient because defendant could not demonstrate that he was prejudiced by his counsel's decisions to inform the trial court that the two robbery convictions (which arose out of a separate criminal transaction) were not before the court and to ask only for the other two sentences to run concurrently. The trial court's decision to impose consecutive sentences for the murder and kidnapping, which arose from the same transaction, clearly showed its belief that defendant should be punished separately for each of his crimes. However, the decision of the Court of Appeals was modified where it misinterpreted N.C.G.S. § 15A-1354(a) to suggest that the trial court would not have been authorized to run the murder and kidnapping sentences concurrently with the robbery sentences.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 278 N.C. App. 564, 2021-NCCOA-354, affirming an order entered on 4 September 2019 by Judge William A. Wood in Superior Court, Forsyth County. Heard in the Supreme Court on 23 May 2022 in session in the Old Burke County Courthouse in the City of Morganton pursuant to N.C.G.S. § 7A-10(a).

Joshua H. Stein, *Attorney General*, *by Robert C. Ennis*, *Assistant Attorney General*, *for the State-appellee.*

Glenn Gerding, *Appellate Defender*, *by Jillian C. Katz*, *Assistant Appellate Defender*, *for defendant-appellant.*

EARLS, Justice.

¶ 1 Defendant Jaamall Denaris Oglesby's motion for appropriate relief (MAR) seeking resentencing under *Miller v. Alabama*, 567 U.S. 460 (2012) explicitly requested that he be sentenced to one consolidated sentence of life with parole or to have his sentences for first-degree murder, first-degree kidnapping, and two counts of robbery with a dangerous weapon all run concurrently. The trial court allowed the motion, and the matter was set for a resentencing hearing. At the resentencing hearing, Oglesby's counsel—despite the clear language of the original motion which listed each of the relevant file numbers—without explanation told the resentencing court that two of the sentences were not before the Court and only requested that two of the four sentences be run concurrently.

¶ 2 After hearing evidence from the defense regarding Oglesby's age and intellectual capacity, his diagnosed but untreated bipolar disorder at the time of the crime, his self-improvement activities in prison, and the fact that before confessing he was subjected to a twenty-six hour interrogation by police without a parent or guardian present, the resentencing court resentenced defendant on the first-degree murder conviction to life with the possibility of parole after 25 years but concluded in its discretion that "based upon the information presented at the resentencing hearing" it would run his first-degree kidnapping sentence consecutively with the murder sentence. The resentencing court "specifically [found] that consecutive sentences are warranted by the facts presented at the resentencing hearing." On appeal, a majority of the Court of Appeals rejected Oglesby's claim that he received ineffective assistance of counsel (IAC) at the resentencing hearing, concluding that Oglesby's counsel did not render deficient performance and that, regardless, Oglesby could not have been prejudiced by counsel's failure to request that all his sentences be run concurrently. *State v. Oglesby*, 278 N.C. App. 564, 2021-NCCOA-354, ¶ 52.

¶ 3 We agree with the majority below that, under the circumstances of this case, Oglesby cannot show prejudice because "the [resentencing] court heard thorough arguments from both parties regarding a range of mitigating and aggravating circumstances surrounding the serious nature of Defendant's offenses . . . [and] chose not to consolidate the two sentences that were before it . . . instead exercising its discretion to keep these sentences consecutive." *Id.* ¶¶ 51–52. Oglesby has not advanced any basis to support his assertion that, notwithstanding the resentencing court's choice to run his first-degree murder sentence consecutively with his first-degree kidnapping sentence, there is a reasonable probability that the court would have chosen to run his first-degree murder sentence consecutively with either or both of his robbery sentences.

¶ 4 However, the majority below erred when it characterized Oglesby's argument that the resentencing court possessed the authority to run all of his sentences concurrently as "speculative and untested." *Id.* ¶ 49. Rather, under N.C.G.S. § 15A-1354(a), the resentencing court possessed the authority to run any and all of Oglesby's sentences imposed at the same time either concurrently or consecutively. Accordingly, we reject the reasoning of the decision below to the extent that it incorrectly suggested that the resentencing court lacked authority to run Oglesby's first-degree murder sentence concurrently with his robbery with a dangerous weapon sentences; otherwise, we affirm.

I. Background

¶ 5 On 7 and 8 September 2002, Oglesby and a group of accomplices entered two separate convenience stores and robbed each store's cashier at gunpoint. Two days later, Oglesby and three other individuals abducted a man named Scott Jester from a restaurant in Winston-Salem. After pulling over on the side of I-40, Oglesby "made Jester get out of the car, Jester pled for his life and told [Oglesby] he had a young child, and [Oglesby] shot Jester three times in the back of the head." *State v. Oglesby*, 174 N.C. App. 658, 660 (2005), *aff'd in part*, *vacated in part*, 361 N.C. 550 (2007). Oglesby, who was sixteen years old at the time, was later arrested and confessed his involvement in both sets of crimes during an interrogation that lasted for twenty-six hours without a parent or guardian present. *Id.*

¶ 6 Oglesby pleaded guilty to two counts of robbery with a dangerous weapon in relation to the convenience store incidents. After a trial, he was convicted of first-degree murder, first-degree kidnapping, and attempted robbery with a dangerous weapon in connection with Jester's killing. On 28 May 2004, Oglesby was sentenced to the following active terms of imprisonment:

File Number	Offense	Sentence
02 CRS 60325 (51)	Robbery with a dangerous weapon	95 to 123 months
02 CRS 60325 (52)	Robbery with a dangerous weapon	95 to 123 months
02 CRS 60369 (52)	First-degree murder	Life without parole (mandatory)
02 CRS 60369 (51)	First-degree kidnapping	29 to 44 months
02 CRS 60369 (53)	Attempted robbery with a dangerous weapon	77 to 102 months.

The trial court ordered all of Oglesby's sentences to be run consecutively. On direct appeal, the Court of Appeals ordered the trial court to arrest judgment on either Oglesby's conviction for attempted robbery with a dangerous weapon or his conviction for first-degree kidnapping to avoid a double jeopardy violation, *State v. Oglesby*, 174 N.C. App. 658, 665 (2005), and we did not disturb that order, *see* 361 N.C. 550, 556 (2007). The trial court ultimately arrested judgment on his attempted robbery with a dangerous weapon conviction.

¶ 7 On 4 April 2013, Oglesby filed an MAR seeking resentencing in light of the United States Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012), which held mandatory life without parole sentences for juvenile offenders unconstitutional under the Eighth Amendment. After the United States Supreme Court held that *Miller*'s substantive Eighth Amendment rule was retroactively applicable in state criminal post-conviction proceedings, *see Montgomery v. Louisiana*, 577 U.S. 190, 212 (2016), Oglesby filed an amended MAR seeking "a resentencing hearing in which his unconstitutional life without parole sentence is converted to a life with parole sentence" and to be "sentenced to one consolidated sentence of life with parole or to have all his sentences in 02-CRS-60369 [murder, kidnapping and attempted robbery] and 02-CRS-60325 [two counts of robbery with a dangerous weapon] run concurrently because the original sentencing judge did not have the guidance of *Miller* and *Montgomery*." On 19 May 2017, Resident Superior Court Judge Richard S. Gottlieb entered an order allowing Oglesby's MAR. The order allowed the MAR without limitation, but in its initial findings referred only to Oglesby's sentences for first-degree murder, attempted robbery with a dangerous weapon, and first-degree kidnapping.

¶ 8 Oglesby's resentencing hearing occurred on 13 April 2021, with Judge William A. Wood presiding. At the hearing, the court informed the parties that the original sentencing judge had already arrested judgment on Oglesby's 77-month minimum sentence for attempted armed robbery. In addition, the State did not contest Oglesby's assertion that he was entitled to be resentenced to life with parole for his murder conviction pursuant to N.C.G.S. § 15A-1340.19B(a)(1), which applies when "the sole basis for conviction of a count or each count of first[-]degree murder was the felony murder rule." The only disputed issue at Oglesby's resentencing hearing was whether his remaining sentences should be run concurrently or consecutively.

¶ 9 In support of his argument that the convictions should be run concurrently, Oglesby's attorney presented mitigating evidence including Oglesby's age at the time of his crimes, that he was the youngest of his

co-defendants, that he suffered from untreated bipolar disorder and borderline intellectual impairment when he was arrested, and that he had developed and submitted a proposal for a program to assist at-risk youth while he was incarcerated. In support of its argument that the convictions should be run consecutively, the State noted the factual underpinnings of Oglesby's convictions and his lengthy disciplinary record while incarcerated, including serious disciplinary incidents near to the time of the resentencing hearing, which the State contended indicated that Oglesby had not been "reformed."

¶ 10 In the middle of the hearing, the court sought clarification from Oglesby's counsel regarding his outstanding sentences and the scope of the court's resentencing authority:

> THE COURT: Just to make sure I understand. . . . First, there are two consecutive armed robbery sentences that the defendant has already served.
>
> DEFENSE COUNSEL: It depends how DOC [the Department of Corrections] actually would calculate that. However, they are not at issue here because they are not related to this particular conduct. They were sentenced at the same time as this was, but it was not part of that trial.
>
> THE COURT: All right. So there are two sentences that he has served or he will have to serve.
>
> DEFENSE COUNSEL: There are. The DOC website shows that he would have been released in February of 2012 in one of them. So it does show that those would be the first sentences that he would be serving. This is from the DOC website and from combined records as to how it was imposed. So the two armed robbery sentences were imposed by DOC prior to the 25 to life.
>
> THE COURT: All right. And then he began a life without parole sentence.
>
> DEFENSE COUNSEL: Yes.
>
> . . . .
>
> THE COURT: . . . I'm curious, is there any authority under 15A-1340.19B, which I believe is what we are doing here, that permits the Court to modify the order

> in which the sentence is run, as opposed to modifying the 25 to life?
>
> . . . .
>
> DEFENSE COUNSEL: . . . So the language of *Miller*, we would contend, is that it fully anticipates that felonious conduct leading to the death and that's what's here. And so with that, the appropriate sentence would be a concurrent sentence because it fully encompasses a single act, a single progression of actions, that led to a death. So with that single death and the felonies that led to that, that that would indicate a 25-to-life sentence.

Later in the hearing, Oglesby's counsel reiterated that she was "not referring to the other armed robberies because they are not related, even though they were sentenced at the same time." Ultimately, Oglesby was resentenced to life with the possibility of parole to be run consecutively with his sentence for first-degree kidnapping; in a subsequent written order, the court noted that it "specifically finds that consecutive sentences are warranted by the facts presented at the resentencing hearing and consecutive sentences in this case are not violative of the Eighth Amendment to the United States Constitution."

II. The Court of Appeals opinion

¶ 11 On appeal, Oglesby asserted that he received IAC during the resentencing hearing.[1] A majority of the Court of Appeals rejected Oglesby's claim. According to the majority, Oglesby's claim failed on both prongs of the IAC standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).

¶ 12 With respect to the first prong of the *Strickland* test, deficient performance, the majority rejected Oglesby's contention that "his counsel acted deficiently by '[telling] the trial court repeatedly that the robbery convictions were unrelated and not before the court' " instead of

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1. In addition, Oglesby argued that the trial court abused its discretion in choosing to run his sentences consecutively rather than concurrently, and that it violated the Eighth Amendment to order him to serve sentences collectively requiring him to spend 43 years in prison before becoming parole eligible. The Court of Appeals unanimously rejected the first argument and dismissed his Eighth Amendment claim without prejudice "such that it may be asserted in a subsequent MAR, in anticipation of our Supreme Court's forthcoming decision in [*State v. Kelliher*, 873 S.E.2d. 366, 2022-NCSC-77]." *State v. Oglesby*, 2021-NCCOA-354, ¶ 55. Neither party sought discretionary review of these aspects of the Court of Appeals' decision; accordingly, neither issue is presently before this Court, and Oglesby remains free to pursue further relief under *Kelliher* in a subsequent MAR.

"rel[ying] on § 15A-1354(a) to persuade the trial court that it was authorized to resentence Defendant on all of his convictions, given that all of his convictions were originally 'imposed . . . at the same time' within the meaning of the statute." *State v. Oglesby*, 2021-NCCOA-354, ¶ 45. According to the majority, the legal argument that N.C.G.S. § 15A-1354(a) granted the resentencing court the authority to run all of Oglesby's convictions concurrently "was, at best, resting on unsettled law, and at worst, meritless." *Id.* ¶ 48. The majority concluded that Oglesby's counsel "did not act deficiently by failing to raise this speculative and untested argument." *Id.* ¶ 49.

¶ 13 With respect to the second prong of the *Strickland* test, prejudice, the majority held that Oglesby "cannot show that he was prejudiced by defense counsel's failure to request that the trial court consider the armed robbery convictions for resentencing." *Id.* ¶ 50. According to the majority, "proving prejudice requires a showing of 'a reasonable probability' that 'the result of the proceeding would have been different' if counsel had not erred." *Id.* (quoting *State v. Lane*, 271 N.C. App. 307, 312 (2020)). Applying this standard, the majority concluded that "*even* if defense counsel had requested that the trial court consider the armed robbery sentences under § 15A-1354(a), and *even* if the court was persuaded by this argument, we think it a highly remote possibility that the trial court would have actually chosen to run these sentences concurrently as [Oglesby] now requests." *Id.* In the majority's view, the resentencing court had already heard "thorough arguments from both parties regarding a range of mitigating and aggravating circumstances" and, "[b]ased on the evidence presented . . . chose not to consolidate the two sentences that were before it (murder and kidnapping), instead exercising its discretion to keep those sentences consecutive." *Id.* ¶¶ 51–52. Thus, "[g]iven that the trial court was apparently unwilling to reduce [Oglesby's] sentence by approximately 29 months via consolidation of the murder and kidnapping sentences, it seems quite unlikely that the trial court would have chosen to reduce his sentence by approximately 190 months via consolidation of the two armed robbery sentences." *Id.* ¶ 52.

¶ 14 Judge Arrowood dissented from the majority's resolution of Oglesby's IAC claim. *Id.* ¶ 57 (Arrowood, J., concurring in part and dissenting in part). According to the dissent, N.C.G.S. § 15A-1345(a) clearly provided the resentencing court with the authority and discretion to run all of Oglesby's sentences concurrently because "[t]he plain meaning of the statute includes defendant, as a person with 'multiple sentences of imprisonment' imposed 'at the same time[.]' " *Id.* ¶ 62. Yet "[a]t the

resentencing hearing, defendant's trial counsel repeatedly described defendant's robbery sentences, one of which defendant had served and the other which was either already or nearly complete, as unrelated and not before the trial court." *Id.* ¶ 61. Therefore, the dissent would have concluded that Oglesby's "trial counsel's insistence that the armed robbery convictions were not before the court, when in fact it was in the trial court's discretion to consider them, was unreasonable and constitutes deficient performance." *Id.* ¶ 62. The dissent would also have concluded that Oglesby had shown prejudice because "[i]t is substantially likely, not just conceivable, that the trial court would have exercised its discretion to consider all of defendant's convictions in resentencing had defendant's trial counsel presented the argument." *Id.* ¶ 64.

¶ 15 Oglesby timely filed a notice of appeal in this Court based on Judge Arrowood's dissent.

III. Oglesby's IAC claim

¶ 16 The Sixth Amendment to the United States Constitution guarantees to all defendants the right to counsel in criminal proceedings. *See*, *e.g.*, *Strickland*, 466 U.S. at 684 ("[T]his Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial."). The right to counsel necessarily encompasses "the right to effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970). To prevail on an IAC claim, a defendant must generally satisfy the two-prong test set forth in *Strickland*:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687; *see also State v. Fair*, 354 N.C. 131, 167 (2001) ("Attorney conduct that falls below an objective standard of reasonableness and prejudices the defense denies the defendant the right to effective assistance of counsel."). With this familiar two-prong test in mind, we turn to Oglesby's IAC claim.

A. Deficient performance.

¶ 17 To prevail on the first prong of the *Strickland* test, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. There exists a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. "Counsel is given wide latitude in matters of strategy, and the burden to show that counsel's performance fell short of the required standard is a heavy one for defendant to bear." *State v. McNeill*, 371 N.C. 198, 218–19 (2018) (cleaned up). At the same time, "this presumption is rebuttable." *State v. Allen*, 378 N.C. 286, 2021-NCSC-88, ¶ 32. "Once a defendant presents evidence rebutting the presumption of reasonableness, the court is not at liberty to invent for counsel a strategic justification which counsel does not offer and which the record does not disclose." *Id.* (citing *Wiggins v. Smith*, 539 U.S. 510, 526–27 (2003)). Instead, when "further investigation" is required to resolve a defendant's IAC claim—for example, when further factual development is needed because the "cold record" does not disclose information relevant to assessing the reasonableness of counsel's performance—the proper course is generally to dismiss the claim without prejudice to allow for a hearing and further factfinding. *Fair*, 354 N.C. at 166.

¶ 18 In this case, Oglesby contends that his counsel rendered deficient performance at his resentencing hearing by failing to ask the court to consider running all of his sentences concurrently and instead asserting that his two robbery convictions were "not before this [c]ourt." In rejecting this claim, the majority below relied principally on its assessment of the legal merits of the argument Oglesby contends his counsel improperly failed to present: the argument that N.C.G.S. § 15A-1354(a) provided the resentencing court with the authority to run Oglesby's first-degree murder and first-degree kidnapping sentences concurrently with his robbery with a dangerous weapon sentences. *Oglesby*, 2021-NCCOA-354, ¶ 48. Based on its conclusion that the argument Oglesby asserted his counsel should have raised was "speculative and untested" and unsupported by precedent, the majority below held that Oglesby's counsel did not "act deficiently" at the resentencing hearing. *Id.* ¶ 49.

¶ 19 However, the majority's assessment of N.C.G.S. § 15A-1354(a) is inconsistent with the plain meaning of the statute. The relevant statutory provision provides in full:

> (a) Authority of Court.—When multiple sentences of imprisonment *are imposed on a person at the same*

> *time* or *when a term of imprisonment is imposed on a person who is already subject to an undischarged term of imprisonment*, including a term of imprisonment in another jurisdiction, the sentences may run either concurrently or consecutively, as determined by the court. If not specified or not required by statute to run consecutively, sentences shall run concurrently.

N.C.G.S. § 15A-1354(a) (2021) (emphasis added). Here, Oglesby's sentences for first-degree murder, first-degree kidnapping, and two counts of robbery with a dangerous weapon—although arising out of two separate criminal transactions and underlying proceedings—were "imposed . . . at the same time" by the trial court on 28 May 2004. Accordingly, after converting Oglesby's life without parole sentence to a life with parole sentence pursuant to North Carolina's *Miller*-fix statute, N.C.G.S. § 15A-1340.19A (2021), the resentencing court possessed the authority to choose to run his life with parole sentence consecutively *or* concurrently with the other sentences "imposed on [him] at the same time" as his original sentence, including his robbery sentences. *Cf. State v. Conner*, 275 N.C. App. 758, 771 (2020), *rev'd on other grounds*, 2022-NCSC-79 (McGee, C.J., concurring in part and dissenting in part) ("[A]s a statutory matter, the trial court may sentence a defendant for murder under the *Miller*-fix statutes to life with parole and run that punishment consecutively [or concurrently] to another sentence under N.C. Gen. Stat. § 15A-1354(a) so long as doing so does not otherwise conflict with the provisions of the *Miller*-fix statutes.").

¶ 20 Naturally, the Court of Appeals' interpretation of N.C.G.S. § 15A-1354(a) significantly influenced its assessment of the strength of Oglesby's IAC claim: when determining whether an attorney's decision not to raise an argument during a proceeding was "a matter of reasonable trial strategy," *Fair*, 354 N.C. at 167, it matters whether the argument the attorney chose to forego was plausible or fanciful, *see*, *e.g.*, *State v. Garcell*, 363 N.C. 10, 54 (2009) (concluding that counsel was not deficient for failing to raise a particular legal argument "as [the argument] has no application to this case"). Still, even operating under a correct understanding of the significance of N.C.G.S. § 15A-1354(a), it is not certain at this stage that Oglesby's counsel performed deficiently.

¶ 21 The record does not disclose whether counsel's failure to urge the resentencing court to use its discretion to run Oglesby's murder and kidnapping sentences concurrently with his robbery sentences reflected a conscious strategic choice on counsel's part or counsel's own

misapprehension of the relevant law. In theory, counsel could have concluded that further consideration of the facts surrounding the other two offenses would be extremely prejudicial to her client and that a more modest request to simply run the murder and kidnapping sentences concurrently was more likely to be successful. Oglesby now argues that such a factual inquiry is unnecessary because on its face it could not have been a reasonable strategy to take the armed robbery charges off the table, but that is the kind of determination that an appellate court should leave to a factfinder. Ordinarily, the proper course under these circumstances would be to remand for an evidentiary hearing on the question of whether counsel made a strategic choice not to make this argument. *See McNeill*, 360 N.C. at 251–52 ("[W]hen an appellate court determines further development of the facts would be required before application of the *Strickland* test, the Court should dismiss the defendant's [claim] without prejudice."); *cf. State v. Cozart*, 260 N.C. App. 96, 103 (2018) (dismissing a defendant's IAC claim without prejudice because "[t]here is insufficient evidence in the record on appeal to reach the merits of Defendant's IAC claim").

¶ 22 But remand is unnecessary in this case because, for reasons more fully explained below, the record and the trial court's order are sufficient to assure us that Oglesby could not have been prejudiced by his counsel's failure to raise this particular legal argument at his resentencing hearing. Of course, it is not always possible to resolve a defendant's prejudice claim by looking to a cold record that was itself shaped by counsel's allegedly deficient performance. When "the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results," *Strickland*, 466 U.S. at 696, denying a defendant's IAC claim on direct appeal on the grounds that he cannot show prejudice based on a suspect record is inconsistent with the right the Sixth Amendment protects.

¶ 23 Thus, an appellate court's decision to deny or dismiss an IAC claim depends in part on that court's confidence in the record produced during the underlying proceeding. *See State v. Phillips*, 365 N.C. 103, 122 (2011) (concluding that it was appropriate to assess a defendant's IAC claim by applying *Strickland* because "the facts do not make it impractical to determine whether defendant suffered prejudice"). By extension, the nature of the deficient performance an attorney allegedly rendered may be relevant in deciding whether it is appropriate to dispose of an IAC claim on direct appeal on prejudice grounds alone. If a defendant alleges that counsel performed deficiently in a manner that could plausibly undermine the validity of the adversarial proceeding as a mechanism

for ascertaining facts—for example, by a failure to call witnesses who would have contributed to the evidentiary record or by a failure to raise a legal argument that deprived the defendant of an opportunity to introduce supporting evidence—then it may not be feasible to resolve an IAC claim on direct appeal on prejudice grounds alone. *Cf. In re B.B.*, 2022-NCSC-67, ¶ 43 (resolving IAC claim on prejudice grounds in case where "[t]he trial court had the totality of the evidence before [it]").

¶ 24 By contrast, in this case, Oglesby does not allege that his counsel was deficient in a way that would undermine the validity of the resentencing hearing as a means of eliciting the facts and information necessary for the court to exercise its discretion to decide between ordering Oglesby to serve consecutive or concurrent sentences. Oglesby alleges solely that his counsel rendered deficient performance by failing to advance a discrete legal argument that was implicitly rejected by the trial court's specific findings that consecutive sentences were warranted. Accordingly, given the nature of Oglesby's IAC claim here and the logic of the resentencing court's ultimate decision, we need not remand for further factual findings because we can assess whether Oglesby could have been prejudiced by his counsel's failure to make the argument that all four sentences should have run consecutively as requested in his MAR.

B. Prejudice.

¶ 25 In order to prevail on an IAC claim, "a defendant must [also] demonstrate that [counsel's] deficient performance prejudiced the defense, which requires a showing that 'counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' " *State v. Todd*, 369 N.C. 707, 710–11 (2017) (quoting *Strickland*, 466 U.S. at 687). "To prove prejudice, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " *Allen*, 2021-NCSC-88, ¶ 27 (quoting *Strickland*, 466 U.S. at 694).

¶ 26 Here, Oglesby contends that he was prejudiced by his counsel's assertedly deficient performance at the resentencing hearing because he "may have received a shorter sentence had his counsel presented" the argument that the court could "reconsider how the robbery convictions were run." The problem with this argument is that the resentencing court heard all of Oglesby's mitigating evidence and chose not to run his murder sentence concurrently with his kidnapping sentence. As noted above, when presented with the opportunity to run Oglesby's life with

parole sentence concurrently with his kidnapping sentence of 29 to 44 months, the resentencing court expressly concluded that "consecutive sentences are warranted by the facts presented at the resentencing hearing." In essence, Oglesby asks us to speculate that the court, presented with the exact same evidence, would have chosen to run his life with parole sentence concurrently with at least one of his robbery sentences of 95 to 123 months. We would have to conclude it was a reasonable probability that while choosing not to shorten his sentence by two and a half to three and a half years, the trial court nevertheless would have chosen to shorten his sentence by at least eight to ten years. This counterintuitive assertion is insufficient to demonstrate prejudice.

¶ 27 Furthermore, the sentences that the resentencing court chose not to run concurrently both arose out of the same criminal transaction. The resentencing court chose to reject counsel's argument that running the life with parole and kidnapping sentences concurrently was appropriate because "the kidnapping charge is part of . . . that felony murder," in that the kidnapping formed part of the "felonious conduct leading up to a death." This choice indicates that the resentencing court believed Oglesby should be punished separately for each of his crimes. Oglesby offers no basis for his assertion that there is any "reasonable probability" that the resentencing court would have deviated from its approach had it also been asked to consider his sentences imposed for separate crimes he committed on different days.

¶ 28 Finally, Oglesby echoes the dissenting opinion at the Court of Appeals in arguing that "[i]t is substantially likely, not just conceivable, that the trial court would have exercised its discretion to consider all of defendant's convictions in resentencing had defendant's trial counsel presented the argument." *Oglesby*, 2021-NCCOA-354, ¶ 64 (Arrowood, J., concurring in part and dissenting in part). But the possibility that the court would have *considered* Oglesby's robbery sentences when exercising its discretion is not enough under the second prong of *Strickland*: while "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case," *Strickland*, 466 U.S. at 693, the possibility that a court may have arrived at the same result by way of a slightly different path does not demonstrate that "the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results," *id.* at 696.

IV. Conclusion

¶ 29 The Court of Appeals erred in characterizing as "speculative and untested" Oglesby's argument that the resentencing court could have

run his murder and kidnapping sentences concurrently with his robbery sentences arising out of a different criminal transaction. *Oglesby*, 2021-NCCOA-354, ¶ 49. In a *Miller* resentencing hearing, the resentencing court possesses the authority and the discretion to run any sentences "imposed . . . at the same time or . . . imposed on a person who is already subject to an undischarged term of imprisonment . . . either concurrently or consecutively, as determined by the court." N.C.G.S. § 15A-1354(a). Nevertheless, the Court of Appeals correctly concluded that Oglesby could not demonstrate prejudice even if his counsel rendered deficient performance by failing to advance this argument at the resentencing hearing. Because the resentencing court was not deprived of any evidence or argument that could have influenced its decision to run Oglesby's murder and kidnapping sentences consecutively, Oglesby's IAC claim is properly disposed of on prejudice grounds alone. Accordingly, we modify and affirm the decision of the Court of Appeals denying Oglesby's IAC claim.

MODIFIED AND AFFIRMED.

STATE OF NORTH CAROLINA
v.
RICHARD ALAN GADDIS, JR.

No. 306A21

Filed 19 August 2022

Constitutional Law—equal protection and due process—request for prior trial transcript—harmless error

At defendant's retrial for multiple driving offenses arising from a car crash, in which two witnesses identified defendant as the drunk driver of the wrecked car, the trial court properly denied defendant's motions for a continuance and for a transcript of his prior mistrial, in which defendant argued that the denial of his motions would violate his due process and equal protection rights because the transcript was necessary to impeach the witnesses who identified him. Although the record did not indicate whether the trial court applied the requisite two-part test from *Britt v. North Carolina*, 404 U.S. 226 (1971), when denying defendant's transcript request, any error (assuming the trial court had erred) was harmless beyond

a reasonable doubt given the overwhelming evidence of defendant's identity as the drunk driver at the crash.

Justice EARLS dissenting.

Justice HUDSON and Justice MORGAN 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, 278 N.C. App. 524, 2021-NCCOA-351, finding no error in the jury's verdicts or in the judgments entered on 6 September 2019 by Judge Jeffery K. Carpenter in Superior Court, Union County. Heard in the Supreme Court on 10 May 2022.

Joshua H. Stein, Attorney General, by Michael T. Henry, Assistant Attorney General, for the State-appellee.

Jarvis John Edgerton IV for defendant-appellant.

BERGER, Justice.

¶ 1 Following a mistrial, defendant was convicted by a jury of driving while impaired, driving while his license was revoked for an impaired driving offense, driving without a valid registration, and driving without a displayed license plate. Based upon a dissent in the Court of Appeals, the issue before this Court is whether the Court of Appeals erred in determining that the trial court correctly denied defendant's motion for a transcript of a prior trial and motion to continue. For the reasons stated below, we affirm the decision of the Court of Appeals.

I. Factual and Procedural Background

¶ 2 On February 12, 2018, defendant was charged with multiple driving offenses stemming from impaired driving. Defendant was found to be indigent, and Onyema Ezeh was appointed as counsel. Defendant's first trial in Superior Court, Union County, began on July 15, 2019. The jury was deadlocked eleven to one, and the trial court declared a mistrial. Ezeh was allowed to withdraw as counsel for defendant, and Peter Dwyer was appointed as new counsel. The case was re-calendared for September 3, 2019.

¶ 3 On August 26, 2019, approximately one week before trial and over five weeks after Mr. Dwyer was appointed as counsel, defendant filed

a "Motion for Transcript" seeking to obtain a free transcript of the previous trial. Defendant also appears to have requested in open court that his trial be continued.[1] The trial court appears to have summarily denied defendant's motion for a transcript and corresponding motion to continue.

¶ 4 On the day of trial, defendant submitted a renewed motion for a transcript and a renewed motion to continue, arguing that the denial of each would be a "violation of [d]efendant['s] right to fundamental fairness and due process of law guaranteed by" both the United States Constitution and the North Carolina State Constitution. The trial court again denied both motions, and the case proceeded to trial.

¶ 5 At defendant's second trial, the evidence tended to show that on the evening of February 12, 2018, Bryan Porcello was driving with his family on Idlewild Road in Union County. Porcello observed a white truck ahead of him travelling in the same direction swerve several times into oncoming traffic and travel through several traffic signals that were emitting a solid red light. Porcello called law enforcement and followed the white truck.

¶ 6 Porcello testified that he observed the driver of the truck attempt to drive around other vehicles stopped at a traffic signal and become stuck on the right-hand shoulder of the road. At that point, Porcello drove past the truck. Shortly thereafter, Porcello decided to turn around to ensure the driver was no longer operating the vehicle and that law enforcement had responded to the scene. However, the driver managed to get off the shoulder and drive away, and soon crossed Porcello's direction of travel.

¶ 7 Porcello turned his vehicle around and followed the truck again. The driver of the truck continued to operate the vehicle erratically for some time until Porcello witnessed the truck travel off the right shoulder of the road, overcorrect, and "sho[o]t across both lanes and wreck into a ditch" off the left side of the road. Porcello testified that he observed a "white male" driving the vehicle and did not see anyone else in the vehicle.

¶ 8 Porcello responded to the crash, but conditions had become too dark to allow Porcello to see clearly into the truck, and he flagged down another driver, David Daniel, for assistance. Porcello testified that he always "kept [his] eye" on the vehicle and did not observe anyone exit the

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1. Although defendant's motion for transcript appears in writing in the record, a motion to continue does not. It appears that defense counsel requested a continuance in open court on August 26, 2019, but there is no transcript in the record for such a hearing.

white truck. Daniel stated that as he approached the wrecked truck, the headlights from Daniel's vehicle helped illuminate the scene. Daniel observed defendant sitting alone in the driver seat of the wrecked truck. When Porcello and Daniel approached the truck with a flashlight, the two men saw defendant sitting in the front seat revving the engine. Defendant was disoriented, his speech was slurred, and his breath smelled strongly of alcohol. Defendant eventually exited the vehicle and stumbled down the road in an attempt to flee the scene.

¶ 9 At first, Porcello and Daniel followed defendant on foot. While Daniel remained on foot behind defendant, Porcello eventually went back to the scene of the accident and retrieved Daniel's vehicle in order to drive along the side of the road to ensure he and Daniel did not lose sight of defendant.

¶ 10 Defendant verbally threatened and charged at Daniel several times. In response, Daniel drew his handgun and fired a warning shot into the ground to keep defendant at bay. When defendant began to head toward a nearby house, Porcello got out of the truck and helped Daniel subdue defendant. The two men held defendant on the ground until law enforcement arrived.

¶ 11 Defendant was handcuffed and placed in the back of a patrol car when officers arrived. Defendant became violent and attempted to kick his way out of the patrol car. Officers removed defendant from the first patrol car and moved him to a different vehicle where he had to be shackled to the floor. In-car camera footage recorded defendant admitting that he owned the wrecked truck and had been driving. Defendant failed to perform field sobriety tests to officers' satisfaction, and a search warrant was obtained to draw a blood sample from defendant. Testing showed defendant's blood alcohol concentration was .12 grams of alcohol per 100 milliliters.

¶ 12 The jury found defendant guilty of all charges, and he timely appealed to the Court of Appeals. The Court of Appeals determined that defendant received a fair trial free from prejudicial error. *State v. Gaddis*, 278 N.C. App. 524, 2021-NCCOA-351, ¶ 17. Defendant appeals to this Court arguing that the trial court erred in denying defendant's motion for a transcript and motion to continue.

¶ 13 Defendant contends that the trial court's denials of his motions violated his equal protection and due process rights under *Britt v. North Carolina*, 404 U.S. 226 (1971), and *State v. Rankin*, 306 N.C. 712 (1982). Specifically, defendant argues that the trial court's denial of his requests for a transcript prevented him from properly impeaching the State's

witnesses on their identification of defendant as the operator of the vehicle. Although we agree that the trial court likely erred in failing to apply the two-part *Britt* test upon defendant's requests for a transcript of the previous proceeding, we conclude that this error was harmless beyond a reasonable doubt.

II. Analysis

¶ 14 "At every retrial a transcript of the former trial would undoubtedly be a convenience and at least of some assistance to all parties." *State v. Matthews*, 295 N.C. 265, 289, 245 S.E.2d 727, 741 (1978). "[E]ven in the absence of specific allegations it can ordinarily be assumed that a transcript of a prior mistrial would be valuable to the defendant in at least two ways: as a discovery device in preparation for trial, and as a tool at the trial itself for the impeachment of prosecution witnesses." *Britt*, 404 U.S. at 228, 92 S. Ct. at 434.

¶ 15 However, a defendant does not have "an unqualified right to a transcript or to demand it at any stage of trial." *Matthews*, 295 N.C. at 289, 245 S.E.2d at 741. Neither the Supreme Court of the United States nor this Court have suggested that "the mere request for a transcript by an indigent imposes a constitutional duty on the trial court to order it prepared." *United States v. Smith*, 605 F.2d 839, 843 (5th Cir. 1979). For example, a trial court may consider such motions untimely if they are made at the last minute or "late in the game." *Id.*

¶ 16 In *Britt*, the Supreme Court outlined the following test to determine whether the State must provide an indigent defendant with a free transcript, requiring trial courts to consider: (1) "the value of the transcript to the defendant in connection with the appeal or trial for which it is sought"; and (2) "the availability of alternative devices that would fulfill the same functions as a transcript." *Britt*, 404 U.S. at 227, 92 S. Ct. at 433–34. Pursuant to *Britt*, resolution of the second factor is ultimately a "determination of need." *Id.* at 228, 92 S. Ct. at 434; *see also Matthews*, 295 N.C. at 289, 245 S.E.2d at 741 ("[T]he crucial test in any case is whether the requested transcript is 'needed for an effective defense or appeal,' a rule first enunciated in *Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956).").

¶ 17 In *Rankin*, we held that because "there was no alternative available to the defendant which was substantially equivalent to a transcript, the defendant was entitled to a free transcript and therefore its denial was error." *Rankin*, 306 N.C. at 717, 295 S.E.2d at 420 (1982).

¶ 18 Determination of whether a trial court erred in denying a defendant's motion for a transcript is ordinarily reviewed for abuse of discretion.

Matthews, 295 N.C. at 290, 245 S.E.2d at 742; *see also United States v. Smith*, 605 F.2d 839, 843 (5th Cir. 1979) (holding that it was within the trial court's "discretion to deny an indigent defendant's last minute request for a transcript" when the reason for the denial was an unnecessary delay of the trial).

> If the motion raises a constitutional issue, the trial court's action upon it involves a question of law which is fully reviewable by an examination of the particular circumstances of each case. However, regardless of the nature of the motion . . . whether constitutional or not, a denial of a motion to continue is grounds for a new trial only upon a showing by the defendant that the denial was erroneous and that his case was prejudiced thereby.

State v. Johnson, 379 N.C. 629, 2021-NCSC-165, ¶ 14 (cleaned up).

¶ 19 Here, the trial court denied defendant's motions for a transcript of the earlier trial. Neither the record nor the transcript of the subsequent proceedings indicate that the trial court considered the *Britt* test in denying defendant's request, making appellate review difficult. However, even if we assume that the trial court erred in denying defendant's motions for a trial transcript, the error was harmless beyond a reasonable doubt.

¶ 20 "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) (2021); *see also State v. Lawrence*, 365 N.C. 506, 512–13, 723 S.E.2d 326, 330–31 (2012). "[A]n error under the United States Constitution will be held harmless if the jury verdict would have been the same absent the error." *Lawrence*, 365 N.C. at 513, 723 S.E.2d at 331 (cleaned up). When a violation is alleged under the federal constitution, the Court must determine whether it was harmless beyond a reasonable doubt. *See id.*

¶ 21 "The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence . . . ." *State v. Malachi*, 371 N.C. 719, 734, 821 S.E.2d 407, 418 (2018) (quoting *Rose v. Clark*, 478 U.S. 570, 577, 106 S. Ct. 3101, 3105 (1986)). "The presence of overwhelming evidence of guilt may render error of constitutional dimension harmless beyond a reasonable doubt." *State v. Bunch*, 363 N.C. 841, 845–46, 689 S.E.2d 866, 869 (2010) (cleaned up) (holding that the trial court's failure to properly instruct the jury in a homicide trial on felony murder was harmless

error and "[t]he foundation on which defendant bases [ ]his argument is superficial in light of the overwhelming evidence that defendant caused the victim's death"). The State bears the burden of demonstrating that the error was harmless beyond a reasonable doubt. *Lawrence*, 365 N.C. at 513, 723 S.E.2d at 331; N.C.G.S. § 15A-1443(b).

¶ 22 The jury's guilty verdicts here are supported by overwhelming evidence. Defendant was captured on video admitting that he was the operator of the vehicle when it wrecked. At a minimum, the evidence at trial showed that defendant was involved in a single-vehicle accident. Daniel and Porcello responded to the accident, where they saw defendant sitting in the vehicle, revving the engine. Daniel and Porcello were ultimately able to detain defendant until law enforcement arrived at the scene. Defendant was handcuffed and arrested by law enforcement. At trial, Deputy James Murray and Sergeant Frank Hearne identified defendant as the individual detained at the scene. A search warrant was issued for officers to obtain a blood sample, which revealed defendant's blood alcohol concentration of .12 grams per 100 milliliters, well above the legal limit of .08.

¶ 23 Even if the trial court had ordered production of the transcript, "the jury verdict would have been the same." *Lawrence*, 365 N.C. at 513, 723 S.E.2d at 331 (quoting *Neder v. United States*, 527 U.S. 1, 17, 119 S. Ct. 1827, 1837 (1999)). Even if defendant had the transcript of the prior trial to impeach the testimony of Porcello and Daniel, there still existed overwhelming evidence of defendant's guilt. The trial court allowed defendant's counsel to call defendant's former counsel, Ezeh, as an impeachment witness. Although able to impeach Porcello's testimony regarding his identification of defendant as the driver of the wrecked truck at the first trial, Ezeh could not, and did not, impeach Daniel's testimony. There is no indication that Daniel made any inconsistent statements.

¶ 24 Officers identified defendant as the individual they arrested at the scene of the accident who had been detained by Porcello and Daniel. After being placed in a patrol unit, defendant admitted that he was the driver of the vehicle when it was wrecked. This admission was captured on video and shown to the jury. A search warrant was obtained to draw defendant's blood, and the sample obtained from defendant indicated that his blood alcohol concentration was above the legal limit. Thus, any error was harmless beyond a reasonable doubt.

III. Conclusion

¶ 25 For the foregoing reasons, the State met its burden to prove that the error in question was harmless beyond a reasonable doubt, and we affirm the decision of the Court of Appeals.

AFFIRMED.

Justice EARLS dissenting.

¶ 26 Affording equal protection and due process to all defendants, whether rich or poor, "is an age-old problem," but "[p]eople have never ceased to hope and strive to move closer to that goal." *Griffin v. Illinois*, 351 U.S. 12, 16 (1956). With *Griffin*, which established that "[d]estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts," our criminal system moved closer to that goal. *Id.* at 19. With *Britt v. North Carolina*, which established that "the State must provide an indigent defendant with a transcript of prior proceedings when the transcript is needed for an effective defense or appeal," we moved closer still. 404 U.S. 226, 227 (1971). Unfortunately, the majority chooses to walk away from that goal in this case due to its unfounded confidence in this defendant's guilt.

¶ 27 This case concerns an indigent defendant, Richard Gaddis, who was charged with various driving-related offenses. The State's case against him relied heavily on the testimony of witnesses who encountered Gaddis after a vehicle he was travelling in crashed on the side of a road. The first trial ended in a mistrial due to a hung jury. Before his second trial—and anticipating that the State would once again elicit testimony from those same witnesses—Gaddis's attorney filed a motion seeking a transcript of the first trial and a continuance to allow sufficient time for its production. Gaddis's attorney hoped to use the transcript to highlight inconsistencies in the witnesses' testimony and impeach their credibility. The trial court denied this request. Gaddis was ultimately convicted.

¶ 28 A wealthier defendant would not have needed to involve the trial court in his or her effort to obtain a transcript. A wealthier defendant could simply have placed a standing order with the court reporter to receive daily copies of the transcript of the trial proceedings. Accordingly, as established in *Griffin* and *Britt*, the trial court's actions implicated Gaddis's constitutional rights. To determine if Gaddis's constitutional rights were violated in a manner warranting reversal, this Court must answer two questions: First, was the transcript of the first trial necessary

to Gaddis's defense at his second trial? And second, if the trial court did violate Gaddis's constitutional rights by failing to provide him with a transcript of the first trial, was the error harmless beyond a reasonable doubt? *See Britt*, 404 U.S. at 227.

¶ 29 The majority addresses only the second question, concluding that "even if . . . the trial court erred in denying defendant's motions for a trial transcript, the error was harmless beyond a reasonable doubt." *Ante*, at ¶ 19. This conclusion is based on the majority's view that the evidence against Gaddis was "overwhelming." *Id.*, at ¶ 22. This conclusion is not supported by the record; indeed, a jury presented with substantially the same evidence as presented at the second trial failed to convict Gaddis during his initial trial. If Gaddis had been provided access to a transcript or something substantially similar in advance of his second trial, there is a reasonable chance the outcome of his trial would have been different. Therefore, the trial court's denial of Gaddis's motion violated his constitutional rights, and that violation was not harmless beyond a reasonable doubt. I respectfully dissent.

I. Background

¶ 30 On 12 February 2018, Richard Alan Gaddis Jr. was charged with driving while impaired, driving with a revoked license, driving without a registration, and driving without a displayed license plate. That night, Bryan Porcello, a witness who would later testify for the State, saw a white utility truck driving erratically before crashing into a ditch. According to Porcello and another witness, David Daniel, Gaddis emerged from the truck exhibiting signs of intoxication. The witnesses followed Gaddis into a residential neighborhood, where they subdued him and waited for the police.

¶ 31 The police arrived roughly twenty minutes later. Their interactions with Gaddis were recorded on an officer's dashboard camera. In that recording, Gaddis can be heard admitting to drinking but denying that he had been driving the truck. When asked who was driving, he stated "[n]ot sure." However, later on in the police officer's questioning, Gaddis said, "Man, you know all that [expletive]. Now if you're going to blow smoke up my ass, I'm going to blow smoke up yours. We can go through this all day. Look here dude, that's my truck, I've been driving the mother-[expletive]." Gaddis subsequently failed a field sobriety test, claimed once again that he was not the driver, and refused to submit to a roadside breath test. A subsequent blood draw revealed a blood alcohol concentration of .12 grams per 100 milliliters, which is above the legal limit. The vehicle identification number associated with the crashed truck indicated the truck belonged to a woman living in Charlotte.

¶ 32 Gaddis was first tried on 15 July 2019. The trial ended in a mistrial due to a hung jury. After the mistrial, Gaddis's attorney, Onyema Ezeh, withdrew as counsel. On 18 July 2019, a new attorney, Peter Dwyer, was appointed as Gaddis's counsel. Dwyer received discovery on 19 August 2019. A new trial was set for 3 September 2019.

¶ 33 On 26 August 2019, Dwyer filed a motion for transcript and a motion to continue so that a transcript from the mistrial could be provided. He asserted that "[d]efendant will need the transcript of the superior court trial showing the testimony of the witnesses from that trial in order to be properly prepared for the re-trial of this matter." In a colloquy, Dwyer emphasized his client's need for a transcript. His concern was that when cross-examining the State's witnesses, he would not be able to "stick them to" what they said at the first trial.

> But I just believe that without seeing the testimony of the two eyewitnesses and what they stated at the prior trial and my inability to impeach them when we do try this case is so critical. And like I said, looking at . . . the information Ezeh had given me, speaking with my client, I think there was good testimony that would benefit me but their testimony when they come back to trial could change substantially. And like I said, I can say didn't you say at the prior trial and they're going to be able to go I don't think I did, I don't recall, no I didn't. And I have no way to pull something out and say yes you did, this is what you stated, this is the questions you were asked at the prior trial, this is the answer you gave, why is your testimony today different. And if they get up there and testify differently.

Dwyer also argued that because the State's attorney was present at the prior trial, Gaddis would be disadvantaged by having counsel who had not heard the arguments and testimony presented at the prior trial. The same day that the motions were filed, the court issued a joint order denying Gaddis's motion for transcript and motion to continue. The trial court did not enter any findings of fact related to Gaddis's need for a transcript.

¶ 34 On 3 September 2019, the morning of the retrial, Dwyer filed a second pretrial motion to continue so that a transcript could be provided. In this renewed motion, Dwyer argued that:

> In reviewing the file, I only see a statement from one [of] two alleged eyewitness[es]. It would be critical to this case to ascertain the testimony of all [of] the witnesses for impeachment purposes but especially the testimony of a witness where no recorded statement or written statement was taken. This case hinges on the testimony of those two eyewitnesses trying to provide testimony to indicate that Defendant was the driver of the truck. The ability to impeach these witnesses with their prior sworn testimony and discredit them is absolutely critical in this case.
>
> Without [the] prior transcript, I have no way of impeaching any witness who testified at the prior trial without a copy of the prior transcript, never mind even knowing exactly how they testified.
>
> In addition, the [S]tate has the unfair advantage of changing their strategy on the retrial of this matter based on prior testimony of the witnesses whereas I not being the attorney of record at the previous trial do not accurately know the testimony of any of the witnesses.
>
> In reviewing the file, the [S]tate obtained an order on [18 July 2019] and may have sent out juror questionnaires and will have the advantage of tailoring their case based on the replies if any from the jurors at the prior trial, while I have no transcript of the trial itself to review.

Dwyer also argued that his delay in requesting the transcript until a week before the trial was not a tactic but was actually the result of him not having a chance to review the case until 19 August 2019, when he returned from leave and first received discovery. Nevertheless, the court again denied Gaddis's motion to continue. It made no written findings but found orally:

> The alleged date of offense is February 12th, 2018. The Defendant was taken into custody on February 12th, 2018. He was appointed counsel on February 14th, 2018, that being Vernon Cloud. Mr. Cloud represented Mr. Gaddis up until the time he withdrew in October of — on October 9th, 2018. At which time Tiffany Wilson was appointed outright to represent

> Mr. Gaddis. Ms. Wilson represented Mr. Gaddis from October 9th, 2018 until December 10th, 2018, at which time she withdrew and Mr. Ezeh was appointed outright to represent Mr. Gaddis. That representation began December 10th, 2018 and continued through July 18th, 2019, which included the last trial of this matter. At which time Mr. Ezeh was allowed to withdraw and Mr. Dwyer was appointed outright to represent Mr. Gaddis and represents Mr. Gaddis here today September 3rd. So we've been through three prior attorneys prior to getting to you, Mr. Dwyer.

The case proceeded to trial.

¶ 35 The State called Porcello and Daniel, the witnesses who first arrived at the scene of the crash, to testify in both trials. At the retrial, Porcello testified that on 12 February 2018, at around 7:30 p.m., he observed a white work truck swerving from lane to lane, running several red lights, and crashing in a ditch. Porcello testified that, as he drove past the crash he saw "a white male" alone in the truck. Porcello then returned to the crash to see if the driver was hurt. By this time, "it was starting to get even darker and [Porcello] couldn't see in the vehicle." Porcello flagged down a second individual, Daniel, to help. Using Daniel's flashlight, Porcello testified that he was able to see Gaddis in the driver's seat as Porcello and Daniel approached. At some point, Gaddis emerged from the truck, and he "ask[ed] where some female was" two or three times.

¶ 36 The State next called on Daniel, who testified that he

> pulled up just as the utility truck had come to a rest in the ditch. Dust, a little bit of smoke was just rising up. As I pulled up I saw the Defendant in the driver's seat. My headlights shined right on him. [Porcello] was out of his vehicle so I rolled my window down to see if everyone was okay . . . .
>
> . . . .
>
> . . . [Porcello] said he didn't want to approach because he couldn't see the driver, didn't know if he had a gun or anything. So hearing gun I grabbed mine out of the cup holder and clipped my holster on and grabbed the flashlight so that we could see clearly and not get into a bad situation. And then we approached the vehicle together. I shown my light into the front

> of the vehicle and saw the Defendant. He was still in the vehicle on the accelerator trying to get it unstuck from the ditch.

Daniel also testified that Gaddis stumbled when he walked, smelled of alcohol, and acted belligerently toward him. On cross-examination, Daniel testified that he "believe[d]" he had testified at the first trial that he had seen Gaddis in the driver's seat. He also testified he never saw Gaddis driving the vehicle because he was not there at the time of the accident.

¶ 37 In an effort to impeach the State's witnesses, Dwyer called Ezeh, Gaddis's attorney from the first trial, to testify. Ezeh alleged that, at the first trial, Porcello (1) was unable to identify how many people were in the truck; (2) could not "tell the [c]ourt or give the [c]ourt any identifier as to who was driving the truck"; (3) "was unable to tell . . . if [the driver was] black, white, male, [or] female"; and (4) "did not testify in the previous trial that he saw . . . Gaddis in the truck." During his closing argument, Dwyer emphasized these alleged discrepancies in Porcello's testimony. He argued that the only way to prove that Gaddis was guilty was to prove that he was driving the truck and that the only witness that allegedly saw Gaddis driving was not "credible" due to his changing testimony. He also noted that Gaddis was not the owner of the truck he was alleged to have driven.

¶ 38 Gaddis was convicted of driving while impaired and driving without a registration, and the trial court sentenced him to 24 months in the Misdemeanant Confinement Program.

II. Analysis

¶ 39 "Ordinarily, a motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review." *State v. Taylor*, 354 N.C. 28, 33 (2001). But when a party's motion to continue is predicated on that party's assertion of a constitutional right, we review the trial court's decision to deny the motion de novo. *See*, *e.g.*, *In re C.A.B.*, 381 N.C. 105, 2022-NCSC-51, ¶ 14 (" 'If, however, the motion is based on a right guaranteed by the Federal and State Constitutions, the motion presents a question of law and the order of the court is reviewable' de novo." (quoting *State v. Baldwin*, 276 N.C. 690, 698 (1970))); *State v. Johnson*, 379 N.C. 629, 2021-NCSC-165, ¶ 16 ("Defendant's motion to continue raised a constitutional issue, requiring de novo review by this Court."). "When the trial court's denial of a [defendant's] motion to continue violates that [defendant's constitutional] rights, the 'harmless error' standard applies: specifically, the

challenged order must be overturned unless the error was harmless beyond a reasonable doubt, and [the State] bears the burden of proving that the error was harmless." *In re C.A.B.*, ¶ 33 (cleaned up).

¶ 40 In this case, it is undisputed that Gaddis's motion to continue was predicated on his assertion of a constitutional right to the transcript of his first trial. The State concedes that "[h]ere, defendant's . . . motion to continue was premised upon his contentions that he was constitutionally entitled to a transcript of his mistrial, and that a continuous was required to allow for its receipt." The majority does not expressly acknowledge that it is reviewing the trial court's denial of Gaddis's motion de novo, as is required, but the majority appears to recognize de novo review is appropriate in concluding "that the trial court likely erred in failing to apply the two-part *Britt* test," *ante*, at ¶ 13, (the legal test used to discern whether denying an indigent defendant's request for a transcript is a constitutional violation) and that any error committed by the trial court "was harmless beyond a reasonable doubt," *id.*, (the legal test used to determine whether a trial court's violation of a defendant's constitutional rights warrants reversal of a conviction). Thus, notwithstanding its imprecision, the majority opinion in no way casts doubt on the "well[-]settled" principle that de novo review is necessary when a trial court denies a defendant's motion to continue which was based on the defendant's assertion of a constitutional right. *See Piedmont Triad Reg'l Water Auth. v. Sumner Hills Inc.*, 353 N.C. 343, 348 (2001).

A. The trial court's denial of Gaddis's motion to continue and motion for a transcript violated his constitutional rights

¶ 41 Denying an indigent defendant a free transcript violates that defendant's constitutional rights when (1) "a transcript is necessary for preparing an effective defense" and (2) there are no "alternative devices available to the defendant which are substantially equivalent to a transcript." *Rankin*, 306 N.C. at 716. Here, the transcript was necessary for Gaddis to prepare an effective defense, and the devices available in lieu of a transcript—Ezeh's notes and testimony—were not substantially equivalent to the transcript. Accordingly, denying Gaddis's motion to continue was a violation of his constitutional rights.

¶ 42 Our caselaw demonstrates that a transcript of prior proceedings is valuable—and often necessary—to an effective criminal defense. *See, e.g.*, *Britt*, 404 U.S. at 228 ("[A] transcript of a prior mistrial would be valuable to the defendant . . . as a tool at the trial itself for the impeachment of prosecution witnesses."); *State v. Reid*, 312 N.C. 322, 323 (1984) (per curiam) (agreeing that the defendant needed a transcript of a prior

mistrial "to effectively cross-examine the [S]tate's witnesses"). This is especially true when much of the State's case substantially depends on witness testimony, *see State v. Tyson*, 220 N.C. App. 517, 520 (holding that the trial court's denial of defendant's motion for a transcript was erroneous "especially in light of the fact that the State's case rested entirely on the victim's identification of defendant as the perpetrator"), or when the defendant's lack of a transcript will put him or her at a disadvantage compared to the State, *see State v. Matthews*, 295 N.C. 265, 290 (1978) (reasoning that denial of a transcript was permissible because "[t]he scales were not tipped in favor of the State on this count"). In addition, this Court has recognized that a transcript is a tool that is not easily replaced. For example, in *Rankin*, we held that "access to the court reporter [from the previous proceeding] and her notes for use during the course of the trial" was not substantially equivalent to the transcript of that proceeding. 306 N.C. at 715 (emphasis omitted).

¶ 43 Here, a transcript—or something substantially similar—was necessary to Gaddis's defense. As his attorney argued, the State's case largely depended on the ability of an eyewitness to identify Gaddis as the driver of the vehicle. Gaddis did not and, given the results of his blood test, could not dispute that he was intoxicated. Thus, his best chance at acquittal was disputing that he had actually been driving the crashed vehicle. The best way of disputing that would have been to challenge the eyewitness testimony placing him behind the wheel before and immediately after the crash. Based on the notes from Ezeh, Gaddis's attorney during the mistrial, Dwyer believed that the witness testimony during the mistrial had been sufficiently vague so as to benefit his client. However, Dwyer worried that should the witnesses change their testimony from one trial to the next—which, according to Ezeh's testimony, did indeed happen—Dwyer would have no way to "stick them to" what they had said under oath at the previous trial. With no credible source to draw from, any factual dispute would amount to Dwyer's (or Ezeh's) word against the witnesses' accounts. This put Gaddis at a significant disadvantage.

¶ 44 This disadvantage was even more severe considering the disparity of information between Dwyer and the prosecutor. Unlike Dwyer, the prosecutor was present for both trials. As Dwyer pointed out before trial, the prosecutor could use her experience from the mistrial to learn from her mistakes and "go after this case in a different fashion." In contrast, Dwyer was not present at the mistrial. In fact, he did not even know he had been appointed as Gaddis's defense counsel until two weeks before the new trial. He had no firsthand knowledge of what was said during the

first trial and thus no independent way of knowing whether the State's witnesses' testimony remained consistent throughout; he had only his client's and Ezeh's notes and recollections to rely upon. A transcript of the mistrial would have helped rectify the imbalance of information between the parties. Because the court did not provide that transcript, the scales of justice were tipped in the State's favor.

¶ 45 The State argues that even if the transcript was necessary for preparing an effective defense, Gaddis had a substantially equivalent alternative: the notes, memory, and testimony of Ezeh. But at the second trial, the prosecutor made a compelling argument to the contrary illustrating why Ezeh's testimony was not equivalent to a transcript. During cross-examination, the prosecutor repeatedly attacked Ezeh's memory and motives:

> "And you can't say word for word what a witness said in that previous trial?"
>
> "And you haven't seen a transcript of the previous trial?"
>
> "Are you relying on your memory of that?"
>
> "And your notes and everything, those notes aren't actual trial transcripts in this case; correct?"
>
> "Again, it's been two months since this prior testimony happened. Your recollection is not fresh in this case; correct?"
>
> "And [when you represented defendant] at the time of that first trial you were interested in the outcome of the case?"
>
> "And Mr. Ezeh, again in the prior case you were interested in the outcome of the case?"

The prosecutor convincingly argued that Ezeh, like all people, was susceptible to bias and the limits of memory. A transcript, on the other hand, would not have suffered from these human shortcomings. With a transcript in hand, Dwyer could have pointed out specific discrepancies in witness testimony using an objective source of information—while the jury would be left to determine the significance of these discrepancies, there would be no disputing their existence. Instead, the best Dwyer could offer was Ezeh's testimony. The jury, after hearing conflicting testimony from the State's witnesses and from Ezeh, may have decided

the State's witnesses were more credible. Afterall, they knew Ezeh had represented Gaddis and may not have been a neutral party. Therefore, Ezeh's testimony could not support Gaddis's efforts to impeach the State's witnesses in the way a transcript would have. Because Gaddis's defense depended on impeaching the State's witnesses, and because the only device available to him to accomplish this task was not substantially equivalent to a transcript, Gaddis was deprived of a tool that was necessary to his defense in violation of his constitutional rights.

B. The trial court's failure to grant a continuance was not harmless beyond a reasonable doubt

¶ 46 Constitutional errors require reversal unless they are shown to be harmless. *See State v. Lawrence*, 365 N.C. 506, 513 (2012). The "harmless error" standard requires that we "declare a belief that [the error] was harmless beyond a reasonable doubt" before deciding to overlook a constitutional violation and affirm a judgment. *Id.* (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). When a constitutional error has occurred, the State "bears the burden of showing that no prejudice resulted from the challenged . . . constitutional error." *Id.* Here, the majority concludes that even if providing Gaddis with a transcript would have enabled him to discredit the State's witnesses, the State has met its burden of proving that there is no reasonable possibility that the jury would have failed to find Gaddis guilty. *Ante*, at ¶ 13.

¶ 47 In coming to this conclusion, the majority relies heavily on the audio of Gaddis telling the arresting officer "now if you're going to blow smoke up my ass, I'm going to blow smoke up yours. We can go through this all day. Look here dude, that's my truck, I've been driving the mother-[expletive]." The majority confidently calls this an "admission." *Ante*, at ¶ 24. Notably, the trial court—the tribunal closest to the evidence—refused to instruct the jury that Gaddis's comment was an admission of guilt. The majority's finding to the contrary is a dramatic overreading of Gaddis's comments, which must be viewed in context of facts casting significant doubt on the majority's chosen interpretation. These facts include that (1) Gaddis appears to have been highly inebriated; (2) the phrase "blow smoke" is commonly meant to denote that the speaker is lying[1]; (3) there is evidence that the truck was not, in fact, owned by

1. *See, e.g.*, *United States v. Fullerton*, 187 F.3d 587, 592 (6th Cir. 1999) (concluding that a prosecutor's "statement that the defense counsel was 'trying to blow smoke in the jury's faces' " was "improper" because it "indicat[ed] a personal belief in the witness's credibility"); *State v. Maye*, No. COA15-676, 2016 WL 1013179, at *3 (N.C. Ct. App. Mar. 15, 2016) (unpublished) (concluding that a prosecutor's statements that defense counsel's

Gaddis; (4) on multiple occasions in the same recording, Gaddis states that he was *not* the driver of the truck; and (5) both Dwyer and the State offered competing (but plausible) interpretations of the meaning of Gaddis's comments in the recording.

¶ 48 This uncertainty undercuts the majority's speculation that Gaddis would have been convicted even if the Gaddis had, armed with a transcript from his first trial, discredited the State's witnesses through more effective cross-examination. Absent this statement, the only direct evidence indicating Gaddis was driving the truck at the time it crashed was the State's witnesses' testimony. Gaddis expressly sought a transcript of his first trial in order to impeach the credibility of those witnesses, and there were in fact discrepancies between at least one of the witnesses' testimony at the first trial and at the second trial. Rather than engage these inconvenient facts, the majority relies almost entirely on a statement it treats as an "admission" notwithstanding the trial court's express refusal to do the same.

¶ 49 The majority also cites other evidence including Gaddis's intoxication and presence near the vehicle around the time of the crash. *See ante*, at ¶ 22. But the evidence needed to demonstrate that a trial court's constitutional error was harmless is not the same as the evidence needed to sustain a conviction: when applying the harmless error standard, "[w]e are not concerned . . . with whether there was sufficient evidence on which the petitioner *could* have been convicted without the [trial court's error]. The question is whether there is a reasonable possibility that the [error] might have contributed to the conviction." *Fahy v. Connecticut*, 375 U.S. 85, 86–87 (1963) (emphasis added). The undisputed facts which demonstrate that Gaddis was involved in an accident, was found at the scene of the accident, and was impaired at the time of the accident do not conclusively establish beyond any reasonable doubt that Gaddis was the person driving the vehicle at the time of the accident. In this case, there is a reasonable possibility that the trial court's constitutional error influenced the jury's verdict.

¶ 50 The conclusion that the evidence of Gaddis's guilt is not "overwhelming" is not just a theory. At Gaddis's first trial, the jury—having heard the same supposed "admission" and witness testimony the majority now relies upon—failed to convict Gaddis. The majority chooses to ignore this mistrial entirely when it conducts its harmless error analysis,

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"theory of the case was '[a] bunch of crap' " and the defendant has "[n]ot only . . . blown smoke in your faces, but he's blown smoke in another part of your body" expressed an "impermissible personal opinion" regarding the defense (first alteration in original)).

even though it is plainly relevant to the question of whether an acquittal was a reasonably possible outcome of Gaddis's second trial. The mistrial suggests that had Gaddis been provided a transcript to effectively hold the State's witnesses to the testimony they gave at the first trial, one or more jurors might have again failed to find him guilty beyond a reasonable doubt. Whether or not Gaddis was driving the truck when it crashed was a disputed question of fact, and there is a reasonable possibility that had Gaddis been able to obtain a transcript, he could have more thoroughly impeached the State's witnesses and convinced the jury to reach a different conclusion. Nevertheless, the majority deigns to find that Gaddis was driving the truck when it crashed. In so doing, the majority acts like a jury, not an appellate court, in substituting its own belief in Gaddis's guilt for a rigorous application of the requisite harmless error standard.

III. Conclusion

¶ 51 The United States Supreme Court wrote in *Griffin* that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin*, 351 U.S. at 19. As the Court acknowledged, money and justice have always been linked, but our system aspires to sever that connection. *Id*. One way to further that goal is the promise that if a defendant cannot afford a transcript from a prior proceeding, a transcript will be provided if it is necessary to the defendant's ability to mount an effective defense. By assuming away Gaddis's constitutional rights based on an unfounded assertion regarding the strength of the State's case, the majority ignores the importance of this protection, frustrates our progress towards the goal of equal justice to all, and denies this defendant a fair trial. For these reasons, I respectfully dissent.

Justice HUDSON and Justice MORGAN join in this dissenting opinion.

STATE v. JONES

[382 N.C. 267, 2022-NCSC-103]

STATE OF NORTH CAROLINA
v.
TONY DESHON JONES

No. 85PA20

Filed 19 August 2022

Appeal and Error—preservation of issues—probation revocation—right to confront witnesses—insufficient objection

Where defendant's objection at his probation revocation hearing to the introduction of a transcript of an officer's testimony (from a prior suppression hearing regarding an offense for which defendant was ultimately not convicted) did not specifically reference either a constitutional or statutory right to confront witnesses, but appeared at most to challenge the evidence on relevance grounds, and where defendant neither made a request to have the officer testify nor was prevented from doing so, the issue of whether defendant's confrontation rights were violated was neither properly preserved for appellate review nor automatically preserved as a violation of a statutory right (under N.C.G.S. § 15A-1354(e)).

Justice EARLS dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 from a unanimous decision of the Court of Appeals, 269 N.C. App. 440, 838 S.E.2d 686 (2020), affirming judgments entered on 23 October 2017 by Judge James K. Roberson in Superior Court, Durham County. Heard in the Supreme Court on 10 May 2022.

Joshua H. Stein, *Attorney General*, *by Christine Wright*, *Assistant Attorney General*, *for the State.*

Glenn Gerding, *Appellate Defender*, *by Nicholas C. Woomer-Deters*, *Assistant Appellate Defender*, *for defendant-appellant.*

BERGER, Justice.

¶ 1 Defendant's probation was revoked following a determination that he had committed new criminal offenses. On appeal to the Court of Appeals, defendant argued that the trial court deprived him of his right to confront witnesses against him at the probation revocation hearing.

The Court of Appeals disagreed and upheld the revocation of defendant's probation. For the reasons stated below, we modify and affirm the decision of the Court of Appeals.

I. Factual Background

¶ 2 Defendant was placed on probation after pleading guilty to discharging a weapon into occupied property and possession of a firearm by a convicted felon in August 2015. Defendant was subsequently alleged to have violated terms of probation in reports filed on December 21, 2016,[1] June 7, 2017, August 10, 2017, and August 18, 2017. Relevant here are the 2017 violation reports which alleged that defendant absconded supervision, committed new criminal offenses, and failed to pay restitution and other costs and fees. The allegation that defendant violated probation by committing new criminal offenses stemmed from an April 1, 2016 incident in which defendant was charged with possession of a firearm by a felon and carrying a concealed weapon.

¶ 3 When these charges come on for trial, defendant filed a motion to suppress evidence obtained as a result of a traffic stop in which a pistol was recovered during a search of the vehicle operated by defendant. During the suppression hearing, the State called Sergeant Casey Norwood, the officer who initiated the traffic stop that led to discovery of the firearm in defendant's vehicle. In its order denying the motion to suppress, the trial court found that Sergeant Norwood first observed defendant in an area known for criminal activity. Sergeant Norwood followed defendant in his patrol unit when defendant left the area. After pacing defendant's vehicle at 50 miles per hour in a 35 miles per hour zone, Sergeant Norwood activated his lights and siren to initiate a traffic stop. Defendant "did not stop right away," and Sergeant Norwood observed defendant "slouch . . . toward the center console" as the vehicle slowed down. The trial court found that defendant's behavior "indicated [to Sergeant Norwood that] the driver might try to conceal something."

¶ 4 After stopping the vehicle, Sergeant Norwood found that defendant was the only occupant. Defendant became "defensive and belligerent" when Sergeant Norwood informed him that the traffic stop was initiated because he was exceeding the speed limit. After defendant was asked to step out of the vehicle, a Smith and Wesson pistol was discovered between the driver's seat and the center console, with "2 to 3 inches of grip

1. The trial court determined that defendant had absconded supervision based on this violation report. As a result, defendant's judgment was modified and he was continued on probation.

showing." Sergeant Norwood testified that he "reached into the vehicle to remove the weapon [and] secured [it]."

¶ 5 The trial court concluded that defendant's constitutional rights had not been violated by the search or seizure and denied defendant's motion to suppress in an order dated July 12, 2017. At trial, the jury was unable to reach a unanimous verdict and a mistrial was declared on July 14, 2017.

¶ 6 On September 14, 2017, the trial court held a probation revocation hearing regarding the violation reports, including the allegation that defendant had committed new criminal offenses. At the outset, the State moved to admit the July 12, 2017 order denying defendant's motion to suppress and a transcript of the suppression hearing which included Sergeant Norwood's testimony. The State indicated that Sergeant Norwood was present and that the State was "prepared to present [Sergeant Norwood] again." Defendant did not call on Sergeant Norwood to testify or otherwise request that Sergeant Norwood remain available for the probation revocation hearing.

¶ 7 In objecting to admission of the order,[2] defense counsel argued,

> there is no evidence of guilt or innocence or any evidence or any admission from [defendant] in this order. So, therefore, there is no relevance to this probation hearing.
>
> There is one way for them to get that violation in if he is found guilty or if he pleads guilty. I don't think we can do it by using a court order based on a suppression hearing. The court at that point in time did not have authority to render [defendant] guilty or to find guilt with regards to that charge.
>
> I think it's important to note that [the] violation is based off of a conviction. There is no evidence of a conviction.

¶ 8 Defense counsel contended that the order was "highly prejudicial and [ ] irrelevant" to the probation revocation issue and should be excluded. The trial court admitted the transcript and the factual findings from the order denying defendant's motion to suppress.

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2. In the transcript of the probation revocation hearing, there is no discussion between the trial court and defense counsel regarding an objection to admission of the transcript. It appears, however, that the trial court treated the objection to the order as an objection to the transcript, admitting both "over defendant's objection."

¶ 9 After resuming the revocation hearing on October 23, 2017, the trial court heard additional evidence from the State in the form of testimony from the probation officer related to the absconding and monetary violations. Defendant testified at the probation violation hearing that he did not know there was a firearm in the vehicle and introduced an affidavit from Lamar Alexander Thomas stating that the firearm did not belong to defendant.

¶ 10 The trial court determined that defendant had committed the criminal offenses of possession of a firearm by a felon and carrying a concealed weapon while on probation,[3] and defendant's probation was revoked. In reaching its decision, the trial court stated on the record that it had "reviewed the evidence presented, the transcript, the previous orders, affidavits - - affidavit, live testimony."

¶ 11 Defendant appealed to the Court of Appeals, arguing that admission of the transcript at the probation revocation hearing resulted in a denial of his right to confront Sergeant Norwood without a finding of good cause pursuant to N.C.G.S. § 15A-1345(e). The Court of Appeals affirmed the trial court's revocation of defendant's probation but remanded the case to the trial court for correction of a clerical error. *State v. Jones*, 269 N.C. App. 440, 445, 838 S.E.2d 686, 690 (2020). The Court of Appeals held that the trial court's admission of the transcript was not error and concluded that a finding of good cause by the trial court was unnecessary because defendant did not seek to confront or cross-examine Sergeant Norwood and had failed to advance an argument related to confrontation in the trial court. *Id.* at 445, 838 S.E.2d at 690. Defendant appeals.

II. Analysis

¶ 12 The Sixth Amendment guarantees 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 protection "bars admission of testimonial evidence unless the declarant is unavailable to testify and the accused has had a prior opportunity to cross-examine the declarant." *State v. Locklear*, 363 N.C. 438, 452, 681 S.E.2d 293, 304 (2009) (citations omitted).

¶ 13 It is well settled, however, that a probation revocation proceeding is not a criminal trial. *State v. Duncan*, 270 N.C. 241, 245, 154 S.E.2d 53, 57 (1967). Because "[a] probation revocation proceeding is not a formal criminal prosecution," a defendant is afforded "more limited

3. The court did not find an absconding violation.

due process right[s].” *State v. Murchison*, 367 N.C. 461, 464, 758 S.E.2d 356, 358 (2014) (cleaned up). Specifically, “[t]he Sixth Amendment, which guarantees [certain protections] to the accused ‘in all *criminal prosecutions*,’ ”, does not apply to hearings on probation violations. *State v. Braswell*, 283 N.C. 332, 337, 196 S.E.2d 185, 188 (1973) (emphasis added). Thus, these proceedings “are often regarded as informal or summary.” *State v. Hewett*, 270 N.C. 348, 353, 154 S.E.2d 476, 479 (1967).

¶ 14 The limited rights a defendant enjoys in a probation revocation hearing are rooted in the Due Process Clause of the Fourteenth Amendment, *Gagnon v. Scarpelli*, 411 U.S. 778, 781–82, 93 S. Ct. 1756, 1759–60 (1973) (citation omitted), *superseded by statute*, Parole Commission and Reorganization Act, Pub. L. No. 94-233, 90 Stat. 119, 228 (1976), and codified in N.C.G.S. § 15A-1345(e). To satisfy due process in this context, an individual alleged to have violated probation

> is entitled to written notice of the claimed violations of his probation; disclosure of the evidence against him; an opportunity to be heard in person and to present witnesses and documentary evidence; a neutral hearing body; and a written statement by the fact-finder as to the evidence relied on and the reasons for revoking probation.

Black v. Romano, 471 U.S. 606, 612, 105 S. Ct. 2254, 2258 (1985) (citing *Gagnon*, 411 U.S. at 786, 93 S. Ct. at 1761).

¶ 15 Further, N.C.G.S. § 15A-1345(e) provides that:

> Before revoking or extending probation, the court must, unless the probationer waives the hearing, hold a hearing to determine whether to revoke or extend probation and must make findings to support the decision and a summary record of the proceedings. The State must give the probationer notice of the hearing and its purpose, including a statement of the violations alleged. The notice, unless waived by the probationer, must be given at least 24 hours before the hearing. At the hearing, evidence against the probationer must be disclosed to him, and the probationer may appear and speak in his own behalf, may present relevant information, and may confront and cross-examine adverse witnesses unless the court finds good cause for not allowing confrontation. The probationer is entitled to be represented by

> counsel at the hearing and, if indigent, to have counsel appointed in accordance with rules adopted by the Office of Indigent Defense Services. Formal rules of evidence do not apply at the hearing, but the record or recollection of evidence or testimony introduced at the preliminary hearing on probation violation are inadmissible as evidence at the revocation hearing.

N.C.G.S. § 15A-1345(e) (2021). The purpose of N.C.G.S § 15A-1345(e) "is to allow the defendant to prepare a defense and to protect the defendant from a second probation violation hearing for the same act." *State v. Moore*, 370 N.C. 338, 342, 807 S.E.2d 550, 553 (2017) (cleaned up).

¶ 16 Traditional rules of evidence do not apply in probation violation hearings, and the trial court is permitted to use "substitutes for live testimony, including affidavits, depositions, [and] documentary evidence," as well as hearsay evidence. *Gagnon*, 411 U.S. at 783 n. 5, 93 S. Ct. at 1760 n. 5; *see also Murchison*, 367 N.C. at 464, 758 S.E.2d at 358. In addition, trial courts are granted "great discretion" in admitting "any evidence relevant to the revocation of defendant's probation." *Murchison*, 367 N.C. at 465, 758 S.E.2d at 359 (cleaned up). Ultimately, all that is required in a probation revocation hearing is that the evidence reasonably satisfy the trial court that a probationer "has willfully or without lawful excuse violated a condition of probation." *State v. Coltrane*, 307 N.C. 511, 516, 299 S.E.2d 199, 202 (1983) (citing *Hewett*, 270 N.C. 348, 154 S.E.2d 476); *see also Duncan*, 270 N.C. at 245, 154 S.E.2d at 57.

¶ 17 Defendant here argues that he was deprived of both his constitutional right and statutory right to confront and cross-examine Sergeant Norwood at his probation violation hearing. However, because defendant failed to preserve his arguments, we modify and affirm the decision of the Court of Appeals.

¶ 18 "It is well settled that an error, even one of constitutional magnitude, that defendant does not bring to the trial court's attention is waived and will not be considered on appeal. As a result, even constitutional challenges are subject to the same strictures of Rule 10(a)(1)." *State v. Bursell*, 372 N.C. 196, 199, 827 S.E.2d 302, 305 (2019) (cleaned up).

¶ 19 Defendant contends that his objection to admission of the suppression denial order preserved his constitutional argument because the specific grounds for his objection were readily apparent from the context under Rule 10(a)(1). However, defense counsel's objection to admission of the order related to an apparent misapprehension of law

that a conviction was required for a revocation violation based on commission of a new criminal offense. Defense counsel argued:

> [DEFENSE COUNSEL]: I am going to object to [admission of the order], Your Honor[.] . . .
>
> I believe there are three ways to get a conviction in Superior Court, plead guilty, be found guilty before a jury, or he can be found guilty before a judge at a bench trial.
>
> As [the prosecutor] pointed out to you . . . we had a trial before Your Honor, before a duly impaneled jury, who at that time were the only finders of fact as to the guilt or innocence or not guilt of [defendant]. A mistrial was declared after a hung jury.
>
> What [the State] has before the court today is an order based off a motion to suppress evidence of a firearm based on what we thought to be a bad stop, and I believe we did appeal that order from this court. And we certainly respect the court's order . . . , but there is no evidence of guilt or innocence or any evidence or any admissions from [defendant] in this order. So, therefore, there is no relevance to this probation hearing.
>
> There is one way for them to get that violation in, if he is found guilty or if he pleads guilty. I don't think we can do it by using a court order based on a suppression hearing.

¶ 20 Further, defendant never objected to admission of the transcript from the suppression hearing at the revocation hearing. Nonetheless, the trial court stated that it admitted State's Exhibit 2 "over the objection of the defendant." At most, defendant's objection was a general objection to relevance. However, defense counsel argued that testimony from law enforcement at the probation revocation hearing was irrelevant in the absence of a prior conviction for the alleged two new offenses. Defense counsel stated,

> I am not quite sure what any of these officers can testify to as far as this criminal activity is concerned which would be more competent at this hearing than a final judgment from the previous hearing which came back as a hung jury, Your Honor. I am not quite sure how that's appropriate . . . ."

¶ 21 Thus, defendant was aware that the officers involved in charging him with the new criminal offenses were available to testify at the probation hearing. Despite this knowledge, defendant never attempted to call Sergeant Norwood to the stand, subpoena him, or ask that he be placed on standby. In fact, defendant argued Sergeant Norwood's testimony was irrelevant.

¶ 22 We cannot conclude that defendant's objections were assertions of confrontation rights, as it is not readily apparent from this record that any such argument was intimated by defense counsel in the trial court. Rather, defendant's arguments to the trial court were related solely to proof of new criminal offenses in the absence of a criminal conviction.

¶ 23 While defense counsel certainly objected to use of the State's exhibits, defendant never raised or referenced confrontation as the grounds for his objection. Defendant's objection was based on the State's attempt to prove that defendant committed new criminal offenses even though defendant had not been convicted of the charges. While defendant enjoyed a limited confrontation right during the probation hearing, he failed to signal to the trial court that an inability to confront Sergeant Norwood was the disputed issue. Defendant's objection was not sufficient to put the trial court on notice that he was making an objection related to confrontation. N.C. R. App. P. 10(a)(1). Because defendant did not include a specific objection related to confronting Sergeant Norwood, his constitutional argument concerning confrontation was not preserved.

¶ 24 Similarly, defendant failed to preserve his statutory argument concerning confrontation.

¶ 25 Generally, "[w]hen a trial court acts contrary to a statutory mandate, the defendant's right to appeal is preserved despite the defendant's failure to object during trial." *State v. Lawrence*, 352 N.C. 1, 13, 530 S.E.2d 807, 815 (2000). This Court has stated that

> [a] statute contains a statutory mandate when it is clearly mandatory, and its mandate is directed to the trial court. A statutory mandate is directed to the trial court when it, either (1) requires a specific act by a trial judge; or (2) leaves no doubt that the legislature intended to place the responsibility on the judge presiding at the trial or at specific courtroom proceedings that the trial judge has authority to direct.

State v. Chandler, 376 N.C. 361, 366, 851 S.E.2d 874, 878 (2020) (cleaned up).

¶ 26 Subsection 15A-1345(e) cannot be said to contain a statutory mandate because that section does not clearly mandate an action by the trial court. In a probation revocation hearing, a defendant "*may* confront and cross-examine adverse witnesses unless the court finds good cause for not allowing confrontation." N.C.G.S. § 15A-1345(e) (emphasis added). While this language could be interpreted as mandatory, the specific act required of the trial court, namely, a finding of good cause, is conditioned upon some attempt by the defendant to confront or cross-examine a witness. Thus, the plain language of N.C.G.S. § 15A-1345(e) contains a conditional statutory mandate which means normal rules of preservation apply unless the trial court fails to make a finding of good cause when the court does not permit confrontation despite a defendant's request to do so.

¶ 27 Defendant argues, however, that this Court in *State v. Coltrane* determined that where a probationer is not permitted to confront or cross-examine adverse witnesses during a probation violation hearing, confrontation arguments are automatically preserved for appellate review. Defendant misapprehends our precedent.

¶ 28 In *Coltrane*, the defendant appeared without her counsel in superior court to answer allegations that she had violated a condition of her probation that she obtain gainful employment or pursue educational or vocational training. 307 N.C. at 512–13, 299 S.E.2d at 200–01 (1983). The State did not put on evidence, but instead the trial court simply asked the defendant if she had obtained employment. *Id.* at 515, 299 S.E.2d at 202. When she replied that she did not have a job, the trial court revoked her probationary sentence. *Id.* at 515, 299 S.E.2d at 202.

¶ 29 This Court set forth the transcript of the entire probation hearing as follows:

> [PROSECUTING ATTORNEY]: Mary Coltrane. She appeared before Your Honor last term of court on a probation violation. Ms. Delilah Perkins was her probation officer. At that time I believe Your Honor advised her to come back to court today, this term of court, with a job. And Ms. Perkins spoke with me this morning, and according to Ms. Perkins this defendant has not procured employment yet, if Your Honor please.
>
> THE COURT: All right.

> MARY COLTRANE: My attorney talked to Ms. Perkins Thursday and she told me that it would be tried at the end of this week.
>
> THE COURT: M'am [sic]? Yes, I know. He talked to me too. I told him it would be today.
>
> MARY COLTRANE: I'm expecting a call about a job at –
>
> THE COURT: Do you have a job now?
>
> MARY COLTRANE: No, sir.
>
> THE COURT: Let the sentence be put into effect. She's in custody.

Id. at 515, 299 S.E.2d at 202.

¶ 30 In addition to determining that the trial court erred by proceeding with the probation violation hearing without the presence of defense counsel, this Court expressed concern over the "brevity [of] the colloquy" with the defendant, stating that the

> defendant was not effectively allowed to speak on her own behalf nor to present information relevant to the charge that she had violated a condition of probation. The court interrupted defendant and did not permit her to offer any explanation of her failure to obtain employment in the previous two weeks or to explain the expected telephone call concerning a job prospect.

Id. at 516, 299 S.E.2d at 202.

¶ 31 This Court concluded that because "[t]he court interrupted [the] defendant" without allowing her "to present information relevant to the charge," the defendant in *Coltrane* was refused the opportunity to confront or cross examine any witnesses. *Id.* at 516, 299 S.E.2d at 202. In so doing, the actions of the trial court triggered the need for a finding of good cause, and the failure to make such findings preserved the issue for appellate review. In contrast here, however, the record contains no indication that defendant requested that Sergeant Norwood testify or that the trial court in any way prevented him from doing so. *Accord Duncan*, 270 N.C. at 246, 154 S.E.2d at 58. Thus, "nothing . . . support[s] the contention that defendant was not given an opportunity to be heard." Defendant's confrontation argument under N.C.G.S. § 15A-1345(e) is not preserved. *Id.* at 246, 154 S.E.2d 53, 58.

III. Conclusion

¶ 32 Pursuant to N.C.G.S. § 15A-1345(e), a defendant in a probation revocation hearing "may confront and cross-examine adverse witnesses unless the court finds good cause for not allowing confrontation." N.C.G.S. § 15A-1345(e) (2021). A defendant's arguments under that provision are preserved when a defendant lodges a proper objection or the trial court does not permit confrontation and fails to make a finding of good cause. Absent confrontation-related requests or objections by defendant, the condition requiring a finding of good cause has not been satisfied. Thus, the trial court did not err, and we modify and affirm the Court of Appeals' determination that defendant's probation revocation was not in error.

MODIFIED AND AFFIRMED.

Justice EARLS, dissenting.

¶ 33 The majority determined that the issue of whether the trial court violated Mr. Jones's right to confront witnesses against him at his probation revocation hearing when the court admitted a transcript that contained the former testimony of an adverse witness was waived and therefore not subject to appellate review. In the majority's view, Mr. Jones did not properly preserve the issue because the grounds for defense counsel's general objection were not readily apparent from the context nor was the issue automatically preserved as a violation of a statutory mandate. However, the reason for defendant's objection was readily apparent from the context as shown in the record. The majority's decision also misapplies our precedent that statutory violations are automatically preserved as issues for appellate review when a clear statutory mandate is directed to the trial court by reading the mandate out of the statute at issue here. Therefore, I dissent.

A. The trial court proceedings

¶ 34 In April 2016, defendant Tony Deshon Jones, was driving his mother's car when Sergeant (Sgt.) Casey Norwood pulled Mr. Jones over for allegedly speeding.[1] During the stop, Sgt. Norwood observed the butt of a black handgun stuck between the cushion and the center console portion of the seat inside the car. Sgt. Norwood seized the gun. Mr. Jones was arrested and charged with being a felon in possession of a firearm

1. In addition to Sgt. Norwood, Sgt. Smith and Detective Valdivieso of the Durham County Sherriff's Office were involved in the traffic stop on 1 April 2016; however, Sgt. Norwood was the only officer who testified at the suppression hearing.

and carrying a concealed weapon. Trial proceedings on those charges commenced in July 2017 before Judge James K. Roberson. Mr. Jones moved to suppress the gun that had been seized by Sgt. Norwood. At the suppression hearing, Sgt. Norwood testified about the events of April 2016 on behalf of the State. After the hearing, Judge Roberson denied Mr. Jones's motion to suppress the gun evidence and the case proceeded to trial. At trial, Mr. Jones testified that the gun belonged to his sister's boyfriend, Lamar Alexander. Neither Mr. Alexander nor Sgt. Norwood testified at trial. On 14 July 2017, the jury was unable to reach a unanimous verdict and the trial court granted Mr. Jones's motion for a mistrial.

¶ 35 On 7 June 2017, Mr. Jones's probation officer, Mitchell Woody, filed violation reports alleging that Mr. Jones absconded supervision and had failed to pay monies owed towards his court costs and supervision fees. In August 2017, Mr. Woody filed an addendum to the previously filed probation violation report. The August filing alleged that Mr. Jones had violated the conditions of his probation in April 2016 by committing the new criminal offenses of possessing a firearm as a felon and concealing the firearm.

¶ 36 On 14 September 2017, Judge Roberson presided over Mr. Jones's probation revocation hearing related to the allegations contained in the August 2017 probation violation report. At the outset of the hearing, the State moved to admit State's Exhibit 1, Judge Roberson's July 2017 order denying Mr. Jones's motion to suppress. The State also moved to admit State's Exhibit 2, the transcript of the motion to suppress hearing. The transcript included Sgt. Norwood's testimony. Mr. Jones's attorney lodged a specific objection to the admission of Exhibit 1, the order. He argued that the order should be excluded because it was not germane to the probation revocation proceeding since the focus of the suppression hearing was the legality of the traffic stop and whether the seized gun could be used as evidence of Mr. Jones's guilt at trial, whereas the purpose of the probation revocation hearing was whether Mr. Jones had willfully committed the offenses of carrying a concealed weapon and being a felon in possession of a firearm. Defense counsel further asserted that in addition to being irrelevant, an admission of the order into evidence would be highly prejudicial given that Mr. Jones had not been found guilty at trial on the charges alleged in the amended probation violation filing of August 2017. In response to the objection, the State argued that the jury's failure to convict Mr. Jones of new offenses did not preclude the trial court from revoking his probation if the court was reasonably satisfied that Mr. Jones committed new criminal conduct during the period of supervision.

¶ 37 Later in the hearing, after discussing the relaxed evidentiary standards in probation revocation proceedings, the State sought to admit Exhibit 2, the suppression hearing transcript, which included Sgt. Norwood's testimony. In seeking its admission, the State asserted that under the relaxed standards of the rules of evidence at probation revocation hearings, the transcript, and by extension Sgt. Norwood's testimony, was admissible to show "whether or not [Mr. Jones] possessed a gun, whether [Mr. Jones] concealed a gun, because [the] court itself ha[d] already heard sworn testimony under oath from Sergeant Norwood and [Mr. Jones]." The State further maintained that the transcript was admissible for purposes of judicial economy. Furthermore, the State reassured the trial court that Sgt. Norwood was present, and that it was prepared to call Sgt. Norwood to testify at the hearing if the court disallowed the admission of the transcript. The State did not assert any reason why Mr. Jones should not have been permitted to confront Sgt. Norwood at the hearing. At this point it is clear from the context of the discussion that the Court and the State understood the basis for opposing admission of the transcript was that it deprived Mr. Jones of his right to cross-examine the witness whose testimony was transcribed therein.

¶ 38 After the State made its final plea to the trial court requesting that it allow the transcript and the order into evidence, defense counsel stated that he thought the court had already ruled on whether to admit the order and sought clarification from the court regarding its ruling. The trial court informed defense counsel that it had not yet resolved the issue of the order's admissibility. Thereafter, the probation revocation hearing transcript indicates that there was an interruption and a brief recess in the proceedings.

¶ 39 Following the recess, the hearing resumed, and the trial court announced that it was going to allow the suppression hearing transcript into evidence "over objection of the defendant." The trial court subsequently declared that it was going to admit the order into evidence "over defendant's objection as well." The transcript of the probation revocation hearing does not reference defense counsel's objection to the suppression hearing transcript; however, contrary to the majority's contention, when the trial court admitted the transcript into evidence, it appears to have treated defense counsel's objection to the order separately from his objection to the transcript. The court stated:

> As to the request for State's, for the court to consider State's Exhibit Number 2, the transcript of the motion to suppress hearing, that is allowed over objection of the defendant.

> As to State's Exhibit Number 1, a previous order issued by the undersigned, by me, rather, regarding a motion to suppress, the court is going to admit that, except for any conclusions of law. I am going to admit it as to any factual findings I had, but because the defendant at a motion to suppress may not strategically testify, it is just something to consider, and I am not bound by whatever findings those were because we are in a different hearing that has a different ultimate goal and there may be additional evidence to be presented.
>
> I will note that ruling is over defendant's objection as well.

¶ 40 The majority is wrong to base its entire analysis on an erroneous reading of the record, making the assertion in footnote 2 of its opinion that the trial court treated the objection to Exhibit 1 (the order) as an objection to Exhibit 2 (the transcript) and then faulting defense counsel for making the wrong argument about Exhibit 2. Notably, Mr. Jones and the State agree that defense counsel's objection to the transcript, when made, was a general objection, though the reason for the objection is not explicitly stated in the record. The majority represents that Mr. Jones never objected to the admission of the transcript from the suppression hearing, that defense counsel's objection to the transcript of the suppression hearing "[a]t most … was a general objection to relevance," and that the trial court treated defense counsel's objection to the order as an objection the transcript, *ante*, at ¶ 20. These assertions all conflict with the record and with the positions taken by both the State and Mr. Jones in their briefs before this Court.

¶ 41 As noted above, defense counsel specifically argued against the admission of the *order* because it was irrelevant and prejudicial. In the State's brief before this Court, it acknowledges that "[i]n addition, it is very important to note that Defendant's objection to State's Exhibit 2, the transcript of the hearing on the motion to suppress, was general, and its reason is not evaluated on the transcript." The State later insists that it ". . . strongly contends that the Defendant['s] objection to State's Exhibit 2 was a general objection, and when the Defendant objected to the entry of State's Exhibit 1 it was for relevance, not confrontation."

¶ 42 Similarly, Mr. Jones's brief corroborates the State's position. Mr. Jones explains: "[d]efense counsel objected to both exhibits, but the record only contains counsel's arguments regarding admission of the

order[.]" Mr. Jones further emphasizes that "[i]f defense counsel made any specific arguments concerning the admission of the transcript of the prior suppression hearing, they were made during the recess in the proceedings."

¶ 43 Only two witnesses testified at the probation revocation hearing, Mr. Woody, who was Mr. Jones's probation officer, and Mr. Jones. The trial court ultimately found that Mr. Jones committed new criminal offenses of possession of a firearm by a felon and carrying a concealed weapon and that he therefore violated his probationary sentence. The court revoked Mr. Jones's probation and ordered that the suspended sentences previously imposed be activated to run concurrently with one another. Mr. Jones's appeal is now before this Court, and we consider whether the Court of Appeals erred when it affirmed the trial court's revocation of Mr. Jones's probation.

B. Statutory right to confront witnesses at probation revocation hearings

¶ 44 A probation revocation hearing is not a criminal prosecution, *State v. Duncan*, 270 N.C. 241, 245 (1967), and therefore does not implicate a defendant's rights under the Sixth Amendment, *State v. Braswell*, 283 N.C. 332, 337 (1973). Nevertheless, "[t]he Due Process Clause of the Fourteenth Amendment imposes procedural and substantive limits on the revocation of the conditional liberty created by probation." *Black v. Romano*, 471 U.S. 606, 610 (1985). During a probation revocation hearing, "the 'minimum requirements of due process' include . . . 'the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)[.]' " *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972)). In North Carolina, the confrontation right has been codified at N.C.G.S. § 15A-1345, which provides that

> [b]efore revoking or extending probation, the [trial] court must, unless the probationer waives the hearing, hold a hearing to determine whether to revoke or extend probation and must make findings to support the decision and a summary record of the proceedings. The State must give the probationer notice of the hearing and its purpose, including a statement of the violations alleged. The notice, unless waived by the probationer, must be given at least 24 hours before the hearing. At the hearing, evidence against the probationer must be disclosed

> to him, and the probationer may appear and speak in his own behalf, may present relevant information, and may confront and cross-examine adverse witnesses unless the court finds good cause for not allowing confrontation. The probationer is entitled to be represented by counsel at the hearing and, if indigent, to have counsel appointed in accordance with rules adopted by the Office of Indigent Defense Services. Formal rules of evidence do not apply at the hearing, but the record or recollection of evidence or testimony introduced at the preliminary hearing on probation violation are inadmissible as evidence at the revocation hearing. When the violation alleged is the nonpayment of fine or costs, the issues and procedures at the hearing include those specified in G.S. 15A-1364 for response to nonpayment of fine.

N.C.G.S. § 15A-1345(e) (2021); *see also State v. Moore*, 370 N.C. 338, 347 (2017) (Ervin, J., concurring) (noting that the statute codifies the federal due process requirement from *Gagnon*).

¶ 45 The majority holds that Mr. Jones waived appellate review of the issue of the trial court's violation of his statutory right to confrontation because his counsel never specifically objected on those grounds. However, a specific statement of the basis for the objection is only required "if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). As we observed in *State v. McLymore*, Rule 10's specificity requirement functions to:

> [c]ontextualize[ ] 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 (2019)]. *However, . . . if the what and why are "apparent from the context," N.C. R. App. 10(a)(1) —the specificity requirement has been satisfied.*

380 N.C. 185, 2022-NCSC-12, ¶ 17 (emphasis added).

¶ 46 In this case, the grounds for defense counsel's general objection to the admission of the transcript were readily apparent from the context.[2]

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2. The majority claims that "[d]efendant contends that his objection to admission of the order preserved his constitutional argument because the specific grounds were readily apparent from the context under Rule 10(a)(1)." However, the majority here again

Under the statute, Mr. Jones was entitled to confront and cross-examine adverse witnesses at the probation revocation hearing unless the court found good cause for not allowing confrontation. N.C.G.S. § 15A-1345(e). The existence of that right, and it being known by the trial court, was sufficient context to make clear that the admission of the transcript containing the testimony of an adverse witness without a finding of good cause to disallow confrontation was a violation of the statute.

¶ 47 Moreover, according to the State, it sought admission of the suppression hearing transcript because it contained previously offered testimony from a key adverse witness, Sgt. Norwood. The State emphasized that admitting the transcript promoted judicial economy and it reassured the trial court that it was prepared to call Sgt. Norwood to testify as a witness if the transcript was not admitted into evidence. These statements further call attention to the readily apparent context of the grounds for defense counsel's general objection to the transcript's admission. Through its declarations, the State acknowledged that the reason for defense counsel's objection centered on Mr. Jones's statutory right to confrontation. The State's declarations illustrate that the basis for the objection was clear from the context.

¶ 48 Likewise, the principle of judicial economy stands for the idea that some action should be adopted by a court to prevent what might be deemed a "needless" expenditure of court time and resources or an action that might cause "unnecessary delay and expense." *See State v. Summers*, 351 N.C. 620, 622 (2000) (explaining that judicial economy is promoted by preventing needless litigation); *Valentine v. Solosko*, 270 N.C. App. 812, 814 (2020) (noting that judicial economy is hindered when an action causes unnecessary delay and expense or needless litigation). By referring to the principle of judicial economy, the State was asking the trial court to receive the transcript containing Sgt. Norwood's testimony into evidence as a measure to prevent delay and to conserve what amounted to the unnecessary expense of calling Sgt. Norwood to repeat testimony that had already been given in an earlier proceeding. This rationale, combined with the fact that neither party expressed doubts about the accuracy of the transcript or its relevance to the question of whether Mr. Jones violated the conditions of his probation, compels the conclusion that the only conceivable grounds for defense counsel's objection to the admission of the transcript was that in defense counsel's

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mischaracterizes Mr. Jones's argument relative to the admission of the transcript, which is discrete from defense counsel's distinct and specific objection to the admission of the order.

view, its admission deprived Mr. Jones of his statutory right to confront and cross-examine Sgt. Norwood, an adverse witness. The State's assertion that the transcript obviated the need to call Sgt. Norwood to provide live testimony and for him to be subjected to cross-examination by Mr. Jones, coupled with defense counsel's opposition to the State's position, sufficiently contextualized the readily apparent nature of the objection as an assertion of Mr. Jones's right to confrontation.

¶ 49 The Rules of Appellate Procedure are promulgated by this Court under Article IV, Section 13(2) of the North Carolina State Constitution. Compliance with the appellate rules is mandatory; the rules govern the practice and procedure in North Carolina's appellate courts along with the practices by which appellate courts review trial court judgments. *See Steingress v. Steingress*, 350 N.C. 64, 65 (1999) (noting that compliance with the appellate rules is mandatory and that a failure to follow the rules will subject an appeal to dismissal). Appellate review performs several functions, including correcting errors committed by a trial court. *See N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 662 (2004) (explaining that the traditional function of appellate courts is to review the decisions of lower tribunals or errors of law or procedure). The integrity of this Court's review function therefore requires that parties are clearly instructed on how an alleged error may be considered for correction and that parties can be confident that this Court will give effect to the language of the rules it crafts to provide such instructions. Doing so ensures that this Court may have an opportunity to address issues properly presented for review on appeal and avoids results that render any portion of the rules nugatory, thereby frustrating the fair administration of justice. Accordingly, I would hold that the grounds for defense counsel's timely, general objection to the admission of the transcript of the suppression hearing were readily apparent from the context, and thus that Mr. Jones properly preserved the issue presented for appellate review.

C. Preservation when a statutory mandate exists

¶ 50 Regardless of the sufficiency of Mr. Jones's objection based on Rule 10 of the North Carolina Rules of Appellate Procedure, I would also hold that the trial court's violation of Mr. Jones's statutory right to confrontation was automatically preserved for appellate review as a violation of a statutory mandate. In *In re E.D.*, this Court held that "[w]hen a statute is clearly mandatory, and its mandate is directed to the trial court, the statute automatically preserves statutory violations for appellate review." 372 N.C. 111, 117 (2019) (cleaned up). We have found automatic preservation "when the mandate was directed to the trial court either:

(1) by requiring a specific act by the trial judge; or (2) by requiring specific courtroom proceedings that the trial judge had authority to direct." *Id.* at 119 (citations omitted). Section 15A-1345(e) encompasses both characteristics. First, the statute expressly requires the trial court to "find[ ] good cause" at a probation revocation hearing if the court does not permit the defendant to confront and cross-examine adverse witnesses. N.C.G.S. § 15A-1345(e). Second, the statute requires specific proceedings directed by the trial court, expressly instructing that "the court must . . . hold a hearing to determine whether to revoke or extend probation and must make findings to support the decision and a summary record of the proceedings." *Id.*

¶ 51 This Court has previously interpreted N.C.G.S. § 15A-1345(e) as imposing a statutory mandate on the trial court. *See State v. Coltrane*, 307 N.C. 511, 514–15 (1983); *State v. Morgan*, 372 N.C. 609, 616 (2019). Our decision in *Coltrane* is instructive. In *Coltrane*, the defendant's probation officer was not present at her probation revocation hearing. *State v. Coltrane*, 307 N.C. at 515. The prosecutor informed the trial court that he had spoken with the probation officer that morning, and that the probation officer said the defendant had not yet procured employment, which was a condition of the defendant's probation. *Id.* at 513, 515. When questioned about her employment status, the defendant told the trial court that she did not have a job. *Id.* at 515. The trial court immediately revoked the defendant's probation and activated her suspended sentence. *Id.* The defendant was not permitted to speak on her own behalf nor present information relevant to the charge that she had violated a condition of her probation at the hearing. *Id.* at 516. We concluded that the trial court violated the defendant's statutory right to confront adverse witnesses under N.C.G.S. § 15A-1345(e) because the defendant was not allowed to confront either the prosecutor or the probation officer at the hearing. Significantly, we determined that the defendant's confrontation right was violated despite her failure to object, specifically or otherwise, on this ground. *Id.* at 515–16.

¶ 52 As in *Coltrane*, in this case the State's witness, Sgt. Norwood, did not testify at the probation revocation hearing. Thus, Mr. Jones had no opportunity to cross-examine Sgt. Norwood about the facts underlying the allegations that he committed two new offenses in April 2016. The fact that defense counsel had the opportunity to cross-examine Sgt. Norwood at Mr. Jones's suppression hearing misses the point. The relevant issues at the suppression proceeding were the legality of the traffic stop and the admissibility of the gun as evidence against Mr. Jones rather than the issues of whether Mr. Jones possessed the gun and

whether it was concealed, which are the elements of the criminal offenses he was charged with committing in violation of his conditions of probation.

¶ 53 Unlike the defendant in *Coltrane*, Mr. Jones raised a general objection to the admissibility of the transcript, a fact that the State concedes, which lends even further support for the conclusion that the issue was preserved. The pertinent provisions of N.C.G.S. § 15A-1345(e) are "clearly mandatory" and "directed to the trial court." Therefore, the issue of whether the trial court violated Mr. Jones's statutory confrontation rights under N.C.G.S. § 15A-1345(e) was preserved for appellate review because Mr. Jones was not exercising his discretion to waive cross-examination but instead, was objecting to the admission of testimony from a witness through a transcript that he could not cross-examine.

¶ 54 The majority attempts to distinguish *Coltrane* on the basis that the defendant in that case was interrupted by the trial court and was not allowed to present any information concerning the charge against her. However, this factual distinction is irrelevant to the operative legal question of whether N.C.G.S. § 15A-1345(e) imposes a statutory mandate on the trial court to make findings that there was good cause for not allowing confrontation. We said in *Coltrane* that it does, and the same rule should apply here to Mr. Jones.

¶ 55 Additionally, the majority posits that N.C.G.S. § 15A-1345(e) does not contain a statutory mandate because its language conditions a finding of good cause on an attempt by the defendant to confront or cross-examine an adverse witness. According to the majority, because the statute says that a defendant "*may* confront and cross-examine adverse witnesses unless the court finds good cause for not allowing confrontation," it cannot be construed as imposing a statutory mandate on the trial court.

¶ 56 However, the majority's construction of the statute's language is flawed. The word "may" in the statute modifies the right of the defendant and tells him what he is free to do; it is not associated with the duty of the trial court, and it does not compel the defendant to take any additional affirmative action to trigger that duty. *See Campbell v. First Baptist Church of the City of Durham*, 298 N.C. 476, 483 (1979) (explaining that "the use of [the word] 'may' generally connotes permissive or discretionary action and does not mandate or compel a particular act"); *Cf. State v. House*, 295 N.C. 189, 203 (1978) (observing that "ordinarily, the word 'must' and the word 'shall,' in a statute, are deemed to indicate a legislative intent to make the provision of the statute mandatory[.]"). Thus, here, the word "may" signals that the defendant retains the discretion

to exercise his statutory right to confront and cross-examine adverse witnesses and advises that he is permitted to exercise that right except when the trial court finds good cause to deny the right and disallow confrontation. Accordingly, contrary to the majority's conclusion, and consistent with this Court's precedent, a defendant does not waive for appellate review the issue of whether his statutory right to confrontation was violated by failing to provide specific grounds for his objection to the admission of hearsay testimony. This issue is automatically preserved for appellate review by operation of law.

D. Conclusion

¶ 57 The majority's decision imposes new, duplicative requirements for issue preservation beyond those expressly stated in Rule 10 of the North Carolina Rules of Appellate Procedure, and disregards precedent concerning automatic issue preservation when a statute directed to the trial court is not followed, all in order to avoid appellate review of defendant's argument that his probation should not have been revoked. A jury failed to convict Mr. Jones of being a felon in possession of a firearm or carrying a concealed weapon. Yet a trial court, based on a transcript of a suppression motion hearing, nevertheless found him guilty of those offenses and revoked his probation. Erecting new doctrinal hurdles to prevent appellate review in this case denies Mr. Jones a fundamental right to due process established by the Constitution and enshrined in state law. It is our responsibility to uphold the law, not to find spurious reasons to justify evading it.

WING v. GOLDMAN SACHS TR. CO., N.A.

[382 N.C. 288, 2022-NCSC-104]

MARY COOPER FALLS WING, ET AL.
v.
GOLDMAN SACHS TRUST COMPANY, N.A., ET AL.

RALPH L. FALLS III, ET AL.
v.
GOLDMAN SACHS TRUST COMPANY, N.A., ET AL.

No. 488PA20

Filed 19 August 2022

1. Appeal and Error—interlocutory orders—substantial right—challenge to trust amendments—order for distributions to defending beneficiaries

Where plaintiffs challenged certain amendments to their father's revocable trust removing them as beneficiaries and the trial court issued an interlocutory order directing the trustee to make distributions to the beneficiaries for the legal fees incurred in their defense of the trust amendments, the Court of Appeals properly exercised jurisdiction over plaintiffs' interlocutory appeal because the order impacted a substantial right—namely, their right to recover from the trustee pursuant to N.C.G.S. § 36C-6-604(b) for distributions to the defending beneficiaries in the event plaintiffs were successful in their challenge to the trust amendments. However, the portions of the Court of Appeals' opinion addressing one of the trial court's rulings not appealed by the parties was vacated.

2. Trusts—subject matter jurisdiction—pay order—new pleadings not required

Where plaintiffs filed actions challenging certain amendments to their father's revocable trust removing them as beneficiaries, the trial court had subject matter jurisdiction to issue an order directing the trustee to make distributions to the beneficiaries for the legal fees incurred in their defense of the trust amendments. The defending beneficiaries were not required to file pleadings to invoke the trial court's jurisdiction on their motions; rather, their motions within the actions commenced by plaintiffs' complaints were sufficient.

3. Trusts—trustee—power to make distributions—during pendency of litigation challenging trust amendments—court order

Where plaintiffs filed actions challenging certain amendments to their father's revocable trust removing them as beneficiaries, the

trial court did not err by ordering the trustee—at the trustee's own request—to make distributions to the beneficiaries for the legal fees incurred in their defense of the trust amendments. The trustee had the power to exercise its discretion to make such distributions, and the record supported the trial court's order compelling the distributions. Further, the Court of Appeals erred by applying N.C.G.S. § 31-36 (a statute applicable to will caveats) in this trust proceeding.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 274 N.C. App. 144 (2020), reversing an order entered on 20 May 2019 by Judge Edwin G. Wilson Jr. in Superior Court, Wake County, and remanding the case to the trial court. Heard in the Supreme Court on 22 March 2022.

Womble Bond Dickinson (US) LLP, by Johnny M. Loper, Elizabeth K. Arias, and Jesse A. Schaefer, for plaintiff-appellee Mary Cooper Falls Wing; and James, McElroy & Diehl, P.A., by Fred B. Monroe, for plaintiff-appellees Ralph L. Falls III; M.E.F., by her next friend and parent, Ralph L. Falls III; L.C.F., by her next friend and parent, Ralph L. Falls III; and J.B.F., by his next friend and parent, Ralph L. Falls III.

J. Mitchell Armbruster, James K. Dorsett III, and Eva Gullick Frongello for defendant-appellant Goldman Sachs Trust Company, N.A.

Alan W. Duncan, Allison O. Mullins, and Hillary M. Kies for defendant-appellant Dianne C. Sellers; and Leslie C. Packer, Alex J. Hagan, and Michelle A. Liguori for defendant-appellants Louise Falls Cone, Toby Cone, Gillian Falls Cone, and Katherine Lenox Cone.

John V. Orth, pro se, amicus curiae.

BARRINGER, Justice.

¶ 1 In this matter, we address the extent of a trustee's duties and powers concerning litigation challenging trust amendments. We ultimately hold that the trustee in this case had the *power* to defend the litigation. We need not and cannot resolve the separate issue of whether the trustee also had a *duty* to defend the litigation in this matter. A trustee's duty to defend is more limited than its powers. It is confined to actions which

may result in a loss to the trust estate. We also hold that the Court of Appeals erred by applying N.C.G.S. § 31-36, a statute applicable to will caveats, to this trust proceeding. Although both wills and trusts may be used to dispose of property at death, a trust is not a will. The law applicable to each is often different. Given our holding on these issues and others, we vacate in part and reverse in part the Court of Appeals' decision.

I. Background

¶ 2 In May 2018, Mary Cooper Falls Wing (Wing) and Ralph L. Falls III (Falls) (collectively, plaintiffs) commenced litigation to set aside certain amendments to the Ralph Falls Revocable Declaration of Trust (Trust) created by their father Ralph L. Falls Jr. (decedent). Through the challenged amendments, decedent removed Wing and Falls as beneficiaries of the Trust. In his last amendment to the Trust (Fifth Amendment), decedent named as the Trust's beneficiaries Dianne C. Sellers (Sellers), Louise Falls Cone,Toby Cone, Gillian Falls Cone, and Katharine Lenox Cone[1] (collectively, defendant beneficiaries). Decedent married Sellers in 2014, and Louise Falls Cone is decedent's daughter. Louise is married to Toby, and Gillian and Katharine are Louise and Toby's children.

¶ 3 In their complaints, Wing and Falls both allege that decedent lacked the capacity to amend the Trust and that Sellers, Louise Falls Cone, and others unduly influenced decedent. They also both seek relief, whether injunctive or by judgment, against the trustee, Goldman Sachs Trust Co., N.A. (Goldman Sachs), for distributions to defendant beneficiaries, which they claim were invalid given that there were pending judicial proceedings challenging the Trust amendments' validity. Wing and Falls named defendant beneficiaries and Goldman Sachs as defendants in their respective actions.

¶ 4 After commencing this litigation, Wing filed a "Motion to Freeze Administration of Revocable Trust Until Beneficiaries Are Determined." In each of the proceedings, defendant beneficiaries then filed a "Joint Motion to Pay Defense Costs," seeking an "order directing Goldman Sachs, as trustee, to pay [defendant beneficiaries] the costs of defending the trust in this case." Defendant beneficiaries stated in their motions that:

> 13. Goldman Sachs prefers that [defendant beneficiaries]—the beneficiaries of the revocable trust—be the parties that defend the trust, rather than Goldman Sachs. Thus, [defendant] beneficiaries

1. We have used the spelling of Katharine as reflected in the complaint but note that the Fifth Amendment uses a different spelling.

> are and have been in the role of defending the trust. In light of Ms. Wing's motion to freeze, it would be appropriate for the [trial c]ourt to enter an order denying that request and to also enter an order allowing Goldman Sachs to make distributions from the trust for the costs of defending the trust so the trust can be defended.
>
> 14. To ensure that the duties of the trustee are discharged, [defendant beneficiaries] seek distributions from the trust administered by Goldman Sachs sufficient to cover the costs and expenses of defending the trust in this litigation.
>
> WHEREFORE, [defendant beneficiaries] respectfully request that the [trial c]ourt enter an order directing Goldman Sachs as trustee to make regular reimbursements to [defendant beneficiaries] for the life of this lawsuit sufficient to cover the costs and expenses of defending the trust.

¶ 5 Wing then filed an "Amended Motion to Freeze Administration of Revocable Trust Until Beneficiaries Are Determined or in the Alternative, to Pay Defense Costs for All Purported Beneficiaries."

¶ 6 Goldman Sachs, as trustee, filed a brief supporting defendant beneficiaries' motions to pay and opposing Wing's motion to freeze. In its brief, Goldman Sachs argued that because Goldman Sachs, as trustee, had "a duty to defend the trust, the [trial c]ourt should allow [Goldman Sachs] to pay the legal expenses of [defendant b]eneficiaries which [Goldman Sachs] deems are being incurred to defend the Trust." Goldman Sachs "request[ed] the [trial c]ourt's instructions and guidance as to the future payment of legal fees to [defendant b]eneficiaries' counsel so that their counsel can continue to appropriately carry out its duty to defend the Trust."

¶ 7 After a hearing on 20 March 2019 and the tendering of competing draft orders, the trial court, using one of defendant beneficiaries' proposed orders, granted the motions to pay and ordered that:

> Defendant Goldman Sachs, as Trustee of the Revocable Trust . . . shall, in the proper exercise of its business judgment, make distributions to [defendant beneficiaries] for payment for legal fees incurred by them in the above-captioned cases with respect to

> their defense of this matter. This Order is without prejudice to any party's other remaining claims and defenses in these matters.

¶ 8 Plaintiffs appealed the trial court's order granting the motions to pay (Pay Order).

¶ 9 On appeal, the Court of Appeals concluded that plaintiffs had shown that the appealed interlocutory order, the Pay Order, affected "substantial rights." *Wing v. Goldman Sachs Tr. Co.*, 274 N.C. App. 144, 153 (2020). Thus, the Court of Appeals allowed appellate review pursuant to N.C.G.S. § 1-277(a). *Id.* at 147, 153.

¶ 10 The Court of Appeals next decided that a subsection of a statute addressing will caveats, N.C.G.S. § 31-36(a)(1), "provide[d] the framework for the case." *Id.* at 153. Then, after concluding that "the trustee's duty of and liability for distribution to disputed beneficiaries during pending litigation [was] an issue of first impression in North Carolina," the Court of Appeals analyzed two decisions from the California Courts of Appeal. *Id.* at 154–55. Finding these decisions persuasive, the Court of Appeals held that:

> The Trust does not need defending in the case before us because there is no contest to the validity of the Trust. This dispute is between the rightful beneficiaries, and the Trust is not in peril. Goldman Sachs has breached their duty of neutrality by deciding who the rightful beneficiaries are before pending litigation has resolved that issue.
>
> . . . .
>
> . . . The trustee is not required to pay attorney fees or legal costs unless the *res* of the Trust is in peril.

Id. at 155–56.

¶ 11 The Court of Appeals concluded that "[t]he trial court erred by not freezing and by ordering distributions from the Trust to some putative beneficiaries but not others during pending litigation[,]" and it reversed the Pay Order and remanded to the trial court for entry of an order allowing the motion to freeze. *Id.* at 156.

¶ 12 Defendant beneficiaries and Goldman Sachs petitioned this Court for discretionary review pursuant to N.C.G.S. § 7A-31. This Court allowed both petitions.

II. Standard of Review

¶ 13 "Review by th[is] . . . Court after a determination by the Court of Appeals, whether by appeal of right or by discretionary review, is to determine whether there is error of law in the decision of the Court of Appeals." N.C. R. App. P. 16(a); *see, e.g.*, *State v. Melton*, 371 N.C. 750, 756 (2018).

III. Appellate Jurisdiction

¶ 14 **[1]** As defendant beneficiaries challenge the Court of Appeals' exercise of jurisdiction over plaintiffs' interlocutory appeal, we address that issue first.

¶ 15 Unless the General Statutes of North Carolina provide an exception, "there is no right of immediate appeal from interlocutory orders." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725 (1990). Subsection 1-277(a) states as follows:

> An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial.

N.C.G.S. § 1-277(a) (2021); *see also* N.C.G.S. § 7A-27(b)(3)(a) (2021).

¶ 16 "The 'substantial right' test for appealability of interlocutory orders is that the right itself must be substantial and the deprivation of that right must potentially work injury if not corrected before appeal from final judgment." *Frost v. Mazda Motor of Am., Inc.*, 353 N.C. 188, 192 (2000) (cleaned up). "If appellant's rights would be fully and adequately protected by an exception to the order that could then be assigned as error on appeal after final judgment, there is no right to an immediate appeal." *Id.* at 194 (cleaned up).

¶ 17 An assessment of whether an order impacts a substantial right often requires "considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered." *Waters v. Qualified Pers., Inc.*, 294 N.C. 200, 208 (1978). "It is the appellant's burden to present appropriate grounds for acceptance of an interlocutory appeal, and not the duty of this Court to construct arguments

for or find support for appellant's right to appeal." *Hanesbrands Inc. v. Fowler*, 369 N.C. 216, 218 (2016) (cleaned up).

A. Motions to Pay

¶ 18 Defendant beneficiaries argue that the Court of Appeals erred by exercising jurisdiction over plaintiffs' appeal of an interlocutory order. Specifically, they assert that "the trial court's order allowing [Goldman Sachs] to pay costs from the Revocable Trust to defend a presumptively valid amendment does not affect a substantial right because it only involves money in [the T]rust."

¶ 19 According to plaintiffs, "the Court of Appeals properly exercised immediate jurisdiction over the Pay Order because it purported to determine both that [defendant beneficiaries] alone should benefit from the Trust during the pendency of the litigation and that [plaintiffs] could not seek to be made whole even if they succeed on the merits." The Court of Appeals held, in part, that the Pay Order was immediately appealable because "no return of funds . . . is guaranteed" on account of Goldman Sachs' "claims [that] it has no liability from distributing funds" pursuant to the Pay Order. *Wing*, 274 N.C. App. at 152. Plaintiffs maintain that *either*: (1) the Pay Order impacts a substantial right because as Goldman Sachs contends, "the existence of the Pay Order prevents [plaintiffs] from recovering the payments made to [defendant beneficiaries] during the pendency of this case—even if they are in violation of the true terms of the Trust and even if the Pay Order was erroneous" *or* (2) the Pay Order does not affect a substantial right because it does not preclude plaintiffs from obtaining a judgment against Goldman Sachs for distributions made to defendant beneficiaries after the entry of the Pay Order.

¶ 20 On the record before us, we agree that the Pay Order impacts a substantial right. The trial court received draft orders addressing the trial court's ruling on the motions to pay from both defendant beneficiaries and plaintiffs. Plaintiffs explained in their letter to the trial court that:

> The key disagreement between the parties [regarding the proposed order] is whether the [trial c]ourt intended to rule that [Goldman Sachs]:
>
> - *may* make distributions for legal fees defending the most recent trust amendment, subject to potential liability if that trust amendment is determined to be invalid; or
> - *shall* make distributions for legal fees, without apparent liability, regardless of how

> the merits of the underlying claims are ultimately decided.

¶ 21 Plaintiffs' proposed order used "may," and defendant beneficiaries' proposed order used "shall." Plaintiffs' proposed order also stated: "This Order is without prejudice to any party's remaining claims and defenses in these matters, including [Wing]'s claim for wrongful distributions against Defendant Goldman Sachs."

¶ 22 The trial court utilized defendant beneficiaries' proposed order, which granted the motions to pay and ordered that:

> Defendant Goldman Sachs, as Trustee of the Revocable Trust . . . *shall*, in the proper exercise of its business judgment, make distributions to [defendant beneficiaries] for payment for legal fees incurred by them in the above-captioned cases with respect to their defense of this matter. This Order is without prejudice to any party's *other* remaining claims and defenses in these matters.

(Emphases added.) Notably, the trial court employed the word "shall" and did not explicitly indicate that the order was without prejudice to Wing's claim for wrongful distribution against Goldman Sachs.

¶ 23 Given this procedural context and record, the Pay Order does not purport to simply "allow" Goldman Sachs to pay costs from the Trust as defendant beneficiaries contend. Rather, the record supports the Court of Appeals' conclusion that the "order affirmatively order[s] payments by a trustee with distributions from a trust to some purported beneficiaries, and not others, when the rightful beneficiaries are disputed," *Wing*, 274 N.C. App. at 151, and "[i]f Wing prevails on her claims of wrongful distribution [against Goldman Sachs], no return of funds or credit to offset future payments is guaranteed[,]" *id.* at 152.

¶ 24 Before this Court, Goldman Sachs has argued that no court can hold Goldman Sachs liable for paying defendant beneficiaries' litigation expenses pursuant to the Pay Order even if reversed on appeal. Yet, subsection 36C-6-604(b) of the North Carolina Uniform Trust Code imposes liability on trustees for distributions of trust property when the trustee knows of a pending judicial proceeding contesting the validity of the trust. N.C.G.S. § 36C-6-604(b) (2021). Pursuant to this subsection, plaintiffs, as beneficiaries under the alleged last valid amendment to the Trust, could seek to hold Goldman Sachs liable for distributions if successful in this litigation. In other words, plaintiffs have a potential right under N.C.G.S. § 36C-6-604(b).

¶ 25 Nevertheless, the trial court's order pursuant to its authority "to determine any question arising in the administration or distribution of any trust," N.C.G.S. § 36C-2-203(a)(9) (2021), directed Goldman Sachs to make distributions to defendant beneficiaries for their litigation legal fees, which defendant beneficiaries incurred after "[t]he trustee kn[ew] of a pending judicial proceeding contesting the validity of the trust," N.C.G.S. § 36C-6-604(b)(1). When a trial court has jurisdiction over both the parties and the subject matter, an order by the trial court enjoining or directing conduct binds the parties even if erroneous unless or until it is vacated or modified by the trial court or in the action on appeal. *Elder v. Barnes*, 219 N.C. 411, 415 (1941); *Hearne v. Stanly Cnty.*, 188 N.C. 45, 51 (1924). Thus, Goldman Sachs is bound to abide by the trial court's order. *Cf. Elder*, 219 N.C. at 415–16 (affirming an order "adjudging the defendant in contempt of court for willful disobedience to an order lawfully issued"); *Hearne*, 188 N.C. at 51 (recognizing that an act in violation of an injunction "then alive and in force" is "an unlawful act"). As John V. Orth, an amicus in this matter and a Professor of Law at the University of North Carolina School of Law explained in his amicus brief:

> Where instructions are sought from a [trial] court, it is essential to the efficient administration of trusts that the trustee be able to rely on such instructions. . . . Penalizing a trustee for obeying the order of a court of competent jurisdiction, even if ultimately found to be erroneous, would confound trust administration, unsettle expectations, and jeopardize the rule of law.

¶ 26 We conclude herein that the trial court did have jurisdiction and that the trial court directed distributions. Further, we agree that in the context of this case where instruction concerning trust distributions from the trial court has been sought and provided by lawful order, if not appealed before final judgment, plaintiffs might not have been able to recover from Goldman Sachs for distributions made in accordance with the Pay Order pursuant to N.C.G.S. § 36C-6-604(b) even if they successfully established themselves as the rightful beneficiaries under the Trust. In other words, the Pay Order may determine Wing's wrongful distribution claim under N.C.G.S. § 36C-6-604(b) by foreclosing monetary recovery from Goldman Sachs from the date of entry of the Pay Order, 20 May 2019, until modified by the trial court or reversed in the action on appeal. *See Frost*, 353 N.C. at 192, 193 ("The *denial* of class certification has been held to affect a substantial right because it determines the action as to the unnamed plaintiffs."). Moreover, it is also important to ensure that persons serving as trustees be able to obtain definitive instructions concerning the manner in which a trust should be administered. Thus,

in this case, the right to collect from Goldman Sachs, as trustee, for the distributions during a pending judicial proceeding contesting the validity of the trust during that time period might be lost absent an appeal before final judgment of the Pay Order. *Cf. id.* at 194 (holding that an order imposing costs on a party was not immediately reviewable because it could be reviewed upon appeal from a final judgment and thus would not be "lost or irremediably adversely affected"). Thus, for all of these reasons, we are convinced that, absent an appeal before final judgment, a substantial right of plaintiffs will potentially be impaired in the absence of an immediate appeal from the Pay Order.

B. Motion to Freeze

¶ 27 Defendant beneficiaries also argue that the Court of Appeals lacked jurisdiction to review the trial court's ruling on Wing's motion to freeze. Defendant beneficiaries contend that plaintiffs did not appeal this ruling. Plaintiffs expressly indicated in their reply brief before the Court of Appeals that "no one has appealed that portion of the order," and thus the Court of Appeals "does not have jurisdiction to review it." Before this Court, plaintiffs concede that they did not appeal the portion of the trial court's order denying the motion to freeze and it was not before the Court of Appeals. Thus, we conclude that the Court of Appeals erred by addressing the motion to freeze and by remanding to the trial court for entry of an order allowing the motion to freeze. *Wing*, 274 N.C. App. at 156. Accordingly, we vacate the portions of the Court of Appeals' decision addressing the motion to freeze.

IV. Analysis

A. Trial Court's Subject Matter Jurisdiction

¶ 28 **[2]** We first consider plaintiffs' challenge to the trial court's subject matter jurisdiction to grant the motions to pay. Within the actions commenced by plaintiffs, defendant beneficiaries filed the motions to pay, and Goldman Sachs, as trustee, filed a brief supporting the motions to pay. Here, plaintiffs for the first time claim that Goldman Sachs or defendant beneficiaries had to file a pleading seeking instruction concerning the Trust for the trial court to have jurisdiction. However, plaintiffs acknowledge that trial courts have the authority to enter orders providing trust instructions.

¶ 29 "Whether or not a trial court possesses subject-matter jurisdiction is a question of law that is reviewed de novo." *In re A.L.L.*, 376 N.C. 99, 101 (2020). "Challenges to a trial court's subject-matter jurisdiction may be raised at any stage of proceedings, including for the first time before

this Court." *Id.* (cleaned up). However, "[t]his Court presumes the trial court has properly exercised jurisdiction unless the party challenging jurisdiction meets its burden of showing otherwise." *In re L.T.*, 374 N.C. 567, 569 (2020).

¶ 30 The legislature has established the subject matter jurisdiction of clerks of superior court and of the superior court division of the General Court of Justice in the North Carolina Uniform Trust Code. N.C.G.S. § 36C-2-203. Specifically, Article 2 of the North Carolina Uniform Trust Code, Judicial Proceedings, contains a statute entitled "Subject matter jurisdiction." N.C.G.S. § 36C-2-203. Subsection 36C-2-203(a) "make[s] clear that the clerk of court and the superior court division of the General Court of Justice have concurrent jurisdiction," N.C.G.S. § 36C-2-203 supp. N.C. cmt. 2007 (2021), over proceedings "to determine any question arising in the administration or distribution of any trust," N.C.G.S. § 36C-2-203(a)(9).

¶ 31 "In resolving issues of statutory construction, we look first to the language of the statute itself." *Hieb v. Lowery*, 344 N.C. 403, 409 (1996).

> When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required. . . .
>
> An unambiguous word has a definite and well[-]known sense in the law. In the event that the General Assembly uses an unambiguous word without providing an explicit statutory definition, that word will be accorded its plain meaning.

Fid. Bank v. N.C. Dep't of Revenue, 370 N.C. 10, 18–19 (2017) (cleaned up). "To determine the plain meaning, this Court has looked to dictionaries as a guide." *Raleigh Hous. Auth. v. Winston*, 376 N.C. 790, 2021-NCSC-16, ¶ 8.

¶ 32 Notably, N.C.G.S. § 36C-2-203(a) uses the term "proceedings" when describing the concurrent jurisdiction. N.C.G.S. § 36C-2-203(a). "Proceedings," by itself, is not a specifically defined term in the North Carolina Uniform Trust Code. *See* N.C.G.S. §§ 36C-1-101 to -11-1106 (2021).[2] Definitions of "proceeding" include:

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2. However, the North Carolina Uniform Trust Code delineates proceedings that fall within "proceedings concerning the internal affairs of trusts," N.C.G.S. § 36C-2-203(a) (2021), and "a proceeding to enforce a charitable trust," N.C.G.S. § 36C-4-405.1(a) (2021); *see also* N.C.G.S. § 36C-2-201(c) (2021) ("A judicial proceeding involving a trust may relate

> 1. The regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment. 2. Any procedural means for seeking redress from a tribunal or agency. 3. An act or step that is part of a larger action. 4. The business conducted by a court or other official body; a hearing.

Proceeding, *Black's Law Dictionary* (11th ed. 2019) (including all definitions of "proceeding" by itself except for the definition specifically designated for bankruptcy); *Proceedings*, *New Oxford American Dictionary* (3rd ed. 2010) (defining "proceedings" to include an "action taken in a court to settle a dispute").

¶ 33 The term pleading is not used in N.C.G.S. § 36C-2-203. *See* N.C.G.S. § 36C-2-203. A "pleading" is "[a] formal document in which a party to a legal proceeding (esp. a civil lawsuit) sets forth or responds to allegations, claims, denials, or defenses." *Pleading*, *Black's Law Dictionary* (11th ed. 2019); *see also Complaint*, *Black's Law Dictionary* (11th ed. 2019) ("The initial pleading that starts a civil action and states the basis for the court's jurisdiction, the basis for the plaintiff's claim, and the demand for relief. In some states, this pleading is called a petition." (cleaned up)). Plaintiffs argue that Goldman Sachs or defendant beneficiaries had to file a pleading for the trial court to have jurisdiction, instead of a motion within the actions commenced by plaintiffs' pleadings. However, the plain language of the term used in the statute on subject matter jurisdiction, "proceedings," is much broader and contains no such additional limiting language.

¶ 34 Also, under Article 2, N.C.G.S. § 36C-2-201(a) provides that: "The court may intervene in the administration of a trust to the extent its jurisdiction is *invoked* by a party or as provided by law." N.C.G.S. § 36C-2-201(a) (emphasis added). "Invoked" is not a defined term and is not used elsewhere in the North Carolina Uniform Trust Code. *See* N.C.G.S. §§ 36C-1-101 to -11-1106. While not defined in Black's Law Dictionary, definitions of "invoke" from other dictionaries include "[t]o call on (a higher power) for assistance [and] support," "[t]o call for earnestly; solicit," *Invoke*, *American Heritage Dictionary* (5th ed. 2018), and "cite or appeal to (someone or something) as an authority for an action," *Invoke*, *New Oxford American Dictionary* (3rd ed. 2010). Thus, the plain meaning of the word "invoke" encompasses conduct

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to any matter involving the trust's administration, including a request for instructions and an action to declare rights.").

other than the filing of a pleading with the trial court. And defendant beneficiaries' filing of a motion within the actions commenced by plaintiffs' pleadings falls within the broad meaning of the term "invoke."

¶ 35 Plaintiffs also argue that another subsection of the North Carolina Uniform Trust Code, N.C.G.S § 36C-2-205(a), supports their position in that it provides that parties shall commence trust proceedings before the clerk of superior court by filing a complaint as in civil actions. Given our adherence to the plain language of a statute, generally, the legislature has not shown an intent for a statutory requirement "to function as prerequisites for . . . jurisdiction" when the legislature neither mentions jurisdiction in the statute nor references it in the statute entitled "jurisdiction." *In re D.S.*, 364 N.C. 184, 193–94 (2010). On its face, N.C.G.S. § 36C-2-205(a) does not mention jurisdiction, and N.C.G.S. § 36C-2-205(a) is not mentioned in the statute dedicated to subject matter jurisdiction, N.C.G.S. § 36C-2-203.

¶ 36 Because the language employed by the legislature in §§ 36C-2-201, -203, and -205 does not reflect a jurisdictional pleading requirement and defendant beneficiaries filed the motions to pay in the actions commenced by plaintiffs' complaint, we reject plaintiffs' contention that the trial court lacked subject matter jurisdiction to address the motions to pay. "[I]t is our duty to give effect to the words actually used in a statute and not to delete words used or to insert words not used." *Lunsford v. Mills*, 367 N.C. 618, 623 (2014). Plaintiffs have not met their burden; they have not shown that the language or the structure of the North Carolina Uniform Trust Code shows an intent by the legislature to require a subsequent pleading for subject matter jurisdiction in the procedural context presented to us in this case.

B. Duty to Defend

¶ 37 **[3]** Goldman Sachs and defendant beneficiaries submit that Goldman Sachs, as trustee, has the duty to pay defendant beneficiaries' litigation expenses arising from these proceedings and that the Court of Appeals erred by holding otherwise. Defendant beneficiaries also maintain that the North Carolina Uniform Trust Code allows a trustee to exercise its business judgment to provide for the defense of the Fifth Amendment to the Trust, which the Court of Appeals erroneously failed to recognize. They present several arguments in support of their positions.

¶ 38 First, Goldman Sachs contends that "[a] party's final trust document . . . is presumed valid and the trustee must act according to the instructions set forth within that document." For this proposition, Goldman Sachs relies on a Court of Appeals' decision, *In re Estate of Phillips*,

251 N.C. App. 99 (2016). Yet, *Phillips* does not address a trust, a trustee's duties or actions, or a document's presumption of validity. *See id.* at 110–11, 113–14. Rather, it states: "The presumption is that every individual has the requisite capacity to make a will, and those challenging the will bear the burden of proving, by the greater weight of the evidence, that such capacity was wanting." *Id.* at 110 (cleaned up). As presented to us by Goldman Sachs, we do not see the relevance of this case to the proposition that a trust document is presumed valid.

¶ 39 Defendant beneficiaries make the same argument—a revocable trust is presumptively valid upon a settlor's death. However, the caselaw relied on by defendant beneficiaries recognizes that "the probate of a will by the Clerk of Superior Court is a judicial act, and his certificate is conclusive evidence of the validity of the will, until vacated on appeal, or declared void by a competent tribunal in a proceeding instituted for that purpose." *Walters v. Baptist Child.'s Home of N.C., Inc.*, 251 N.C. 369, 377 (1959); *In re Will of Neal*, 227 N.C. 136, 138 (1947) (same). Thus, the presumption of validity in *Walters* and *Neal* arises from the judicial act of probate taken by the clerk of superior court. A settlor's death is not a judicial act, and none of the cases cited by defendant beneficiaries address a trust. Therefore, we do not find these cases persuasive.[3]

¶ 40 The North Carolina Uniform Trust Code also contradicts Goldman Sachs' and defendant beneficiaries' proposition. Subsection 36C-6-604(b) states as follows:

> Upon the death of the settlor of a trust that was revocable at the settlor's death, the trustee *may* proceed to distribute the trust property in accordance with the terms of the trust. *The trustee is not subject to liability for doing so unless*:
>
> (1) *The trustee knows of a pending judicial proceeding contesting the validity of the trust*; or
>
> (2) A potential contestant has notified the trustee of a possible judicial proceeding to contest the trust, and a judicial proceeding is commenced within 60 days after the contestant sent the notification.

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3. The General Assembly has also provided by statute that "[s]uch record and probate is conclusive in evidence of the validity of the will, until it is vacated on appeal or declared void by a competent tribunal." N.C.G.S. § 28A-2A-12 (2021). The North Carolina Uniform Trust Code contains no such statute to this effect concerning the validity of a trust. *See* N.C.G.S. §§ 36C-1-101 to -11-1106 (2021).

N.C.G.S. § 36C-6-604(b) (emphases added). Notably, "may" is used, not "shall." "The word 'may,' as used in statutes, in its ordinary sense, is permissive and not mandatory." *Rector v. Rector*, 186 N.C. 618, 620 (1923); *see also State v. Waycaster*, 375 N.C. 232, 240 (2020) ("This Court has repeatedly interpreted the General Assembly's usage of the word 'may' as having a permissive—as opposed to a mandatory—effect.").

¶ 41 Further, if "[a] party's final trust document . . . is presumed valid and the trustee must act according to the instructions set forth within that document" as Goldman Sachs contends, then a trustee would always be required to distribute the trust proceeds and be subject to liability for doing so pursuant to N.C.G.S. § 36C-6-604(b). We are not convinced that the legislature intended this result.

¶ 42 Therefore, based on the arguments before us, we are not persuaded that the Court of Appeals erred by "fail[ing] to acknowledge the presumptive validity of the Trust Document."

¶ 43 However, we agree with Goldman Sachs' and defendant beneficiaries' second argument that the Court of Appeals erred by applying N.C.G.S. § 31-36, a statute applicable to will caveats, to this trust proceeding. Plaintiffs concur that the Court of Appeals erred by concluding that N.C.G.S. § 31-36 was controlling in this trust proceeding but contend it is persuasive.

¶ 44 Under the North Carolina Uniform Trust Code, N.C.G.S. § 36C-1-112 provides that: "The rules of construction that apply in this State to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property." N.C.G.S. § 36C-1-112 (2021). Relying on this provision, the Court of Appeals stated:

> N.C.[G.S.] § 31-36(a)(1) provides the framework for the case before us. Plaintiff[s'] challenge of the purported amendments is comparable to a caveat to determine who the rightful beneficiaries should be. The plain text of the statute directs the clerk of the superior court to order the executor or administrator to freeze all distributions until the caveat is resolved.

Wing, 274 N.C. App. at 153.

¶ 45 The subsection cited by the Court of Appeals, N.C.G.S. § 31-36(a)(1), is in the chapter on "Wills," Chapter 31, and entitled "Effect of caveat on estate administration." N.C.G.S. § 31-36 (2021). It provides that:

> Where a caveat is filed, the clerk of the superior court shall forthwith issue an order that shall apply during the pendency of the caveat to any personal representative, having the estate in charge, . . . [t]hat there shall be no distributions of assets of the estate to any beneficiary[.]

N.C.G.S. § 31-36(a).

¶ 46 Goldman Sachs argues that this is a procedural rule, and N.C.G.S. § 36C-1-112 "applies only to 'rules of construction.' " Goldman Sachs and defendant beneficiaries cite the official comment to N.C.G.S. § 36C-1-112, which describes rules of construction as "specific in nature, providing guidance for resolving specific situations or construing specific terms." N.C.G.S. § 36C-1-112 off. cmt. (2021). The official comment further states that rules of construction "can involve the meaning to be given to particular language in the document, such as the meaning to be given to 'heirs' or 'issue,' " and "address situations the donor failed to anticipate . . . [like] failure to anticipate the predecease of a beneficiary." *Id.*; *see also Construction*, *Black's Law Dictionary* (11th ed. 2019) (defining construction as "[t]he act or process of interpreting or explaining the meaning of a writing (usu. a constitution, statute, or other legal instrument); the ascertainment of a document's sense in accordance with established judicial standards; INTERPRETATION"). The North Carolina comment states: "This section is intended to make all rules of construction applicable to wills also applicable to trusts, including but not limited to the rules governing abatement." N.C.G.S. § 36C-1-112 N.C. cmt. (2021).

¶ 47 Subsection 31-36(a)(1) does not address the act or process of interpreting a will, whether a term or an unanticipated situation that impacts the disposition of property under the will. Therefore, N.C.G.S. § 31-36(a)(1) is not applicable to trust proceedings pursuant to N.C.G.S. § 36C-1-112 of the North Carolina Uniform Trust Code. In other words, N.C.G.S. § 31-36(a)(1) is not a rule of construction. Additionally, N.C.G.S. § 31-36(a)(1), which requires a cessation of distributions upon the filing of a will caveat, is contrary to N.C.G.S. § 36C-6-604, which permits distributions by the trustee during a pending judicial proceeding challenging a trust albeit subject to potential liability. Thus, the Court of Appeals erred by relying on N.C.G.S. § 31-36(a)(1) as the framework for its analysis in this trust proceeding.

¶ 48 Finally, we reach the fundamental issue and alleged error by the Court of Appeals—whether Goldman Sachs, as trustee, has a duty to pay defendant beneficiaries' litigation expenses based on a duty to defend

under the North Carolina Uniform Trust Code, specifically N.C.G.S. § 36C-8-811. "We review matters of statutory interpretation de novo because they present questions of law." *In re Foreclosure of Vogler Realty, Inc.*, 365 N.C. 389, 392 (2012).

¶ 49 In this matter, the Court of Appeals concluded that Goldman Sachs, as trustee, did not "ha[ve] a duty to defend the purported amendments during pending litigation between purported beneficiaries," *Wing*, 274 N.C. App. at 154, and reversed the Pay Order, *id.* at 156. Finding the reasoning of two California Courts of Appeal's cases persuasive, the Court of Appeals applied their reasoning to this case to hold that because the trust was not in peril and, instead, this case involves a dispute between rightful beneficiaries, the trustee was not required to pay attorney fees or legal costs. *Id.* at 154–55.

¶ 50 Both Goldman Sachs and defendant beneficiaries insist that the Court of Appeals improperly relied on the two California cases. From our close analysis of the North Carolina Uniform Trust Code, its comments, and North Carolina common law, we are persuaded that the Court of Appeals erred by looking to caselaw from other jurisdictions before the law of this State. The Court of Appeals did not need to consider caselaw from other jurisdictions to resolve the appeal.

¶ 51 Our legislature adopted verbatim section 811 of the Uniform Trust Code and codified it as N.C.G.S. § 36C-8-811. *Compare* Unif. Tr. Code § 811 (Unif. L. Comm'n 2000) (amended 2003), *with* N.C.G.S. § 36C-8-811. When enacting the North Carolina Uniform Trust Code in 2005, the legislature also directed that "all relevant portions of the Official Commentary to the Uniform Trust Code" be printed with the enactments. An Act to Adopt a Revised Version of the Uniform Trust Code for North Carolina, S.L. 2005-192, § 6, 2005 Sess. Laws 345, 403. The official comment to N.C.G.S. § 36C-8-811 reflects verbatim the comment to section 811 of the Uniform Trust Code. *Compare* Unif. Tr. Code § 811 cmt., *with* N.C.G.S. § 36C-8-811 off. cmt. (2021).

¶ 52 Specifically, N.C.G.S. § 36C-8-811 provides that: "A trustee *shall* take reasonable steps to enforce claims of the trust and to defend claims *against the trust*." N.C.G.S. § 36C-8-811 (emphases added). "Trust" is not a defined term in the North Carolina Uniform Trust Code, *see* N.C.G.S. §§ 36C-1-101 to -11-1106,[4] and the definitions in Black's Law Dictionary are varied as follows:

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4. However, the North Carolina Uniform Trust Code provides definitions for types of trusts. *See, e.g.*, N.C.G.S. § 36C-1-103(4) (defining "Charitable trust").

> 1. The right, enforceable solely in equity to the beneficial enjoyment of property to which another person holds the legal title; a property interest held by one person (the *trustee*) at the request of another (the *settlor*) for the benefit of a third party (the *beneficiary*). • For a trust to be valid, it must involve specific property, reflect the settlor's intent, and be created for a lawful purpose. The two primary types of trust are *private trusts* and *charitable trusts* (see below). 2. A fiduciary relationship regarding property and charging the person with title to the property with equitable duties to deal with it for another's benefit; the confidence placed in a trustee, together with the trustee's obligations toward the property and the beneficiary. • A trust arises as the result of a manifestation of an intent to create it. See FIDUCIARY RELATIONSHIP 3. The property so held; CORPUS (1).

Trust, *Black's Law Dictionary* (11th ed. 2019). Given these varied definitions, all of which could reasonably apply to N.C.G.S. § 36C-8-811, the plain meaning of the term "trust" is not ascertainable by merely referencing the statutory language and a dictionary.

¶ 53 However, the official comment to the statute states as follows:

> This section codifies the substance of Sections 177 and 178 of the Restatement (Second) of Trusts (1959). It may not be reasonable to enforce a claim depending upon the likelihood of recovery and the cost of suit and enforcement. It might also be reasonable to settle an action or suffer a default rather than to defend an action. *See also* Section 816(14) (power to pay, contest, settle, or release claims).

N.C.G.S. § 36C-8-811 off. cmt.

¶ 54 Since "trust" is neither a defined term nor unambiguous and the comment states that "[t]his section codifies the substance of Section[ ] . . . 178 of the Restatement (Second) of Trusts (1959)," we construe the trustee's obligation "to defend claims against the trust" under N.C.G.S. § 36C-8-811 to be the equivalent to the Restatement (Second) of Trusts § 178. This Court routinely references the official commentary to a statutory provision to discern the legislature's intent when a statute is ambiguous. *Parsons v. Jefferson-Pilot Corp.*, 333 N.C. 420, 425 (1993); *see also State v. Jones*, 371 N.C. 548, 554 (2018) ("This seeming

inconsistency between and among the statutory enactments at issue in the present case is readily resolved by the Official Commentary to Article 49 of the North Carolina General Statutes."); *State v. Capps*, 374 N.C. 621, 626–27 (2020); *Gyger v. Clement*, 375 N.C. 80, 83–84 (2020). When the legislature explicitly instructs the revisor of statutes to print the commentary with the statute, *see* § 6, 2005 Sess. Laws at 403, such reliance appears particularly appropriate. *See Parsons*, 333 N.C. at 425.

¶ 55 Section 178 of the Restatement (Second) of Trusts states that: "The trustee is under a duty to the beneficiary to defend actions which may result *in a loss to the trust estate*, unless under all the circumstances it is reasonable not to make such defense." Restatement (Second) of Trusts § 178 (Am. L. Inst. 1959) (emphasis added). The trust estate is "[t]he property for which a trustee is responsible; the trust principal." *Corpus*, *Black's Law Dictionary* (11th ed. 2019) (noting "corpus" is also known as "res; trust estate; trust fund; trust property; trust res; trust" (emphasis omitted)); *see also Trust Estate*, *Black's Law Dictionary* (11th ed. 2019) (referring to first definition of corpus).

¶ 56 Another term for "trust estate" is "trust." *Corpus*, *Black's Law Dictionary* (11th ed. 2019). And one of the definitions of trust is "[t]he property so held; CORPUS (1)." *Trust*, *Black's Law Dictionary* (11th ed. 2019). Another definition of trust is "a property interest held by one person (the *trustee*) at the request of another (the *settlor*) for the benefit of a third party (the *beneficiary*)." *Trust*, *Black's Law Dictionary* (11th ed. 2019). Thus, the legislature's use of the term "trust" in N.C.G.S. § 36C-8-811 is consistent with the substance of Restatement (Second) of Trusts § 178, and we construe N.C.G.S. § 36C-8-811 to maintain that consistency.

¶ 57 Restatement (Second) of Trusts § 178 is also consistent with the common law of this State.[5] In *Belcher v. Cobb*, 169 N.C. 689 (1915), this Court, recognized the "self-evident" "duty of the trustee to defend and protect the title to the trust estate and defend the action in good faith." *Id.* at 693. Later, in *Chinnis v. Cobb*, 210 N.C. 104 (1936), this Court concluded that a trustee could appeal and argue the invalidity of an attachment levied on a beneficiary of a spendthrift trust. *Id.* at 110. This Court stated as follows:

> But it is not only the right but the duty of a trustee to protect and defend the title to the trust estate. . . .

5. *Cf.* N.C.G.S. § 36C-1-106 ("The common law of trusts and principles of equity supplement this Chapter, except to the extent modified by this Chapter or another statute of this State.").

> He holds the property under the will as trustee for the purposes expressed in the devise. . . . In order to carry out the purposes of the trust and perform the duties imposed upon him, it is incumbent on him to preserve and protect the trust property, and for that purpose may appear and defend the action for all purposes in this Court as well as the court below.

Id. at 110.

¶ 58 Notably, Goldman Sachs also concedes that whether a trustee has a duty to defend claims challenging the validity of a trust instrument that amends and restates a prior trust instrument is an issue of first impression in this State. Goldman Sachs additionally indicates that it has "not identified any jurisdiction applying the Uniform Trust Code, which governs North Carolina's trust laws, that has addressed this precise question." Nevertheless, Goldman Sachs asks this Court to hold that plaintiffs' claims seeking to invalidate the Fifth Amendment to the Trust are "an attack on the validity of the trust itself" because "[n]o consultation to other versions of that document is necessary in order to determine the parties' rights and obligations." Goldman Sachs cites in support of its position George Gleason Bogert's treatise, *The Law of Trusts and Trustees* § 581, as updated in November 2020. Goldman Sachs also cites a reporter's note to a section in the Restatement (Third) of Trusts that relies on a Bogert hornbook. Similarly, defendant beneficiaries contend that Goldman Sachs, as trustee, has a duty to defend the current terms of a trust, in this case the Fifth Amendment, against all trust contests initiated pursuant to N.C.G.S. § 36C-6-604(a).

¶ 59 However, the legislature stated that a trustee "shall take reasonable steps . . . to defend claims against the trust." N.C.G.S. § 36C-8-811. It did not use the term "trust instrument," "terms of the trust," "contest," or reference N.C.G.S. § 36C-6-604. *Id.* "Trust instrument" and "[t]erms of a trust" are defined in N.C.G.S. § 36C-1-103. A "[t]rust instrument" is "[a]n instrument that contains the terms of a trust." N.C.G.S. § 36C-1-103(21). "Terms of a trust" means "[t]he manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as established, determined, or amended by . . . [a] judicial proceeding" and other means set forth in the statute. N.C.G.S. § 36C-1-103(20). "A 'contest' is an action to invalidate all or part of the terms of the trust or of property transfers to the trustee" according to the official comment to N.C.G.S. § 36C-6-604. N.C.G.S. § 36C-6-604 off. cmt. (2021).

¶ 60 In contrast, "trust estate" is not defined in the North Carolina Uniform Trust Code, *see* N.C.G.S. §§ 36C-1-101 to -11-1106, and "trust" can mean

"trust estate," *Corpus*, *Black's Law Dictionary* (11th ed. 2019) (identifying "trust" and "trust estate" as synonyms of "corpus"); *see also Trust*, *Black's Law Dictionary* (11th ed. 2019) (defining trust as the property held in trust or property and the property interest held by the trustee). The official commentary to N.C.G.S. § 36C-8-811 also plainly restricts the statute's meaning to a specific provision of the Restatement (Second) of Trusts, N.C.G.S. § 36C-8-811 off. cmt., which limits the duty to defend to "actions which may result in a loss to the trust estate," Restatement (Second) of Trusts § 178 (Am. L. Inst. 1959). Not all trust contests or challenges to a trust's terms may result in a loss to the trust estate.

¶ 61 Moreover, since the first publication of Bogert's treatise, and in subsequent editions, section 581 has essentially stated as follows:

> An effort to invalidate or prejudice a trust may be made in a number of different ways by one or more of several groups of parties. The settlor himself may seek to set aside the trust conveyance on the ground of fraud, undue influence, duress, or similar reason, or his successors in interest may seek a decree of invalidation for these reasons or because of the mental incapacity of the settlor. The creditors of the settlor may attack the trust on the ground that it was executed in fraud of them. A claim may be made that the trust violates a rule against perpetuities, a mortmain act, or similar statutory or common-law rule of policy. The beneficiaries may seek to terminate the trust prematurely. Creditors of a cestui may sue to reach the interest of the cestui, which may or may not be protected by spendthrift provisions.
>
> Is it the duty of the trustee to defend suits of this type which will wholly invalidate the trust or will reduce its scope and effect? Or may the trustee stand passive? It is believed that equity imposes upon the trustee the duty of defending the integrity of the trust, if he has reasonable ground for believing that the attack is unjustified or if he is reasonably in doubt on that subject. Where it ought to be entirely clear to any person of ordinary intelligence, after taking legal advice, that the attack is warranted and that the trust is defective and should be set aside in whole or in part, or that for other reason a defense would be

> futile or unnecessary, the trustee has no duty to incur expense to defend the suit.

George Gleason Bogert, *The Law of Trusts and Trustees* § 581 (1st ed. 1935) (footnotes omitted); *see also* George Gleason Bogert, *The Law of Trusts and Trustees* § 581 (2d ed. 1960); George Gleason Bogert, *The Law of Trusts and Trustees* § 581 (Rev. 2d ed. 1980) (last supplemented 2021).

¶ 62 This passage does not squarely address the situation before this Court and the trial court: a challenge to the validity of a trust instrument that amends and restates a prior trust instrument. Instead, the passage summarizes the array of ways a trust may be wholly invalidated in its entirety or the trust estate may be prejudiced. On the record and arguments before us, the challenged amendments to the Trust impact who the beneficiaries are, not the scope or effect of the trust estate and not the entire validity of the Trust.[6] Therefore, we find the proposition stated in Bogert's treatise consistent with our recognition that when a party seeks to invalidate an amendment to a trust on account of the incompetency of the grantor or undue influence over the grantor, a duty to defend pursuant to N.C.G.S. § 36C-8-811 could apply but only if such claim against the trust may result in a loss to the trust estate.

¶ 63 However, the North Carolina Uniform Trust Code grants powers to trustees that are broader than duties. N.C.G.S. § 36C-8-815 off. cmt. (2021). As explained in the official comment to N.C.G.S. § 36C-8-815, which addresses the general powers of the trustee:

> A power differs from a duty. A duty imposes an obligation or a mandatory prohibition. A power, on the other hand, is a discretion, the exercise of which is not obligatory. The existence of a power, however created or granted, does not speak to the question of whether it is prudent under the circumstances to exercise the power.

N.C.G.S. § 36C-8-815 off. cmt. The North Carolina Uniform Trust Code provides that the trustee has "[a]ll powers over the trust property that an unmarried competent owner has over individually owned

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6. However, we acknowledge that the revocation of the challenged amendments may result in a loss to the trust estate, but that is not before us. While defendant beneficiaries and Goldman Sachs allude to tax benefits arising from the amendment and decedent's marriage to Sellers, they neither raised this as a basis for the trustee's duty before the trial court nor did the trial court reach this issue.

property," N.C.G.S. § 36C-8-815(a)(2)(a), and may "defend an action, claim, or judicial proceeding in any jurisdiction to protect trust property and the trustee in the performance of the trustee's duties," N.C.G.S. § 36C-8-816(24).

¶ 64 Such discretionary power is much broader than the trustee's *duty* "to defend claims against the trust" under N.C.G.S. § 36C-8-811. These provisions are broad and sufficient to permit Goldman Sachs, in its discretion and in this action, to make distributions to defendant beneficiaries for their litigation expenses and incur litigation expenses as an administrative expense of the Trust. However, since these are discretionary powers, not duties, in certain circumstances, it may be a breach of a trustee's other duties to do so. *See* N.C.G.S. § 36C-8-815(b) ("No provision of this section shall relieve a trustee of the fiduciary duties under this Article.").[7]

¶ 65 Here, the trial court used one of defendant beneficiaries' proposed orders, granted the motions to pay, and ordered that:

> Defendant Goldman Sachs, as Trustee of the Revocable Trust . . . shall, in the proper exercise of its business judgment, make distributions to [defendant beneficiaries] for payment for legal fees incurred by them in the above-captioned cases with respect to their defense of this matter. This Order is without prejudice to any party's other remaining claims and defenses in these matters.

¶ 66 The trial court did not conclude that Goldman Sachs, as trustee, had a duty to defend. The trial court instead ordered "*distributions*" to defendant beneficiaries "for payment for legal fees incurred by *them*" for "*their* defense of this matter." (Emphases added.) In contrast, defendant beneficiaries' other proposed order, which the trial court declined to use, included a conclusion that Goldman Sachs had a duty to defend the Fifth Amendment as the operative trust document. Thus, we conclude that the trial court's order only compelled Goldman Sachs, as trustee, to make distributions to defendant beneficiaries. The trial court compelled this conduct even though Goldman Sachs had knowledge of "a pending judicial proceeding contesting the validity of the trust." *See* N.C.G.S. § 36C-6-604(b)(1).

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7. Whether Goldman Sachs breached other duties is not before us, and thus, we do not address that question.

¶ 67 As such, we conclude that the trial court acted within the scope of its jurisdiction to determine a question arising in the distribution of a trust, *see* N.C.G.S. § 36C-2-203(a), when presented with a request for instruction and proposed order from defendant beneficiaries and Goldman Sachs, *see* N.C.G.S. § 36C-2-201. Consistent with our holdings herein, the trial court compelled conduct permitted by the North Carolina Uniform Trust Code as a power—at the request of Goldman Sachs, who as trustee holds the discretionary power to perform the requested conduct. *See* N.C.G.S. §§ 36C-8-815(a)(2)(a), -816. And competent evidence in the record supports the trial court's conclusion to compel this conduct. Goldman Sachs and defendant beneficiaries cited and produced affidavits in support of decedent's competency around the time of the execution of the Fifth Amendment as well as other documents in support of the motions to pay and their position that plaintiffs' claims are unjustified. Plaintiffs, in contrast, did not respond with any evidence. Thus, regardless of the standard of review applicable to our review of the trial court's Pay Order, whether for abuse of discretion, for competent evidence, or de novo, we discern no error in the Pay Order justifying reversal. Therefore, we conclude that the Court of Appeals erred by reversing the Pay Order.

C. Duty of Neutrality

¶ 68 Goldman Sachs also contends that the Court of Appeals erred by concluding that "Goldman Sachs has breached their duty of neutrality by deciding who the rightful beneficiaries are before pending litigation has resolved that issue." *Wing*, 274 N.C. App. at 155. We agree. Plaintiffs have not pled that Goldman Sachs breached its duty of neutrality, and the appealed order, the Pay Order, does not purport to resolve any such claim or require consideration of this issue to resolve the appeal. Therefore, we express no opinion concerning whether a duty of neutrality exists or would impact this matter.

V. Conclusion

¶ 69 In summary, the trial court had jurisdiction and did not err by instructing Goldman Sachs, as trustee, to pay defendant beneficiaries' litigation expenses as distributions in this action. Goldman Sachs had the power to in its discretion make such payments, and the record supports the trial court's direction requiring the exercise of that power. As the trial court did not find that Goldman Sachs had a duty to defend and the record on this issue is not developed, we do not address whether Goldman Sachs has a duty to defend this action, but we do hold that a duty to defend pursuant to N.C.G.S. § 36C-8-811 only arises when the

action may result in a loss to the trust estate. When addressing this appeal, the Court of Appeals erred in several ways as addressed in this opinion. As a result, we vacate the portions of the Court of Appeals' decision that addressed the order on the motion to freeze and the duty of neutrality and reverse the remainder of the decision.

VACATED IN PART; REVERSED IN PART.

STATE v. FLOW

[382 N.C. 313 (2022)]

STATE OF NORTH CAROLINA	From N.C. Court of Appeals 20-534
v.	
SCOTT WARREN FLOW	From Gaston 18CRS3691 18CRS56251 18CRS56323 18CRS56326-27 19CRS5616

No. 202P21

ORDER

Upon consideration of the Defendant's Petition for Discretionary Review, the Defendant's Petition for Discretionary Review is allowed as to issue number one only. The petition is denied as to issue number two.

By order of the Court in Conference, this the 17th day of August 2022.

/s/ Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 19th day of August 2022.

Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

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

On 27 June 2022, Common Cause filed a Motion for Expedited Hearing and Consideration and the Court received responses from

all parties. On 19 July 2022, Legislative Defendants filed a Motion for Extension of Time to File Brief, which was allowed by special order on 25 July 2022.

In light of the great public interest in the subject matter of this case, the importance of the issues to the constitutional jurisprudence of this State, and the need to reach a final resolution on the merits at the earliest possible opportunity, Common Cause's Motion for Expedited Hearing and Consideration is allowed as follows: Legislative Defendants' appellant brief shall be filed on or before 1 August 2022 pursuant to the 25 July special order. All other deadlines established by the rules of appellate procedure or prior orders of this Court remain in effect. This consolidated case shall be scheduled for oral argument as soon as practicable after all briefing, on a date to be determined during arguments scheduled the week of 3 October 2022, or by special setting no later than 18 October 2022.

This order does not address Legislative Defendants' Motion to Dismiss.

By order of the Court, this the 28th day of July 2022.

s/ Hudson, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 28th day of July 2022.

Grant E. Buckner

GRANT E. BUCKNER
Clerk of the Supreme Court

Justice BARRINGER dissenting.

Plaintiff Common Cause first requests that this Court expedite the hearing and consideration of this matter because it involves a "significant public issue implicating substantial rights." However, resolution of this appeal will have no impact on the 2022 elections, and Common Cause fails to identify a single real world, negative consequence that will occur if this case proceeds in customary fashion. In fact, it is very likely that our consideration of this case in October 2022—the expedited scenario imposed by the majority—will instead result in considerable voter confusion since early voting for the November 2022 general elections starts on 20 October 2022. Nonetheless, for no discernible jurisprudential reason, four Justices on this Court have chosen, without explanation, to allow Common Cause's motion.

In addition, the four Justices are not, at this time, allowing Legislative Defendants to withdraw their own appeal. Legislative Defendants' pursuit of their appeal will have no effect on the upcoming election but will cost significant taxpayer resources while squandering limited court resources to no purpose. The predecessor case to Legislative Defendants' appeal is also currently under review by the Supreme Court of the United States. It is unprecedented for this Court to not allow a withdrawal under these circumstances.

Simply put, the majority's decision to allow Common Cause's motion to expedite while not allowing Legislative Defendants' motion to withdraw their appeal cannot be explained by reason, practice, or precedent. Common Cause's motion to expedite is meritless. Legislative Defendants' request to withdraw is more than warranted. Given the absence of any identifiable jurisprudential reason, the majority's decision today appears to reflect deeper partisan biases that have no place in a judiciary dedicated to the impartial administration of justice and the rule of law.

I. The Motion to Expedite

Two separate appeals are at issue in this case: (1) plaintiffs' appeal of the trial court's decision regarding the state legislative maps, and (2) Legislative Defendants' appeal of the trial court's decision regarding the federal congressional map. Common Cause moved for expedited hearing and consideration of both appeals.

A. The Legislative Maps Appeal

Unlike previous motions that this Court has recently allowed, Common Cause's motion to expedite the legislative maps appeal is

striking in its failure to identify even one negative consequence that would occur should this matter proceed according to a normal schedule. For instance, in *Hoke County Board of Education v. State*, the State argued that an expedited decision was necessary because otherwise the State would not be able to implement funding for the Year 3 plan which was due at "the start of the[ ] fiscal year on July 1, 2022."[1] Similarly, in the plaintiffs' petition to bypass the Court of Appeals in *Community Success Initiative v. Moore*, the plaintiffs argued that delaying a final adjudication for the case to proceed through the Court of Appeals would deny affected individuals "the franchise for yet another election cycle."[2] Likewise, in the plaintiffs' petition to bypass the Court of Appeals in *Holmes v. Moore*, the plaintiffs argued that delaying final adjudication by waiting for the case to proceed through the Court of Appeals would risk the reinstatement of the contested legislation, requiring election officials "to immediately begin implementing the law's requirements and educating voters," which would ultimately be a "waste" and require additional efforts to correct if this Court then overruled the Court of Appeals decision.[3] Even in *McKinney v. Goins*, plaintiffs argued that an accelerated decision was necessary to prevent numerous federal and state courts from deciding potentially unnecessary issues that were currently pending, as well as to avoid a potential split in authority.[4]

Compare those at least plausible arguments to the reasons Common Cause offers in the present motion. First, plaintiff argues that the legislative maps appeal should be expedited for the same reasons as our previous ruling in this case—"the need for urgency in reaching a final resolution on the merits at the earliest possible opportunity." Yet this Court's previous reason for urgency was the need to render a final decision early enough that if necessary the legislature could draw new maps and the Board of Elections could implement them prior to the upcoming November elections. *See Harper v. Hall*, 380 N.C. 302, 306–07 (2022) (order prior to opinion). In contrast, at this point, the districts

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1. Petition for Discretionary Review Prior to a Determination by the North Carolina Court of Appeals at 29, *Hoke County Board of Education v. State*, No. 425A21-2 (N.C. Feb. 14, 2022).

2. Petition for Discretionary Review Prior to Determination by the Court of Appeals and Motion to Suspend Appellate Rules at 33, *Community Success Initiative v. Moore*, No. 331PA21 (N.C. Apr. 4, 2022).

3. Petition for Discretionary Review Prior to a Determination by the North Carolina Court of Appeals at 18–19, No. 342PA19-2 (N.C. Jan. 14, 2022).

4. Petition for Discretionary Review Prior to a Determination by the North Carolina Court of Appeals at 23–24, *McKinney v. Goins*, No. 109PA22-1 (N.C. Apr. 12, 2022).

for the upcoming November elections are fixed. This Court's decision in this case will have no effect on those elections regardless of whether or not we decide that the legislative districts comply with the State Constitution. Accordingly, there is no similar need for urgency in the present matter.

Next, Common Cause argues that "[w]hile this appeal remains pending, the meaning and effect of [redistricting in conformity with the State Constitution] hangs in the balance, leaving North Carolina's voters with continued uncertainty regarding the status of their right to elect representatives pursuant to maps that comport with state constitutional requirements." Yet plaintiffs do not identify any actual negative consequence of this "uncertainty." Instead, an accelerated decision in this case, particularly one that decides this case prior to the conclusion of the 2022 elections, is actually more likely to produce uncertainty rather than clarity. Voters might reasonably be confused, or even dissuaded from voting, if they learn that this Court just ruled that the districts in which they were set to vote were unconstitutional. *See Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) ("Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls."). Given that, according to Common Cause, briefing on the legislative maps appeal will likely not conclude until two days prior to the start of absentee voting, an accelerated decision in this case will only ensure that the decision is released in the middle of an election, maximizing voter confusion.

Finally, Common Cause alleges that "expedited consideration of this matter is warranted to ensure that any additional redistricting this cycle can be completed in an orderly fashion" and "before any future redistricting, avoiding the rushed timeline for future redistricting." Common Cause does not identify any "additional redistricting" needed for the imminent elections. Indeed, any more changes to the maps, this close to the commencement of voting, would appear to be a clear violation of the Supreme Court of the United States' "repeated[ ] emphasi[s]" that "courts ordinarily should not alter state election laws in the period close to an election." *See Democratic Nat'l Comm. v. Wisconsin State Legislature*, 141 S. Ct. 28, 30 (2020) (Kavanaugh, J., concurring) (collecting cases). As for future redistricting, according to State Defendants, candidate filing for the 2024 elections is currently set to begin on 4 December 2023. Common Cause fails to explain how an expedited decision from this Court will make any meaningful difference on the legislature's ability to comply with a deadline that is more than sixteen months away. Indeed, State Defendants take no position on Common Cause's

motion, indicating that they do not perceive that ordinary disposition of this appeal will prevent them from administering future elections on time.

In short, Common Cause fails to identify a single practical, negative consequence that would occur if we allowed the legislative maps appeal to proceed on a normal schedule. Plaintiffs Harper and the North Carolina League of Conservation Voters (NCLCV), filing in support of Common Cause's motion to expedite, likewise do not identify any new dangers but merely repeat Common Cause's unpersuasive arguments. Yet despite the lack of any credible argument or reason supporting this decision, the majority inexplicably has allowed the motion to expedite the legislative maps appeal.

B. The Congressional Map Appeal

As for the congressional map appeal, plaintiffs Common Cause, Harper, and NCLCV all assert that this Court should expedite its decision on that matter because the Supreme Court of the United States granted certiorari to review it. In other words, plaintiffs request that this Court rush to reach a decision based on case law that may very well be reversed only a few short months from now. *See* Angie Gou et al., *STAT Pack for the Supreme Court's 2021–22 Term* 24 (2022) (reflecting the high percentage of cases that the Supreme Court of the United States reversed last term).

Still, plaintiffs submit that this Court should address the appeal of the congressional map that is currently before the Supreme Court of the United States because it allegedly involves questions of state law. Specifically, Harper and NCLCV plaintiffs argue that the Supreme Court of the United States cannot decide this case without interpreting state law. Likewise, Common Cause submits that a final decision by this Court would fully inform, and thereby "assist," the Supreme Court of the United States in understanding North Carolina law, thus avoiding a decision based on an "incomplete or inaccurate understanding of state law and the scope of this Court's exercise of remedial power."

Harper and NCLCV plaintiffs' argument that this Court must decide this case in order for the Supreme Court of the United States to reach a decision is misguided. Legislative Defendants' appeal to the Supreme Court of the United States hinges not on whether this Court complied with the requirements of the North Carolina statutes authorizing judicial review of congressional-districting legislation but instead on whether this Court's actions and interpretations of those statutes were of such a nature that this Court usurped the legislature's authority to prescribe

districts pursuant to the United States Constitution.[5] Regardless of how this Court interprets the North Carolina statutes allegedly at issue, it cannot eliminate the federal question of whether its previous decision in this case violated the Constitution of the United States. Only the Supreme Court of the United States can answer that question with finality. Furthermore, given that the validity of our previous redistricting decision is presently under review, expediting this case might well result in the Court wasting time and resources resolving an appeal that in a few short months is rendered unconstitutional by the Supreme Court of the United States' forthcoming decision.

Additionally, it is worth noting that this Court is not the first forum in which plaintiffs have presented their state law arguments. Rather, in requesting the Supreme Court of the United States deny certiorari of Legislative Defendants' appeal, Common Cause argued that "this case is really about state law,"[6] and NCLCV argued that it "raise[d] only . . . state-law disputes on issues state courts have not addressed."[7] Despite plaintiffs' presentation of these arguments, the Supreme Court of the United States still allowed certiorari, *see Moore v. Harper*, No. 21-1271, 2022 WL 2347621, at *1 (U.S. June 30, 2022), indicating its view that it could fully decide the issues presented without gratuitous edification from this Court.

Yet the majority, apparently, disagrees. By expediting this particular appeal, the majority effectively asserts that it knows better than the Supreme Court of the United States and that this Court must move quickly to ensure our nation's highest court is not left without the benefit of our guidance. I, on the other hand, have found no instance, nor have the parties offered any, in which this Court has refused to stay a proceeding once the Supreme Court of the United States granted certiorari, so as to allow our nation's highest court a full review. Given the analysis above, I do not share the majority's unexplained confidence that this case should be the exception.

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5. *See* Applicants' Reply in Supp. of Their Emergency Appl. for Stay Pending Pet. for Writ of Cert. at 2–3, *Moore v. Harper*, No. 21-1271 (U.S. Mar. 3, 2022), https://www.supremecourt.gov/DocketPDF/21/21-1271/217666/20220303162705813_2022-03-03%20Moore%20Reply%20Brief.pdf#page=7.

6. Br. in Opp'n of Resp't Common Cause at 30, *Moore*, No. 21-1271 (U.S. May 20, 2022), https://www.supremecourt.gov/DocketPDF/21/21-1271/225937/20220520150719842_2022.05.20%20Common%20Cause%20BIO.pdf#page=43.

7. Br. in Opp'n of Resp'ts N.C. League of Conservation Voters, Inc., et al. at 2–3, *Moore*, No. 21-1271 (U.S. May 20, 2022), https://www.supremecourt.gov/DocketPDF/21/21-1271/225909/20220520133247549_21-1271%20BIO%20NCLCV.pdf#page=13.

II. The Motion to Dismiss the Congressional Map Appeal

The need to expedite a decision regarding the congressional map appeal is further lessened by Legislative Defendants' voluntary abandonment of that appeal. After the record was settled on appeal, but prior to the completion of briefing, Legislative Defendants moved to dismiss their congressional map appeal. Explaining that "the remedial Congressional Map ordered by the trial court will apply in 2022" and that "2022 is the only election to which the remedial Congressional Map will apply," Legislative Defendants requested to withdraw the appeal since pursuing it would only cause "further cost and confusion to the taxpayers and voters of North Carolina." In addition, to remedy any loss to the opposing parties, Legislative Defendants offered to pay their taxable appellate costs related to the congressional map appeal.

In response, plaintiff Common Cause took no position on Legislative Defendants' motion to dismiss the appeal. Plaintiffs Harper and NCLCV, however, argue that this Court should not dismiss the appeal, alleging that the motion is a "transparent effort to prevent this Court from addressing important questions" and "pure gamesmanship." Harper and NCLCV plaintiffs further contend that Legislative Defendants are attempting to procure the Supreme Court of the United States' interpretation of certain North Carolina statutes, instead of allowing this Court to interpret those statutes.

As explained above, plaintiffs' fear of the Supreme Court of the United States interpretating North Carolina law is unpersuasive. Moreover, the Supreme Court of the United States has long recognized that "state courts are the ultimate expositors of state law." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). It is unreasonable to expect the Supreme Court of the United States to suddenly forget or ignore this principle.

More concerningly, neither plaintiffs nor the majority can point to any instance where this Court required an appellant to present oral argument as to why the Court should allow its motion to withdraw the appeal, rather than simply allowing the appellant's motion to withdraw.[8]

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8. Indeed, neither plaintiffs nor the majority have identified a case where this Court denied a party's motion to withdraw its own appeal. At best, plaintiffs proffer a case out of the United States Court of Appeals for the Seventh Circuit where a party filed a motion to dismiss an appeal after the completion of briefing, oral argument, and a draft of the opinion. *See Albers v. Eli Lilly & Co.*, 354 F.3d 644, 646 (7th Cir. 2004). In that case, the movant "decided to dismiss the appeal" only after "oral argument had not gone well." *Id.* Clearly, *Albers* is distinguishable from the instant case where the first brief has yet to even be filed.

Rather, as a leading North Carolina appellate treatise recognized, the appellate courts of this State "generally grant a motion to dismiss an appeal filed unilaterally by an appellant, provided that the other parties do not show that they will be prejudiced by the dismissal." Elizabeth Brooks Scherer & Matthew Nis Leerberg, *North Carolina Appellate Practice and Procedure* § 32.02 (2022).

Here, plaintiffs cannot possibly show prejudice. By not appealing the trial court's decision on the congressional map, plaintiffs have indicated that the congressional map imposed by the trial court is acceptable to them. The congressional map will be used in the 2022 elections regardless of this Court's decision on Legislative Defendants' appeal. Further, by offering to cover the appellate costs that plaintiffs have expended in defending this appeal, Legislative Defendants alleviate any economic harm plaintiffs' might otherwise have borne. At the same time, Legislative Defendants are withdrawing their appeal to avoid incurring significant and unnecessary taxpayer expenditures and wasting court resources given that the map at issue will not be changed before the upcoming elections and thereafter may be discarded. The majority's decision to not allow a motion to withdraw in this instance is entirely without precedent in the history of this Court.

By forcing Legislative Defendants to argue not only whether they should be allowed to withdraw their appeal, but also the underlying merits of it, the majority is, at this point, foreclosing a party's ability to craft its own appeal by forcing it to make arguments that they have expressly indicated they do not wish to make. This Court has long recognized that "it is not the role of the appellate courts to create an appeal for an appellant." *In re A.M.O.*, 375 N.C. 717, 721 (2020) (cleaned up). Yet here, the majority is not simply creating an appeal, it is outright forcing one on Legislative Defendants. This extraordinary and unprecedented disposition cannot be ignored. Accordingly, the motion to dismiss should be allowed now.

III. Conclusion

It is admittedly quite unusual for a Justice to dissent from an order that on its surface simply resolves a motion to expedite, and does not address a related motion to withdraw. Yet, given the extraordinary way the majority resolves these motions, I cannot remain silent. What is happening in this case cannot go unnoticed. An alliance of special interest groups, unable to convince a majority of the people's representatives to pass certain desired legislation, has now resorted to asking this Court to simply write that legislation into our State's sacred charter—the

North Carolina Constitution. It is a feckless attempt to enable a thin majority of our State's highest court to supersede the will of the millions of citizens who participate in our political and legislative processes.

Despite the absence of a single meritorious justification for expediting the legislative maps appeal, the majority has agreed to do so. Furthermore, the majority declines to address the Legislative Defendants' request to withdraw their appeal of the congressional map, forcing the Legislative Defendants to pursue a meaningless appeal. The majority's decision on both of these motions lacks any jurisprudential support. It reeks of judicial activism and should deeply trouble every citizen of this state. Therefore, I emphatically dissent.

Chief Justice NEWBY and Justice BERGER join in this dissent.

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1P22-2	State v. Quinton Lajuan Duncan	Def's Pro Se Motion to Reconsider and Amend Previous Order (COAP21-515)	Denied **07/05/2022**
2P22-2	Thomasina Gean v. Novant Health	Plt's Pro Se Motion for Appeal	Dismissed
5P22	State v. Dusty Ray Whisenant	Def's PDR Under N.C.G.S. § 7A-31 (COA21-114)	Denied
7P22	State v. RaeKwon B. Bryant	1. Def's Pro Se Motion for PDR 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Petition for Writ of Certiorari 4. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed 4. Dismissed as moot
14P07-3	State v. Chris Sealeath Miller	1. Def's Pro Se Motion for Access to All Records 2. Def's Pro Se Motion for Waiver of Any Possible Fee 3. Def's Pro Se Petition for Writ of Certiorari	1. Dismissed 2. Allowed 3. Dismissed
14P12-3	State v. Jarrell Damont Wilson	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **07/27/2022**
14P22	State v. Shelby Midgett	Def's Pro Se Motion for an Investigation	Dismissed
19P22	Lt. Col. Donald Sullivan v. Town of Atkinson, Inc.; Hon. Timothy K. Moore, as Speaker of the House and Hon. Philip E. Berger, as President Pro Tempore of the Senate	Plt's Pro Se Motion for Appointment of Three-Judge Panel	Dismissed
20PA21	Radiator Specialty Company v. Arrowood Indemnity Company, et al.	Def's (Fireman's Fund Insurance Company) Motion to Admit Michael A. Kotula Pro Hac Vice	Allowed **08/17/2022** **Berger, J., recused**
26P22	State v. Y'Quan Da'Shay Holloman	Def's Pro Se Motion for Appropriate Relief	Dismissed
39A22	State v. Robin Applewhite	State's Motion for Release of Exhibits Filed Under Seal	Allowed **08/04/2022**

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40P22	State v. Sterling Eugene Whitted	1. Def's PDR Under N.C.G.S. § 7A-31 (COA20-683) 2. Def's Petition for Writ of Certiorari to Review Decision of the COA	1. Dismissed 2. Denied
43A21	Reynolds-Douglass v. Terhark	1. Counsel's Motion for Withdrawal as Counsel of Record 2. Def's Pro Se Petition for Rehearing	1. Allowed **07/19/2022** 2. Dismissed **07/21/2022**
53P22	State v. Johnathan Wendell Ward	Def's PDR Under N.C.G.S. § 7A-31 (COA21-303)	Denied
65P22-2	State v. Donovan M. Williams	1. Def's Pro Se Motion for Further Review 2. Def's Pro Se Motion to Remedy Arbitrary Denials of Other Motions	1. Dismissed **07/21/2022** 2. Dismissed **07/21/2022**
76P22	State v. William Glasson	Def's PDR Under N.C.G.S. § 7A-31 (COA20-15)	Denied
85P22	Kirt Abernathy v. Mission Health System, Inc.	Plt's PDR Under N.C.G.S. § 7A-31 (COA21-253)	Denied
86P22	State v. Steven Craig English	Def's PDR Under N.C.G.S. § 7A-31 (COA20-595)	Denied
87P22	Kimberly D. Bryant v. Wake Forest University Baptist Medical Center, North Carolina Baptist Hospital, Wake Forest University Health Sciences, and Mehmet Tamer Yalcinkaya, M.D.	Plt's PDR Under N.C.G.S. § 7A-31 (COA21-138)	Denied
92P22	State v. Charles Robert Guin, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA21-150)	Denied
94A22	Batson, et al. v. Coastal Resources Commission, et al.	1. Petitioners' Motion to Hold Appeal in Abeyance to Remand to Trial Court for Findings (COA21-110) 2. Petitioners' Motion to Expedite Ruling on this Motion in the Interests of Justice	1. Denied **06/21/2022** 2. Allowed **06/21/2022**
98P22	State v. Oliver W. Ford	Def's Pro Se Motion to Dismiss	Dismissed

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103P17-2	State v. Earl Wayne Flowers	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **06/27/2022**
103P17-3	State v. Earl Wayne Flowers	Def's Pro Se Motion to Reconsider Order Denying Petition for Writ of Habeas Corpus	Denied **07/12/2022**
109PA22	Dustin Michael McKinney, George Jermey McKinney, and James Robert Tate, Plaintiffs State of North Carolina, Intervenor v. Gary Scott Goins and the Gaston County Board of Education, Defendants	Plts and Intervenor's PDR Prior to a Decision by COA (COA22-261)	Allowed **07/05/2022**
118P22	Timothy Shane Hoffman v. Marissa Curry	1. Def's Pro Se Motion for Temporary Stay (COAP21-513) 2. Def's Pro Se Petition for Writ of Supersedeas	1. Denied **04/19/2022** 2. Denied **06/17/2022**
129P04-6	State v. Carl Edward Lyons	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Wake County 2. Def's Pro Se Motion to Appoint Counsel 3. Def's Pro Se Petition for Writ of Habeas Corpus	1. 2. 3. Denied **07/22/2022**
132PA21	In the Matter of J.N. & L.N.	Respondent-Father's Petition for Rehearing	Denied **06/16/2022**
140P22	Juliana Cauley v. Charles Bean	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA21-219) 2. Def's Conditional PDR Review Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot **Ervin, J., recused**
141P22	State v. James Hampton Evans State v. Marquez Breon Springs-Owens	1. Def's (Marquez Breon Springs-Owens) PDR Under N.C.G.S. § 7A-31 (COA21-145) 2. Def's (James Hampton Evans) Notice of Appeal Based Upon a Constitutional Question 3. Def's (James Hampton Evans) PDR Under N.C.G.S. § 7A-31 4. State's Motion to Dismiss Appeal	1. Denied 2. --- 3. Denied 4. Allowed

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141PA20	The Cherry Community Organization, et al. v. Sellars, et al.	Defs' (Midtown Area Partners II, LLC and Midtown Area Holdings, LLC) Petition for Rehearing (COA19-695)	Denied **06/27/2022** **Berger, J., recused**
144P22	State v. George William Sheffield	1. Def's PDR Under N.C.G.S. § 7A-31 (COA19-282) 2. Def's Petition for Writ of Certiorari to Review Order of COA 3. Def's Motion to Unseal	1. Denied 2. Denied 3. Denied **Ervin, J., recused**
148P22	Daedalus, LLC, and Epcon Communities Carolinas, LLC v. City of Charlotte	1. Def's PDR Under N.C.G.S. § 7A-31 (COA21-329) 2. Plts' Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
154P22	In the Matter of J.A.D.	1. Def's Motion for Temporary Stay (COA21-228) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31 4. Def's Motion for Withdrawal of Petitions for Discretionary Review and Writ of Supersedeas and to Lift the Temporary Stay	1. Allowed **05/19/2022** 2. --- 3. --- 4. Allowed **07/21/2022**
156P22	Daniel T. Bryan and Lisa D. Bryan v. Firefly Mountain Properties, LLC, Enoch Ferguson, Susan Elingberg, Frederes Realty and Construction, Inc., and Pamela Frederes	Plts' Pro Se Motion for PDR (COA21-683)	Denied
158P16-4	State v. Larry Brandon Moore	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Gaston County 2. Def's Pro Se Motion for Accommodations and Expenses	1. Denied **07/18/2022** 2. Dismissed **07/18/2022**
158P16-5	State v. Larry Brandon Moore	Def's Pro Se Motion for Stay on Release	Dismissed
159A22	West 4th, LLC v. Brown, et al.	Defs' (VonDelle Brown, Wanda Haskins, and Jaeda Green) Motion to Dismiss Appeal (COA21-362)	Allowed **06/24/2022**

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165A21	Dewalt, et al. v. Hooks, et al.	Plts' Motion for Peremptory Setting	Dismissed as moot **07/08/2022**
169P22	State v. Travon Donielle Hines	Def's Pro Se Motion for Legal Action	Dismissed
170P22	Bruce Higgins v. Rebecca Sue Silvernail	1. Def's Pro Se Motion for Notice of Appeal 2. Def's Pro Se Petition for Writ of Mandamus 3. Def's Pro Se Motion for Reconsideration of Three Prior Orders Entered by Trial Court	1. Dismissed 2. Denied 3. Dismissed
172PA22	In re S.R.	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA21-633)	Allowed **06/27/2022**
177P22	William Verrinder v. Dennis Verrinder, North Carolina Judicial Branch	Plt's Pro Se Motion for Default Judgment	Dismissed without prejudice
181P22	James A. Johnston and Phyllis M. Johnston v. Timothy Pyka and Janice Pyka	Plts' PDR Under N.C.G.S. § 7A-31 (COA21-452)	Denied
184P22	Matthew Rawls v. Judge Wells and the Pamlico County Courts	Petitioner's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Pamlico County	Denied **06/21/2022**
186P22	In the Matter of L.H.L.	1. Respondent-Father's Petition for Writ of Certiorari to Review Order of the COA 2. Respondent-Father's Petition for Writ of Certiorari to Review Order of District Court, Ashe County 3. Respondent-Mother's Petition for Writ of Certiorari to Review Order of the COA 4. Respondent-Mother's Petition for Writ of Certiorari to Review Order of District Court, Ashe County	1. Denied 2. Denied 3. Denied 4. Denied

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188P22	Rachel Lynne Osborne v. Heath Paris, Jordan Ashworth, and Government Employees Insurance Company	1. Def's (Government Employees Insurance Company) PDR Under N.C.G.S. § 7A-31 (COA21-226) 2. Plt's PDR Under N.C.G.S. § 7A-31	1. Denied 2. Denied
191P22	Linda Kaye Huggins v. Emma Kate Creech and Lonza Derwin Creech	Plt's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Wake County	Denied
193P22	State v. Khawan Tyrell Dixon	1. Def's Pro Se Motion to Be Freed While Awaiting Trial 2. Def's Pro Se Motion for Self-Representation	1. Dismissed **06/23/2022** 2. Dismissed **06/23/2022**
193P22-2	State v. Khawan Tyrell Dixon	Def's Pro Se Motion for Speedy Trial and Dismissal if Time Limit Violated	Dismissed **07/22/2022**
194P22	State v. Deandrew Hobson	Def's Pro Se Motion to be Released from Custody Immediately	Denied **06/23/2022**
196P22	Town of Cary v. Rajendra S. Rathore, Sachi D. Rathore, and Carolina Power & Light Company d/b/a Progress Energy Carolinas, Inc. n/k/a Duke Energy Progress	1. Defs' (Rajendra S. Rathore and Sachi D. Rathore) Pro Se Motion for Notice of Appeal (COA21-584) 2. Defs' (Rajendra S. Rathore and Sachi D. Rathore) Pro Se Motion for PDR 3. Defs' (Rajendra S. Rathore and Sachi D. Rathore) Pro Se Motion to Remand to Superior Court for Jury Trial	1. Dismissed *ex mero motu* 2. Denied 3. Dismissed **Ervin, J. Recused**
197P22	In the Matter of S.G.A.R.B., H.D.B., T.U.B.	Respondent-Mother's Pro Se PDR Under N.C.G.S. § 7A-31	Denied **07/13/2022**
199P22	Joe Benton Armstrong v. Joshua Kiser and Jonathan McCraw	1. Plt's Pro Se Motion for Petition for Review 2. Plt's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Johnston County	1. Denied 2. Denied
200P22	State v. Jason M. Kibler	Def's Pro Se Motion for Sentence to be Concurrent or Overturned	Dismissed **06/30/2022**
201P22	State v. Joseph W. Goswick	Def's Pro Se Motion to Dismiss for Lack of Subject Matter Jurisdiction	Denied **07/13/2022**
202P21	State v. Scott Warren Flow	Def's PDR Under N.C.G.S. § 7A-31 (COA20-534)	Special Order

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203P22	Wake County on Behalf of Kelly Williams v. Andrelle Wiley	1. Def's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA21-347) 2. Def's Pro Se PDR Under N.C.G.S. § 7A-31 3. Def's Pro Se Motion for Temporary Stay 4. Def's Pro Se Petition for Writ of Supersedeas 5. Def's Pro Se Motion to Request Judicial Notice	1. 2. 3. Denied **07/07/2022** 4. 5.
204P22	Sharp v. North Carolina Aquatic Club, Inc., et al.	Plt's Petition for Writ of Certiorari	Denied **Barringer, J., recused**
205P22	State v. Nathaniel Rice	Def's Pro Se Motion to Order/Instruct Lower Courts to Provide Final Trial Date or Dismiss All Charges in Case	Dismissed **07/08/2022**
208P22	State v. Melvin Ray Woolard, Jr.	1. State's Motion for Temporary Stay (COAP22-156) 2. State's Petition for Writ of Supersedeas 3. State's Petition for Writ of Certiorari to Review Order of COA 4. State's Petition for Writ of Certiorari to Review Order of District Court, Beaufort County	1. Allowed **07/08/2022** 2. 3. 4.
209P22	Steven Beaver v. Eddie M. Buffaloe, Jr., Secretary, North Carolina Department of Public Safety, et al.	Petitioner's Pro Se Petition for Writ of Habeas Corpus	Denied **07/12/2022**
213P21	State v. Chad Metzger	Def's Pro Se Motion for Notice of Amended Appeal	Dismissed
221P22	Stewart v. Goulston Techs., Inc.	1. Defs' Motion for Temporary Stay (COA21-642) 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed **07/26/2022** 2. 3.
240A22	State v. Darren O'Brien Lancaster	1. State's Motion for Temporary Stay (COA21-231) 2. State's Petition for Writ of Supersedeas	1. Allowed **08/05/2022** 2.

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242P22	State v. Tyrell Dontaye Daniels	1. Def's Pro Se Motion for Speedy Trial	1. Dismissed **08/12/2022**
		2. Def's Pro Se Motion for 2 English Historical Documents	2. Dismissed **08/12/2022**
		3. Def's Pro Se Motion for Change of Venue	3. Dismissed **08/12/2022**
		4. Def's Pro Se Motion for Exclusion of Evidence/Suppress Evidence	4. Dismissed **08/12/2022**
		5. Def's Pro Se Motion for Lower Bond	5. Dismissed **08/12/2022**
243P19-2	State v. Gregory K. Parks	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Wilson County	1. Dismissed
		2. Def's Pro Se Motion to Appoint Counsel	2. Dismissed as moot
243P22	Creekside Crabtree Apartments, Inc. v. May	1. Defs' Pro Se Motion for Temporary Stay	1. Allowed **08/10/2022**
		2. Defs' Pro Se Petition for Writ of Supersedeas	2.
		3. Defs' Pro Se Motion for Notice of Appeal	3.
		4. Defs' Pro Se Motion for Petition from Decision of the Court of Appeals	4.
255P22	Eastpointe Human Services v. N.C. Department of Health & Human Services, et al.	1. Plt's Motion for Temporary Stay	1. Allowed **08/10/2022**
		2. Plt's Petition for Writ of Supersedeas	2.
		3. Plt's PDR Under N.C.G.S. § 7A-31	3.
258P22	State v. Wisezah Buckman	1. Def's Motion to Stay All Proceedings in the Superior Court	1. Dismissed as moot **08/17/2022**
		2. Def's Emergency Petition for Writ of Certiorari to Review Order of Superior Court, Dare County	2. Denied **08/17/2022**
		3. Def's Motion for Temporary Stay	3. Dismissed as moot **08/17/2022**
		4. Def's Petition for Writ of Supersedeas	4. Dismissed as moot **08/17/2022**

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261A18-3	NC NAACP v. Moore, et al.	Defs' Motion for Alternative Relief to Disqualify Justice Earls	Dismissed as moot **Earls, J., recused only on consideration of the alternative motion.**
269A21	In the Matter of J.A.J., K.D.M.J., P.A.P.J.	Respondent-Father's Petition for Writ of Certiorari to Review Decision of District Court, Wilson County	Allowed **07/15/2022**
278P18-2	State v. Vondell Tyshang Gregory	1. Def's Pro Se Motion for Appropriate Relief 2. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
283P21-8	American Transportation Group Insurance Risk Retention Group v. MVT Insurance Services, Inc., Amrit Singh, Eleazar Rojas, and Shamsher Singh	Def's (Amrit Singh) Pro Se Motion to Dismiss Case Due to Plt's Failure to Adhere to Rule 37	Dismissed
287P21	State v. Roger Timothy Best	Def's PDR Under N.C.G.S. § 7A-31 (COA20-543)	Denied
304P20-7	State v. Clyde Junior Meris	1. Def's Pro Se Motion for Notice of Appeal (COAP21-488) 2. Def's Pro Se Motion for PDR 3. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Dismissed 3. Allowed
305P16-2	State v. Jeremy Daniel Russom	Def's Pro Se Motion for PDR	Dismissed **Berger, J., recused**
306P18-6	Hunter F. Grodner v. Andrzej Grodner (now Andrew Grodner)	1. Def's Pro Se Motion to Clarify this Court's Dismissal Order From 17 August 2021 Related to Def's Motion to Disqualify Opposing Counsel Filed on 16 October 2019 2. Def's Pro Se Motion to Clarify this Court's Dismissal Order From 17 August 2021 Related to Def's Petition for Writ of Supersedeas Filed on 5 March 2021	1. Dismissed 2. Dismissed

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313A21	In the Matter of J.R.	1. Respondents and State's Joint Motion to Consolidate Oral Arguments 2. Disability Rights North Carolina's Motion for Leave to Present Oral Argument	1. Allowed **07/21/2022** 2. Denied **07/21/2022**
314P21	Paul Steven Wynn v. Rex Frederick, in his official capacity as Magistrate, and Great American Insurance Company	1. Def's (Rex Frederick) PDR Under N.C.G.S. § 7A-31 (COA20-472) 2. Plt's Conditional PDR N.C.G.S. § 7A-31	1. Allowed 2. Allowed as to Issue #1; Denied as to Issue #2
318P21	State v. Brandon Helms	1. Def's PDR Under N.C.G.S. § 7A-31 (COA20-553) 2. Def's Petition in the Alternative for Writ of Certiorari to Review Decision of the COA	1. Denied 2. Denied
326PA21-2	Alden v. Osborne	1. Petitioner's Pro Se Motion to Dismiss Appeal 2. Alleghany Department of Social Services' Motion to Vacate and Dismiss as Moot	1. Dismissed as moot 2. Allowed **07/26/2022**
331PA21	Community Success Initiative v. Moore, et al.	1. Plts' Motion to Admit R. Stanton Jones Pro Hac Vice (COA22-136) 2. Plts' Amended Motion to Admit R. Stanton Jones Pro Hac Vice 3. Plts' Motion to Admit Elisabeth S. Theodore Pro Hac Vice 4. Plts' Motion to Admit Farbod K. Faraji Pro Hac Vice 5. Plts' Motion for Expedited Briefing and Argument	1. Dismissed as moot **06/08/2022** 2. Allowed **06/07/2022** 3. Allowed **06/07/2022** 4. Allowed **06/07/2022** 5. Denied **06/27/2022**
335P21	State v. Brandon Dion Greene	Def's PDR Under N.C.G.S. § 7A-31 (COA20-598)	Denied
345P21-2	State v. Gilbert Lee King, Jr.	Def's Pro Se Motion for Bond Reduction	Dismissed
354P21	State v. Sean Michael Lent	Def's PDR Under N.C.G.S. § 7A-31 (COA20-565)	Denied

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374A14-2	Lewis, et al. v. Flue-Cured Tobacco Cooperative	1. Plts' PDR Prior to a Determination by COA (COA21-551) 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 4. Plts' Motion to Withdraw PDR and Petition in the Alternative for Writ of Certiorari	1. --- 2. --- 3. Allowed **02/04/2022** 4. Allowed **07/21/2022**
387P21	State v. Jennifer Lynn Pierce	Def's Motion to Withdraw as Counsel and Appoint Office of Appellate Defender (COA20-494)	Allowed **06/27/2022**
393P21	State v. Roger Arthur, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA20-635)	Allowed
399P11-2	State v. Nathaniel Goode	Def's Pro Se Motion to Appoint Counsel	Dismissed **Ervin, J., recused**
401P21	State v. Brian Louis Paige	Def's Pro Se Motion for Charges	Dismissed
413PA21	Harper, et al. v. Hall, et al.	Plt's (Common Cause) Motion for Expedited Hearing and Consideration (COAP21-525)	Special Order **07/28/2022**

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414PA21	T. Alan Phillips and Robert Warwick, in their capacities as Co-Trustees of the Marital Trust Created Under Section 2 of Article IV of the Hugh MacRae II Revocable Declaration of Trust; and Robert Warwick, Hugh MacRae III, and Nelson MacRae, in their capacities as Co-Trustees of the Family Trust Created Under Section 3 of Article IV of the Hugh MacRae II Revocable Declaration of Trust Which Family Trust is the Sole Remainder Beneficiary of the Marital Trust v. Eunice Taylor MacRae and Marguerite Bellamy MacRae, in her capacity as a Beneficiary of the Family Trust	Defs' Motion to Dismiss Appeal (COA20-903)	Allowed **07/13/2022**

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425A21-1	Hoke County Board of Education, et al. v. State of North Carolina, et al.	1. Plts' Notice of Appeal Based Upon a Dissent (COAP21-511)	1. Special Order **03/18/2022**
		2. Plts' Notice of Appeal Based Upon a Constitutional Question	2. Special Order **03/18/2022**
		3. Plts' PDR Under N.C.G.S. § 7A-31	3.
		4. Plts' Petition in the Alternative for Writ of Certiorari to Review Order of the COA	4. Special Order **03/18/2022**
		5. Plt-Intervenors' (Rafael Penn, et al.) Motion to Admit David Hinojosa Pro Hac Vice	5. Allowed **03/18/2022**
		6. Plt-Intervenors' (Rafael Penn, et al.) Notice of Appeal Based Upon a Dissent	6. Special Order **03/18/2022**
		7. Plt-Intervenors' (Rafael Penn, et al.) Notice of Appeal Based Upon a Constitutional Question	7. Special Order **03/18/2022**
		8. Plt-Intervenors' (Rafael Penn, et al.) PDR Under N.C.G.S. § 7A-31	8. Special Order **03/18/2022**
		9. Plt-Intervenors' (Rafael Penn, et al.) Petition for Writ of Certiorari to Review Order of the COA	9. Special Order **03/18/2022**
		10. Controller's Motion to Dismiss Appeals	10. Special Order **03/18/2022**
		11. Controller's Conditional Petition for Writ of Supersedeas	11. Special Order **03/18/2022**
		12. Legislative-Intervenors' Motion to Dismiss Appeals	12. Special Order **03/18/2022**
		13. State's Notice of Upcoming Filing	13. Dismissed as moot **03/18/2022**
		14. Petitioner's Motion for Substitution of Party	14. Allowed **07/22/2022**

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425A21-2	Hoke County Board of Education, et al. v. State of North Carolina	1. Legislative-Defs' Conditional Petition for Writ of Certiorari to Review Order of Superior Court, Wake County (COA22-86) 2. Petitioner's Motion for Substitution of Party 3. Duke Children's Law Clinic, Education Law Center, the Center for Educational Equity, Southern Poverty Law Center, and Constitutional and Education Law Scholars' Motion to Admit David G. Sciarra Pro Hac Vice 4. North Carolina Business Leaders' Motion to Amend Amicus Brief 5. Parties' Joint Motion to Extend the Time Limits for Oral Argument	1. 2. Allowed **07/22/2022** 3. Allowed **07/22/2022** 4. Allowed **08/05/2022** 5. Allowed **08/08/2022**
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. Allowed 3. Allowed
449P11-27	In re Charles Everette Hinton	Petitioner's Pro Se Petition for Writ of Habeas Corpus	Denied **07/27/2022** **Ervin, J., recused**
476P20-3	Hankins v. Willard	1. Petitioner's Pro Se Motion for Emergency En Banc Hearing 2. Petitioner's Pro Se Motion for Review Opinion 3. Petitioner's Pro Se Petition for Writ of Certiorari 4. Petitioner's Pro Se Motion to Proceed *In Forma Pauperis* 5. Petitioner's Pro Se Motion for Amendment Petition	1. Dismissed **08/15/2022** 2. Dismissed **08/15/2022** 3. Dismissed **08/15/2022** 4. Dismissed **08/15/2022** 5. Dismissed **08/15/2022**
503P00-3	Daniel A. Young, Sr. v. State of North Carolina, County of Wake, City of Raleigh	Petitioner's Motion for Writ of Certiorari to Petition for Redress of Civil Rights Abuse	Dismissed

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

19 AUGUST 2022

531P20-4	State v. Connell Dixon Hawkins, Chadley Tyrone Norris, James Alexander Ray	Def's Pro Se Motion to Proceed *In Forma Pauperis*	Dismissed **07/22/2022**

DEWALT v. HOOKS

[382 N.C. 340, 2022-NCSC-105]

ROCKY DEWALT, ROBERT PARHAM, ANTHONY McGEE, AND SHAWN BONNETT, INDIVIDUALLY AND ON BEHALF OF A CLASS OF SIMILARLY SITUATED PERSONS

v.

ERIK A. HOOKS, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, AND THE NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY

No. 165A21

Filed 4 November 2022

Class Actions—class certification—common predominating issue—DPS inmates—solitary confinement settings

The trial court did not abuse its discretion by denying plaintiffs' motion for class certification where plaintiffs were inmates in the custody of the N.C. Department of Public Safety (DPS) who were being or would be subjected to solitary confinement and were alleging that DPS's policies and practices concerning five types of restrictive housing assignments violated the state constitution. Specifically, there was no abuse of discretion in the trial court's conclusion that plaintiffs had failed to demonstrate a common predominating issue among the proposed class members where plaintiffs presented insufficient evidence connecting the five challenged types of restrictive housing assignments to an alleged uniform risk of harm, and where risk of harm depended significantly upon the penological purposes served, the duration and length of stay, the procedural safeguards, and the relevant attendant circumstances of each type of housing assignment.

Justice EARLS dissenting.

Justice HUDSON joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-27(a)(4) from an order denying plaintiffs' motion for class certification entered on 22 February 2021 by Judge James E. Hardin Jr. in Superior Court, Wake County. Heard in the Supreme Court on 30 August 2022.

ACLU of North Carolina Legal Foundation by Daniel K. Siegel and Kristi Graunke, for plaintiff-appellants.

Joshua H. Stein, Attorney General, by Orlando L. Rodriguez, Special Deputy Attorney General, Mary Carla Babb, Special Deputy

Attorney General, and James B. Trachtman, Special Deputy Attorney General, for defendant-appellees.

Aviance Brown, Irving Joyner, Daryl Atkinson, Whitley Carpenter, and Ashley Mitchell, for North Carolina Conference of the NAACP, amicus curiae.

Lockamy Law Firm, by Scott Holmes; and Roderick & Solange MacArthur Justice Center, Northwestern Pritzker School of Law, by Daniel Greenfield, Bradford Zukerman, and Kathrina Szymborski, for Professors Sharon Dolovich, Alexander A. Reinert, Margo Schlanger, and John F. Stinneford, amici curiae.

Nichad Davis and Benjamin I. Friedman, Professors and Practitioners of Psychiatry, Psychology, and Medicine, for amici curiae.

NEWBY, Chief Justice.

¶ 1 In this case we consider whether the trial court erred by denying plaintiffs' motion for class certification. Plaintiffs are inmates in North Carolina Department of Public Safety (DPS) custody. Plaintiffs brought a class action lawsuit against defendants seeking to represent certain individuals in DPS custody who are being or will be subjected to solitary confinement. Plaintiffs do not challenge the use of solitary confinement in every housing setting or allege that solitary confinement is per se unconstitutional. Rather, plaintiffs allege that defendants' policies and practices concerning specific restrictive housing assignments violate the state constitution. The trial court denied plaintiffs' motion for class certification. The trial court concluded plaintiffs failed to establish a common predominating issue, plaintiffs did not demonstrate that the named representatives would fairly and adequately represent the class, and that litigating as a class was not the superior method of adjudication. Plaintiffs appealed directly to this Court. Because the trial court did not abuse its discretion, we affirm the trial court's order.

¶ 2 On 16 October 2019, plaintiffs[1] filed a class action lawsuit seeking to certify a class of current and future inmates assigned to one of five restrictive housing classifications. Plaintiffs alleged the conditions of

1. Plaintiffs are Rocky Dewalt, Robert Parham, Anthony McGee, and Shawn Bonnett. Plaintiffs sought to appoint Robert Parham, Anthony McGee, and Shawn Bonnett as class representatives and requested that Rocky Dewalt remain a named plaintiff.

confinement across the five restrictive housing assignments presented the same substantial risk of harm to all individuals and constituted cruel or unusual punishment.

¶ 3 The five challenged restrictive housing settings are: Restrictive Housing for Disciplinary Purposes (RHDP), Restrictive Housing for Control Purposes (RHCP), High Security Maximum Control (HCON), Restrictive Housing for Administrative Purposes (RHAP), and the first two phases of the Rehabilitative Diversion Unit (RDU).

¶ 4 RHDP is a short-term placement and "presumptive sanction" for disciplinary infractions, such as disobeying an order, possessing a cell phone, refusing a drug test, or using disrespectful or defamatory language. Individuals assigned to RHDP may have personal property in their cells, are allowed limited telephone privileges, receive visitation rights, and have access to cell study materials, such as educational programs and college coursework. Prison staff may impose up to twenty or thirty days of confinement in RHDP. Between October 2018 and October 2019, the average length of a placement in RHDP was eleven days.

¶ 5 RHCP "is a long-term restrictive housing assignment for the removal of [an incarcerated person] from the general offender population to confinement in a secure area." RHCP is reserved for offenders who have displayed "disruptive behavior, assaultive actions, threats to the safety of staff or other offenders, or threats to the security and operational integrity of the facility." People in RHCP receive one hour of recreation time five days a week and have access to a shower three times a week. They eat all meals in their cell, may not attend religious, educational, or vocational programs outside of their cell, and have no guaranteed telephone or canteen access. People in RHCP are entitled to two noncontact visits every thirty days, but visitation privileges are suspended for at least twelve months if an individual is found guilty of assault on a staff member resulting in physical injury. RHCP classifications are reviewed every six months. If placement in RHCP is due to assault on a staff member resulting in physical injury, however, assignments are reviewed at twelve months. Between October 2018 and October 2019, the average length of stay in RHCP was 131 days.

¶ 6 HCON is the most restrictive housing assignment and is for "offenders who pose the most serious threat to the safety of staff and other offenders or who . . . require more security than can be afforded in [other housing settings]." Review of an HCON classification occurs every six months, or it occurs every twelve months if placement is due to assault on a staff member resulting in physical injury. People who are removed

from HCON are automatically placed in RHCP, RDU, or the Therapeutic Diversion Unit. Between October 2018 and October 2019, the average length of stay in HCON was 154 days.

¶ 7 RHAP is a temporary placement for administrative, rather than disciplinary, purposes. Individuals may be placed in RHAP to protect staff members and other offenders from threats of harm, to minimize the risk of escape, to preserve order, to provide control while completing an investigation, or to serve as a "cooling off measure[,]" as referred to in the policy. While assigned to RHAP, individuals have access to medical and mental health services, receive daily visits from a health care staff member, may have personal property in their cells, and are allowed telephone privileges. In addition, individuals in RHAP may receive an unlimited number of one-hour, noncontact visits. Between October 2018 and October 2019, the average length of stay in RHAP was eight days.

¶ 8 RDU is a placement program "designed as a safe alternative to segregation, providing positive reinforcements to increase desired behaviors, and decrease unwanted behaviors through . . . appropriate consequences . . . [and] positive reinforcement." Individuals in RDU housing are allowed certain authorized personal property in their units, such as pencils, pens, books, a radio, a deck of cards, and hygiene items. From October 2018 to October 2019, the average length of stay in RDU was between twelve and fourteen months.

¶ 9 Defendants filed their answer on 21 January 2020. On 4 February 2020, the matter was designated as exceptional pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts and assigned to Judge James E. Hardin Jr. Plaintiffs filed their motion for class certification on 24 April 2020 pursuant to Rule 23(a) of the North Carolina Rules of Civil Procedure. *See* N.C.G.S. § 1A-1, Rule 23(a) (2021). Plaintiffs thereafter took discovery and submitted evidence in support of their motion. Defendants filed their response in opposition with supporting evidence on 12 August 2020. The trial court held a Webex hearing on 1 December 2020 and heard oral argument from both parties.

¶ 10 On 22 February 2021, the trial court denied plaintiffs' motion for class certification and found that a certifiable class did not exist for three independent reasons: (1) plaintiffs failed to demonstrate a common predominating issue among the group of potential class members, (2) plaintiffs did not establish that the named representatives would fairly and adequately represent the interests of all class members, and (3) litigating this case as a class action was not the superior method of adjudication. Plaintiffs appealed directly to this Court under N.C.G.S. § 7A-27(a)(4).

¶ 11 This Court reviews a trial court's class certification order for abuse of discretion. *Fisher v. Flue-Cured Tobacco Coop. Stabilization Corp.*, 369 N.C. 202, 209, 794 S.E.2d 699, 706 (2016). "[T]he test for abuse of discretion is whether a decision 'is manifestly unsupported by reason[ ]' or 'so arbitrary that it could not have been the result of a reasoned decision . . . .' " *Frost v. Mazda Motor of Am., Inc.*, 353 N.C. 188, 199, 540 S.E.2d 324, 331 (2000) (quoting *Little v. Penn Ventilator Co.*, 317 N.C. 206, 218, 345 S.E.2d 204, 212 (1986)). "Within this general standard, when addressing a class certification order, this Court has recognized that conclusions of law are reviewed de novo, and findings of fact are considered binding if supported by competent evidence." *McMillan v. Blue Ridge Cos.*, 379 N.C. 488, 2021-NCSC-160, ¶ 7 (citing *Fisher*, 369 N.C. at 209, 794 S.E.2d at 706).

¶ 12 Rule 23 of the North Carolina Rules of Civil Procedure authorizes class action lawsuits. Rule 23 provides that "[i]f persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued." N.C.G.S. § 1A-1, Rule 23(a).[2] "The party seeking to bring a class action under Rule 23(a) has the burden of showing that the prerequisites to utilizing the class action procedure are present." *Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 282, 354 S.E.2d 459, 465 (1987) (footnote omitted). First, the class representatives must demonstrate the existence of a class. *Id.* at 277, 354 S.E.2d at 462. "A proper class exists 'when the named and unnamed members each have an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members.' " *Fisher*, 369 N.C. at 209, 794 S.E.2d at 705 (quoting *Crow*, 319 N.C. at 280, 354 S.E.2d at 464). A common issue predominates when plaintiffs demonstrate that the potential class members' claims share a common issue capable of resolution "in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 1131 S.Ct. 2541, 180 L. Ed. 2d 374 (2011) (providing that plaintiffs' "claims must depend upon a common contention . . . capable of class[-]wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke").

¶ 13 In addition to this initial requirement, the class representatives must show:

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2. There are notable differences between Rule 23 of the North Carolina Rules of Civil Procedure and Rule 23 of the Federal Rules of Civil Procedure governing class action lawsuits. Nonetheless, the federal cases which address the provision of the federal rule that is similar to the state provision are instructive to our analysis.

> (1) that they will fairly and adequately represent the interests of all members of the class; (2) that they have no conflict of interest with the class members; (3) that they have a genuine personal interest, not a mere technical interest, in the outcome of the case; (4) that they will adequately represent members outside the state; (5) that class members are so numerous that it is impractical to bring them all before the court; and (6) that adequate notice is given to all class members.

Fisher, 369 N.C. at 209, 794 S.E.2d at 705–06 (internal quotations omitted) (quoting *Faulkenbury v. Teachers' & State Emps.' Ret. Sys.*, 345 N.C. 683, 697, 483 S.E.2d 422, 431 (1997)).

¶ 14 When a party seeking class certification meets these prerequisites, "it is left to the trial court's discretion 'whether a class action is superior to other available methods for the adjudication of th[e] controversy.' " *Id.* at 209, 794 S.E.2d at 706 (alteration in original) (quoting *Beroth Oil Co. v. N.C. Dep't of Transp.*, 367 N.C. 333, 337, 757 S.E.2d 466, 470 (2014)).

> Class actions should be permitted where they are likely to serve useful purposes such as preventing a multiplicity of suits or inconsistent results. The usefulness of the class action device must be balanced, however, against inefficiency or other drawbacks. . . . [T]he trial court has broad discretion in this regard and is not limited to consideration of matters expressly set forth in Rule 23 or in [existing case law].

Crow, 319 N.C. at 284, 354 S.E.2d at 466. As such, "the touchstone for appellate review of a Rule 23 order . . . is to honor the 'broad discretion' allowed the trial court in all matters pertaining to class certification." *Frost*, 353 N.C. at 198, 540 S.E.2d at 331 (citing *Crow*, 319 N.C. at 284, 345 S.E.2d at 466).

¶ 15 Here the trial court identified three distinct bases for denying plaintiffs' motion for class certification: (1) no common predominating issue; (2) inadequacy of plaintiffs as class representatives; and (3) a class action is not a superior method of adjudication. Any of the three independent bases would have been adequate to support the denial of class certification. However, because we conclude the trial court did not abuse its discretion in determining there is no common predominating issue, we limit our review to that basis.

¶ 16 The question here is whether the trial court abused its discretion in concluding plaintiffs failed to demonstrate a common predominating issue among the proposed class members. The trial court determined plaintiffs presented insufficient evidence to connect DPS's practices and policies to an alleged risk of harm. In an attempt to support their claim that DPS's practices caused all class members to face risks of similar harm, plaintiffs relied on four studies. The trial court found, however, that only two studies concerned DPS and only one addressed its restrictive housing practices. One report, "suggest[ing] that exposure to restrictive housing is associated with an increased risk of death during community reentry[,]" provided insufficient evidence to support plaintiffs' claim because it was a correlational analysis that, by the authors' admission, could not support conclusions of causation. Additionally, the study was based on observational data that failed to consider confounding factors which could have affected the study's ultimate outcome. Accordingly, this study could not provide concrete support to plaintiffs' claim that restrictive housing causes an increase in the risk of post-release mortality.

¶ 17 Likewise, the trial court concluded the second relevant report (the Vera Report), which was prepared by the Vera Institute of Justice, was insufficient to connect DPS's practices to the alleged risk of harm.[3] The Vera Report commended DPS on its previous reform efforts, suggested that DPS "continue[ ] implementation of [both] current and future reforms," and noted that DPS's restrictive housing population decreased by 10% in the year following the study. Furthermore, as the trial court concluded, all but one of DPS's policies discussed in the Vera Report has since been revised.

¶ 18 Aside from these two reports, plaintiffs failed to present additional evidence, such as specific studies and expert witness reports to support their claim that DPS's policies and practices create a uniform risk of harm to individuals assigned to each of the challenged restrictive housing settings. This lack of evidentiary support is distinguishable from the evidence presented by the claimants in many of the federal cases upon which plaintiffs rely. *See Parsons v. Ryan*, 754 F.3d 657, 669, 678 (9th Cir. 2014) (presenting numerous expert reports and ten specifically defined policies to which all class members were subjected); *see, e.g.*, *Braggs*

3. In 2016 DPS partnered with the Vera Institute of Justice to evaluate DPS's restrictive housing policies and practices. The Vera Report "outline[d] the findings of th[e] assessment and provide[d] recommendations to [DPS] on how to safely reduce its use of restrictive housing." The experiences of the named plaintiffs and other affiants, who have collectively experienced each of the five restrictive housing settings, generally align with the Vera Report's findings.

v. Dunn, 257 F. Supp. 3d 1171, 1236 (M.D. Ala. 2017); *Davis v. Baldwin*, No. 3:16-CV-600-MAB, 2021 WL 2414640 (S.D. Ill. June 14, 2021). Based upon the minimal evidence specific to DPS's restrictive housing practices, the trial court did not abuse its discretion in concluding plaintiffs failed to establish that the potential class members' claims share a common issue capable of resolution "in one stroke." *See Wal-Mart Stores, Inc.*, 564 U.S. at 350.

¶ 19 The trial court also concluded that the variety of penological purposes across the challenged housing classifications are fundamental distinctions that prevent a finding that a common issue predominates across such a broad class. Further, the circumstances which necessitate placement in restrictive housing and the length of each assignment require an individualized assessment that preclude finding a common predominating issue.

¶ 20 The lack of a "legitimate penological justification" is relevant in analyzing a conditions-of-confinement claim. *See Porter v. Clarke*, 923 F.3d 348, 362–63 (4th Cir. 2019). The record evidence supports the trial court's conclusion and demonstrates that each challenged housing setting serves a distinct purpose. The record shows that RHDP is used exclusively for disciplinary purposes and is reserved for incarcerated individuals who have committed a disciplinary infraction, while RHAP serves administrative purposes, such as to protect staff, minimize the risk of escape, and preserve order. Unlike both RHDP and RHAP, the purpose of RHCP is to manage incarcerated individuals who have demonstrated a risk to the operations of a facility. Alternatively, HCON is reserved for individuals who pose the most serious threat and require an increased level of security over that offered by the other settings. Finally, the purpose of RDU is to discourage unwanted behaviors through appropriate consequences and positive reinforcement. The penological purposes served by each housing setting thus inform the placement of an individual into the appropriate classification, which necessarily requires an individualized assessment. As such, the trial court did not abuse its discretion in concluding that the varying penological purposes precluded a finding that plaintiffs established a common predominating issue.

¶ 21 The trial court next concluded that the wide variation in the duration of confinement in a challenged setting precluded a finding that plaintiffs established a common predominant issue. The duration of confinement in a challenged setting is highly relevant to a conditions-of-confinement claim. *See Hutto v. Finney*, 437 U.S. 678, 686, 98 S.Ct. 2565, 57 L. Ed. 2d 522 (1978) ("[T]he length of confinement cannot be ignored in deciding whether the confinement meets constitutional standards."); *see*

also Rice v. Corr. Med. Servs., 675 F.3d 650, 666 (7th Cir. 2012) (finding duration of confinement as one factor in determining whether a stay in administrative segregation constituted cruel and unusual punishment).

¶ 22 Plaintiffs contend that once individuals are placed in restrictive housing, they are subject to the same substantial risk of harm that can manifest within fifteen days of placement, and as such, they have established a common predominating issue. The trial court concluded, in its discretion, that the length of time individuals spend in restrictive housing varies across each challenged setting and impacts the nature of each plaintiff's claim. This conclusion is supported by the record. Placement in RHAP, for instance, is initially limited to seventy-two hours and may be extended for up to fifteen days with further extension requiring approval by the Facility Classification Committee. Between October 2018 and October 2019, the average length of stay in RHAP was eight days. RHDP, alternatively, sets a maximum assignment of thirty days, and the average placement in RHDP between October 2018 and October 2019 was eleven days. In contrast, the average length of stay in RHCP and HCON between October 2018 and October 2019 was 131 days and 154 days, respectively, and placements in RHCP and HCON are reviewed less frequently. Assignments to RHCP and HCON are reviewed every six months in most instances and every twelve months for individuals who assaulted and injured a staff member. Therefore, despite plaintiffs' claim, the differences between the challenged housing classifications are relevant given that the duration of placement varies. Because duration of confinement is relevant to a conditions-of-confinement claim and because the record evidence clearly indicates significant variations in the length of stay across each challenged restrictive housing setting, the trial court did not abuse its discretion in concluding that this factor precluded a finding that plaintiffs established a common predominating issue.

¶ 23 Next, the trial court concluded that each challenged housing setting has different procedural safeguards which affect plaintiffs' ability to establish a common predominating issue. An assessment of procedural safeguards is relevant to a conditions-of-confinement claim. *See Porter*, 923 F.3d at 359–63 (holding that plaintiffs were placed in solitary confinement based upon being sentenced to death but were afforded no mechanisms for removal).

¶ 24 Here the trial court's conclusion that different procedural safeguards accompany the challenged housing settings is supported by sufficient record evidence. As the record reveals, initial placement in RHAP may be made by an officer-in-charge without conducting a prior hearing or providing an opportunity to challenge the assignment. Review by a

full committee is not required unless the placement is extended beyond fifteen days. Alternatively, placement in RHDP requires an investigation resulting in compilation of a disciplinary package, a prior hearing, and an opportunity to appeal. Unlike both RHAP and RHDP, assignment to RHCP is preceded by a six-step review process by two separate committees. Moreover, an HCON placement requires a hearing, multiple reviews, and approval by specifically defined staff members, while assignment to RDU is based on recent disciplinary history and eligibility factors such as age, reading level, IQ score, and close custody designation, rather than a hearing.

¶ 25 Plaintiffs fail to account for the variations in procedural safeguards, which are relevant to a conditions-of-confinement claim. Such material variations hinder plaintiffs' ability to establish a common predominating factor. Accordingly, the trial court did not abuse its discretion in concluding that the different procedural safeguards for each restrictive housing classification precluded a finding that plaintiffs established a common predominating issue.

¶ 26 Finally, the trial court concluded that the attendant conditions of each restrictive housing setting vary significantly, are relevant to a conditions-of-confinement claim, and prevent a finding that plaintiffs established a common predominating issue. Plaintiffs argue, though, that class-wide issues predominate when a class seeks injunctive relief from shared conditions that expose all class members to the same harm, irrespective of the specific conditions of a particular housing assignment and individual experiences in restrictive housing. Given several general conditions common to all forms of restrictive housing, namely the amount of time individuals spend in their cells each day and the minimal opportunity for human interaction they receive, plaintiffs contend the trial court erred by considering conditions specific to the challenged restrictive housing settings.

¶ 27 Here the trial court determined that the most significant differences among the attendant conditions occur in the frequency of visitation, the nature of recreation, and the quantity and quality of interactions with other incarcerated people. This finding is supported by the record.

¶ 28 The record shows that visitation rights vary across the challenged settings. Offenders assigned to RHAP and RHDP may receive an unlimited number of one-hour noncontact visits, while individuals in RHCP and HCON are limited to two visits every thirty days. The record also highlights differences in which individuals in restrictive housing settings can interact with other inmates, including by location, whether restrained or

unrestrained, frequency, and duration. Offenders placed in RDU, for instance, may recreate in an open yard with other inmates and access the gym. Individuals placed in the other restrictive housing settings, however, are limited to outdoor recreation, and the classifications differ on whether individual or group recreation is permitted. Further, the trial court found the availability of in-cell activities to be a relevant attendant condition. The degree to which individuals in restrictive housing can participate in cell study programs and other types of stimulating activities varies by housing assignment. Placement in RDU affords individuals the opportunity to complete educational courses, receive high school and college credit, and participate in short-term work assignments similar to those offered in general population. Alternatively, offenders assigned to RHAP have access to a portable library, pastoral counseling, and cell-study materials.

¶ 29 Moreover, a journal article relied upon by plaintiffs echoes the relevance of varying attendant circumstances. The article explains that variables among housing conditions, including the availability of reading material and frequency of visitation, "might explain differing outcomes."

¶ 30 Whether there is a substantial risk of harm depends significantly on the penological purposes served, the procedural safeguards, the duration and length of stay, and the relevant attendant circumstances to each restrictive housing assignment. Thus, the fundamental distinctions and individual issues identified by the trial court are material and far from collateral. *Compare Faulkenbury*, 345 N.C. at 698, 483 S.E.2d at 431–32 (holding the trial court did not abuse its discretion in certifying a class, where plaintiffs' claim for the underpayment of benefits predominated over individual, "collateral issues"), *with Fisher*, 369 N.C. at 215, 794 S.E.2d at 709 (concluding the trial court did not abuse its discretion in certifying a class because "the same basic questions of fact and law will determine whether" plaintiffs can recover damages from defendant). Accordingly, the trial court did not abuse its discretion in concluding that no common issue predominates over issues affecting only individual class members because of the fundamental differences across the housing classifications.

¶ 31 Plaintiffs alternatively contend the trial court erred because it "failed to acknowledge that institutionalized plaintiffs may seek broad systemic relief when faced with systemic risks of harm." To support their contention, plaintiffs claim that when "a class seeks an indivisible injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate," quoting *Wal-Mart Stores, Inc.*, 564 U.S. at 362–63. As the trial court correctly

concluded, however, the Supreme Court of the United States was analyzing a subsection of Rule 23 of the Federal Rules of Civil Procedure, Rule 23(b)(2), which is not included in North Carolina's Rule 23. Further, it is well established that this Court has interpreted North Carolina's Rule 23 to require plaintiffs seeking class certification to establish the existence of a class, which requires plaintiffs to demonstrate that each member has "an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members." *Crow*, 319 N.C. at 277, 354 S.E.2d at 462.

¶ 32 Plaintiffs have failed to establish that the claims of all potential class members share a common issue capable of resolution with one stroke. *Beroth Oil Co.*, 367 N.C. at 346, 757 S.E.2d at 476 (holding there was no error in the trial court's denial of class certification because although defendant's "generalized actions may [have been] common to all [potential class members' properties], . . ." "liability [could] be established only after extensive examination of the circumstances surrounding each of the affected properties" (internal quotations and citation omitted)). We therefore hold the trial court did not abuse its discretion in concluding plaintiffs failed to demonstrate a common predominating issue among the purported class members.

¶ 33 While the trial court identified two additional bases for denying plaintiffs' motion for class certification—inadequacy of plaintiffs as class representatives and that litigation as a class is not a superior method of adjudication—we do not need to reach those bases here. The record evidence firmly supports the trial court's conclusion that plaintiffs failed to establish a common predominating issue among the purported class members. Since the trial court did not abuse its discretion in determining plaintiffs failed to meet this initial requirement to class certification, review of the additional bases is not needed.

¶ 34 A trial court possesses broad discretion in class certification. Honoring that discretion is the "touchstone for appellate review" of class certification orders. *See Frost*, 353 N.C. at 198, 540 S.E.2d at 331. We hold that the trial court did not abuse its discretion in denying plaintiffs' motion for class certification and affirm the trial court's order.

AFFIRMED.

Justice EARLS dissenting.

¶ 35 While a trial court has discretion to determine whether to certify a class, that discretion is not completely unfettered. When the trial court

erroneously requires plaintiffs to prove their case on the merits in the guise of determining a common legal issue, and where the trial court mischaracterizes the nature of the plaintiffs' claims, those legal errors cannot be endorsed in the name of fidelity to the trial court's discretion. *See Beroth Oil Co. v. N.C. DOT*, 367 N.C. 333, 342 (2014) ("In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 [class certification] are met." (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974))); *see also Blitz v. Agean, Inc.*, 197 N.C. App. 296, 312 (2009) (vacating a denial of class certification based on the trial court's "misapprehension of applicable law") (cleaned up).

¶ 36 In 2015, Justice Kennedy echoed words Dostoyevsky wrote over 150 years ago: "The degree of civilization in a society can be judged by entering its prisons." *Davis v. Ayala*, 576 U.S. 257, 290 (2015) (Kennedy, J., concurring) (quoting The Yale Book of Quotations 210 (Fred R. Shapiro ed. 2006)). "There is truth to this in our own time." *Ayala*, 576 U.S. at 290. "Prisoners are shut away— out of sight, out of mind." *Id.* at 288. For many people in prison, this detention includes the use of solitary confinement. Plaintiffs in this case allege that in North Carolina, people in solitary confinement are forced to live for twenty-two to twenty-four hours a day in cells no bigger than a typical parking space, with little to no opportunity for meaningful human contact or environmental stimulation. And it is this policy, as a whole, that Rocky Dewalt, Robert Parham, Anthony McGee, and Shawn Bonnett (plaintiffs) challenge, not only for themselves but for anyone who is or will be subjected to solitary confinement.

¶ 37 Since at least 1890, the United States Supreme Court has noted "serious objections" regarding the use of solitary confinement. *In re Medley*, 134 U.S. 160, 168 (1890). In *In re Medley* the Court noted that the adverse effects of solitary confinement occurred "after even a short confinement." *Id.*; *see Ruiz v. Texas*, 137 S. Ct. 1246 (2017) (mem.) (Breyer, J., dissenting) (citing *In re Medley*, 134 U.S. at 172). More recently Justice Kennedy acknowledged that "[y]ears on end of near total isolation exact a terrible price." *Ayala*, 576 U.S. at 289 (Kennedy, J., concurring). Social isolation and lack of environmental stimulation are the hallmarks of solitary confinement. These practices can exacerbate pre-existing mental illnesses and cause the "appearance of an acute mental illness in individuals who had previously been free of any such illness."[1] *See* Stuart

1. This is especially concerning given people with mental illness are more likely to be subjected to solitary confinement than those without a mental illness.

Grassian, *Psychiatric Effects of Solitary Confinement*, 22 Wash. U. J.L. & Pol'y 325, 333 (2006) (stating common side effects of solitary confinement include anxiety, panic, withdrawal, hallucinations, self-mutilation, and suicidal thoughts and behaviors). Even more significantly, the effects of solitary confinement in many cases can be permanent. In North Carolina the effects of solitary confinement are especially harrowing, with at least one study finding that people who spent any time in solitary confinement in our state prisons "were significantly more likely to die of all causes in the first year after release than those who did not." Statistics also demonstrate that African Americans and other people of color are disproportionately represented among persons subjected to solitary confinement.[2]

¶ 38 North Carolina still allows people to be placed in solitary confinement indefinitely. Plaintiffs challenge this State's solitary confinement policy, arguing that the policy "viewed as a whole, impose[s] cruel or usual punishment forbidden by Article I, Section 27 of the state Constitution." They seek declaratory and injunctive relief limiting the use of solitary confinement, such that it could only be used "as a last resort, and for the shortest time possible." Because thousands of people are subjected to solitary confinement each day under the same statewide policy, there are thousands of potential class members, all of whom face nearly identical conditions. Class members challenge the same statewide practices, rely on the same legal theory, and seek uniform relief through changes to statewide policy. As plaintiffs' brief makes clear "no one is asking for an individually tailored remedy based on unique personal circumstances."

¶ 39 The trial court mischaracterized plaintiffs' argument as "depend[ing] greatly on the individual class member's experiences in the various restrictive housing settings." In affirming the trial court's order, the majority goes to great lengths to find irrelevant differences that do not have any legal significance. Instead of addressing plaintiffs' argument, which

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2. The Vera Institute reported that "while 35 percent of the white incarcerated population had spent at least one night in restrictive housing during the [year prior to the study]," the same was true for 47 percent of African American individuals. Jessa Wilcox, Léon Digard, & Elena Vanko, *Vera Inst. Of Just.*, *The Safe Alternatives to Segregation Initiative: Findings and Recommendations for the North Carolina Department of Public Safety*, 22-23 (Dec. 2016). Further, people identifying as African American were overrepresented in all but one type of restrictive housing. Id. Latino men are also disproportionately impacted by solitary confinement, as they make up 16.9% of the male restrictive housing population across all evaluated jurisdictions, despite being only 15.4% of the total male custodial population. The Corr. Leaders Ass'n & The Arthur Liman Ctr. for Pub. Int. L. at Yale L. Sch. *Time-In-Cell 2019: A Snapshot of Restrictive Housing based on a Nationwide Survey of U.S. Prison Systems*, 26 (Sept. 2020).

requires that this State's solitary confinement policy be "taken as a whole," the majority engages in an analysis of the policy's administrative classifications for solitary confinement, the varied average lengths of time each person is kept in solitary confinement, and the varied reasons a person may be subjected to such confinement, among other things. But none of these factors are relevant to a class certification motion in a case that challenges a statewide policy "as a whole." *See Brown v. Plata*, 563 U.S. 493, 505 n.3 (2011) (addressing a class action challenge to a policy "taken as a whole"); *see also Parsons v. Ryan*, 754 F.3d 657, 678 (9th Cir. 2014) ("That inquiry does not require us to determine the effect of those policies and practices upon any individual class member (or class members) or to undertake any other kind of individualized determination."). Because North Carolina's solitary confinement policy allows for indefinite use of solitary confinement across all classifications, these distinctions cannot, as a matter of law, weigh against plaintiffs. *See Pride v. Correa*, 719 F. 3d 1130, 1137 (9th Cir. 2013) (stating that individual claims for relief "are discrete from the claims for systemic reform addressed in *Plata*.").

¶ 40 It matters not how well supported by the evidence the trial court's factual findings about the various classifications of confinement may be. "What all members of the putative class and subclass have in common is their alleged exposure, as a result of specified statewide . . . policies and practices that govern the overall conditions of . . . confinement, to a substantial risk of serious future harm . . ." *Parsons v. Ryan*, 754 F. 3d. 657, 678 (2014). Thus, the legal significance of this detention policy for plaintiffs' class certification motion is that plaintiffs must show that a large number of individuals are subject to the same treatment, namely, twenty-two to twenty-four hours of isolation inside a cell for an indefinite amount of time; accordingly, as a legal matter, those individuals can request the same type of relief.[3] *See Braggs v. Dunn*, 317 F.R.D. 634, 667 (M.D. Ala. 2016) ("The Supreme Court has approved of system-wide relief in prison cases involving systemwide violation[s] resulting from systemwide deficiencies" (quoting *Plata*, 563 U.S. at 532 (cleaned up))).

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3. The majority's analysis is like saying that in a suit challenging the constitutionality of a reduction in public employees' disability benefits, a class action cannot be maintained because different class members receive differing payments and thus would recover different amounts. It may be true that disability benefits and recovery amounts vary, but that's not the point. In this example, as a class, this group challenges the constitutionality of their reduction in disability benefits, and thus class certification is appropriate for class-wide relief. *See Faulkenbury v. Tchrs' & State Emps' Ret. Sys.*, 345 N.C. 683, 698 (1997) ("The predominate issue is how much the parties' retirement benefits were reduced by an unconstitutional change in the law. This issue defines the class.").

The majority also determined that because there are differences in the frequency of visitation, the nature of recreation, and the quantity and quality of human interaction, the plaintiffs could not establish a predominating issue. Yet plaintiffs' argument is not that there aren't differences among the different housing assignments. Those distinctions are irrelevant. *See Parsons*, 754 F. 3d 657, 678 (9th Cir. 2014). Instead, they argue that the actual conditions of confinement in every instance, whatever the housing arrangements, or visitation options, which dictate that a person will spend twenty-two to twenty-four hours a day in a cell, for an indefinite time, violate Article I, Section 27 of the North Carolina Constitution. *See id.* at 678.

¶ 41 Plaintiffs' argument is similar to the contentions advanced in *Plata v. Brown*. In *Plata* the class was composed of state prisoners who suffered an alleged constitutional violation based on "systemwide deficiencies" in prison "medical and mental health care that, taken as a whole, subject[ed] sick and mentally ill prisoners in California to 'substantial risk of serious harm' and cause[d] the delivery of care in the prisons to fall below the evolving standards of decency that mark the progress of a maturing society." 563 U.S. at 505 n.3 (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)). In *Plata* the Court further stated that because the plaintiffs did "not base their case on deficiencies in care provided on any one occasion, [there was] no occasion to consider . . . particular deficienc[ies] in [the] medical care complained of." *Id.* Similarly, because plaintiffs in this case do not allege a constitutional violation based on particular deficiencies but rather make allegations related to North Carolina's policy "as a whole," the majority's analysis of differences in the ways in which different types of restrictive housing implement the policy is misplaced. Specifically, the majority's recitation of variations in implementation of the policy's administrative classifications for solitary confinement, the varied average length of time a person is kept in solitary confinement, the varied reasons a person may be subjected to such confinement, frequency of visitation, the nature of recreation and the quantity and quality of human interaction is irrelevant to the determination before us now. *See id.*; *see also Parsons*, 754 F. 3d at 678.

¶ 42 Furthermore, the trial court improperly assessed the merits of plaintiffs' claims when it found there was not enough evidence to show the "Department's [solitary confinement] policies and practices *actually caused* the complained of harm[.]" Addressing the merits of the plaintiffs' case not only bypasses the process of discovery and trial but is also legal error. In North Carolina, Rule 23 does not ask whether the plaintiff will prevail on the merits and any inquiry into the merits of a case should

be limited to the issue of class certification. *Beroth Oil*, 367 N.C. at 342, 342 n. 5 At this stage plaintiffs are only required to show that North Carolina's statewide solitary confinement policy and practice exposes class members to a common risk of harm, not whether this exposure occurred or rises to the level of a constitutional violation. *See Beroth Oil*, 367 N.C. 333 at 342. The evidence submitted by the plaintiffs meets this burden because at this stage all they seek to establish is that a group of people within North Carolina prisons may be exposed to a risk of harm because they spend twenty-two to twenty-four hours a day inside a cell.

¶ 43 In making its determination, the trial court considered two of the four reports submitted by the plaintiffs. One report detailed the increased risk during community reentry following the use of solitary confinement. The trial court and majority conclude alike that because the study involved observational data and correlational analysis, it could not "provide concrete support" for plaintiffs' claim that solitary confinement increases the risk of post-release mortality. However, this does not address class certification under Rule 23, *see Beroth Oil*, 367 N.C. at 342 n. 5, and instead the trial court and majority's reasoning addresses the central question in this case, namely whether defendants have in fact imposed a class wide policy that causes a substantial risk of serious harm. Yet at this point in the litigation, there is only one discreet question—whether class certification is met under Rule 23. *See id*.

¶ 44 Regarding the second study, the Vera Report, the majority recounts the trial court's findings stating the report was "insufficient to connect DPS's practices to the alleged risk of harm." In doing so, the majority notes that the Vera Report "commended DPS on its previous reform efforts, suggested that DPS continue implementation of both current and future reform," and noted that DPS's restrictive housing population had decreased by 10% one month after the study concluded." However, this line of reasoning speaks to the merits of the plaintiffs' alleged constitutional violation and is more properly addressed at a later stage in the litigation. *See Beroth Oil*, 367 N.C. at 342 n. 5. Thus, because at this stage plaintiffs only seek to establish a class of persons subjected to solitary confinement for twenty-two to twenty-four hours a day, their burden has been met.

¶ 45 Furthermore, although the majority does not reach this issue, the trial court found that the named representatives would not fairly and adequately represent the interests of all class members because (1) the plaintiffs do not represent the "wide spectrum of inmates potentially encompassed in the class," and (2) "their own actions may compromise the viability of their own claims." This conclusion was based upon the

named plaintiffs being "placed in restrictive housing early in their sentence" and "being repeatedly assigned to restrictive housing or having had their assignment extended" due to "repeated disciplinary infractions." However, the class is not based on the individual actions or circumstances of each plaintiff, instead it is based on a solitary confinement policy that subjects people to twenty-two to twenty-four hours a day in a cell, for an unlimited number of days. Thus, plaintiffs being placed in solitary confinement early in their sentences, or the reason they were placed there or had their time there extended has no legal relevance.

¶ 46 The trial court also found that a class action was not superior to other available methods of adjudication because litigation would "devolve into a series of mini trials" about "each of the challenged restrictive housing assignments" and "the myriad of other relevant considerations and defenses that undoubtedly would not apply uniformly to all potential class members." Here again the trial court mischaracterized plaintiffs' arguments. Because plaintiffs challenge the policy as a whole there is no occasion to consider the individual circumstances of each plaintiff. *See Plata v. Brown*, 563 U.S. 493, 505 n.3 (2011). Instead, what is important is that the class is composed of people who spend twenty-two to twenty-four hours a day in a cell in social isolation.

¶ 47 Lastly, in upholding the trial court's order, the majority repeatedly states that a trial court has broad discretion to decide whether to certify a class. Although it is true that under this Court's precedent in *Crow v. Citicorp Acceptance Co., Inc.*, 319 N.C. 274 (1987), a "trial court has broad discretion," this discretion relates to balancing "[t]he usefulness of the class action device. . . against inefficiency or other drawbacks." *Id.* at 284. Assessing the extent to which evidence proffered on the class certification motion proves that plaintiffs have suffered a violation of their constitutional rights is a legal error and does nothing to contemplate the required balance. Instead, it evidences hostility to their claim on the merits, which is not the appropriate assessment at this point in the litigation. In other words, it is an abuse of discretion for the trial court to deny class certification on the grounds that the plaintiffs should lose on the merits. *See Beroth Oil*, 367 N.C. at 342.

¶ 48 The class here is not based on the individual circumstances of each plaintiff; instead, it is based on a solitary confinement policy that subjects people to twenty-two to twenty-four hours a day in a cell, for an unlimited number of days. Like in *Faulkenbury*, 345 N.C. at 698, plaintiffs all seek the same type of relief, namely an injunction and declaratory judgment that the state constitutional guarantees mean that solitary confinement be used only as a last resort and for the shortest time necessary.

See id. ("Each of the parties had a claim based on what he or she contends is underpayment of retirement benefits. This claim predominates over issues affecting only one individual class member. This establishes a class."). Likewise, class certification is not based on an assessment of the plaintiffs' allegations on the merits. *See Beroth Oil*, 367 N.C. at 342 n. 5. Thus, whether plaintiffs provided correlational or observational evidence cannot be relevant to this inquiry because all that is necessary to establish the grounds for class certification is that there is a group of people alleged to be exposed to the same treatment of little to no social interaction or environmental stimulation for twenty-two to twenty-four hours a day inside a cell.

¶ 49 "[C]onsideration of these issues is needed" and "[t]here are indications of a new and growing awareness . . . of solitary confinement." *Ayala*, 576 U.S. at 289 (Kennedy, J., concurring). Even years ago, it was "evident that some changes must be made in the system." *In re Medley*, 134 U.S. 160, 168 (1890). As a result of the "terrible human toll" resulting from solitary confinement, *Ruiz*, 137 S. Ct. at 1247 (Breyer J. dissenting), it has been suggested that if a case presents an issue of solitary confinement, "the judiciary may be required, within its proper jurisdiction and authority, to determine whether workable alternative systems for long term confinement exist, and, if so, whether a correctional system should be required to adopt them." *Ayala*, 576 U.S. at 290 (Kennedy, J., concurring). Today this Court has the responsibility to apply the criteria for class certification to the claim that is actually being brought by plaintiffs, not to the claim as chopped up and reconstituted by defendants and the majority.

¶ 50 Plaintiffs are asking this Court to recognize that, as a group, they have state constitutional rights that are implicated by North Carolina's solitary confinement practices. Those rights are equally violated by the whole policy, without regard to whether detainees are in RHAP, RHDP, HCON, or some other acronym for the same thing—solitary confinement in a single cell for twenty-two to twenty-four hours a day for an indefinite number of days. The majority essentially holds that because it does not agree with the constitutional claims on the merits, class certification is not appropriate. But our system of laws has long recognized the importance of the class action vehicle for the resolution of disputes in which large numbers of individuals share a common claim and would all benefit from a common resolution.[4]

4. The English bill of peace, which originated in the middle ages to facilitate the adjudication of disputes involving common questions and multiple parties in a single action, was the basis for North Carolina's early class action decisions in the late 1800s.

¶ 51 Because plaintiffs challenge a widespread state policy and seek to establish a class of individuals who are subject to the same policy allowing for twenty-two to twenty-four hours inside a prison cell for an indefinite period, I would hold that the trial court based its ruling on a misapprehension of plaintiffs' claim and a mistake of law. I would reverse the trial court's order denying class certification, and remand the matter for further proceedings applying the correct understanding of class certification in these circumstances. Accordingly, I respectfully dissent.

Justice HUDSON joins in this dissenting opinion.

See Chambers v. Moses H. Cone Mem'l Hosp., 374 N.C. 436, 440 (2020) (citing *Bronson v. Wilmington N.C. Life Ins. Co.*, 85 N.C. 411, 414 (1881) (acknowledging the class action mechanism as a feature of civil procedure)).

IN RE FORECLOSURE OF A LIEN BY EXEC. OFF. PARK OF DURHAM ASS'N AGAINST ROCK

[382 N.C. 360, 2022-NCSC-106]

IN THE MATTER OF THE FORECLOSURE OF A LIEN BY EXECUTIVE OFFICE PARK OF DURHAM ASSOCIATION, INC. AGAINST MARTIN E. ROCK A/K/A MARTIN A. ROCK

No. 240PA21

Filed 4 November 2022

Associations—non-judicial power of sale—North Carolina Condominium Act—plain language of Act and declaration

A condominium formed in 1982, prior to the enactment of the N.C. Condominium Act in 1985, had the power of sale for foreclosure pursuant to section 3-116 of the Act for nonpayment of an assessment that occurred after 1 October 1986 where the plain language of the Act stated that section 3-116 applied "to all condominiums created in this State on or before October 1, 1986, unless the declaration expressly provides to the contrary" and the condominium's declaration did not expressly provide to the contrary. A reference in the declaration to the intent to submit the property to the N.C. Unit Ownership Act, which did not expressly exclude foreclosure by power of sale, simply satisfied a registration requirement and did not bar the use of foreclosure by power of sale.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 277 N.C. App. 444, 2021-NCCOA-211, vacating an order entered on 4 March 2019 by Judge John M. Dunlow in Superior Court, Durham County and remanding for dismissal. Heard in the Supreme Court on 29 August 2022.

Jordan Price Wall Gray Jones & Carlton, PLLC, by J. Matthew Waters and Hope Derby Carmichael, for petitioner-appellant.

Mark Hayes for respondent-appellee.

Sellers, Ayers, Dortch & Lyons, PA, by Cynthia A. Jones, for Community Associations Institute, amicus curiae.

BARRINGER, Justice.

¶ 1 In this matter, we address whether a condominium formed prior to the enactment of the North Carolina Condominium Act in 1985 has the

power of sale for foreclosure pursuant to section 3-116 of that Act for nonpayment of an assessment that occurred after 1 October 1986. For the reasons addressed herein, given the plain language of the statute addressing the applicability of the North Carolina Condominium Act and the plain language of the condominium's declaration, we conclude that petitioner Executive Office Park of Durham Association, Inc. (Executive Office) has the power of sale for foreclosure pursuant to N.C.G.S. § 47C-3-116. Therefore, we reverse the decision of the Court of Appeals, which vacated the trial court's order authorizing sale, and remand to the Court of Appeals to address the argument of respondent Martin Rock (Rock) that the Court of Appeals declined to address.

I. Background

¶ 2 In 1982, Executive Office Park Developers, LP filed a declaration of unit ownership (Declaration) for a condominium development with Executive Office as the governing entity. As relevant to this matter, Executive Office filed a claim of lien on 23 October 2018 against three units owned by Rock, alleging that assessments and other charges from 2018 remained unpaid for more than thirty days. Subsequently, the substitute trustee initiated a power of sale foreclosure. The clerk of superior court entered an order authorizing sale, which Rock appealed. The trial court affirmed the order authorizing sale. Thereafter, Rock appealed to the Court of Appeals.

¶ 3 Before the Court of Appeals, Rock argued that Executive Office lacked the power of sale for foreclosure and that he was not in default. The Court of Appeals concluded that Executive Office lacked the power of sale for foreclosure because it is the governing entity for a condominium formed and governed by a declaration signed in 1982 that was not amended to bring it within the provisions of the North Carolina Condominium Act. *Foreclosure of a Lien by Exec. Off. Park of Durham Ass'n v. Rock*, 277 N.C. App. 444, 2021-NCCOA-211, ¶¶ 19–23. The Court of Appeals also indicated that Executive Office's Declaration did not include the power of non-judicial foreclosure. *Id.* ¶ 21. The Court of Appeals, therefore, vacated the trial court's order affirming the clerk of court's order authorizing sale and remanded for dismissal. *Id.* ¶ 22. The Court of Appeals declined to address Rock's remaining argument that he was not in default. *Id.*

¶ 4 Executive Office petitioned this Court for discretionary review pursuant to N.C.G.S. § 7A-31. This Court allowed the petition for discretionary review.

II. Analysis

¶ 5 On appeal to this Court, Executive Office argues that the Court of Appeals erred because the clear and express language of N.C.G.S. § 47C-1-102(a) provides that "[section] 47C-3-116 (Lien for Assessments) . . . appl[ies] to all condominiums created in this State on or before October 1, 1986, unless the declaration expressly provides to the contrary," N.C.G.S. § 47C-1-102(a) (2021) (emphasis added),[1] and Executive Office's Declaration does not expressly prohibit power of sale foreclosures.

¶ 6 We agree that the Court of Appeals erred. This Court reviews decisions by the Court of Appeals for error of law. N.C. R. App. P. 16(a). Questions of statutory interpretation are questions of law and are reviewed de novo. *In re Summons Issued to Ernst & Young, LLP*, 363 N.C. 612, 616 (2009).

¶ 7 In its entirety, N.C.G.S. § 47C-1-102(a) states:

> This Chapter applies to all condominiums created within this State after October 1, 1986. G.S. 47C-1-105 (Separate Titles and Taxation), 47C-1-106 (Applicability of Local Ordinances, Regulations, and Building Codes), 47C-1-107 (Eminent Domain), 47C-2-103 (Construction and Validity of Declaration and Bylaws), 47C-2-104 (Description of Units), 47C-2-121 (Merger or Consolidation of Condominiums), 47C-3-102(a)(1) through (6) and (11) through (16) (Powers of Unit Owners' Association), 47C-3-103 (Executive board members and officers), 47C-3-107.1 (Procedures for fines and suspension of condominium privileges or services), 47C-3-108 (Meetings), 47C-3-111 (Tort and Contract Liability), 47C-3-112 (Conveyance or Encumbrance of Common Elements), 47C-3-116 (Lien for Assessments), 47C-3-118 (Association Records), 47C-3-121 (American and State flags and political sign displays), and 47C-4-117 (Effect of Violation on Rights of Action; Attorney's Fees) and G.S. 47C-1-103 (Definitions), to the extent

1. In June 2022, the General Assembly amended this subsection. Act of 29 June 2022, S.L. 2022-12, § 3.(a), https://www.ncleg.gov/Sessions/2021/Bills/Senate/PDF/S278v4.pdf. Executive Office has not argued that this amendment applies to this matter.

> necessary in construing any of these sections, apply to all condominiums created in this State on or before October 1, 1986, unless the declaration expressly provides to the contrary. Those sections apply only with respect to events and circumstances occurring after October 1, 1986, and do not invalidate existing provisions of the declarations, bylaws, or plats or plans of those condominiums.

N.C.G.S. § 47C-1-102(a) (emphasis added).

¶ 8 As relevant to this matter, the legislature provided in subsection 47C-3-116(f) that:

> Except as provided in subsection (h) of this section, the association, acting through the executive board, may foreclose a claim of lien in like manner as a mortgage or deed of trust on real estate under power of sale, as provided in Article 2A of Chapter 45 of the General Statutes, if the assessment remains unpaid for 90 days or more.

N.C.G.S. § 47C-3-116(f) (2021).

¶ 9 When construing statutes, courts first look "to the language of the statute itself." *Hieb v. Lowery*, 344 N.C. 403, 409 (1996). "When the language of a statute is clear and without ambiguity," courts must "give effect to the plain meaning of the statute." *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387 (2006). In these circumstances, "judicial construction of legislative intent is not required." *Id.*

¶ 10 Here, the statute is clear: "unless the declaration expressly provides to the contrary," the power of sale permitted by N.C.G.S. § 47C-3-116(f) "appl[ies] to all condominiums created in this State on or before October 1, 1986 . . . with respect to events and circumstances occurring after October 1, 1986." N.C.G.S. § 47C-1-102(a).

¶ 11 Since it is undisputed that the condominium at issue was created in North Carolina before 1 October 1986 and the assessments and non-payment at issue in this case occurred after 1 October 1986, Executive Office possesses the power of sale permitted by N.C.G.S. § 47C-3-116(f) "unless the declaration expressly provides to the contrary." N.C.G.S. § 47C-1-102(a).

¶ 12 In the Declaration, the declarant indicates its desire and intention "to submit" the property "to the provisions of the North Carolina Unit Ownership Act (Chapter 47A, North Carolina General Statutes)."

¶ 13 Then, in paragraph 12 in the subparagraph entitled "Powers," the Declaration states as follows:

> The Association shall have all of the powers and duties set forth in the Unit Ownership Act, except as limited by this Declaration and the Bylaws, and all of the powers and duties reasonably necessary to operate the condominium as set forth in this Declaration and the Bylaws and as they may be amended from time to time.

¶ 14 Subsequently, in paragraph 15 entitled "Assessments," it states:

> Any sum assessed remaining unpaid for more than thirty (30) days shall constitute a lien upon the delinquent unit or units when filed of record in the Office of the Clerk of Superior Court of Durham County in the manner provided for by Article 8 of Chapter 44 of the General Statutes of North Carolina as amended. The lien for unpaid assessments shall also secure reasonable attorney's fees incurred by the Manager or the Board of Directors incident to the collection of such assessment or the enforcement of such lien. In any foreclosure of a lien for assessments, the owner of the unit subject to the lien shall be required to pay a reasonable rental for the unit, and the Manager or Board of Directors shall be entitled to the appointment of a receiver to collect the same.

¶ 15 The foregoing language neither expressly excludes foreclosure by power of sale nor limits Executive Office's foreclosure authority to only judicial foreclosures.[2] Rather, the Declaration expressly allows for foreclosure of a claim of lien but does not elaborate further. In other words, no provision in the Declaration before us is "invalidated" by the

2. In fact, the paragraph on "Assessments" uses the term "*any* foreclosure," and the subparagraph on "Powers" indicates that Executive Office "shall have . . . all of the powers and duties reasonably necessary to operate the condominium."

application of N.C.G.S. § 47C-3-116(f), which permits the power of sale for foreclosure in certain circumstances. *See* N.C.G.S. § 47C-1-102(a) ("Those sections apply only with respect to events and circumstances occurring after October 1, 1986, and do not invalidate existing provisions of the declarations . . . .") (emphasis added)).

¶ 16 Rock argues that the declarant's indication in the Declaration of its desire and intention "to submit" the property "to the provisions of the North Carolina Unit Ownership Act" bars Executive Office's use of non-judicial foreclosure. However, the North Carolina Unit Ownership Act neither expressly excludes foreclosure by power of sale nor limits its foreclosure authority to only judicial foreclosures. *See* N.C.G.S. § 47A-22(b) (2021). Further, the North Carolina Unit Ownership Act in effect when the Declaration was filed required a declaration of intent by the owners to submit their property to the Act to be filed with the register of deeds to create unit ownership. N.C.G.S. § 47A-2 (1981). Thus, this reference to the North Carolina Unit Ownership Act simply satisfies the requirement in N.C.G.S. § 47A-2. Rock's reliance on this reference is therefore misplaced. Thus, we conclude that the Declaration does not *expressly* provide to the contrary.

III. Conclusion

¶ 17 The Court of Appeals erred by failing to reference and apply the plain language of N.C.G.S. § 47C-1-102(a) when addressing respondent Rock's contention that the condominium association Executive Office lacked the power of sale for foreclosure. Having construed the statute according to its plain language and determined that Executive Office's Declaration does not contain a provision "expressly to the contrary" of the power of sale for foreclosure permitted by N.C.G.S. § 47C-3-116(f), we reverse the Court of Appeals' decision. We further remand this case to the Court of Appeals to address Rock's remaining argument that he was not in default that the Court of Appeals did not reach and is not before this Court.

REVERSED AND REMANDED.

FARMER v. TROY UNIV.

[382 N.C. 366, 2022-NCSC-107]

SHARELL FARMER
v.
TROY UNIVERSITY, PAMELA GAINEY, AND KAREN TILLERY

No. 457PA19-2

Filed 4 November 2022

Constitutional Law—interstate sovereign immunity—waiver—sue and be sued clause—out-of-state public university—local office registered as foreign nonprofit

An Alabama public university that operated a recruiting office in North Carolina (to enroll students from this state in online courses) explicitly waived its sovereign immunity from being sued in North Carolina by a former employee raising intentional tort claims when it registered its local office as a foreign nonprofit corporation—which rendered it subject to the sue and be sued clause of the North Carolina Nonprofit Corporation Act (N.C.G.S. § 55A-3-02(a)(1))—and when it obtained a certificate of authority to conduct business in this state—which signaled its consent to be treated like a domestic corporation of like character and to be sued in North Carolina.

Justice BERGER concurring.

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, 276 N.C. App. 53, 2021-NCCOA-36 affirming an order entered on 1 July 2019 by Judge Andrew T. Heath in Superior Court, Cumberland County. Heard in the Supreme Court on 30 August 2022.

Kennedy, Kennedy, Kennedy, and Kennedy, LLP, by Harvey L. Kennedy and Harold L. Kennedy III, for plaintiff-appellant.

Ford & Harrison, LLP, by Benjamin P. Fryer, for defendant-appellees.

EARLS, Justice.

¶ 1 Troy University is an accredited, four-year state university with multiple physical campuses in Alabama that opened an office in Fayetteville, North Carolina, specifically to recruit military students for its on-line programs. When a former North Carolina employee filed suit against Troy University alleging various state tort claims arising out of his employment in Fayetteville and his termination, the University asserted that sovereign immunity barred his claims. Reading two 2019 United States Supreme Court decisions together and consistent with earlier analogous precedent, we conclude that Troy University's actions in registering as a non-profit corporation in North Carolina and engaging in business here subject to the sue and be sued clause of the North Carolina Nonprofit Corporation Act, N.C.G.S. §55A-3-02(a)(1) (2021), constituted an explicit waiver of its sovereign immunity. *See Franchise Tax Bd. of California v. Hyatt*, 139 S. Ct. 1485 (2019); *Thacker v. Tenn. Valley Auth.*, 139 S. Ct 1435 (2019); *see also Georgia v. City of Chattanooga*, 264 U.S. 472 (1924).

I. Background

¶ 2 Troy University, a state institution, has its primary campus in Troy, Alabama. Although Troy University does not have a campus in North Carolina, it registered with the North Carolina Secretary of State as a nonprofit corporation on 25 September 2006 and leased an office building in Fayetteville, North Carolina, near Fort Bragg, where it conducted its business. Mr. Farmer was hired by Troy University in May 2014 as a recruiter and worked there until 9 September 2015. As part of his employment, Mr. Farmer recruited military personnel from Fort Bragg to take on-line educational courses that originated from Troy University's main campus in Troy, Alabama. Throughout his employment, he was the top recruiter in the southeastern region of the United States.

¶ 3 Mr. Farmer claims that while employed at Troy University, he was subjected to frequent and ongoing sexual harassment by Pamela Gainey and Karen Tillery, both of whom also worked at the Troy University office in Fayetteville, North Carolina. This harassment included unwanted touching, and making false statements to third parties about Mr. Farmer's sexual relationships with married women and female students. Mr. Farmer further alleges he witnessed students being subjected to sexual harassment, such as one student who was "challenged" by Mses. Gainey and Tillery "to pull his pants down and show them his penis" and another male student whom they called a "faggot."

¶ 4 Around May 2015, Mr. Farmer filed a complaint with both Troy University's Human Resources Department and Troy University's District Director about the sexual harassment he and other males had

experienced. Although Mr. Farmer had given Troy University the names of several witnesses, Troy University did not interview any witnesses before deciding that Mr. Farmer's complaint lacked merit.

¶ 5 Mr. Farmer further alleges that, following his May 2015 complaint, Ms. Gainey retaliated against him by increasing his work hours and making his working conditions unreasonably onerous. On 9 September 2015, Mr. Farmer was terminated from his job at Troy University. He was escorted from the building by two police officers, one with a hand on their gun, and the other with a hand on Mr. Farmer's shoulder pushing him forward. He was also threatened with arrest if he ever set foot on the property again. As a result of this treatment, and his termination from Troy University, Mr. Farmer became homeless, could not obtain another job, and suffered serious mental health consequences.

¶ 6 On 24 July 2018, Mr. Farmer filed this suit against Troy University and the individual defendants, Ms. Gainey, and Ms. Tillery. Mr. Farmer asserted claims against Troy University for (1) wrongful discharge from employment in violation of public policy, and (2) negligent retention or supervision of an employee, or both. He also asserted claims against all defendants for intentional infliction of mental and emotional distress and tortious interference with contractual rights. In the alternative, Mr. Farmer also advanced a claim against all defendants alleging a violation of his rights under the North Carolina Constitution, in the event that the trial court found his other claims were barred by sovereign immunity.

¶ 7 On 3 October 2018, all defendants (Troy University, Ms. Gainey, and Ms. Tillery) filed a motion to dismiss pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted, which the trial court denied. On 6 December 2018, all defendants filed an answer to Mr. Farmer's complaint, generally denying the claims and asserting numerous defenses, including sovereign immunity. On 13 May 2019, the Supreme Court of the United States issued its opinion in *Franchise Tax Board of California v. Hyatt* (*Hyatt III*), a five-to-four decision, and held that "States retain their sovereign immunity from private suits brought in the courts of other States." *Hyatt III*, 139 S. Ct. 1485, 1492 (2019). Before *Hyatt III*, the rule was that States were allowed, but not constitutionally required, to extend sovereign immunity to sister States as a matter of comity. *See Nevada v. Hall*, 440 U.S. 410, 425 (1979). Under that rule, Alabama could be sued in North Carolina by a private party if North Carolina chose not to acknowledge Alabama's sovereign immunity. *See id.* at 426–27; *see, e.g.*, *Atl. Coast Conference v. Univ. of Md.*, 230 N.C. App. 429, 440 (2013) (declining to extend sovereign immunity as a matter of comity in a contract action, stating "it does not

follow that because we decided to extend comity to the University of Virginia in *Cox* we must, ipso facto, extend sovereign immunity to all the educational institutions of our sister states irrespective of the attendant circumstances.") (citing *Cox v. Roach*, 218 N.C. App. 311, 318 (2012)). *Hyatt III* established that in general, states are required to recognize the sovereign immunity of other states as a matter of Federal Constitutional law.

¶ 8 Two days after the decision in *Hyatt III*, Troy University filed another motion to dismiss on 15 May 2019 based on sovereign immunity, pursuant to Rules 12(b)(2) and 12(b)(6) of the North Carolina Rules of Civil Procedure, while individual defendants Gainey and Tillery simultaneously sought dismissal of all claims against them based on mootness in light of a stipulation filed on 25 April 2019 in which Mr. Farmer agreed not to seek damages against the individual defendants. On 24 May 2019, defendants filed an amended motion to dismiss, or in the alternative, for judgment on the pleadings on the same grounds. On 3 June 2019, Mr. Farmer filed his response. On 1 July 2019, the trial court entered an order granting the motion to dismiss as to all defendants, citing *Hyatt III*. Mr. Farmer appealed, but the Court of Appeals rejected Mr. Farmer's arguments and affirmed the trial court's order. *Farmer v. Troy Univ.*, 276 N.C. App. 53, 2021-NCCOA-36, ¶ 52. Mr. Farmer filed a petition for discretionary review pursuant to N.C.G.S. §7A-31 and this Court granted review.

II. Sovereign Immunity

¶ 9 This Court reviews de novo a motion to dismiss made under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. *E.g.*, *Krawiec v. Manly*, 370 N.C. 602, 606 (2018) (stating standard of review for a 12(b)(6) motion). "[Q]uestions of law regarding the applicability of sovereign or governmental immunity" are also reviewed de novo. *Est. of Long by and through Long v. Fowler*, 378 N.C. 138, 2021-NCSC-81, ¶ 12 (quoting *Wray v. City of Greensboro*, 370 N.C. 41, 47 (2017)). Furthermore, sovereign immunity may be a defense under Rule 12(b)(2) of the North Carolina Rules of Civil Procedure.[1] In this case, as noted above, the motion and the trial court's order were made pursuant to both Rule 12(b)(2)

1. "As was the case in *Teachy v. Coble Dairies, Inc.* we need not decide whether a motion to dismiss on the basis of sovereign immunity is properly designated as a Rule 12(b)(1) motion or a 12(b)(2) motion." *Est. of Long*, ¶ 12 n.1; *see Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 328 (1982) (explaining this designation is crucial in North Carolina because denial of a Rule 12(b)(2) motion is immediately appealable by statute but the denial of a 12(b)(1) motion is not.) In this case, the motion to dismiss was granted and neither Mr. Farmer's appeal to the Court of Appeals nor this Court was an interlocutory appeal. *Est. of Long*, ¶ 12 n.1.

and Rule 12(b)(6); however the questions of whether there is personal jurisdiction over defendants and whether plaintiff has stated a claim for relief in this particular case both turn on the sole issue of sovereign immunity, and the standard of review is the same for both.[2]

¶ 10 The initial issue in this appeal is whether Mr. Farmer's state tort claims against defendants are barred in North Carolina under the doctrine of sovereign immunity by virtue of Troy University's status in Alabama as a public university. The Court of Appeals concluded that under *Hyatt III*, no suit may be maintained because "States retain their sovereign immunity from private suits brought in the courts of other States." *Farmer*, ¶ 14 (quoting *Hyatt III*, 139 S. Ct. at 1492).

¶ 11 The doctrine of sovereign immunity, establishing that a sovereign cannot be sued without its consent, *see Alden v. Maine*, 527 U.S. 706, 715–16 (1999), was widely accepted in the states at the time the Constitution was drafted. *Hyatt III*, 139 S. Ct. at 1493–1495. As Alexander Hamilton explained in The Federalist No. 81, "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. . . and the exemption is. . . now enjoyed by the government of every State in the Union." The Federalist No. 81, at 487 (Alexander Hamilton) (J. & A. McLean ed., 1788).

¶ 12 Sovereign immunity is enshrined in Alabama's Constitution, which declares that "the State of Alabama shall never be made a defendant in any court of law or equity." *Ex parte Davis*, 930 So.2d 497, 500 (Ala. 2005) (quoting Ala. Const. art I, § 14). "This immunity extends to [the State of Alabama's] institutions of higher learning." *Ala. State Univ. v. Danley*, 212 So.3d 112, 122 (Ala. 2016) (quoting *Taylor v. Troy State University*, 437 So.2d 472, 474 (Ala.1983)). Moreover, Alabama "State officers and employees, in their official capacities and individually, [also are] absolutely immune from suit when the action is, in effect, one against the State." *Id.* (quoting *Philips v. Thomas*, 555 So.2d 81, 83 (Ala.1989)). This principle is familiar to North Carolina where our state institutions of higher learning are also deemed to be arms of the State protected by sovereign immunity except in certain circumstances. *See Corum v. Univ. of N.C.*, 330 N.C. 761, 786 (1992) (finding that although the University of North Carolina could typically claim sovereign immunity, the plaintiff had a direct cause of action under the state constitution); *Smith*

2. The trial court's order does not distinguish any separate ground for dismissal of the individual defendants. Mr. Farmer's appeal only raises the question of whether suit in North Carolina against Troy University is barred by sovereign immunity. Therefore, we have no occasion here to consider the extent to which another state's sovereign immunity bars individual defendants' liability for their intentional torts in North Carolina.

v. State, 289 N.C. 303, 320 (1976) (holding that the State of North Carolina, including its agencies, consents to be sued for damages for breach of contract whenever it enters into a valid contract).

¶ 13 Before 2019, controlling United States Supreme Court precedent in *Nevada v. Hall* provided that States maintained their sovereign immunity from suit in other state courts as a matter of comity. 440 U.S. 410, 425 (1979). But in 2019, the United States Supreme Court explicitly overturned its holding in *Hall*. *See Hyatt III*, 139 S. Ct. at 1490, 1492 (concluding that *Nevada v. Hall* is "contrary to our constitutional design"). In *Hyatt III*, the Court determined that States retained their sovereign immunity from private suits brought in the courts of other states regardless of comity. *Id.* at 1492. Put another way, the *Hyatt III* decision holds that the United States Constitution does not simply permit a State to grant its sister States immunity from suit but requires it. *See id.* at 1499 (Breyer, J., dissenting). Under *Hyatt III* and the United States Constitution, as a general matter, Troy University is entitled to sovereign immunity from suit without its consent in the state courts of every state in the country. *See Hyatt III*, 139 S. Ct. at 1490 (majority opinion).

III. Waiver of Sovereign Immunity

¶ 14 Next, this Court must determine whether Troy University has explicitly waived its sovereign immunity from suit in North Carolina. As the Court of Appeals noted, any waiver of sovereign immunity must be explicit. *See Sossamon v. Texas*, 563 U.S. 277, 284 (2011); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999). Nonetheless, United States Supreme Court precedent does not support the Court of Appeals' conclusion that a sue and be sued clause cannot constitute an explicit waiver of sovereign immunity. Specifically, we find that when Troy University registered as a nonprofit corporation here and engaged in business in North Carolina, it accepted the sue and be sued clause in the North Carolina Nonprofit Corporation Act and thereby explicitly waived its sovereign immunity from suit in this state.

¶ 15 The North Carolina Nonprofit Corporation Act covers all nonprofit corporations in North Carolina. This act contains a sue and be sued clause. Specifically, the Act provides:

> (a) Unless its articles of incorporation or this Chapter provides otherwise, every corporation has perpetual duration and succession in its corporate name and has the same powers as an individual to do all things necessary or convenient to carry out its affairs, including without limitation, power:

> (1) *To sue and be sued*, complain and defend in its corporate name. . . .

N.C.G.S. § 55A-3-02(a)(1) (emphasis added). It is crucial to our analysis that *Hyatt III* did not involve a sue and be sued clause. *See generally Hyatt III*, 139 S. Ct. 1485. Instead, *Hyatt III* involved an individual who misrepresented his residency as Nevada to avoid paying California more than ten million dollars in taxes. *Id.* at 1490–91. Suspecting Mr. Hyatt's move to Nevada was a sham, the Franchise Tax Board of California conducted an audit, which involved sharing personal information with business contacts and interviews with Hyatt's estranged family members. *Id.* Mr. Hyatt subsequently sued the Franchise Tax Board of California in Nevada state court for torts he alleged were committed during the audit. *Id.* at 1491. On these facts, the Court overruled *Nevada v. Hall*, 440 U.S. 410 (1979), and held that "States retain their sovereign immunity from private suits brought in the courts of other States." 139 S. Ct. at 1492.

¶ 16 In contrast, in *Thacker v. Tennessee Valley Authority*, 139 S. Ct. 1435 (2019), the Supreme Court addressed a sue and be sued clause and its effect on sovereign immunity. In *Thacker* the sue and be sued clause at issue was embedded in the Tennessee Valley Authority Act of 1933, which states that, "the Tennessee Valley Authority . . . [m]ay sue or be sued in its corporate name." 139 S. Ct. at 1438. There the Court determined the sue and be sued clause "serv[ed] to waive sovereign immunity otherwise belonging to an agency of the Federal Government." *Id.* at 1440 (citing *Loeffler v. Frank*, 486 U.S. 549, 554 (1988)). The Court further explained that "[s]ue and-be-sued-clauses . . . 'should be liberally construed' " and opined that those words " 'in their usual and ordinary sense'. . . 'embrace all civil process incident to the commencement or continuance of legal proceedings.' " *Id.* at 1441 (citing *Fed. Hous. Admin. v. Burr*, 309 U.S. 242, 245–246 (1940)). But a sue and be sued clause is not without limits, and the Court explained that although a sue and be sued clause allows suits to proceed against a public corporation's commercial activity, just as these actions would proceed against a private company, suits challenging an entity's governmental activity may be limited. *Id.* at 1443. In cases involving governmental activities in which a sue and be sued clause is present, immunity will only apply "if it is clearly shown that prohibiting the type of suit at issue is necessary to avoid grave interference with a governmental function's performance." *Id.* (cleaned up). Thus, while *Hyatt III*, 139 S. Ct. at 1492, requires a State to acknowledge a sister State's sovereign immunity, *Thacker* recognizes that a sue and be sued clause can act as a waiver of sovereign immunity when a state entity's nongovernmental activity is being challenged. 139 S. Ct. at 1443.

¶ 17 The parties in this case disagree about how to characterize Troy University's activities. While Troy University asserts its purpose in North Carolina was to continue the governmental function of higher education, Mr. Farmer argues Troy University's activities were commercial in nature because they involved marketing and selling on-line educational programs.[3] While providing students with an education may be a governmental activity for the Alabama Government in Alabama, here Troy University was engaged in the business of recruiting students for on-line education— recruitment that occurred in North Carolina for students who remained in North Carolina. The complaint clearly alleges that while in North Carolina, Troy University engaged in marketing and recruitment. Mr. Farmer's job was to help Troy University carry out its commercial activities by recruiting military personnel in North Carolina to enroll in and pay for educational courses. Because Troy University engaged in commercial rather than governmental activity, the sue and be sued clause is to be liberally construed. *See Thacker*, 139 S. Ct. at 1441.

¶ 18 In doing so, this Court concludes that when Troy University chose to do business in North Carolina, while knowing it was subject to the North Carolina Nonprofit Corporation Act and able to take advantage of the Act's sue and be sued clause, *see* N.C.G.S. § 55A-3-02, it explicitly waived its sovereign immunity. *Sossamon*, 563 U.S. at 284 (a waiver of sovereign immunity cannot be "implied" and must be "unequivocally expressed").

¶ 19 Troy University argues that under this Court's precedent in *Guthrie v. North Carolina State Ports Authority*, 307 N.C. 522 (1983), a sue and be sued clause "is not always construed as an express waiver of sovereign immunity and is not dispositive of the immunity defense when suit is brought against an agency of the State." *Id.* at 538. But this Court's holding in *Guthrie* is not inconsistent with our ruling today. Simply because something is not "always . . . an express waiver of sovereign immunity" *id.*, does not mean it can never be a waiver of the same. Furthermore, *Guthrie* is distinguishable from the case at bar because *Guthrie* involved the application of the North Carolina Tort Claims Act to a North Carolina agency, the North Carolina State Ports Authority,

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3. It is difficult to posit how, absent a cooperation agreement, memorandum of understanding, or joint venture with a North Carolina State agency, another State legitimately could engage in governmental functions within North Carolina. Likewise, if the conduct at issue is not in some fashion controlled by the citizens of North Carolina, the entity cannot rightly be engaged in a governmental activity because in this State, "all government of right originates from the people." N.C. Const. art. I, § 2. Nevertheless, we do not need to resolve this issue because, for purposes of the motion to dismiss, Troy University's activities are alleged to be business activities.

while the present case involves a sister state's entity registered as a nonprofit corporation in North Carolina to conduct business. *See id.* at 524.

¶ 20 We also find additional support for Troy University's waiver of sovereign immunity in chapter 55A, article 15 of the North Carolina Nonprofit Corporation Act. Under this portion of the Act any foreign corporation operating in North Carolina must obtain a certificate of authority. N.C.G.S. § 55A-15-01 (2021). "A certificate of authority authorizes the foreign corporation to which it is issued to conduct affairs in [North Carolina] . . . " *Id.* § 55A-15-05(a) (2021). Foreign corporations operating in North Carolina with a valid certificate of authority have "the same but no greater rights and [have] the same but no greater privileges as, and [are] subject to the same duties, restrictions, penalties, and liabilities now or later imposed on, a domestic corporation of like character." *Id.* § 55A-15-05(b) (2021). Taking this provision together with the United States Supreme Court's holding in *Georgia v. City of Chattanooga*, we find that when Troy University obtained a certificate of authority to operate in North Carolina, it waived any sovereign immunity it had and agreed to be treated like "a domestic corporation of like character."[4] *Id.*; *see Georgia v. City of Chattanooga*, 264 U.S. 472 (1924).

¶ 21 In *City of Chattanooga*, the State of Georgia undertook construction of a railroad which ran from Atlanta to Chattanooga, Tennessee. 264 U.S. at 478. In furtherance of the project, Georgia purchased approximately eleven acres, which at the time were located in the outskirts of Chattanooga, to use as a railroad yard. *Id.* As the city grew, there was a demand for extending one of the principal city streets through Georgia's railroad yard. *Id.* at 479. The City began legal proceedings to condemn the land and named the State of Georgia as a defendant. Georgia contended that it had never consented to be sued in Tennessee courts and that sovereign immunity applied. *Id.* The Court determined that by "acquir[ing] land in another State for the purpose of using it in a private capacity, Georgia [could] claim no sovereign immunity." *Id.* at 479–480. Specifically, when Tennessee granted Georgia permission to acquire and use the land, and Georgia accepted the terms of the agreement, the State of Georgia consented to be made a party to condemnation proceedings. *Id.* at 480.

¶ 22 The same is true in this case. By requesting and receiving a certificate of authority to do business in North Carolina, renting a building

4. Here a "domestic corporation of like character" is a private university established through the Secretary of State's office, as a nonprofit corporation, which does not enjoy sovereign immunity. State universities are incorporated by state statute. *See, e.g.*, N.C.G.S. § 116-3 (2021).

here, and hiring local staff, Troy University, as an arm of the State of Alabama, consented to be treated like "a domestic corporation of like character," and to be sued in North Carolina. *Id.* § 55A-3-02(a)(1). N.C.G.S. § 55A-15-05.

¶ 23 The Court of Appeals also relied on this Court's precedent in *Evans ex. rel. Horton v. Housing Authority of Raleigh*, 359 N.C. 50 (2004), to support its conclusion that governmental immunity bars Mr. Farmer's suit against Troy University, however, that case does not apply here because it involved a different immunity question. In *Evans* this Court examined whether a municipal corporation could be sued in state court and explained that "[t]he State's sovereign immunity applies to both its governmental and proprietary functions, while the more limited governmental immunity covers only the acts of a municipality or a municipal corporation committed pursuant to its governmental functions." 359 N.C. at 53 (citing *Guthrie*, 307 N.C. at 533). But here the question is to what degree does sovereign immunity apply to another State engaged in business in North Carolina. This case involves actions by a State other than North Carolina, while *Evans* involved the actions of a North Carolina municipal entity, the Housing Authority of the City of Raleigh. 359 N.C. at 51 (addressing the Housing Authority's failure to repair a property). Therefore, *Evans* does not apply and does not foreclose the conclusion we reach here, namely, that Troy University has explicitly waived sovereign immunity by engaging in business as a nonprofit corporation registered to do business in this state.

¶ 24 Lastly, Mr. Farmer argued in the alternative that, when no other remedy exists, under the Tenth Amendment to the United States Constitution and article I, section 2 of the North Carolina Constitution, the State has the sovereign right to protect its citizens from sexual harassment and the other torts alleged in his complaint. Because we hold that Troy University waived its sovereign immunity and Mr. Farmer can pursue his claims against defendants, there is no need for this Court to address plaintiff's asserted violation under the North Carolina Constitution.

IV. Conclusion

¶ 25 While the United States Constitution requires States to afford one another sovereign immunity from private suits brought in other states, this privilege can be explicitly waived through a sue and be sued clause. *See Hyatt III*, 139 S. Ct. at 1492 (2019); *Thacker*, 139 S. Ct. at 1440 (2019). When Troy University entered North Carolina and conducted business in North Carolina, while knowing it was subject to the North Carolina Nonprofit Corporation Act and its sue and be sued clause, it explicitly

waived its sovereign immunity. *See* N.C.G.S. § 55A-3-02. Additionally, by requesting and receiving a certificate of authority to do business in North Carolina, Troy University consented to be treated like "a domestic corporation of like character" and therefore to be sued in North Carolina. *Id.* § 55A-15-05; *see City of Chattanooga*, 264 U.S. at 480. Accordingly, concluding that the doctrine of sovereign immunity does not bar Mr. Farmer's suit against these defendants, we reverse the Court of Appeals decision and remand this case to that court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Justice BERGER concurring.

¶ 26 The founding fathers understood that state sovereign immunity was not absolute. In Federalist 81, Alexander Hamilton stated that "[i]t is inherent in the nature of sovereignty, not to be amendable to the suit of an individual *without its consent*." The Federalist No. 81 at 422 (Alexander Hamilton) (Gideon ed. 2001). The distinction between a governmental function and a commercial function plays an important role in clarifying the extent of Troy University's consent to be sued in North Carolina. I concur in the result reached by the majority but write separately because I would have decided the case with greater emphasis on the proprietary actions by Troy University. *See Georgia v. City of Chattanooga*, 264 U.S. 472, 44 S. Ct. 369, 68 L. Ed. 796 (1924), and *Thacker v. Tennessee Valley Authority*, 139 S. Ct. 1435, 203 L. Ed. 2d 668 (2019).

¶ 27 At the founding, "both Federalists and Antifederalists saw the lack of state suability in the courts of sister states as the beginning point of their arguments," thus it was assumed that a state could not be haled into the court of another state without consent. Ann Woolhandler, *Interstate Sovereign Immunity*, 2006 Sup. Ct. Rev. 249, 259; s*ee also Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1494, 203 L. Ed. 2d 768, 776 (2019). The adoption of the Eleventh Amendment displayed that the "the Constitution was understood, in light of its history and structure, to preserve the States' traditional immunity from private suits." *Hyatt*, 139 S. Ct. at 1496, 203 L. Ed. 2d at 778 (quoting *Alden v. Maine*, 527 U.S. 706, 724, 119 S. Ct. 2240, 2252, 144 L. Ed. 2d 636 (1999)). However, state sovereign immunity may be waived by consent. *Principality of Monaco v. Mississippi*, 292 U.S. 313, 321, 54 S. Ct. 745, 747 (1934).

¶ 28 The U.S. Supreme Court held in *Hyatt* that "States retain their sovereign immunity from private suits brought in the courts of other States." 139 S. Ct. at 1492, 203 L. Ed. 2d at 774. Further, the Court concluded that

"the Constitution assumes that the States retain their sovereign immunity except as otherwise provided[;] it also fundamentally adjusts the States' relationship with each other and curtails their ability, as sovereigns, to decline to recognize each other's immunity." *Id.* at 1493, 203 L. Ed. 2d at 775. In short, a nonconsenting state cannot be sued by a private party in the courts of a different state. *See id.* at 1490, 203 L. Ed. 2d at 772. Thus, for a suit against a state to be maintained in the forum of a sister state, there must be consent to be sued.

¶ 29 In *Thacker*, the United States Supreme Court addressed how far a waiver of sovereign immunity extends when that waiver is premised upon consent via a sue-and-be-sued clause in a statute. 139 S. Ct. at 1438–39, 203 L. Ed. 2d at 672–73. *Thacker* involved the Tennessee Valley Authority (TVA). *Id.* at 1438–39, 203 L. Ed. 2d at 672–73. When Congress created the TVA by federal statute, it "decided . . . that the TVA could 'sue and be sued in its corporate name.' " *Id.* at 1439, 203 L. Ed. 2d at 673 (citing 16 U.S.C. § 831c(b)). To determine the extent of the sovereign immunity waiver, the Court looked to the distinctions between commercial and governmental functions, reasoning that "a suit challenging a commercial act will not 'gravel[y]'—or, indeed, at all—interfere with the 'governmental functions.' " *Id.* at 1442–44, 203 L. Ed. 2d at 677 (quoting *Federal Housing Administration v. Burr*, 309 U.S. 242, 245, 60 S. Ct. 488, 84 L. Ed. 724 (1940)).

¶ 30 The Court concluded that "suits based on a public corporation's *commercial* activity may proceed as they would against a private company; only suits challenging the entity's governmental activity may run into an implied limit on its sue-and-be-sued clause." *Id.* at 1443, 203 L. Ed. 2d at 677. In short, the Court decided that the statute subjected the TVA to suit challenging its commercial activities, putting the TVA "in the same position as a private corporation." *Id.* at 1439, 203 L. Ed. 2d at 672–73. The Court did not decide whether the TVA might still have immunity from suits involving its engagement in governmental activities. *Id.* at 1439, 203 L. Ed. 2d at 673. Thus, the role of commercial versus governmental functions defines the scope of the waiver of sovereign immunity.

¶ 31 Similarly, *Georgia v. City of Chattanooga* describes the State of Georgia's engagement in commercial functions, and as such, *City of Chattanooga* is helpful in analyzing the case before us. In that case, the State of Georgia was engaged in proprietary activities related to construction of a railroad. 264 U.S. at 478, 44 S. Ct. at 369. In doing so, Georgia acquired land in the outskirts of the City of Chattanooga to locate a railroad yard. *Id.* at 478, 44 S. Ct. at 369. Tennessee sought to use its

eminent domain power to condemn the land, and Georgia asserted that Tennessee could not interfere with its possession in the land because "Georgia ha[d] never consented to be sued in the courts of Tennessee." *Id.* at 479, 44 S. Ct. at 370.

¶ 32 The U.S. Supreme Court determined that "[t]he sovereignty of Georgia was not extended into Tennessee. Its enterprise in Tennessee is a *private undertaking*. It occupies the same position there as does a *private corporation* authorized to own and operate a railroad, and, as to that property, it cannot claim sovereign privilege or immunity." *Id.* at 481, 44 S. Ct. 369, 370 (emphases added). The Court stated that "[h]aving acquired land in another state *for the purpose of using it in a private capacity*, Georgia can claim no sovereign immunity or privilege in respect of its expropriation." *Id.* at 479–80, 44 S. Ct. at 370 (emphasis added).

¶ 33 The Court also concluded that "[t]he terms on which Tennessee gave Georgia permission to acquire and use the land and Georgia's acceptance amounted to consent that Georgia may be made a party to condemnation proceedings." *Id.* at 480, 44 S. Ct. at 370. A Tennessee state statute provided that the State of Georgia would receive all the same "rights, privileges and immunities with the same restrictions" which are given to the Nashville & Chattanooga Company. *Id.* at 481, 44 S. Ct. at 370. In addition, a decision of the Court of Chancery Appeals of Tennessee determined that included "among the rights and restrictions [is] the right to sue and be sued," and state sovereignty was not offended because the relief only applied to Georgia's "contracts as to the operation of the union depot situated in the city of Chattanooga." *Id.* at 482, 44 S. Ct. at 371 (quoting *E. Tenn., Va. & Ga. Ry. v. Nashville, Chattanooga & St. Louis Ry.*, 51 S.W. 202 (Tenn. Ct. Ch. App. 1897)). The U.S Supreme Court found that the decision of the Tennessee appeals court bolstered the claim that Georgia consented to sue and be sued in Tennessee with respect to its railroad property. *Id.* at 482, 44 S. Ct. at 371.

¶ 34 The Court focused on the "private" and "proprietary" rights of Georgia when it entered Tennessee to do business and rejected Georgia's contention that it was entitled to sovereign immunity in its commercial activities. *Id.* at 480–81, 44 S. Ct. at 370.

¶ 35 Both *Thacker* and *City of Chattanooga* support the conclusion that when a state engages in a proprietary function in another state and consents by agreement to the sister state's terms of doing business, it consents to suit and waives its sovereign immunity for those commercial activities. It follows that a state which engages in private enterprise activity and consents to the sister state's terms of doing business, should

be treated like a similarly situated private corporation for its commercial activities while retaining immunity for its governmental functions.

¶ 36 Here, Alabama did not and has not waived all sovereign immunity in North Carolina. But as to its business activities in North Carolina related to the operation of Troy University for marketing and recruiting, Alabama has waived sovereign immunity.

¶ 37 Troy University sought and obtained a certificate of authority under the North Carolina Nonprofit Corporation Act, rented a building, and hired staff in order to conduct business in North Carolina. Troy University subsequently engaged in marketing and recruiting activities in North Carolina to encourage potential students to pay fees and attend online courses. Troy University chose to engage in a "private undertaking" in a sister state.

¶ 38 To operate in the State of North Carolina, Troy University had to apply for and be granted a certificate of authority to conduct its business activities. The North Carolina Nonprofit Corporation Act provides that a foreign corporation operating with a valid certificate of authority to conduct affairs in North Carolina "has the same but no greater rights and the same but no greater privileges as, and is subject to the same duties, restrictions, penalties, and liabilities now or later imposed on, a domestic corporation of like character." N.C.G.S. § 55A-15-05(b) (2021). Similar in effect to the statute in *City of Chattanooga*, this statute declares that Troy University, as a foreign, nonprofit corporation within North Carolina, will receive the same rights, privileges, duties, restrictions, penalties, and liabilities as a similarly situated private corporation. Among the general powers afforded to nonprofit corporations within North Carolina is the power "[t]o sue and be sued." N.C.G.S. § 55A-3-02(a).

¶ 39 Having affirmatively acted to obtain the benefit of conducting business in North Carolina, and operating pursuant to the North Carolina Nonprofit Corporation Act, Troy University has consented to suit in this state for its commercial activities. Alabama has thus waived sovereign immunity related to the commercial activities of Troy University.

Justice BARRINGER dissenting.

¶ 40 At issue in this case is whether a private party can sue a public university of the State of Alabama in the courts of this State without Alabama's consent. The pivotal question before us is what does our Federal Constitution say about the sovereign immunity of a state when

sued in a sister state. The United States Supreme Court has spoken. Nonetheless, this Court misunderstands the extent of the holding in *Franchise Tax Board of California v. Hyatt* (*Hyatt III*), 139 S. Ct. 1485 (2019), thus rendering a misguided departure from the United States Constitution, as well as our own precedent. Alabama's constitution explicitly states that Alabama cannot be sued. Ala. Const. art. I, § 14. And further, Alabama has not consented to be haled into court in this State. I respectfully dissent.

I. Background

¶ 41 Troy University is a public university in the State of Alabama with its main campus located in Troy, Alabama. Troy University is organized and exists under the laws of the State of Alabama. Ala. Code § 16-56-1 (2022). Plaintiff was employed by Troy University, although his office was in Cumberland County, North Carolina. Troy University hired plaintiff to travel "throughout the southeastern United States to recruit students."

¶ 42 Plaintiff was allegedly harassed by other employees of Troy University at its Cumberland County office. After plaintiff reported the harassment "to the appropriate officials at Troy University," he was allegedly suspended and then fired in retaliation. Plaintiff sued Troy University solely seeking monetary damages in Superior Court, Cumberland County, alleging (1) wrongful discharge from employment in violation of public policy, (2) intentional infliction of mental and emotional distress, (3) tortious interference with contractual rights, (4) negligent retention and/or supervision of an employee, and (5) a state constitutional claim under Article I, Section 19.

¶ 43 Troy University filed a motion to dismiss under Rules 12(b)(2) and 12(b)(6) arguing that, under the recent Supreme Court of the United States decision in *Franchise Tax Board of California v. Hyatt* (*Hyatt III*), 139 S. Ct. 1485 (2019), Troy University, as a public education institution of the State of Alabama, was immune from suit based on sovereign immunity. The trial court agreed and allowed the motion. After plaintiff appealed, the Court of Appeals affirmed the trial court's dismissal of plaintiff's claims. *Farmer v. Troy Univ.*, 276 N.C. App. 53, 2021-NCCOA-36, ¶ 1.

II. Standard of Review

¶ 44 "Our review of the grant of a motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure is de novo." *Bridges v. Parrish*, 366 N.C. 539, 541 (2013). In reviewing a motion to dismiss, this Court considers "whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted

under some legal theory." *Id.* (quoting *Coley v. State*, 360 N.C. 493, 494 (2006)). "Questions of statutory interpretation are questions of law and are reviewed de novo." *In re D.S.*, 364 N.C. 184, 187 (2010). "We review constitutional issues de novo." *State v. Whittington*, 367 N.C. 186, 190 (2014) (italics omitted).

III. Analysis

¶ 45 The Constitution of Alabama states "[t]hat the State of Alabama shall never be made a defendant in any court of law or equity." Ala. Const. art. I, § 14. Unlike other states which establish sovereign immunity by statute or common law, Alabama's sovereign immunity is enshrined in its constitution. Ala. Const. art. I, § 14. "This immunity extends to [Alabama's] institutions of higher learning." *Taylor v. Troy State Univ.*, 437 So. 2d 472, 474 (Ala. 1983) (citations omitted). In this case, Troy University is a public education institution of the State of Alabama. Ala. Code § 16-56-1. Yet plaintiff argues that either *Hyatt III* does not apply to Alabama in this instance or that Alabama consented to be sued in North Carolina. Neither contention is persuasive.

A. *Hyatt III* controls the outcome of this case.

¶ 46 In *Hyatt III*, the Supreme Court of the United States held that a State may not "be sued by a private party without its consent in the courts of a different State." 139 S. Ct. at 1490. Similar to this case, Hyatt sued the Franchise Tax Board of California in Nevada state court for intentional torts he alleges the agency committed during an audit. *Id.* at 1490–91; *see also Franchise Tax Bd. of California v. Hyatt* (*Hyatt I*), 538 U.S. 488, 491 (2003). The trial court initially entered a judgment awarding Hyatt over $490 million. *Hyatt III*, 139 S. Ct. at 1491. However, this judgment was eventually overturned based on California's sovereign immunity. *Id.* at 1499.

¶ 47 The facts of *Hyatt III* are clearly analogous to the present case. Both defendants, Franchise Tax Board of California and Troy University, claimed sovereign immunity in causes of actions arising from alleged intentional torts. *Id.* at 1491. Hyatt moved from California to Nevada in 1991, thereafter claiming Nevada as his primary residence on his 1991 and 1992 tax returns. *Id.* at 1490. In 1993, the Franchise Tax Board of California "launched an audit to determine whether Hyatt underpaid his 1991 and 1992 state income taxes by misrepresenting his residency." *Id.* at 1490–91. This investigation led to Hyatt's intentional tort claims. *Id.*

¶ 48 Also significant, *Hyatt III* explicitly overruled *Nevada v. Hall*. *Id.* at 1490 ("We . . . overrule our decision . . . in *Nevada v. Hall*.") (citation

omitted). The facts in *Hall* are similar to those presented by this case. The respondents in *Hall* were California residents who brought a tort claim in California after they suffered severe injuries in an automobile collision in that state. The other driver was a University of Nevada employee. *Hall*, 440 U.S. 410, 411 (1979). Before the California state courts and ultimately the Supreme Court of the United States, Nevada argued that the Full Faith and Credit Clause of the United States Constitution mandated that California recognize the Nevada statute governing Nevada's sovereign immunity in tort actions. *Id.* at 412–14. Nevada's statute governing sovereign immunity limited "any award in a tort action against the State pursuant to its statutory waiver of sovereign immunity" to a maximum of $25,000. *Id.* at 412. The Supreme Court rejected Nevada's argument, holding that when sovereign immunity or statutory limitations on waivers of sovereign immunity are "obnoxious to [ ] statutorily based policies of jurisdiction," a State is not required to recognize another State's sovereign immunity or limitations on waiver. *Id.* at 424.

¶ 49 The Supreme Court overruled "this erroneous precedent" in *Hyatt III*. 139 S. Ct. at 1492. *Hyatt III* reasoned that "*Hall* is contrary to our constitutional design and the understanding of sovereign immunity shared by the States that ratified the Constitution." *Id.* In reaching its conclusion, the Supreme Court performed an historical analysis of sovereign immunity and determined that "[t]he Constitution does not merely allow States to afford each other immunity as a matter of comity; it embeds interstate sovereign immunity within the constitutional design." *Id.* at 1497. In other words, whether to apply sovereign immunity is not a choice based on public policy. It is a constitutional mandate.

¶ 50 Just as "*Hall* is irreconcilable with our constitutional structure," *id.* at 1499, so too is this Court's application of sovereign immunity. In the instant case, we have claims similar to those in *Hall*. The plaintiffs in *Hall* sued the University of Nevada after one of its employees tortiously "drove across the dividing strip and collided head-on with the plaintiffs' vehicle." Brief for Respondents, *Hall*, 440 U.S. 410 (No. 77-1337), 1978 WL 206995 (U.S.), at *4. The employee was conducting business in California, "pick[ing] up some television parts." *Id.* Similarly, plaintiff here is suing Alabama for the tortious actions of employees of a public university allegedly conducting business in North Carolina.

¶ 51 The Court here is making the same analytical mistake made in *Hall* that the Supreme Court rejected. Rather than being based on the weight of public policy, *see Hall*, 440 U.S. at 425–27, sovereign immunity applies because of "our constitutional structure and . . . the historical evidence showing a widespread preratification understanding that States

retained immunity from private suits, both in their own courts and in other courts," *Hyatt III*, 139 S. Ct. at 1499.

¶ 52 *Hyatt III* controls the outcome of this case. *Id.* at 1492 ("States retain their sovereign immunity from private suits brought in the courts of other States."). Alabama's sovereign immunity is enshrined in its constitution. Ala. Const. art. I, § 14 ("[T]he State of Alabama shall never be made a defendant in any court of law or equity."). Accordingly, Alabama carries its sovereign immunity into the courts of North Carolina.

¶ 53 *Hyatt III* grounded its reasoning in the "historical understanding of state immunity." *Id.* at 1498. According to *Hyatt III*, "at the time of the founding, it was well settled that States were immune under both the common law and the law of nations." *Id.* at 1494; *see also id.* at 1499 ("[T]he historical evidence show[s] a widespread preratification understanding that States retained immunity from private suits, both in their own courts and in other courts.").

¶ 54 A review of the founders' understanding of sovereign immunity anchors it not in interstate commerce, but rather in the ability of private citizens to recover money from a State's treasury. As Hamilton wrote in Federalist 81:

> The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will. To what purpose would it be to authorize suits against states for the debts they owe? How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting state; and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the state governments, a power which would involve such a consequence, would be altogether forced and unwarrantable.

The Federalist No. 81, at 318–19 (Alexander Hamilton) (J. & A. McLean ed., 1788). Similarly, in his now favorably cited[1] dissent in *Chisholm*

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3. *See, e.g.*, *Alden v. Maine*, 527 U.S. 706, 715–16, 720, 727 (1999); *Hans v. Louisiana*, 134 U.S. 1, 14 (1890) ("[L]ooking at the subject as Hamilton did, and as Mr. Justice Iredell did, in the light of history and experience and the established order of things, the views of [Hamilton and Iredell] were clearly right,—as the people of the United States in their sovereign capacity subsequently decided.").

v. Georgia, 2 U.S. (2 Dall.) 419 (1793), Justice Iredell reviewed the status of sovereign immunity under the common law at the time of the founding and wrote "there is no doubt that neither in the State now in question, nor in any other in the *Union*, any particular Legislative mode, authorizing a compulsory suit for the recovery of money against a State, was in being either when the Constitution was adopted, or at the time the judicial act was passed." *Id.* at 434–35 (Iredell, J., dissenting). Although the Court here properly acknowledges that Alabama cannot be haled into a North Carolina court without its consent, they do so without fully understanding the extent of the holding in *Hyatt III*. Additionally, this Court improperly held that Alabama waived its sovereign immunity.

B. Alabama did not waive its sovereign immunity.

1. Alabama's Constitution prohibits waiver.

¶ 55 As an initial matter, the mere fact that Alabama was doing business in North Carolina does not cause waiver of its immunity under *Hyatt III*. As noted above, *Hyatt III* overruled *Nevada v. Hall*, 440 U.S. 410 (1979). *See Hyatt III*, 139 S. Ct. at 1490, 1492 ("States retain their sovereign immunity from private suits brought in the courts of other States."). Alabama's Constitution expressly provides "[t]hat the State of Alabama shall never be made a defendant in any court of law or equity." Ala. Const. art. I, § 14. Since there is no clear indication that Alabama has consented to be haled into North Carolina's courts, this Court violates the Constitution of the United States by subjecting Alabama to its jurisdiction.

2. North Carolina law strictly construes waiver.

¶ 56 Furthermore, under North Carolina law, when a statute grants a State entity the power to "sue and be sued" that power "standing alone, does not necessarily act as a waiver of immunity." *Evans ex rel. Horton v. Hous. Auth. of Raleigh*, 359 N.C. 50, 56 (2004); *accord College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999) ("[A] state does not . . . consent to suit in federal court merely by stating its intention to 'sue and be sued.' "). This interpretation is predicated on the principle that "[w]aiver of sovereign immunity may not be lightly inferred and State statutes waiving this immunity, being in derogation of the sovereign right to immunity, must be strictly construed." *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 537–38 (1983); *see also Orange County v. Heath*, 282 N.C. 292, 296 (1972) ("The concept of sovereign immunity is so firmly established that it should not and cannot be waived by indirection or by procedural rule. Any such change should be by plain, unmistakable mandate of the lawmaking

body."); *accord Petty v. Tenn.-Mo. Bridge Comm'n*, 359 U.S. 275, 276 (1959) ("The conclusion that there has been a waiver of immunity will not be lightly inferred."). Accordingly, by "strictly construing" statutes passed by the General Assembly enabling a sovereign entity to "sue and be sued" and refusing to "lightly infer" a waiver of immunity, North Carolina courts have repeatedly held that such language alone does not waive a sovereign entity's immunity. *Evans ex rel. Horton*, 359 N.C. at 56–57; *Guthrie*, 307 N.C. at 537–38; *Jones v. Pitt Cnty. Mem'l Hosp., Inc.*, 104 N.C. App. 613, 616–17 (1991); *Truesdale v. Univ. of N.C.*, 91 N.C. App. 186, 192 (1988), *overruled in part on other grounds by Corum v. Univ. of N.C.*, 330 N.C. 761, 771 n.2 (1992). Plaintiff points to no North Carolina cases holding otherwise.

¶ 57 Plaintiff argues that *Georgia v. City of Chattanooga*, an eminent domain case, should control the sovereign immunity analysis in this case. 264 U.S. 472 (1924). However, *City of Chattanooga*, decided long before *Hyatt III*, addresses property issues, not an intentional tort action seeking money from a state's treasury, as in the present case. *See id.* at 478–80. Also, by my reading of *Hyatt III*, the Supreme Court did not address the distinction between commercial and governmental activity. However, this door may have been left open by the Supreme Court.

¶ 58 Likewise, *Thacker v. Tennessee Valley Authority* is also distinguishable. 139 S. Ct. 1435 (2019). *Thacker* interpreted the *United States Code* to determine whether Congress, by statute, waived sovereign immunity when it established the Tennessee Valley Authority. *Id.* at 1438. In *Thacker*, the Court analyzed how federal law, not state law, views a statutory sue and be sued clause. *Id.* at 1438–39. Additionally, the Tennessee Valley Authority is a federally created agency, not a sovereign state. *Id.* at 1438; 16 U.S.C. § 831.

¶ 59 It is fundamental to our federal system that "[i]n the interpretation of the Constitution of the United States, the Supreme Court of the United States is the final arbiter," and "any provision of the Constitution or statutes of North Carolina in conflict therewith must be deemed invalid." *Constantian v. Anson County*, 244 N.C. 221, 229 (1956); see also U.S. Const. arts. III, VI. Alabama's immunity from suit is predicated on the United States Constitution. *Hyatt III*, 139 S. Ct. at 1498. ("Interstate sovereign immunity is . . . integral to the structure of the Constitution.").

¶ 60 As a result, this Court cannot unilaterally impose a waiver of sovereign immunity on Alabama. Rather, Alabama must consent to be haled into North Carolina courts. While North Carolina's sovereign immunity from suits in this State may be judge-made law, *Corum*, 330 N.C. at 786,

according to *Hyatt III*, Alabama's immunity from suit in this State is based on the United States Constitution itself.

IV. Conclusion

¶ 61 The United States Supreme Court has held that the United States Constitution renders Alabama immune from suits by private parties in this State unless Alabama consents to waive its immunity. *Hyatt III*, 139 S. Ct. at 1490. Plaintiff has presented no persuasive arguments that this case somehow escapes that rule. Moreover, there is no clear indication that Alabama has waived its immunity. Therefore, to hold that Alabama has waived its immunity, through reasoning that is attenuated at best and certainly does not constitute a "plain, unmistakable mandate of the lawmaking body," *Heath*, 282 N.C. at 296, violates both the United States Constitution and North Carolina's own standard for waiver of sovereign immunity. Accordingly, I respectfully dissent.

Chief Justice NEWBY joins in this dissenting opinion.

HOKE COUNTY BOARD OF EDUCATION, ET AL.;

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION; AND

RAFAEL PENN, ET AL.

v.

STATE OF NORTH CAROLINA;

STATE BOARD OF EDUCATION;

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION; AND

PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE, AND TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES

No. 425A21-2

Filed 4 November 2022

1. Constitutional Law—North Carolina—education provisions—fundamental right to sound basic education

The Supreme Court reaffirmed the principle stated in *Leandro v. State*, 346 N.C. 336 (1997) and *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605 (2004), that the education provisions of the North Carolina Constitution (including Article I, Section 15 and Article IX, Section 2) expressly establish the right of every child in North Carolina to be

given the opportunity to receive at least a sound basic education, a right that the State has an affirmative duty to protect and maintain.

2. Constitutional Law—public school funding—role of General Assembly—appropriations power—subject to duty to provide sound basic education

The education provisions of the North Carolina Constitution (including Article I, Section 15 and Article IX, Section 2) require the General Assembly to wield its appropriations power in accordance with its contemporaneous duty to provide every child in every school district the opportunity to receive at least a sound basic education.

3. Constitutional Law—public school funding—failure to provide—equitable remedy—inherent power of judiciary to grant—ordering the transfer of state funds

The North Carolina Constitution requires the General Assembly to adequately fund the public school system in order to fulfill the State's constitutional duty to provide to every child in North Carolina the opportunity to receive a sound basic education, and it gives the judiciary inherent power to uphold constitutional rights; thus, in the exceedingly rare and extraordinary circumstance where the General Assembly continually fails to meet its obligations to provide adequate funds to meet the constitutional minimum standard for public education, a court may, after exhibiting the appropriate deference and after established methods of seeking a remedy fail, order as an equitable remedy the transfer of adequate available state funds.

4. Constitutional Law—public school funding—right to sound basic education—ongoing violation—remedy—transfer of state funds

Where the state public education system was constitutionally deficient due to the State's continued failure to provide to all children the opportunity to receive a sound basic education—as set forth in *Leandro v. State*, 346 N.C. 336 (1997), and *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605 (2004)—the extraordinary circumstances of the State's ongoing constitutional violation and the failure of the legislative and executive branches to correct those educational deficiencies despite years of opportunity required the judiciary to exercise its inherent power to fashion an appropriate equitable remedy. The trial court did not err when it ordered the State to transfer funds to comply with portions of the State's Comprehensive Remedial Plan based on conclusions that the violation was statewide and that

the trial court had shown proper deference to the other branches prior to taking this step. However, the trial court's subsequent order rescinding the transfer requirement—based on a mistaken conclusion, which required reversal, that it lacked authority to order the transfer—was vacated and the matter remanded to the trial court for the narrow purpose of recalculating the amount of funds to be transferred, subject to the 2022 state budget.

Justice BERGER dissenting.

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

Appeal pursuant to N.C.G.S. § 7A-31(b) from the 10 November 2021 order by Judge W. David Lee in Superior Court, Wake County, and from the 26 April 2022 order of Judge Michael L. Robinson in Superior Court, Wake County. On 21 March 2022, pursuant to N.C.G.S. § 7A-31(a) and Rule 15(e) of the North Carolina Rules of Appellate Procedure, the Supreme Court allowed the State's petition for discretionary review prior to determination by the Court of Appeals. Heard in the Supreme Court on 31 August 2022.

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Higgins Benjamin, PLLC, by Robert N. Hunter, Jr., for Nels Roseland, Controller of the State of North Carolina.

Jane R. Wettach and John Charles Boger, for Professors and Long-Time Practitioners of Constitutional and Educational Law, amici curiae.

Duke Children's Law Clinic, by Peggy D. Nicholson and Crystal Grant; Education Law Center, by David Sciarra, for Duke Children's Law Clinic, Center for Educational Equity, Southern Poverty Law Center, and Constitutional and Education Law Scholars, amici curiae.

Elizabeth Lea Troutman, Eric M. David, Daniel F.E. Smith, Kasi W. Robinson, Richard Glazier, and Matthew Ellinwood, for North Carolina Justice Center, amicus curiae.

John R. Wester, Adam K. Doerr, Erik R. Zimmerman, Emma W. Perry, Patrick H. Hill, and William G. Hancock, for North Carolina Business Leaders, amici curiae.

Jeanette K. Doran, for North Carolina Institute for Constitutional Law and John Locke Foundation, amici curiae.

HUDSON, Justice.

¶ 1 A quarter-century ago, this Court recognized that the North Carolina Constitution vests in all children of this state the right to the opportunity to receive a sound basic education and that it is the constitutional duty of the State to uphold that right. *Leandro v. State*, 346 N.C. 336, 345 (1997) (*Leandro I*). In 2004, we affirmed the trial court's determination "that the State had failed in its constitutional duty to provide certain students with the opportunity to attain a sound basic education," and that "the State must act to correct those deficiencies." *Hoke County Bd. of Educ. v. State*, 358 N.C. 605, 607, 647–48 (2004) (*Leandro II*). At that still-early stage of the litigation, this Court deferred to the legislative and executive branches to craft and implement a remedy to this failure. *Id.* at 643. However, we also expressly noted that

> when the State fails to live up to its constitutional duties, a court is empowered to order the deficiency remedied, and if the offending branch of government or its agents either fail to do so or have consistently shown an inability to do so, a court is empowered to provide relief by imposing a specific remedy and instructing the recalcitrant state actors to implement it.

Id. at 642.

¶ 2 In the eighteen years since, despite some steps forward and back, the foundational basis for the ruling of *Leandro II* has remained unchanged: today, as in 2004, far too many North Carolina schoolchildren, especially those historically marginalized,[1] are not afforded their constitutional right to the opportunity to a sound basic education. As foreshadowed in *Leandro II*, the State has proven—for an entire generation—either unable or unwilling to fulfill its constitutional duty.

¶ 3 Now, this Court must determine whether that duty is a binding obligation or an unenforceable suggestion. We hold the former: the State may not indefinitely violate the constitutional rights of North Carolina schoolchildren without consequence. Our Constitution is the supreme law of the land; it is not optional. In exercising its powers under the Appropriations Clause, the General Assembly must also comply with its duties under the Education Provisions.

¶ 4 Accordingly, in response to decades of inaction by other branches of state government, the judiciary must act. This Court has long recognized that our Constitution empowers the judicial branch with inherent authority to address constitutional violations through equitable remedies. *See*, *e.g.*, *Wilson v. Jenkins*, 72 N.C. 5, 6 (1875); *In re Alamance Cnty. Court Facilities*, 329 N.C. 84, 94 (1991) (*Alamance*). Today, to remedy that inaction, we exercise that power. For twenty-five years, the judiciary has deferred to the executive and legislative branches to implement a comprehensive solution to this ongoing constitutional violation. Today, that deference expires. If this Court is to fulfill its own constitutional obligations, it can no longer patiently wait for the day, year, or decade when the State gets around to acting on its constitutional duty "to guard and maintain" the constitutional rights of North Carolina schoolchildren. Further deference on our part would constitute complicity in the

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1. For instance, students from economically disadvantaged families and communities, students with learning differences, English-language learners, and students of color. *See, e.g.*, *Leandro II*, 328 N.C. at 632, n.13, 636, n. 16 (defining "at-risk").

violation, which this Court cannot accept. Indeed, ultimately "[i]t is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens." *Corum v. Univ. of N.C.*, 330 N.C. 761, 783 (1992).

¶ 5 After decades of largely choosing to watch this litigation from the sidelines, Legislative Defendants now intervene to allege a variety of procedural and substantive infirmities. They argue that despite twenty-eight years of focusing on statewide problems and statewide solutions, this case really involves only Hoke County. They argue that the passage of the 2021 Budget Act fulfills their constitutional duties under *Leandro*. They argue that because this case implicates education policies, it raises non-justiciable political questions. They argue that prior to their intervention, this case constituted a friendly suit with no actual controversy before the court.

¶ 6 These claims unequivocally fail. They are untimely, distortive, and meritless. At best, they reveal a fundamental misunderstanding of the history and present reality of this litigation. At worst, they suggest a desire for further obfuscation and recalcitrance in lieu of remedying this decades-old constitutional violation. In any event, they do not prevent this Court from exercising its inherent authority to realize the constitutional right of North Carolina children to the opportunity to a sound basic education.

¶ 7 Accordingly, we affirm and reinstate the trial court's 10 November 2021 Order's directive instructing certain State officials to transfer the funds necessary to comply with Years 2 and 3 of the State's Comprehensive Remedial Plan. We vacate in part and reverse in part the trial court's April 2022 Order removing that transfer directive. We remand the case to the trial court for the narrow purpose of recalculating the amount of funds to be transferred in light of the State's 2022 Budget. Once those calculations have been made, we instruct the trial court to order those State officials to transfer those funds to the specified State agencies. To enable the trial court to do so, we stay the 30 November 2021 Writ of Prohibition issued by the Court of Appeals.[2] Finally, we instruct the trial court to retain jurisdiction over the parties to monitor State compliance with this order. In so doing, we uphold our own obligation to safeguard the constitutional rights of North Carolina's schoolchildren while still allowing for our coequal branches to correct course in the years to come.

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2. On its own motion, today the Court is issuing a Special Order to stay this Writ.

I. Factual and Procedural History

¶ 8 The long history of this litigation is well documented. Nevertheless, the extraordinary nature of the remedy we order today—and Legislative Defendants' attempt to rewrite and relitigate the case's history—demands a summary of the equally extraordinary path that now renders that remedy necessary.

A. *Leandro I*: Establishing the Right

¶ 9 In May 1994, students and families from five rural North Carolina school districts united to sue the State and the State Board of Education for failing to provide adequate educational opportunities. These students and families—including Robert Leandro and his mother Kathleen, after whom the case would be named—represented students and schools at all levels of K–12 education, from Rollins Elementary School in Henderson to Carroll Middle School in Lumberton to Hoke County High School in Raeford. The Boards of Education of the five rural counties—Hoke, Halifax, Robeson, Cumberland, and Vance—likewise joined the students and families as plaintiffs in the suit (collectively referred to as Plaintiffs).

¶ 10 Specifically, Plaintiffs brought a declaratory judgment action "based on state constitutional and statutory provisions that entitle all North Carolina children to receive adequate and equitable educational opportunities, no matter where in the State they may live." Plaintiffs' complaint alleged that "[s]uch opportunities have been denied to children in some of the poorest school districts in the State[ ] as a result of an irrational, unfair, and unconstitutional funding system."

¶ 11 To support this claim, Plaintiffs identified specific examples of inadequate educational opportunities resulting from inadequate funding. For instance, Plaintiffs noted facilities issues such as a "lack [of] adequate classroom space," instructional issues such as a lack of basic science equipment and up-to-date textbooks, and personnel issues such as a lack of well qualified teachers. "The end result of the[se] inferior education opportunities caused by this unconstitutional system[,]" Plaintiffs alleged, "is poorly educated students."

¶ 12 That end result showed in student achievement. Plaintiffs noted that under numerous tests, "the majority of children in plaintiff districts have been unable to satisfy the State's standards for basic proficiency." Likewise, Plaintiffs showed that the performance of students in plaintiff districts on the Scholastic Aptitude Test (SAT) for college admission lagged well below the statewide average, and that students from plaintiff districts who *do* graduate and enter or attempt to enter college

faced significant challenges due to their lack of foundational educational opportunities.

¶ 13 Plaintiffs further noted that the funding differences between wealthy and poor districts at the heart of these disparities "are not accounted for by the amount of tax effort exerted by districts." Indeed, "[t]he average tax effort of plaintiff districts—that is, the amount of local dollars spent on education for every dollar of property tax valuation—is substantially *higher* than the average tax effort in the wealthiest North Carolina school districts." (emphasis added). Rather, Plaintiffs alleged, the significant gap in education funding and subsequent gap in educational opportunities falls on the shoulders of the State.

¶ 14 Cumulatively, Plaintiffs alleged that the consequences of these inadequate educational opportunities could not be more dire:

> Plaintiff students and other students from plaintiff districts face a lifetime of relative disadvantage as a result of their inadequate educational opportunities. They have diminished prospects for higher education, for obtaining satisfying employment, and for providing well for themselves and their families. They face increased risks of unemployment, welfare dependency, drug and alcohol addiction, violence, and imprisonment. Thus the inferior educational opportunities in plaintiff districts perpetuate a vicious cycle of poverty and despair that will, unless corrected, continue from one generation to the next. This cycle entails enormous losses, both in dollars and in human potential, to the State and its citizens.

¶ 15 Based on this factual foundation, Plaintiffs alleged that the failure of the State and State Board of Education "to provide plaintiff schoolchildren with adequate educational opportunities violates Articles I and IX of the [North Carolina] Constitution."[3] Accordingly, Plaintiffs' complaint asked the court to:

> [Declare] that education is a fundamental right, and that the public education system of North Carolina, including its system of funding, violates the Constitution of North Carolina by failing to provide adequate educational opportunities . . . ;

3. Plaintiffs likewise asserted claims based on equal protection, equal educational opportunities, due process, and statutory rights.

> [Declare] that the education system of North Carolina must be reformed so as to assure that all North Carolina schoolchildren, no matter where they may live in the State, receive adequate educational opportunities, . . . ;
>
> [Declare] that, to assure adequate educational opportunities, the State must provide for the necessary resources, including well qualified teachers and other school personnel in fully sufficient numbers, adequate school buildings, equipment, technology, and instructional materials; . . . .
>
> [Declare] that the public education system of North Carolina, including its system of funding, must recognize and provide for the needs of at[-]risk schoolchildren and others who are educationally disadvantaged;
>
> Order defendants to take all steps necessary to provide plaintiff school boards with the funds necessary to provide their students with an adequate education;
>
> [R]etain jurisdiction over this case to ensure full compliance with the [c]ourt's decree; [and]
>
> [Order] such other equitable relief including relief by way of injunction or mandamus as the [c]ourt deems proper.

¶ 16 In October 1994, students and families from five urban school districts, along with the districts themselves, joined Plaintiffs' suit as "Plaintiff Intervenors." Plaintiff Intervenors—representing schools in Buncombe, Charlotte-Mecklenburg, Durham, Wake, and Forsyth Counties—alleged that the State's educational funding system also failed to account for "the burdens faced by urban school districts that must educate large numbers of students with extraordinary educational needs." Accordingly, Plaintiff Intervenors raised the same constitutional claims and requests as Plaintiffs, asserting that "[a]s a result of defendants' violations of their constitutional duty, [Plaintiff Intervenors] have been denied access to an adequate public school education" under the North Carolina Constitution.

¶ 17 In response, the State and the State Board of Education (collectively, the State or State Defendants) moved to dismiss Plaintiffs' complaint. State Defendants claimed that the trial court lacked jurisdiction over the complaint because the issues raised were non-justiciable, State

Defendants were shielded by sovereign immunity, and Plaintiffs failed to state a claim upon which relief could be granted. Defendants contended that the North Carolina constitution does not "create[ ] a right to an adequate education in the public schools, greater than the right to attend a free public school for nine months a year in which equal opportunities are afforded as provided by Article IX of the Constitution," and therefore that "neither the State nor the State Board of Education has deprived any plaintiff of any right under the North Carolina Constitution."

¶ 18 After a hearing, the trial court denied State Defendants' motion to dismiss. State Defendants appealed this ruling to the North Carolina Court of Appeals.

¶ 19 In March 1996, the Court of Appeals reversed the trial court's denial of State Defendants' motion to dismiss. *Leandro v. State*, 122 N.C. App. 1 (1996). The Court of Appeals held that "the fundamental educational right under the North Carolina Constitution is limited to one of equal *access* to education, and it does not embrace a qualitative standard." *Id.* at 11 (emphasis added). "Thus," the court stated, "[Plaintiffs'] claims that the Constitution provides a fundamental right to *adequate* educational opportunities, and that the State has violated that alleged right, should have been dismissed for failure to state a claim upon which relief can be granted." *Id.* Plaintiffs subsequently appealed this ruling to this Court.

¶ 20 In July 1997, this Court unanimously reversed.[4] *Leandro I*, 346 N.C. at 358. As an initial matter, the Court addressed the State's argument that courts could not hear cases on claims of educational adequacy because they raised "nonjusticiable political questions." *Id.* at 344–45. The Court squarely rejected this notion. *Id.* Rather, "[w]hen a government action is challenged as unconstitutional, the courts have a duty to determine whether that action exceeds constitutional limits." *Id.* at 345. "Therefore," the Court held, "it is the duty of this Court to address plaintiff-parties' constitutional challenge to the state's public education system." *Id.*

¶ 21 Next, the *Leandro I* Court addressed the primary question of that case: whether the North Carolina Constitution establishes the right to *qualitatively adequate* educational opportunities, rather than mere educational *access*. *Id.* Here, the Court unanimously agreed with Plaintiffs' claim: the educational rights enshrined in our Constitution do not

4. Justice Orr dissented from the Court's rejection of Plaintiff's argument regarding *equal* educational opportunities but concurred in the Court's recognition of Plaintiff's claim regarding educational adequacy. *Id.* at 358–64 (Orr, J., dissenting in part and concurring in part).

merely protect a student's ability to *access* an education; rather, "there is a qualitative standard inherent in the right to education guaranteed by this state's constitution." *Id.* at 346. More specifically, this Court

> conclude[d] that the right to education provided in the state constitution is a right to a sound basic education. An education that does not serve the purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and is constitutionally inadequate.

Id. at 345. Accordingly, the Court held that "[t]he trial court properly denied defendants' motion to dismiss this claim for relief[, and] [t]he Court of Appeals erred in concluding otherwise." *Id.* at 348.

¶ 22 After recognizing the right to a sound basic education, this Court then set out to broadly define its contours. "For purposes of our Constitution," the Court held,

> a "sound basic education" is one that will provide the student with at least: (1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student's community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.

Id. at 347.

¶ 23 The *Leandro I* Court then noted certain factors that the trial court could consider on remand in assessing whether Plaintiff-parties were being afforded their constitutional right to a sound basic education. *Id.* at 355. These factors included, but were expressly not limited to, "[e]ducational goals and standards adopted by the legislature," " 'input' [measurements] such as per-pupil funding or general educational

funding provided by the state," and " 'output' measurements" such as "the level of performance of the children of the state and its various districts on standard achievement tests." *Id.* at 355, 357.

¶ 24 Finally, the *Leandro I* Court noted the powers and duties of each branch of our government in protecting the constitutional right to a sound basic education. Because "the administration of the public schools of the state is best left to the legislative and executive branches," the Court clarified that "the courts of this state must grant every reasonable deference to [those] branches when considering whether they have established and are administering a system that provides the children of the various school districts of the state a sound basic education." *Id.* at 357. "[A] clear showing to the contrary must be made before the courts may conclude that they have not." *Id.* "Only such a clear showing," the Court counseled, "will justify a judicial intrusion into an area so clearly the province, *initially at least*, of the legislative and executive branches as the determination of what course of action will lead to a sound basic education." *Id.* (emphasis added).

¶ 25 After noting the importance of this initial deference, though, this Court made clear its own constitutional obligation:

> [L]ike the other branches of government, the judicial branch has its duty under the North Carolina Constitution. If on remand this case to the trial court, that court makes findings and conclusions from competent evidence to the effect that defendants in this case are denying children of the state a sound basic education, a denial of a fundamental right will have been established. It will then become incumbent upon defendants to establish that their actions denying this fundamental right are necessary to promote a compelling governmental interest. If defendants are unable to do so, *it will then be the duty of the court to enter a judgment granting declaratory relief and such other relief as needed to correct the wrong* while minimizing the encroachment upon the other branches of government.

Id. (emphasis added).

¶ 26 With these principles as a guide, this Court then remanded the case back to the trial court to determine whether the State was upholding its constitutional duty to provide all children with a sound basic education. *Id.* at 358.

B. *Leandro II*: Establishing a Violation

¶ 27 Upon remand, then-Chief Justice Mitchell designated the case as exceptional under Rule 2.1 of our General Rules of Practice and assigned it to Judge Howard Manning.[5] Thereafter, Judge Manning presided over several years of fact finding, research, and hearings culminating in a fourteen-month trial in which the court took evidence from over forty witnesses and thousands of pages of exhibits to answer one foundational question: whether the State was complying with or violating *Leandro I*'s constitutional mandate to provide all children with the opportunity to receive a sound basic education. At the conclusion of this process, the trial court issued its factual findings and legal conclusions via four "Memoranda of Decision" published between October 2000 and April 2002.

¶ 28 In its first Memorandum of Decision, issued 12 October 2000, the trial court considered the constitutionality of the major components of North Carolina's Statewide Education Delivery system. As a preliminary matter, the trial court explained that "[b]ecause of the sheer size and complexity of dealing with evidence relating to five (5) low wealth districts," the court "made the initial decision to take evidence on one system" that would serve as a representative district. "The [c]ourt suggested that the low wealth district be Hoke County and the parties agreed with that decision[.]" Upon selecting this representative district, the court noted that "[i]t is clear that the same issues affecting each small district are similar[.]" Thereafter, the trial court focused its inquiry primarily—though not exclusively—on this representative county, and "plaintiff-intervenors were permitted to participate fully in discovery and in the trial of the case centered on Hoke County." Likewise, the State repeatedly made clear that despite the parties' selection of Hoke County as a representative district, its various remedial "efforts have been directed to establishing and maintaining a *State-wide* system which provides adequate educational opportunities to *all* students," and that "[t]he State has never understood the Supreme Court or [the trial] [c]ourt to have ordered the defendants to provide students in Hoke County or any of the other plaintiff or plaintiff-intervenor school districts special treatment, services or resources which were not available to at-risk students in other LEAs across the State." (emphasis added).

¶ 29 After noting this procedure, the trial court's first Memorandum of Decision noted its preliminary conclusions of law. Most pertinently, the

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5. We take a moment of privilege to express the Court's gratitude to Judge Manning for his many years of diligent service to the State presiding over this case.

court determined that as a whole, North Carolina's Statewide Educational Delivery System—including its curriculum, teacher licensing and certification standards, funding delivery system, and school accountability program—was "sound, valid, and constitutional when measured against the sound basic education standard of *Leandro*." "However," the court noted, "the existence of a constitutionally sound and valid [educational delivery system], standing alone, does not constitute clear evidence that [that system] is being properly implemented . . . in such a manner as to provide each child with an equal opportunity to receive a sound basic education." The court made clear that these legal conclusions applied "to all school systems in North Carolina, including Hoke County."

¶ 30 In its second Memorandum of Decision, issued 26 October 2000, the trial court considered the implementation of the various facets of the statewide educational delivery system with respect to at-risk students. The court determined that in order "for at-risk children to have an equal opportunity for a sound basic education, the State should provide quality pre-kindergarten programs for at-risk children." Again, the court emphasized that its findings and conclusions were directed at both Hoke County and "other counties in North Carolina."

¶ 31 In its third Memorandum of Decision, issued 26 March 2001, the trial court compared student achievement data from at-risk students in various counties across the state. The court considered several different measures of student achievement, including standardized test scores, high school retention rates, and vocational and college preparedness. "This comparison showed that there were at-risk students failing to achieve a sound basic education statewide, as well as in Hoke County, and that the low performance of at-risk students was similar regardless of the wealth and resources of the school system attended." "Taking all of the evidence into account, the [c]ourt determined that the at-risk children in North Carolina are not obtaining a sound basic education[.]" Again, the court emphasized that "[t]his problem is not limited to Hoke County." Indeed, the court expressly stated that the evidence

> show[ed] that HCSS is not alone or isolated in terms of the poor academic performance of great numbers of its at-risk students. Poor academic performance of at-risk populations of North Carolina public school students permeates throughout the State regardless of the "wealth" or local funding provided. Based on the data available and the enormity of the at-risk problems throughout the State, the [c]ourt cannot close its eyes to this fact and look only at HCSS. The

> poor academic performance of at-risk populations is too widespread to by-pass and put off for another day.

"Reduced to essentials," the court concluded, "the plaintiffs and plaintiff-intervenors have produced clear and convincing evidence that there are at-risk children in Hoke County and throughout North Carolina who are, by virtue of the ABCs accountability system and other measures, not obtaining a sound basic education."

¶ 32 In its fourth and final Memorandum of Decision, issued 4 April 2002, the trial court issued its final judgments and orders. First, the trial court enumerated certain minimum requirements for statewide *Leandro* compliance including: (1) "that every classroom be staffed with a competent, certified, well-trained teacher who is teaching the standard course of study by implementing effective educational methods that provide differentiated, individualized instruction, assessment and remediation to the students in that classroom;" (2) "that every school be led by a well-trained, competent Principal with the leadership skills and the ability to retain competent, certified, and well-trained teachers;" and (3) "that every school be provided, in the most cost-effective manner, the resources necessary to support the effective instructional programs within that school so that the educational needs of all children, including at-risk children, to obtain a sound basic education, can be met." Second, the trial court concluded that "there are children at-risk of educational failure who are not being provided the equal opportunity to obtain a sound basic education because their particular LEA, such as the Hoke County Public Schools, is not providing them with one or more of the educational services set out . . . above." Third, the trial court emphasized that "the State of North Carolina is ultimately responsible for providing each child with access to a sound basic education and that this ultimate responsibility cannot be abdicated by transferring responsibility to local boards of education." Fourth, the trial court declared that "the State of North Carolina is ORDERED to remedy the [c]onstitutional deficiency for those children who are not being provided the basic educational services set out [above], whether they are in Hoke County[ ] or another county within the State." Fifth, the court stated that "[t]he nuts and bolts of how this task should be accomplished is not for the [c]ourt to do," but rather "belongs to the executive and legislative branches of government." "By directing this to be done," the court noted, "the [c]ourt is showing proper deference to the executive and legislative branches by allowing them, initially at least, to use their informed judgment as to how best to remedy the identified constitutional deficiencies." Finally, the court clarified that its prior three Memoranda of Decision were

incorporated into its final judgment and "constitute the Decision and Judgment of th[e] [c]ourt," ordered the State to keep the plaintiff-parties and the court advised of its remedial actions, and retained jurisdiction over the case to resolve issues of enforcement.

¶ 33 On 6 May 2002, the State appealed. Thereafter, both the plaintiff-parties and the State sought discretionary review by this Court prior to a determination by the Court of Appeals. On 18 March 2003, this Court allowed the parties' motions for discretionary review. The appeal was heard in this Court on 10 September 2003.

¶ 34 On 30 July 2004, in *Leandro II*, this Court unanimously affirmed the trial court's central conclusion: "the State had failed in its constitutional duty to provide certain students with the opportunity to attain a sound basic education, as defined by this Court's holding in [*Leandro I*]. 358 N.C. at 608.

¶ 35 As an initial matter, the Court in *Leandro II* noted the unique procedural history of this case. Because the trial court designated Hoke County "as the representative plaintiff district," this Court noted that "our consideration of the case is properly limited to the issues relating solely to Hoke County as raised at trial." *Id.* at 613. The Court recognized, however, that "plaintiffs from the four other rural districts . . . were not eliminated as parties as a result of the trial court's decision to confine evidence to its effect on Hoke County Schools." *Id.* at 613 n.5. Accordingly, "[w]ith regard to the claims of named plaintiffs from the other four rural districts, [this Court] remanded [the case] to the trial court for further proceedings that include, but are not necessarily limited to, presentation of relevant evidence by the parties, and findings and conclusions of law by the trial court." *Id.* More generally, though, the Court emphasized that

> the unique procedural posture and substantive importance of the instant case compel us to adopt and apply the broadened parameters of a declaratory judgment action that is premised on issues of great public interest. The children of North Carolina are our state's most valuable renewable resource. If inordinate numbers of them are wrongfully being denied their constitutional right to the opportunity for a sound basic education, our state courts cannot risk further and continued damage because the perfect civil action has proved elusive.

Id. at 616. Likewise, the Court noted that while declaratory judgment actions

> require that there be a genuine controversy to be decided, they do not require that the participating parties be strictly designated as having adverse interests in relation to each other. In fact, declaratory judgment actions, by definition, are premised on providing parties with a means for courts of record to declare such rights, status, and other legal relations among such parties.

Id. at 617 (cleaned up). This procedural flexibility is necessary, the Court concluded, because

> *Leandro* and our state Constitution . . . accord[ ] the right at issue to all children of North Carolina, regardless of their respective ages or needs. Whether it be the infant Zoe, the toddler Riley, the preschooler Nathaniel, the "at-risk" middle-schooler Jerome, or the not "at-risk" seventh-grader Louise, the constitutional right articulated in *Leandro* is vested in them all.

Id. at 620.

¶ 36 With these procedural issues addressed, the *Leandro II* Court then assessed the merits of the trial court's ruling. First, the Court considered "whether there was a clear showing of evidence supporting the trial court's conclusion that 'the constitutional mandate of *Leandro* has been violated [in the Hoke County School System] and action must be taken by both the LEA [Local Educational Area] and the State to remedy the violation.' " *Id.* at 623 (alterations in original). After reviewing the evidence documented by the trial court regarding educational "inputs," academic "outputs," post-secondary and vocational opportunities, and the State's educational delivery system and funding mechanisms, the Court agreed with the trial court's foundational determination: "the State's method of funding and providing for individual school districts such as Hoke County was such that it did not comply with *Leandro*'s mandate of ensuring that all children of the state be provided with the opportunity for a sound basic education." *Id.* at 637. The Court concluded that "the trial court's approach to the issue was sound and its order reflects both findings of fact that were supported by the evidence and conclusions that were supported by ample and adequate findings of fact." *Id.* at 638. Therefore, the Court "affirmed those portions of the trial court's order that conclude that there has been a clear showing of a denial of the

established right of Hoke County students to gain their opportunity for a sound basic education and those portions of the order that require the State to assess its education-related allocations to the county's schools so as to correct any deficiencies that presently prevent the county from offering its students the opportunity to obtain a *Leandro*-conforming education." *Id.*

¶ 37 Second, the *Leandro II* Court addressed the trial court's Pre-K ruling. On the questions of rights and violations, the Court agreed with the trial court: the evidence presented at trial clearly supported the conclusion "that there was an inordinate number of 'at-risk' children who were entering the Hoke County school district . . . behind their non 'at-risk' counterparts[,]" that such 'at-risk children were likely to stay behind, or fall further behind, their non 'at-risk' counterparts as they continued their education[,]" "that the State was providing inadequate resources for such 'at-risk' prospective enrollees, and that the State's failings were contributing to the 'at-risk' prospective enrollees' subsequent failure to avail themselves of the opportunity to obtain a sound basic education." *Id.* at 641. Accordingly, the Court agreed with the trial court's conclusion "that State efforts towards providing remedial aid to 'at-risk' prospective enrollees were inadequate." *Id.* at 642.

¶ 38 On the question of remedy, though, this Court disagreed. "[T]here is a marked difference," the Court noted, "between the State's recognizing a need to assist 'at-risk' students prior to enrollment in the public schools and a court order compelling the legislative and executive branches to address that need in a singular fashion." *Id.*

> In our view, while the trial court's findings and conclusions concerning the problem of 'at-risk' prospective enrollees are well supported by the evidence, a similar foundational support cannot be ascertained for the trial court's order requiring the State to provide pre-kindergarten classes for either all of the State's 'at-risk' prospective enrollees or all of Hoke County's 'at-risk' prospective enrollees.

Id. While the Court

> assuredly recognize[d] the gravity of the situation for "at-risk" prospective enrollees in Hoke County and elsewhere, and acknowledge[d] the imperative need for a solution that will prevent existing circumstances from remaining static or spiraling further, we [were] equally convinced that the evidence indicates that the

> State shares our concerns and, more importantly, that the State has already begun to assume its responsibilities for implementing corrective measures.

Id. at 643. Accordingly, the Court held that the trial court's Pre-K remedy was "premature" and "reverse[d] those portions of the trial court order that . . . require[d] the State to provide pre-kindergarten services as the remedy for [the aforementioned] constitutional violations." *Id.* at 645.

¶ 39 Simultaneously, though, the *Leandro II* Court emphasized that if push came to shove, it would not shy away from its duty to address constitutional violations.

> Certainly, when the State fails to live up to its constitutional duties, a court is empowered to order the deficiency remedied, and if the offending branch of government or its agents either fail to do so or have consistently shown an inability to do so, a court is empowered to provide relief by imposing a specific remedy and instructing recalcitrant state actors to implement it.

Id. at 642.

¶ 40 Finally, the *Leandro II* Court addressed the question of federal funds. Plaintiffs contended that the trial court had erred by considering educational services provided by federal funds within its statewide assessment for *Leandro* compliance. *Id.* at 645–46. The Court disagreed and concluded that the trial court's consideration of federal funds was permissible because "the relevant provisions of the North Carolina Constitution do not forbid the State from including federal funds in its formula for providing the state's children with the opportunity to obtain a sound basic education." *Id.* at 646. "While the State has a duty to provide the means for such educational opportunity," the Court clarified, "no statutory or constitutional provisions require that it is concomitantly obliged to be the exclusive source of the opportunity's funding." *Id.*

¶ 41 The *Leandro II* Court concluded by emphasizing the "paramount" importance of education toward "[a]ssuring that our children are afforded the chance to become contributing, constructive members of society." *Id.* at 649. "Whether the State meets this challenge[,]" the Court noted, "remains to be determined." *Id.* Accordingly, the Court remanded "to the lower court[,] and ultimately into the hands of the legislative and executive branches, one more installment in the 200-plus year effort to provide an education to the children of North Carolina." *Id.* "As

for the pending cases involving either other rural school districts or urban school districts," the Court "order[ed] that they should proceed, as necessary, in a fashion that is consistent with the tenets outlined in this opinion." *Id.* at 648.

C. Remedial Phase: 2004–2018

¶ 42 Following *Leandro II*, the trial court diligently undertook its responsibilities on remand and initiated the remedial phase of the *Leandro* litigation. For over a decade, through more than a dozen hearings, the trial court took evidence and heard arguments from the parties regarding the State's various efforts to achieve constitutional compliance. In alignment with its 2002 Judgment and *Leandro II*, the trial court took evidence and rendered factual finding and legal conclusions regarding the constitutional adequacy of educational opportunities not just in Hoke County, but statewide. For instance, at different points during this period, the trial court reviewed evidence regarding the State's Disadvantaged Student Supplemental Funding (DSSF) program, county-specific student achievement data from Hoke and other counties, statewide grade-specific achievement data, and statewide subject-specific achievement data, among many other categories. The trial court primarily issued its factual findings and legal conclusions based on this evidence in periodic "Notice of Hearing and Order[s]" or "Report[s] from the Court," in which the trial court memorialized past proceedings, made factual findings and legal conclusions, and requested particular information from the parties in upcoming hearings.

¶ 43 Reviewing a few of these orders is illustrative. First, on 9 September 2004, the trial court's order focused in part on the State's response to statewide teacher recruitment and retention issues through the DSSF program. After reviewing the submissions of the parties, the trial court concluded that "[t]here is no dispute that there exists a serious problem in hiring, training[,] and retaining certified teachers in North Carolina, especially in the low wealth plaintiff LEAs and other low wealth LEAs." The court observed that the Department of Public Instruction and the State Board of Education

> acknowledged the constitutional deficiency and the lack of compliance under *Leandro* in the classroom teacher area and sought $22,000,000 from the General Assembly to fund the DSSF pilot program for sixteen (16) LEAs in which there was demonstrated need to remedy the constitutional deficiency of the presence

> of a competent, certified[,] and well trained teacher in individual classrooms.

"Despite knowing of this deficiency and being repeatedly advised of [the] demonstrated need for assistance in these low-wealth school districts and despite being advised of the constitutional requirements in *Leandro*," the court noted, "the General Assembly of North Carolina passed its budget and adjourned without funding the DSSF program for any LEA, including HCSS." As such, the trial court "direct[ed] counsel for the State . . . to be prepared [at the next hearing] to report to the [c]ourt on behalf of the legislative branch of government (the General Assembly) what action the General Assembly has taken[ ] to address its failure to fund the pilot $22,000,000 DSSF program."

¶ 44 Second, on 15 March 2009, the trial court's order focused primarily on Halifax County Public Schools. After an extensive review of student achievement data broken down by individual schools and grade-levels throughout the district, the trial court concluded that

> [t]he majority of these children in the Halifax County Public Schools from elementary school through high school are not receiving the equal opportunity to obtain a sound basic education and the State of North Carolina must take action to remedy this deprivation of constitutional rights since the State of North Carolina is responsible to see that these schools become *Leandro* compliant in the classroom and in the principal's office and in the general administration and leadership of the system.

"Accordingly," the trial court concluded, "it is time for the State to exert itself and exercise command and control over the Halifax County Public Schools beginning in the school year 2009–2010, nothing more and nothing less." More broadly, based on the extensive evidence presented, the trial court reiterated its conclusion regarding a statewide *Leandro* violation:

> poor academic performance remains a problem in a host of elementary, middle[,] and high schools throughout North Carolina and as a result, the children of those schools who are blessed with the right to the equal opportunity to obtain a sound basic education as guaranteed by the Constitution and as set out in *Leandro* are being deprived of their constitutional right to that opportunity on a daily basis.

Indeed, this legal conclusion was repeated verbatim in the trial court's subsequent orders on 3 August 2009, 26 March 2010, and 20 May 2011, among many others.[6]

¶ 45 Third, on 5 May 2014, the trial court's order focused on "the reading problem."[7] The trial court summarized its factual findings regarding various reading programs and assessments from Halifax County, Forsyth County, Durham County, Guilford County, Johnston County, Union County, and Charlotte-Mecklenburg County, among several others. Based on these statewide factual findings, the trial court concluded "that there are way too many thousands of school children from kindergarten through . . . high school who have not obtained the sound basic education mandated and defined above and reaffirmed by the North Carolina Supreme Court in November 2013."

¶ 46 Fourth, on 17 March 2015, the trial court's order addressed the State's recent "redefin[ing] and relabeling [of] the standards for academic achievement." The court expressed its concern that

> [n]o matter how many times the [c]ourt has issued Notices of Hearings and Orders regarding unacceptable academic performance, and even after the North Carolina Supreme Court plainly stated that

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6. On 15 August 2011, Legislative Defendants filed a Motion to Intervene and For Clarification from the trial court order issued 18 July 2011 regarding "Pre-K services for at-risk four year[-]olds." On 2 September 2011, the trial court denied Legislative Defendants' motion, reasoning that the defendant in this case was the State as a whole, "not the legislative branch—nor the executive branch" individually. In 2013, the General Assembly enacted N.C.G.S. § 1-72.2, which established that legislative leaders "have standing to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute or provision of the North Carolina Constitution." N.C.G.S. § 1-72.2(b). In 2017, N.C.G.S. § 1-72.2 was amended by adding: "[i]ntervention pursuant to this section shall be effected upon the filing of a notice of intervention of right in the trial or appellate court in which the matter is pending regardless of the stage of the proceeding." Here, the record reflects no attempt by Legislative Defendants to intervene in this litigation between the 2011 motion and their 2021 intervention.

7. On 8 November 2013, this Court considered a third appeal within this litigation. *Hoke Cnty. Bd. of Educ. v. State*, 367 N.C. 156 (2013) (*Leandro III*). There, plaintiffs challenged the General Assembly's 2011 statutory changes to its "More at Four" Pre-K program. *Id.* at 156. However, before this Court could consider the case, the General Assembly substantively amended the statute with the apparent intent of ridding the law of its dubious constitutionality. *Id.* at 159. Accordingly, this Court "conclude[d] that the questions originally in controversy between the parties [were] no longer at issue and that th[e] appeal [was] moot." *Id.* Nevertheless, the Court took the opportunity to emphasize that "[o]ur mandates in [*Leandro I* and *II*] remain in full force and effect." *Id.* at 160.

> the mandates of *Leandro* remain "in full force and effect[,]" many adults involved in education . . . still seem unable to understand that **the constitutional right to have an equal opportunity to obtain a sound basic education is a right vested in <u>each and every child</u> in North Carolina regardless of their respective age or educational needs**.

Based on these findings, trial court again concluded "that the valid assessments of student achievement in North Carolina show that many thousands of children in K–12 . . . are not obtaining a sound basic education. This is an ongoing problem that needs to be dealt with and corrected." Accordingly, the trial court ordered the State to "propose a definite plan of action as to how the State of North Carolina intends to correct the educational deficiencies in the student population."

¶ 47 These orders illustrate several key themes within the record. First, the trial court made extensive factual findings over the course of about twelve years regarding many educational "inputs" and "outputs" including school funding, teacher retention, instructional methods, and academic performance. In reviewing this data, the trial court's findings of fact consider the efficacy of the State's various piecemeal proposals to achieve *Leandro* compliance, such as the DSSF and the redefining of academic standards. Second, these factual findings did not focus solely on Hoke County, but expressly drew upon testimony and evidence regarding rural, urban, and suburban counties across the state. Third, based upon this clear and convincing evidence, the trial court repeatedly documented its ultimate legal conclusion that "in way too many school districts across the state, thousands of children in the public schools have failed to obtain, and are not now obtaining[,] a sound basic education as defined by and required by the *Leandro* decisions." Put differently, the trial court repeatedly concluded based on clear and convincing evidence that, despite its piecemeal compliance efforts, the State remained in an ongoing and statewide violation of its constitutional duty. Fourth, despite its growing impatience with the State's failure to remedy its statewide violation, the trial court continued—for well over a decade—to defer to the executive and legislative branches to craft a remedy. Fifth and finally, in response to the repeated failure of various piecemeal remedial attempts, the trial court ultimately ordered the State to propose and implement a comprehensive "definite plan of action" to remedy its statewide *Leandro* violation.

D. WestEd Report and the Comprehensive Remedial Plan: 2018–2021

¶ 48 On 7 October 2016, upon Judge Manning's retirement, then-Chief Justice Mark Martin reassigned this case to Judge W. David Lee.[8] On 10 July 2017, the State Board of Education filed a Motion for Relief Pursuant to Rule 60 and Rule 12 requesting that the trial court relinquish jurisdiction over the case. The SBE contended that "[b]ecause the factual and legal landscapes have significantly changed [since the beginning of the case], the original claims, as well as the resultant trial court findings and conclusions, are divorced from the current law and circumstances [and] are stale." As such, the SBE argued, "[c]ontinued status hearings on the present system . . . exceed the jurisdiction established by the original pleadings in this action."

¶ 49 On 7 March 2018, the trial court denied the SBE's motion to relinquish jurisdiction. First, the court stated its factual findings, including expressly finding that "[t]he court record is replete with evidence that the *Leandro* right continues to be denied to hundreds of thousands of North Carolina schoolchildren" and that "a definite plan of action is still necessary to meet the requirements and duties of the State of North Carolina with regard to its children having equal opportunity to obtain a sound basic education." While the court noted that it "indeed indulges in the presumption of constitutionality with respect to each and every one of the legislative enactments cited by the SBE," that "is not the issue before the court." Rather, the court found, "the evidence before this court upon the SBE motion is wholly inadequate to demonstrate that these enactments translate into substantial compliance with the constitutional mandate of *Leandro* measured by applicable educational standards."

¶ 50 Based on these factual findings, the trial court concluded that "[t]he changes in the factual landscape that have occurred during the pendency of this litigation do not serve to divest the court of its jurisdiction to address the constitutional right at issue in this case." Further, the court concluded that "there is an ongoing constitutional violation of every child's right to receive the opportunity for a sound basic education[,]" and that "[t]his court not only has the *power* to hear and enter appropriate orders declaratory and remedial in nature, but also has a *duty* to address this violation." The trial court concluded that "state

8. We take a moment of privilege to express the Court's gratitude to Judge Lee's family (Judge Lee himself recently passed away on 4 October 2022) for his many years of diligent service to the State presiding over this case.

defendants have the burden of proving that remedial efforts have afforded substantial compliance with the constitutional directives of our Supreme Court," and that "[t]o date, neither defendant has met this burden." "Both law and equity demand the prospective application of the constitutional guarantee of *Leandro* to every child in this State."

¶ 51 In closing, the trial court emphasized its own constitutional duty and growing impatience with the legislative and executive branches:

> This [c]ourt notes that both branches have had more than a decade since the Supreme Court remand in *Leandro II* to chart a course that would adequately address this continuing constitutional violation. The clear import of the *Leandro* decisions is that if the defendants are unable to do so, it will be the duty . . . of the court to enter a judgment "granting declaratory relief and such other relief as needed to correct the wrong while minimizing the encroachment upon the other branches of government." (*Leandro I*).
>
> This trial court has held status conference after status conference and continues to exercise tremendous judicial restraint. This court is encouraged by Governor Cooper's creation of the Governor's Commission on Access to a Sound Basic Education. . . . The time is drawing nigh, however, when due deference to both the legislative and executive branches must yield to the court's duty to adequately safeguard and actively enforce the constitutional mandate on which this case is premised. It is the sincere desire of this court that the legislative and executive branches heed the call.

¶ 52 That same day, the trial court also issued a Consent Order Appointing Consultant. In January 2018, the State and plaintiffs filed a joint motion in which they proposed to nominate, for the court's consideration and appointment, an independent, non-party consultant to assess the current state of *Leandro* compliance in North Carolina and to make subsequent comprehensive recommendations for specific actions necessary to achieve sustained constitutional compliance. In its subsequent Order, the court agreed to the parties' request and stated that the appointed consultant would be charged with recommending specific actions the State should take to meet the core requirements of *Leandro*, including providing a competent and well-trained teacher in every classroom,

providing a competent and well-trained principal in every school, and identifying resources necessary to ensure that all students have an equal opportunity to obtain a sound basic education. In its Consent Order, the trial court consented to the parties' joint nomination of WestEd, a nationally acclaimed nonpartisan education research and development nonprofit, to serve as the independent non-party consultant. As such, WestEd was instructed to submit its final recommendation to the parties and the court within one year, and the parties were required to submit a subsequent "proposed consent order . . . of specific actions to achieve compliance with the constitutional mandates establish forth above."

¶ 53 Thus began the WestEd chapter of this litigation. For the next year, in collaboration with the Friday Institute for Educational Innovation at North Carolina State University and the Learning Policy Institute, WestEd conducted thirteen distinct studies to better identify, define, and understand key issues and challenges to North Carolina's education system and to offer a comprehensive framework of change for the State. The researchers developed and carried out an extensive research agenda to investigate the current state and major needs of North Carolina public education in four overarching areas: (1) access to effective educators, (2) access to effective school leaders, (3) adequate and equitable school funding and resources, and (4) adequate accountability and assessment systems.

¶ 54 WestEd's methodology was comprehensive. Each of its thirteen studies was designed to address specific research questions and used mixed-method designs such as data analysis, school visits, focus group interviews with key stakeholders, statewide surveys, reviews of prior studies, and cost function analysis. "Site visits, interviews, and focus groups were designed to maximize engagement with education stakeholders representing the diversity of the state in terms of geography, school level, and school type as well as the characteristics of the student and educator populations." Researchers collected new data from schools in forty-four counties, engaged with over 1,200 educators, and examined existing data from Duke University's North Carolina Education Research Data Center and UNC's Education Policy Initiative at Carolina.

¶ 55 On 4 October 2019, WestEd submitted its final report to the trial court. In short, the WestEd Report concluded that as North Carolina educators "prepare for the 2019–20 school year, the state is *further away* from meeting its constitutional obligation to provide every child with the opportunity for a sound basic education than it was when the Supreme Court of North Carolina issued the *Leandro* decision more than 20 years ago." (emphasis added). "Although there have been many efforts

on the part of the state and districts to improve students' achievement, the challenges of providing every student with a sound basic education have increased, along with the number of at-risk students." Specifically, the WestEd Report found systemic deficiencies in teacher and principal quality and supply (especially in low-wealth districts) and programmatic funding and resources (especially those necessary to support disadvantaged students), among other statewide shortcomings. While the WestEd Report noted that many promising initiatives had been put in place, they "have neither been sustained nor been brought to scale and are insufficient to adequately address the *Leandro* requirements."

¶ 56 Accordingly, the WestEd Report issued eight primary findings and recommendations. These recommendations included revising the state funding model to provide adequate and equitable resources, providing all at-risk students with the opportunity to attend high-quality early childhood programs, directing resources and opportunities to economically disadvantaged students, revising the student assessment and school accountability systems, and building an effective regional and statewide system of support for the improvement of low-performing and high-poverty schools, among others. For each of these recommendations, the WestEd Report provided a detailed "investment overview and sequenced action plan" which described the timeline, stakeholders, and resources necessary for proper implementation. Likewise, the action plan itemized the necessary statewide investments for each recommendation for each fiscal year from 2020–2021 to 2027–2028.

¶ 57 On 21 January 2020, the trial court issued its subsequent Consent Order. First, the trial court noted that "[t]he State of North Carolina, North Carolina State Board of Education, and other actors have taken significant steps over time in an effort to improve student achievement and students' opportunity to access a sound basic education." "However," the trial court continued,

> historic and current data before the [c]ourt show that considerable, systemic work is necessary to deliver fully the *Leandro* right to all children in the State. In short, North Carolina's PreK-12 public education system leaves too many students behind—especially students of color and economically disadvantaged students. As a result, thousands of students are not being prepared for full participation in the global, interconnected economy and the society in which they will live, work, and engage as citizens. The costs to those students, individually, and to the State are

> considerable and if left unattended will result in a North Carolina that does not meet its vast potential.

¶ 58 Next, the trial court addressed the WestEd Report. The court concluded that "[t]he WestEd Report confirms what this [c]ourt has previously made clear: that the State Defendants have not yet ensured the provision of education that meets the required constitutional standard to all school children in North Carolina." The court observed that the WestEd Report's "findings and recommendations are rooted in an unprecedented body of research and analysis, which will inform decision-making and th[e] [c]ourt's approach to this case."

¶ 59 Based on the WestEd Report, the trial court made two primary conclusions of law. First, the trial court concluded that "North Carolina has substantial assets to draw upon to develop a successful PreK-12 education system that meets the *Leandro* tenets." These assets "includ[e] a strong state economy, a deep and long-standing commitment to public education to support the social and economic welfare of its citizens, and an engaged business community that sees the value and economic benefits of the public education system."

¶ 60 Second, the trial court concluded that "despite numerous initiatives, many children are not receiving a *Leandro*-conforming education; systemic changes and investments are required to deliver the constitutional right to all children." On this point, the court acknowledged that "the State Defendants face greater challenges than ever" in achieving *Leandro* compliance, and that "systemic, synchronous action and investments are necessary to successfully deliver the *Leandro* tenets," including in teacher quality and supply, principal quality and supply, resources and school funding, assessment and accountability systems, low-performing and high-poverty schools, early childhood learning and Pre-K, and alignment and preparation for post-secondary opportunities. Throughout its order, the trial court repeatedly emphasized that "[t]he Defendants have not yet met their constitutional duty to provide all North Carolina students with the opportunity to obtain a sound basic education."

¶ 61 Based on these legal conclusions, the trial court ordered "the State Defendants to work expeditiously and without delay to take all necessary actions to create and fully implement" a comprehensive remedial plan to address each of the seven *Leandro* compliance issues noted above. The trial court further ordered the parties

> [t]o keep the [c]ourt fully informed as to the remedial progress . . . [by] submit[ting] a status report to the [c]ourt . . . setting out . . . :

> 1. Specific actions that the State Defendants must implement in 2020 to begin to address the issues identified by WestEd and described herein and the seven components set forth above;
>
> 2. A date by which the State Defendants, in consultation with each other and the Plaintiffs, will submit to the [c]ourt additional, mid-range actions that should be implemented, including specific actions that must be taken, a timeframe for implementation, and an estimate of the resources in addition to current funding, if any, necessary to complete those actions[; and]
>
> 3. A date by which the State Defendants, in consultation with each other and the Plaintiffs, will submit to the [c]ourt a comprehensive remedial plan . . . to provide all public school children the opportunity for a sound basic education, including specific long-term actions that must be taken, a timeframe for implementation, an estimate of resources in addition to current funding, if any, necessary to complete those actions, and a proposal for monitoring implementation and assessing the outcomes of the plan.

The trial court likewise ordered State Defendants to "identify the State actors and institutions responsible for implementing specific actions and components of the proposed Plan," and retained jurisdiction over the case and parties.

¶ 62 On 15 June 2020, the parties submitted their initial "Fiscal Year 2021 Remedial Plan and Action Steps" to the trial court. As instructed, the joint report stated the parties' shared goals and commitments for each of the seven issue areas identified in the trial court's January 2020 Order for fiscal year 2021. These commitments addressed both broad issues, such as "[s]ignificantly increas[ing] the racial and ethnic diversity of North Carolina's qualified and well-prepared teacher workforce," and more specific steps, such as "[r]emov[ing] [the] 12.75 percent funding cap for students with disabilities to provide supplemental funding for all students with disabilities at the current formula rate."

¶ 63 On 1 September 2020, the trial court issued a "Consent Order on *Leandro* Remedial Action Plan for Fiscal Year 2021" in response to the parties' joint report. The trial court approved the report and ordered Defendants to implement its remedial actions by 30 June 2021. Further, the trial court ordered Defendants, "in consultation with Plaintiff parties,

[to] develop and present to the [c]ourt[ ] a *Leandro* Comprehensive Remedial Plan to be fully implemented by the end of 2028 with the objective of fully satisfying the Defendant's *Leandro* obligations by the end of 2030." The court likewise ordered Defendants to submit quarterly status reports "to assist the [c]ourt's efforts to enter a final, enforceable judgment in this case, while promoting transparency in these proceedings."

¶ 64 On 15 March 2021, State Defendants submitted their Comprehensive Remedial Plan (CRP) to the trial court. As mandated by the trial court's prior orders, the CRP laid out "both broad programs and discrete, individual action steps to be taken [between 2021 and 2028] to achieve the overarching constitutional obligation to provide[ ] all children the opportunity to obtain a sound basic education in a public school [by 2030]." "The Parties agree[d] that the actions outlined in [the CRP] are the necessary and appropriate actions needed to address the constitutional violations in providing the opportunity for a sound basic education to all children in North Carolina."

¶ 65 As its title indicates, the CRP is comprehensive. For each of the seven pillar issues, the CRP enumerates specific action steps to be initiated in various fiscal years between 2021 and 2028. Each action step lists the various state actors responsible for its implementation and itemizes the specific funding required in each year. Some of the steps, such as "[u]pdat[ing] the State's school administrator preparation standards and principal licensure requirements to align with the National Education Leadership Preparation (NELP) standards," require administrative effort, but no additional funding. Others, such as "[p]rovid[ing] funding to cover the reduced-price lunch co-pays for all students who qualify for reduced-price meals so that those students would receive free lunches," require a static amount of funding ($3.9 million) each fiscal year. Still others, like "[i]ncreas[ing] low wealth funding to provide eligible counties supplemental funding equal to 110% of the statewide local revenue per student," require increasing funding in each fiscal year (growing from $20 million in 2022 to $182.7 million by 2028). The CRP is the only remedial plan submitted to the trial court by any party in this case.

¶ 66 On 11 June 2021, the trial court issued its "Order on Comprehensive Remedial Plan." After reviewing and approving the CRP, the trial court noted that "[t]he urgency of implementing the [CRP] on the timeline currently set forth by State Defendants cannot be overstated . . . . Time is of the essence." The trial court further emphasized that "[i]f the State fails to implement the actions described in the [CRP,] . . . 'it will then be the duty of this [c]ourt to enter a judgment granting declaratory relief and such other relief as needed to correct the wrong.' [*Leandro I*,] 346 N.C.

at 357." Finally, the trial court ordered that "the [CRP] shall be implemented in full and in accordance with the timelines set forth therein," and that

> [t]he State shall inform and engage its actors, agencies, divisions, and/or departments as necessary to ensure the State's compliance with this Order, including without limitation seeking and securing such funding and resources as are needed and required to implement in a sustainable manner the programs and policies set forth in the [CRP].

E. November 2021 Order, April 2022 Order, and Present Appeal

¶ 67 On 6 August 2021, State Defendants submitted their first progress report regarding implementation of the CRP. Plaintiff parties submitted responses on 25 August 2021. On 8 September 2021, the trial court held a subsequent hearing to review the State's progress toward the CRP. In short, State Defendants made clear to the trial court that they had not made progress toward substantially implementing the action steps within the CRP due to inadequate existing allocations of the necessary funding.

¶ 68 On 22 September 2021, the trial court issued its subsequent "Order on First Progress Reports for Implementation of Comprehensive Remedial Plan." Therein, the trial court made the following "findings of fact, each of which was stipulated to by Counsel on the record at the [8 September 2021] hearing:"

> 1. The [CRP], developed by State Defendants in consultation with Plaintiffs, is a fair and reasonable plan that is based upon the extensive evidence developed in this action . . . . The parties to this action agree that this fair and reasonable plan is the necessary step to provide the children of our State the opportunity to obtain a sound basic education.
>
> . . . .
>
> 3. The [CRP] represents the only robust and all-embracing plan to secure the opportunity for a sound basic education that has been presented to the [c]ourt over the course of this decades-long litigation . . . .
>
> . . . .

> 5. The State of North Carolina presently has available the fiscal resources needed to implement Years 2 and 3 of the [CRP], which in total is approximately $1.7 billion. According to the First Progress Report from the State, as of the time the Report was filed a collection of funding sources could be utilized to support the policies, programs, and procedures in the [CRP]. To wit, an unappropriated cash balance of $8 billion, projected revenues for the current fiscal year of 2021–22 exceeding the current budgetary allocations by about $5 billion, and additional funding from the federal government amounting to over $5 billion.

¶ 69 Following these findings, the trial court noted that

> [i]mproved educational policies, programs, and procedures alone do not ensure that the children of our State have the opportunity to obtain a sound basic education unless those policies, programs, and procedures are in fact supported by the resources and funds necessary for implementation. Accordingly, should all necessary steps to fully fund the [CRP] not be taken by the State—that is, our legislative and executive branches—as of [18 October 2021], this [c]ourt is prepared to implement the judicial remedies at its disposal to ensure that our State's children are finally guaranteed their constitutionally-mandated opportunity to obtain a sound basic education.

¶ 70 Therefore, the trial court ordered the parties to appear before it on 18 October 2021 "to inform the court of the State's progress in securing the full funds necessary to implement the [CRP]." "In the event the full funds necessary to implement the [CRP] are not secured by that date," the trial court ordered, "the [c]ourt will hear and consider any proposals for how the [c]ourt may use its remedial powers to secure such funding."

¶ 71 On 18 October 2021, the trial court conducted this compliance hearing. That same day, the trial court issued an Order in which it noted that it had been "informed by counsel that an appropriations bill in which the [CRP] is fully funded has not, as of that date, been finalized and enacted." "Because the full funds necessary to implement the [CRP] were not secured by [that day], the [c]ourt heard proposals for how [it] may use its remedial powers to secure such funding." The trial court further

ordered that Plaintiffs would have until 1 November 2021 to submit "any additional authorities, memoranda of law, or proposed orders for the [c]ourt's consideration on the use of its remedial powers, which include, but are not necessarily limited to, a writ of mandamus, a legislative injunction, sanctions, or a combination thereof," and that State Defendants would have until 8 November 2021 to subsequently respond.

¶ 72 On 10 November 2021, the trial court issued the subsequent Order (November 2021 Order) now before us for review. First, the November 2021 Order made findings of fact summarizing the history of the litigation to that point. The court repeated its prior conclusion that "the evidence before this court is wholly inadequate to demonstrate substantial compliance with the constitutional mandate of *Leandro* measured by applicable educational standards." (cleaned up). The court "noted many shortcomings in the State's accomplishments and the State admitted that [its Progress] Report showed that it had failed to implement the Year One Plan as ordered." The court found that "more than sufficient funds are available to execute the current needs of the [CRP]." "As of the date of this Order," the trial court declared, "the State's implementation of the [CRP] is already behind the contemplated timeline, and the State has failed yet another class of students. Time is of the essence."

¶ 73 Next, the trial court noted its years and years of deference. The court found that, in compliance with this Court's 1997 instructions in *Leandro I*, it had "granted every reasonable deference to the legislative and executive branches to establish and administer a [*Leandro*-compliant education] system . . . , including, most recently, deferring to State Defendants' leadership in the collaborative development of the [CRP] over the past three years." The court noted its

> extraordinary lengths in granting these co-equal branches of government time, deference, and opportunity to use their informed judgment as to the 'nuts and bolts' of the remedy, including the identification of the specific remedial actions that required implementation, the time frame for such implementation, the resources necessary for the implementation, and the manner in which to obtain those resources.

The trial court further found that "[t]he failure of the State to provide the funding necessary to effectuate North Carolina's constitutional right to a sound basic education is consistent with the antagonism demonstrated by legislative leaders towards these proceedings, the constitutional rights of North Carolina children, and this [c]ourt's authority." The

court found that it had "provided the State with ample time and every opportunity to make meaningful progress towards remedying the ongoing constitutional violations that persist within our public education system." Nevertheless, "[t]he State has repeatedly failed to act to fulfill its constitutional obligations."

¶ 74 Finally, the court found that "[i]n the seventeen years since the *Leandro II* decision, a new generation of school children, especially those at-risk and socioeconomically disadvantaged, were denied their constitutional right to a sound basic education. Further and continued damage is happening now, especially to at-risk children from impoverished backgrounds, and that cannot continue."

¶ 75 Accordingly, the trial court made the following conclusions of law. First, regarding its own constitutional duties and powers, the trial court concluded:

> 11. Because the State has failed for more than seventeen years to remedy the constitutional violation as the Supreme Court ordered, this [c]ourt must provide a remedy through the exercise of its constitutional role. Otherwise, the State's repeated failure to meet the minimum standards for effectuating the constitutional right to a sound basic education will threaten the integrity and viability of the North Carolina Constitution by:
>
> > a. nullifying the Constitution's language without the people's consent, making the right to a sound basic education merely aspirational and not enforceable;
> >
> > b. ignoring rulings of the Supreme Court of North Carolina setting forth authoritative and binding interpretations of our Constitution; and
> >
> > c. violating separation of powers by preventing the judiciary from performing its core duty of interpreting our Constitution.
>
> . . . .
>
> 13. . . . This [c]ourt concludes that Article I Section 15 of the North Carolina Constitution represents an ongoing constitutional appropriation of funds sufficient to create and maintain a school system that

provides each of our State's students with the constitutional minimum of a sound basic education. This constitutional provision may therefore be deemed an appropriation "made by law" [under Article V Section 7].

14. . . . [S]uch an appropriation may be considered to have been made by the people themselves, through the Constitution, thereby allowing fiscal resources to be drawn from the State Treasury to meet that requirement. The Constitution reflects the direct will of the people; an order effectuating Article I, § 15's constitutional appropriation is fully consistent with the framers[‘] desire to give the people ultimate control over the state's expenditures.

. . . .

20. Accordingly, this [c]ourt recognizes, as a matter of constitutional law, a continuing appropriation from the State Treasury to effectuate the people's right to a sound basic education. . . . When the General Assembly fulfills its constitutional role through the normal (statutory) budget process, there is no need for judicial intervention to effectuate the constitutional right. As the foregoing findings of fact make plain, however, this [c]ourt must fulfill its constitutional duty to effect a remedy at this time.

. . . .

22. The [c]ourt further concludes that . . . [it] has inherent and equitable powers that allow it to enter this Order. . . .

. . . .

23. . . . [T]he [c]ourt's inherent powers are derived from being one of three separate, coordinate branches of the government. . . .

24. In fact, it is the separation of powers doctrine itself which undergirds the judicial branch's authority to enforce its order here. "Inherent powers are critical to the court's autonomy and to its functional existence: 'If the courts could be deprived by the

> Legislature of these powers, which are essential in the direct administration of justice, they would be destroyed for all efficient and useful purposes.' " *Matter of Alamance Cty. Ct. Facilities*, 329 N.C. 84, 93–94 (1991) . . . (citing *Ex Parte Scheneck*, 65 N.C. 353, 355 (1871).

¶ 76 Second, regarding its duty to limit its encroachment upon its co-equal branches, the trial court concluded:

> 25. . . . The relief proposed here carefully balances these interests with the [c]ourt's constitutional obligation of affording relief to injured parties. First, there is no alternative or adequate remedy available to the children of North Carolina that affords them the relief to which they are so entitled. State Defendants have conceded that the [CRP]'s full implementation is necessary to provide a sound basic education to students and there is nothing else on the table. . . .
>
> 26. Second, this [c]ourt will have minimized its encroachment on legislative authority through the least intrusive remedy. Evidence of the [c]ourt's deference over the last seventeen years and its careful balancing of the interests at stake includes but is not limited to:
>
> a. The [c]ourt has given the State seventeen years to arrive at a proper remedy and numerous opportunities proposed by the State have failed to live up to their promise. Seventeen classes of students have since gone through schooling without a sound basic education;
>
> b. The [c]ourt deferred to State Defendants and the other parties to recommend to the [c]ourt an independent, outside consultant to provide comprehensive, specific recommendations to remedy the existing constitutional violations;
>
> c. The [c]ourt deferred to State Defendants and the other parties to recommend a remedial plan and the proposed duration of the plan . . . .

> d. The [c]ourt deferred to State Defendants to propose an action plan and remedy for the first year and then allowed the State Defendants additional latitude in implementing its actions in light of the pandemic's effect on education;
>
> e. The [c]ourt deferred to State Defendants to propose a long-term comprehensive remedial plan, and to determine the resources necessary for full implementation . . . .
>
> f. The [c]ourt also gave the State discretion to seek and secure the resources identified to fully implement the [CRP]. . . .
>
> g. The [c]ourt has further allowed for extended deliberations between the executive and legislative branches over several months to give the State an additional opportunity to implement the [CRP];
>
> h. The status conferences, including more recent ones held in September and October 2021, have provided the State with additional notice and opportunities to implement the [CRP], to no avail. The [c]ourt has further put [the] State on notice of forthcoming consequences if it continued to violate students' fundamental rights to a sound basic education.

¶ 77 Based on these findings of fact and conclusions of law, the trial court ordered the following:

> 1. The Office of State Budget and Management and the current State Budget Director ("OSBM"), the Office of the State Controller and the current State Comptroller ("Controller"), and the Office of the State Treasurer and the current State Treasurer ("Treasurer") shall take the necessary actions to transfer the total amount of funds necessary to effectuate years 2 & 3 of the [CRP], from the unappropriated balance within the General Fund to the state

agencies and state actors with fiscal responsibility for implementing the [CRP] as follows:

(a) Department of Health and Human Services ("DHHS"): $189,800,000.00;

(b) Department of Public Instruction ("DPI"): $1,522,058,000.00; and

(c) University of North Carolina System: $41,300,000.00

2. OSBM, the Controller, and the Treasurer are directed to treat the foregoing funds as an appropriation from the General Fund as contemplated within [N.C.G.S.] § 143C-6-4(b)(2)(a) and to carry out all actions necessary to effectuate those transfers;

. . . .

4. DHHS, the University of North Carolina System, and the State Superintendent of Public Instruction, and all other State agents or State actors receiving funds under the [CRP] are directed to administer those funds to guarantee and maintain the opportunity of a sound basic education consistent with, and under the time frames set out in, the [CRP], including the Appendix thereto;

5. In accordance with its constitutional obligations, the State Board of Education is directed to allocate the funds transferred to DPI to the programs and objectives specified in the Action Steps in the [CRP] and the Superintendent of Public Instruction is directed to administer the funds so allocated in accordance with the policies, rules, . . . and regulations of the State Board of Education so that all funds are allocated and administered to guard and maintain the opportunity of a sound basic education consistent with, and under the time frames set out in, the [CRP], including the appendix thereto[;]

6. OSBM, the Controller, and the Treasurer are directed to take all actions necessary to facilitate and authorize those expenditures;

> 7. To the extent any other actions are necessary to effectuate the year 2 & 3 actions in the [CRP], any and all other State actors and their officers, agents, servants, and employees are authorized and directed to do what is necessary to fully effectuate years 2 and 3 of the [CRP];
>
> 8. The funds transferred under this Order are for maximum amounts necessary to provide the services and accomplish the purposes described in years 2 and 3 of the [CRP]. Savings shall be effected where the total amounts appropriated are not required to perform these services and accomplish these purposes and the savings shall revert to the General Fund at the end of fiscal year 2023, unless the General Assembly extends their availability[.]

Finally, the trial court declared that its Order would be "stayed for a period of thirty (30) days to preserve the *status quo* . . . to permit the other branches of government to take further action consistent with the findings and conclusions of this Order."

¶ 78 One week later, on 18 November 2021, the State enacted An Act to Make Budget Appropriations for Current Operations of State Agencies, Departments, and Institutions, and for Other Purposes, S.L. 2021-180, https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2021-2022/SL2021-180.pdf (Budget Act).

¶ 79 On 24 November 2021, the Controller of the State of North Carolina petitioned the Court of Appeals for a Writ of Prohibition. The Controller sought an order preventing her from being required to comply with the trial court's November 2021. Specifically, the Controller asserted that the transfer directive within the trial court' November 2021 was legally erroneous and required her to act in a manner which would defeat a legal right.

¶ 80 On 30 November 2021, the trial court issued a "Notice of Hearing and Order Continuing Stay of Court's November 10, 2021 Order." After reviewing the Budget Act, the trial court concluded that the Act "appear[ed] to provide for some—but not all—the resources and funds required to implement years 2 & 3 of the [CRP], which may necessitate a modification in the November 10 Order." Therefore, the court announced that it would hold a hearing on 13 December 2021 for the State "to inform the [c]ourt of the specific components of the [CRP] plan

for years 2 & 3 that are funded by the [Budget] Act and those that are not." The court further stayed its 10 November 2021 Order until ten days after the conclusion of its December hearing.

¶ 81 But the trial court's planned 13 December hearing never came to pass. Instead, also on 30 November 2021, the Court of Appeals issued a writ of prohibition restraining the trial court from proceeding in the matter. In its writ, the Court of Appeals concluded that the trial court's November Order erred for two reasons. First, the Court of Appeals reasoned that the trial court's interpretation of a constitutional appropriation within Article I, § 15 would render the subsequent Educational Provisions in Article IX "unnecessary and meaningless." Second, the Court of Appeals stated that the trial court's reasoning "would result in a host of ongoing constitutional appropriations . . . that would devastate the clear separation of powers between the legislative and judicial branches and threaten to wreck the carefully crafted checks and balances that are the genius of our system of government." The Court of Appeals therefore restrain[ed] the trial court from enforcing its direct transfer order. Judge Arrowood dissented from the Court of Appeals' Order.[9]

¶ 82 On 7 December 2021, the State appealed the November 2021 Order to the Court of Appeals. The next day, 8 December 2021, for the first time since their August 2011 Motion to Intervene regarding Pre-K, Legislative Defendants intervened as a matter of right pursuant to N.C.G.S. § 1-72.2(b) and likewise appealed the trial court's November Order to the Court of Appeals.

¶ 83 On 14 February 2022, the State filed with this Court a Petition for Discretionary Review Prior to Determination by the Court of Appeals of the trial court's November 2021 Order. On 24 and 28 February 2022, Plaintiffs and Plaintiff Intervenors likewise requested this Court's discretionary review prior to determination by the Court of Appeals. On 28 February 2022, Legislative Defendants filed a response requesting that this Court deny the State's petition.

¶ 84 On 21 March 2022, this Court issued an order allowing the State's petition. Before appellate review, however, this Court remanded the case to the trial court "for a period of no more than thirty days for

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9. The dissent reasoned that the majority's *ex mero motu* shortening of the time for Plaintiff parties to file a response to the petition to one day when there were no immediate consequences in the case "was arbitrary, capricious and lacked good cause and instead designed to allow this panel to rule on this petition during the month of November" before a new panel was assigned.

the purpose of allowing the trial court to determine what effect, if any, the enactment of the [2021] State Budget has upon the nature and extent of the relief that the trial court granted in its 11 November 2021 order." This Court instructed the trial court to "make any necessary findings of fact and conclusions of law and to certify any amended order that it chooses to enter with this Court on or before the thirtieth day following the entry of this order." That same day, Chief Justice Newby reassigned this case from Judge Lee to Judge Michael L. Robinson.[10]

¶ 85 On 24 March, 13 April, and 22 April 2022, the trial court conducted hearings with the parties to determine the effect of the 2021 Budget Act on the relief granted in the trial court's November 2021 Order. At these hearings, the parties took contrasting views on the scope of this Court's 21 March 2022 Remand Order. Legislative Defendants contended that the remand order allowed the trial court "to make a de novo legal determination on the legality and enforceability of the 10 November Order—claiming that, as concluded by the panel of the Court of Appeals, the trial court lacked legal authority to order funds transferred from the North Carolina treasury to fund specific educational programs." Alternatively, Legislative Defendants argued "that the Budget Act as passed fully satisfies the State's obligation to provide K–12 students with a sound basic education as established by the Supreme Court in [*Leandro I*]."

¶ 86 "By comparison, Plaintiffs and the State Defendants contend[ed] that the trial court's task [was] simply to examine the Budget Act as passed and determine the amount of funding provided therein for each of the CRP programs during years 2 and 3 of the CRP." The State's evidence, based on the affidavit of the Chief Deputy Director of State Budget for the North Carolina Office of State Budget and Management, indicated that "the Budget Act funded approximately 60 percent of year 2 CRP programs and 49 percent of year three programs."

¶ 87 On 26 April 2022, the trial court issued its subsequent order (April 2022 Order), also now before us for review. As an initial matter, the trial court addressed the parties' arguments regarding its own authority in light of the Court of Appeals' Writ of Prohibition. Because that order "has not been overruled or modified[,]" the court "conclude[d] that it is binding on the trial court." "Accordingly," the trial court determined that it "cannot and shall not consider the legal issue of the trial court's authority to order State officers to transfer funds from the State treasury to the CRP."

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10. We take a moment of privilege to express the Court's gratitude to Judge Robinson for his diligent service to the State presiding over this case.

¶ 88 The trial court then addressed the effect of the Budget Act on the CRP. "Based on [its] review of analyses provided to it by [OSBM] and the General Assembly's Fiscal Research Division . . . , and the arguments and submissions of the parties," the trial court found that "significant necessary services for students, as identified in the CRP, remain unfunded and/or underfunded by the Budget Act." The court found that "the Budget Act fail[ed] to provide nearly one-half of the[ ] total necessary funds." Specifically, the court found that "the Budget Act fund[ed] approximately 63% of the total cost of the programs to be conducted during year 2 and approximately 50% of the total cost of the programs to be conducted during year 3." Regarding the State's unappropriated savings, the trial court found that "[t]he Budget Act reserves during each year of the two-year budget cycle $1.134 billion to the State's Saving Reserve, which brings the total of unappropriated funds in the State's Savings Reserve to $4.25 billion after the fiscal year 2022–23 legislatively-mandated transfer." Therefore, "[a]s a matter of mathematical calculation," the trial court found that "the funds transferred on a discretionary basis to the State's Savings Reserve and the State's Capital and Infrastructure Reserve during the two-year budget cycle is substantially in excess of the amount necessary to fully fund the CRP during years 2 and 3 of the CRP."

¶ 89 Based on these findings of fact, the trial court concluded that the Budget Act "partially but not totally fund[ed] years 2 and 3 of the CRP." Specifically, the court concluded that "the total underfunding of CRP programs during years 2 and 3 . . . is $785,106,248 in the aggregate." Regarding the State's potentially available funds, the court concluded that "the General Fund does contain sufficient unappropriated monies to make the transfer anticipated by the 10 November Order and the lesser amount of underfunding identified above." However, based on the Court of Appeals' Writ of Prohibition, the trial court "conclude[d] that the 10 November Order should be amended to remove a directive that State officers or employees transfer funds from the State treasury to fully fund the CRP." Instead, the trial court concluded that its Order must simply "determine that the State of North Carolina has failed to comply with the trial court's prior order to fully fund years 2 and 3 of the CRP" without specifically directing the State officials to make the transfers necessary to do so.

¶ 90 Accordingly, the trial court ordered:

> The Department of Health and Human Services[,] the Department of Public Instruction, and the University of North Carolina System have and recover from the State of North Carolina to properly fund years 2 and 3 of the [CRP] the following sums in addition to those

> sums otherwise provided for the [CRP] by the Budget Act and federal or other funds made available:
>
> a. The [DHHS] recover from the State of North Carolina the sum of $142,900,000;
>
> b. The [DPI] recover from the State of North Carolina the sum of $608,006,248; and
>
> c. The [UNC] System recover from the State of North Carolina the sum of $34,200,000.

¶ 91 In alignment with the November 2021 Order, the trial court further ordered that "DHHS, DPI, UNC System, and all other State agents or State actors receiving funds under the [CRP] are directed to administer those funds consistent with, and under the time frames set out in the [CRP], including the Appendix thereto." Likewise, the court ordered that upon administering these funds, any "savings shall revert to the General Fund at the end of fiscal year 2023, unless the General Assembly extends their availability."

¶ 92 In July 2022, the State enacted the 2022 Appropriations Act. An Act to Modify the Current Operations Appropriations Act of 2021 and to Make Other Changes in the Budget Operations of the State, S.L. 2022-74, https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2021-2022/SL2022-74.pdf.

¶ 93 Following the trial court's April 2022 Order, this case returned to the jurisdiction of this Court. On appeal, Plaintiffs, Plaintiff-Intervenors, and the State argued that, contrary to the order of the Court of Appeals, under the extraordinary circumstances summarized here, the trial court had the proper authority to direct State actors to transfer the available funds necessary to fulfill years two and three of the Comprehensive Remedial Plan in its November 2021 Order.[11] The State Board of Education emphasized that the CRP is the product of the State's efforts to fulfill its constitutional commitment and that the CRP's action steps are necessary to avoid judicial encroachment on the Board's constitutional authority.

¶ 94 Contrastingly, Legislative Defendants argued that the trial court's November 2021 Order's transfer provisions violated the Separation of

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11. Plaintiffs and Plaintiff-Intervenors' position was supported by amici curiae professors and longtime practitioners of constitutional and educational law, the North Carolina Justice Center, the Duke Law Children's Law Clinic, the Center for Educational Equity, the Southern Poverty Law Center, and over fifty North Carolina business leaders.

Powers Clause of our State's Constitution.[12] Legislative Defendants further argued that both the November 2021 and April 2022 Orders were improper because the case is narrowly confined to Hoke County and not the state as a whole, the trial court engaged with non-justiciable political questions, the trial court failed to presume that the Budget Act was constitutionally compliant, and the suit was friendly and lacked genuine controversy.

¶ 95 Finally, the State Controller argued that the trial court's November 2021 Order lacked constitutional authority to order the Controller and other state officials to transfer available State funds, and therefore that this Court should affirm the trial court's April 2022 Order removing those transfer directives.

¶ 96 This case came before this Court once more for oral arguments on 31 August 2022.

II. Analysis

¶ 97 Now, this Court must assess the constitutionality of the trial court's 10 November 2021 and 26 April 2022 Orders. This Court reviews constitutional questions de novo. *Cooper v. Berger*, 370 N.C. 392, 413 (2018). Under the extraordinary circumstances of this case, we hold that the trial court's November 2021 Order properly directed certain State officials to transfer State funds in compliance with the CRP. We thus affirm the constitutional analysis and transfer directives within the November 2021 Order and vacate in part and reverse in part the April 2022 Order with further instructions on remand. To enable the trial court to comply with these instructions, we stay the Court of Appeals' Writ prohibiting the trial court from issuing the November 2021 transfer directive.

¶ 98 First, we review the meaning and scope of the constitutional right at the heart of this case: the right of all North Carolina schoolchildren to the opportunity to receive a sound basic education. Second, we consider the duties and powers of the legislative and judicial branches as they relate to guarding and maintaining that constitutional right. Third, we apply this constitutional analysis to the trial court's November 2021 and April 2022 Orders. Fourth, we address Legislative Defendants' various assertions of trial court error.

A. The Constitutional Right to a Sound Basic Education

¶ 99 **[1]** Our Constitution and statutes recognize certain rights. In particular, our Constitution's Declaration of Rights vests within all people of our

12. Legislative Defendants' position was supported by amici curiae North Carolina Institute for Constitutional Law and the John Locke Foundation.

State rights that we deem fundamental, such as the right to free elections, equal protection under law, and freedom of speech and assembly. N.C. Const. Art. I, §§ 10, 12, 14, 19; *see also Harper v. Hall*, 380 N.C. 317, 2022-NCSC-17, ¶ 159 (discussing these rights).

¶ 100 Since its inception in 1994, this case has revolved around the rights enshrined within our Constitution's "Education Provisions:" namely Article I, § 15 and Article IX, § 2, but also Article IX, §§ 6 and 7. Accordingly, we begin our analysis by reviewing the text, structure, and history of the right to a sound basic education as established in these Education Provisions. *See Harper*, 2022-NCSC-17, ¶ 121 (considering the text, history, and structure of constitutional rights to ascertain their meaning).

¶ 101 Constitutional analysis begins with the text. *State ex rel. Martin v. Preston*, 325 N.C. 438, 449 (1989). "We look to the plain meaning of [each] phrase to ascertain its intent." *Town of Boone v. State*, 369 N.C. 126, 132 (2016). To understand the meaning of the fundamental right at issue in this case, we must consider the plain text of our Constitution's Education Provisions.

¶ 102 First, Article I, § 15 of our Constitution's Declaration of Rights declares that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." The plain text of this provision is not suggestive, but obligatory. It does not declare that the State *may* guard and maintain the people's right to the privilege of education, but that it is the *duty* of the State to do so. Further, the plain text of this provision places this affirmative duty on the shoulders of one entity: the State. While subsequent constitutional provisions note that the State *may* involve local units of government in school operation, Article I, § 15 makes clear that the ultimate responsibility lies with the State. Finally, the word "maintain" within this provision begins to establish that the State's affirmative duty here is not merely administrative, but financial. One definition of maintain is "[t]o support . . . financially," *Maintain*, *Black's Law Dictionary* (11th ed. 2019), or "to support the expense of." *Maintain*, *Webster's American Dictionary of the English Language* (1865). *See also Maintain*, *A Dictionary of the English Language* (1865) ("To bear the expense of; to support; to keep up; to supply with what is needed."). This meaning aligns with the Constitution's plain emphasis on education funding within subsequent provisions noted below.

¶ 103 Second, Article IX, § 2(1) establishes that "[t]he General Assembly shall provide by taxation and otherwise for a general and uniform

system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students." Like Article I, § 15, the plain language of this section is obligatory; it does not declare that the General Assembly *may* provide for a system of free public schools, but that it *shall* do so. *See Mebane Graded Sch. Dist. v. Alamance Cnty.*, 211 N.C. 213, 223 (1937) (*Mebane*) ("The duty imposed on the State, under Art. IX of the Constitution of North Carolina, is mandatory."). This contrasts with the subsequent permissive language in Article IX, § 2(2), which states that "[t]he General Assembly *may* assign to units of local government such responsibility for the financial support of the free public schools as it may deem appropriate[,]" and that "units of local government with financial responsibility for public education *may* use local revenues to add or to supplement any public school or post-secondary school program." (emphasis added). Here again, the plain constitutional text makes clear that the ultimate responsibility for securing the people's right to education lies with the State. And in declaring the governmental entity that is obligated to *fund* public education, the plain language of Article IX, § 2 is even more specific: "[t]he General Assembly."

¶ 104 Third, two subsequent provisions within Article IX further specify methods for funding the state's system of free public schools. Article IX, § 6 states that

> The proceeds of all lands that have been or hereafter may be granted by the United States to this State, and not otherwise appropriated by this State or the United States; all moneys, stocks, bonds, and other property belonging to the State for purposes of public education; the net proceeds of all sales of the swamp lands belonging to the State; and all other grants, gifts, and devises that have been or hereafter may be made to the State, and not otherwise appropriated by the State or by the terms of the grant, gift, or devise, shall be paid into the State Treasury and, together with so much of the revenue of the State as may be set apart for that purpose, shall be faithfully appropriated and used exclusively for establishing and maintaining a uniform system of free public schools.

Next, Article IX, § 7(a) states that

> [e]xcept as provided in subsection (b) of this section, all moneys, stocks, bonds, and other property

> belonging to a county school fund, and the clear 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 belong and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools.

Building from Article IX, § 2, the plain text of these provisions further clarifies the Constitution's repeated emphasis on adequately funding the State's system of free public schools. Indeed, these provisions establish specific requirements for the manner in which the General Assembly may exercise its appropriation powers by declaring that such funds "*shall* be faithfully appropriated and used *exclusively* for establishing and maintaining a uniform system of free public schools." More broadly, the plain text of these provisions emphasizes the distinctive prominence of public education within our Constitution: it is first established as a positive right of the people within the Declaration of Rights, then mandated to be guarded and maintained by the State, then specifically required to be funded through taxation and otherwise by the General Assembly. This renders the fundamental right established within these provisions highly exceptional, even among other rights enumerated within the Declaration of Rights.

¶ 105 The structure of our Constitution likewise supports this prominence. As an initial matter, the location of the right to education (N.C. Const. art. I, § 15) within the Constitution's Declaration of Rights indicates its significance. "The Declaration of Rights was passed by the Constitutional Convention on 17 December 1776, the day before the [state] Constitution itself was adopted, manifesting the primacy of the Declaration in the minds of the framers." *Corum*, 330 N.C. at 782. That original "logical and chronological primacy is preserved in our present constitution, with the Declaration of Rights now incorporated in the text of the [C]onstitution itself as article I." *Harper*, 2022-NCSC-17, ¶ 122. The fundamental purpose for the adoption of the Declaration of Rights "was to provide citizens with protection from the State's encroachment upon these rights." *Corum*, 330 N.C. at 782. It is no wonder, then, that the Framers chose to enshrine the fundamental right to education within the Declaration; like the right to free elections, N.C. Const. art. I, § 10, the right to religious liberty, N.C. Const. art. I, § 13, and the right to freedom of speech and press, N.C. Const. art. I, § 14, the right to education inherently strengthens the ability of a person and a community to safeguard their personal liberty and popular sovereignty from infringement. *See* N.C. Const. art. IX, § 1 ("Religion, morality, and knowledge being necessary

to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged"); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (*Brown I*) (describing education as "the very foundation of good citizenship.").

¶ 106 Beyond the location of Article I, § 15, the structure of the North Carolina Constitution further emphasizes the paramount importance of the right to education by devoting an *entire article* to it: Article IX. For context, there are only fourteen articles in our entire Constitution, including the Declaration of Rights and those establishing our three branches of government. Within Article IX, the Constitution contains ten sections enumerating certain principles and requirements for our state's system of public education, such as those establishing the State Board of Education, N.C. Const. art. IX, § 4, and describing methods of education funding, N.C. Const. art. IX, §§ 2, 6, 7. By comparison, the articles addressing local governments and corporations contain three and two sections, respectively. *See* N.C. Const. art. VII; N.C. Const. art. VIII. In short, the Constitution's structure makes clear that the right to education is regarded with foremost significance.

¶ 107 Finally, constitutional history likewise supports this significance. *See Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 2021-NCSC-6, ¶ 15 ("Constitutional provisions should be construed in consonance with the objects and purposes in contemplation at the time of their adoption."). North Carolina constitutional history illustrates both that our citizens have long valued public education and that experience taught them the necessity of safeguarding it through our Constitution, particularly to secure the fundamental rights of marginalized communities.

¶ 108 "Throughout the colonial period, the provincial government accepted no responsibility for education." N.C. Dep't of Public Instruction, The History of Education in North Carolina, 5 (1993) (hereinafter DPI Report). Because of the absence of State funding, what few educational opportunities that did exist were largely private, religious, and limited to affluent white families. *Id.*

¶ 109 In 1776, North Carolina's original Constitution provided "[t]hat a school or schools shall be established by the Legislature, for the convenient instruction of youth, with such salaries to the masters, paid by the public." N.C. Const. of 1776 art. XLI. Nevertheless, educational opportunities remained underfunded and exclusive, and "[m]any North Carolina citizens were dissatisfied with the deplorable state of affairs and efforts were begun to remedy the situation." DPI Report at 7.

¶ 110 The 1825 enactment of the Literary Fund was one such effort. *Id.* at 8. Over time, the fund grew and, in conjunction with further legislative support, "ushered in a period of expansion and progress for North Carolina public schools." *Id.* at 9. "By the time the Civil War erupted in 1861, it was generally recognized that North Carolina had one of the best school systems in the South." *Id.* Notably, though, this system still expressly excluded Black children, who could only access educational opportunities—if at all—at freedmen schools established and funded by private groups such as the American Missionary Association. *See* John L. Bell, *Samuel Stanford Ashley, Carpetbagger and Educator*, 72 N.C. Hist. Rev. 456, 459, 461 (1995) (hereinafter Bell).

¶ 111 The Civil War "brought this progressive period in education to an abrupt halt." DPI Report at 10. First, the Literary Fund was depleted due to wartime economic instability. Bell at 476. Then, in 1866, due to this economic fallout and "fear[ ] that the federal government would force integration of [B]lack pupils into the statewide school system," the General Assembly abolished North Carolina's public school system entirely, instead leaving county governments to establish schools "at their discretion." *Id.*

¶ 112 Against this historical backdrop, North Carolina's first ever multiracial cohort of state leaders "met in the winter of 1868 to draft a new state constitution." *Id.* at 473; *see also* Leonard Bernstein, *The Participation of Negro Delegates in the Constitutional Convention of 1868 in North Carolina*, The Journal of Negro History, Vol. 34, No. 4, 391, 394 (Oct. 1949) (describing the composition of the Constitutional Convention of 1868) (hereinafter Bernstein); John V. Orth, The North Carolina State Constitution 12 (1993) (same) (hereinafter Orth). The resulting 1868 Constitution was markedly more progressive than its predecessor, including, for instance, the expansion of property rights to women and elimination of property qualifications from political participation. *See* Orth at 15; DPI Report at 10.

¶ 113 The 1868 Constitution likewise expanded educational rights. "Seeing that the legislature could abolish the school system by law in 1866, [delegates] insisted that the guarantee of a public school education for all children of North Carolina be embedded in the [C]onstitution beyond the reach of legislative majorities." Bell at 482–83. Thus, Article I, § 27 of the 1868 Constitution established the express positive right of the people to the privilege of education and corresponding duty of the State to guard and maintain that right. *See* Orth at 52 ("[T]he right to education was intended to mark a new and more positive role for state government."). The 1868 Constitution likewise established the General

Assembly's duty to fund the state's public education system, declaring that "[t]he General Assembly shall provide by taxation and otherwise for a general and uniform system of Public Schools," and specified that certain funds "shall be faithfully appropriated for establishing and perfecting in this State a system of Free Public Schools, and for no other purposes or uses whatsoever." N.C. Const. of 1868 art. IX, §§ 2, 4. Although conservative legislators attempted "to add segregation amendments to the [Education Provisions,]" these were rejected. Bernstein at 398. Instead, these constitutional guarantees "made no mention of race."[13] Bell at 473. As noted above, our current State Constitution, ratified in 1971, includes substantially similar or identical language within its Education Provisions as its 1868 predecessor. *See* N.C. Const. art. I, § 15; N.C. Const. art. IX, §§ 2, 6, 7. Cumulatively, this historical context emphatically supports the paramount importance of the right to the opportunity to a sound basic education within our Constitution and of the will of the people to safeguard this right from legislative diminishment or abandonment.

¶ 114 These historical origins confirm what the text and structure make plain: that our Constitution expressly establishes the fundamental right of the people to the privilege of education, that it is the "sacred duty" of the State to safeguard that right, and that the General Assembly is constitutionally obligated to provide for our system of free public schools by taxation and otherwise. *Mebane*, 221 N.C. at 223. More specifically, the Education Provisions express a clear desire by the people to hold the executive and legislative branches accountable for ensuring that our public school system is properly maintained, financially and otherwise. Finally, "[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." *Corum*, 330 N.C. at 783.

¶ 115 In accordance with these principles, this Court has held that the Education Provisions "combine to guarantee every child of this state an opportunity to receive a sound basic education in our public schools." *Leandro I*, 346 N.C. at 345. This Court has further concluded that this right is substantive, robust, and paramount. *Id.*; *Leandro II*, 358 N.C. at 649. Today, we expressly and emphatically reaffirm the inherent substance, broad scope, and paramount importance of the fundamental

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13. However, "a post-Reconstruction amendment in 1876 required segregated schooling ('separate but equal') . . . [until] [o]utlawed in 1954 by the U.S. Supreme Court's ruling in *Brown v. Board of Education* [and subsequently] forbidden by the 1971 Constitution." Orth at 145.

right to the opportunity to a sound basic education enshrined in our Constitution as first recognized by this Court in *Leandro I* and *II*.

B. Legislative and Judicial Duties and Powers

¶ 116 When rights are violated, justice requires a remedy. N.C. Const. art. I, § 18 ("[E]very person for an injury done him . . . shall have remedy by due course of law."); *see also Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("[E]very right, when withheld, must have a remedy, and every injury its proper redress."). The nature of the right and the extent of the violation dictate the appropriate nature and extent of the corresponding remedy. *Corum*, 330 N.C. at 784. Accordingly, a longstanding violation of a fundamental constitutional right demands a remedy of equivalent magnitude.

¶ 117 Here, as summarized above, the trial court repeatedly concluded based on an abundance of clear and convincing evidence that the State—for many years—has continued to violate the fundamental constitutional rights of North Carolina schoolchildren across the state by failing to guard and maintain their right to the opportunity of a sound basic education. The trial court likewise repeatedly concluded that this violation disproportionately impacts historically marginalized students such as students from economically disadvantaged families, English language learners, students with learning differences, and students of color. The trial court emphasized these conclusions most recently within the November 2021 Order before us on this appeal.

¶ 118 Now, this Court must consider the scope of its authority to appropriately remedy this violation. To do so, we first analyze the constitutional duties and powers of the legislative branch as they relate to guarding and maintaining the fundamental right to a sound basic education. Second, we analyze the constitutional duties and powers of the judicial branch relating to that right. Third, we harmonize these constitutional duties and powers in light of the principles of separation of powers and checks and balances within our tripartite system of democratic governance.

1. Legislative Duties and Powers

¶ 119 Because this case primarily involves the boundaries between the legislative and judicial branches, we begin by considering the constitutional duties and powers of the legislative branch.

¶ 120 Our Constitution assigns certain positive and negative duties to the legislative branch. Positive duties are those the Constitution mandates that the legislative branch fulfill. For instance, Article II, §§ 3 and 5 respectively mandate 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 senate [and representative] districts and the apportionment of Senators [and Representatives] among those districts." (emphasis added). Likewise, Article II, § 20 establishes that each house of the General Assembly "*shall* prepare bills to be enacted into laws." (emphasis added). Contrastingly, negative duties prohibit certain legislative action. For instance, Article II, § 24 dictates that "[t]he General Assembly *shall not* enact any local private, or special act or resolution" relating to certain subjects, such as "changing the names of cities, towns, and townships." N.C. Const. art. II, § 24(b) (emphasis added).

¶ 121 This case considers the legislature's duties under the Education Provisions. As summarized above, these provisions create a positive duty for the legislature to fulfill its role (as part of "the State") in maintaining the people's right to education by providing by taxation and otherwise for a general and uniform system of free public schools. N.C. Const. art. I, § 15; N.C. Const. art. IX, §§ 2, 6. As established by *Leandro I*, this constitutional guarantee is not one of mere education *access*, but of education *adequacy*. 346 N.C. at 345–46. Put differently, the General Assembly is not merely responsible for ensuring that there is an operational school building in each district that lets students in its front doors, but for ensuring that once a student enters those doors, she has the opportunity to receive—at minimum—a sound basic education. *See id.* at 345 ("An education that does not serve the purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and is constitutionally inadequate."). The history of this case has established that this duty is both substantive (for instance, ensuring through education statutes and policies that there is a competent, well-trained teacher in every classroom) and financial (ensuring that state funding is distributed in a manner that allows every school district to provide all students with the opportunity to receive a sound basic education).

¶ 122 To fulfill these constitutional duties, the legislature is granted broad powers. For instance, Article II, § 1 provides that "[t]he legislative power of the State shall be vested in the General Assembly[.]" As such, the General Assembly is broadly empowered to enact legislation to advance its policy goals, including in the realm of education. Other constitutional provisions, such as Article II, § 22, describe the procedures that the General Assembly must follow in exercising its legislative power.

¶ 123 More specifically, our Constitution grants the General Assembly extensive financial authority. For instance, Article II, § 23 provides for the General Assembly's power to enact revenue bills. Likewise, Article III,

§ 5(3) "defines the manner in which th[e] three-branch governmental structure should operate in the budgetary context by providing that . . . '[t]he budget as enacted by the General Assembly shall be administered by the Governor.' " *Cooper v. Berger*, 376 N.C. 22, 37 (2020). Article V § 2 delineates the General Assembly's taxation power. Finally, Article V, § 7 notes that "[n]o money shall be drawn from the State treasury but in consequence of appropriations made by law[.]" The Appropriations Clause is further operationalized by statute in N.C.G.S. § 143C-1-2 of the State Budget Act, which states that "[a] law enacted by the General Assembly that expressly appropriates funds from the State treasury is an appropriation."

¶ 124 Here, the trial court's November 2021 Order concluded that Article I, § 15 "represents an ongoing constitutional appropriation of funds sufficient to create and maintain a school system that provides each of our State's students with the constitutional minimum of a sound basic education[,] . . . [and] may therefore be deemed an appropriation 'made by law.' " By contrast, Legislative Defendants and the State Controller contend that the Appropriations Clause and the Separation of Powers Clause indicate that the trial court's subsequent transfer order is prohibited.

2. Judicial Duties and Powers

¶ 125 Next, we must likewise consider the duties and powers of the judicial branch in addressing the violation of constitutional rights.

¶ 126 Article I, § 18 of our Constitution establishes that "every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." In accordance with this constitutional promise, this Court has expressed a "longstanding emphasis on ensuring redress for every constitutional injury." *Craig ex rel. Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 342 (2009).

¶ 127 The duty to ensure such redress belongs to the courts. Because the judicial branch "is the ultimate interpreter of our State Constitution[,] [i]t 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*, 330 N.C. at 783.

¶ 128 With this constitutional duty comes constitutional powers. Generally, judicial power arises from Article IV, § 1 of our Constitution, which establishes that "[t]he judicial power of the State shall . . . be vested in a Court for the Trial of Impeachments and in a General Court of Justice."

The Constitution further establishes that "[t]he General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of government." N.C. Const. art. IV, § 1.

¶ 129 More specifically, the judiciary is endowed with certain inherent power. In 1991, Chief Justice Exum, writing unanimously on behalf of this Court, observed that

> [a] court's inherent power is that belonging to it by virtue of its being one of three separate, coordinate branches of government. For over a century this Court has recognized such powers as being plenary within the judicial branch—neither limited by our [C]onstitution nor subject to abridgment by the legislature. In fact, the inherent power of the judicial department is expressly protected by the constitution: "The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government . . . . " N.C. Const. art. IV, § 1. Inherent powers are critical to the court's autonomy and to its functional existence: if the courts could be deprived by the legislature of these powers, which are essential to the direct administration of justice, they would be destroyed for all efficient and useful purposes.
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> Generally speaking, the scope of a court's inherent power is its authority to do all things that are reasonably necessary for the proper administration of justice. . . . This Court has upheld the application of the inherent powers doctrine to a wide range of circumstances, from dealing with its attorneys[ ] to punishing a party for contempt.

Alamance, 329 N.C. at 93–94 (1991) (cleaned up).

¶ 130 "Typically, . . . [due to the Separation of Powers,] the exercise of inherent power by courts of this state has been limited to matters discretely within the judicial branch." *Id.* at 94. However,

> [t]he scope of the inherent power of a court does not, in reality, always stop neatly short of explicit, exclusive powers granted to the legislature, but

occasionally must be exercised in the area of overlap between branches. The North Carolina Constitution provides: "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, § 4. The perception of the separation of the three branches of government as inviolable, however, is an ideal not only unattainable but undesirable. An overlap of powers constitutes a check and preserves the tripartite balance, as two hundred years of constitutional commentary note. "Unless these [three branches of government] be so far connected and blended as to give each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained." The Federalist No. 48, at 308 (J. Madison) (Arlington House ed. 1966). This "constant check . . . preserving the mutual relations of one branch with the other . . . can best be accomplished, if not solely accomplished, by an occasional mixture of the powers of each department with that of the others, while the separate existence, and constitutional independence of each are fully provided for." 2 J. Story, Commentaries on the Constitution of the United States 22 (1833). A contemporary view notes that this area of overlap is occupied not only by the doctrine of checks and its basis in maintaining the province of each power, but also by a functional component of pragmatic necessity—termed by some commentators "incidental powers"—whereby one branch exercises some activities usually belonging to one of the other two branches in order to fully and properly discharge its duties.

Like the jealous checks by one branch upon the encroachments of another, which the Framers viewed positively as the basis for government's critical balance, a functional overlap of powers should facilitate the tasks of each branch. . . . No less important to a functional balance of power is the notion of a working reciprocity and cooperativeness amongst the branches: "While the Constitution diffuses power the better to secure liberty, it also contemplates that

> practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 96 L. Ed. 1153, 1199 (1952) (Jackson, J., concurring).

Id. at 96–97 (cleaned up).

¶ 131 "In the realm of appropriations," this Court has noted, "some overlap of power between the legislative and the judicial branches is inevitable." *Id.* at 97. Accordingly, this Court has "[held] that when inaction by those exercising legislative authority threatens fiscally to undermine the integrity of the judiciary, a court may invoke its inherent power to do what is reasonably necessary for the orderly and efficient administration of justice." *Id.* at 99. Although "Article V prohibits the judiciary from taking public monies without statutory authorization[,]" when the exercise of remedial power "necessarily includes safeguarding the constitutional rights of the parties[,] . . . the court has the inherent authority to direct local authorities to perform that duty." *Id.*

¶ 132 However, even inherent power is not without limitation. For instance,

> doing what is reasonably necessary for the proper administration of justice means doing *no more* than is reasonably necessary. The court's exercise of its inherent power must be responsible—even cautious—and in the spirit of mutual cooperation among the three branches. The very genius of our tripartite Government is based upon the proper exercise of their respective powers together with harmonious cooperation between the three independent branches. However, if this cooperation breaks down, the Judiciary must exercise its inherent power to preserve the efficient and expeditious administration of Justice and protect it from being impaired or destroyed.
>
> The inherent power of the court must be exercised with as much concern for its potential to usurp the powers of another branch as for the usurpation it is intended to correct. It is a tool to be utilized only where other means to rectify the threat . . . are unavailable or ineffectual, and its wielding must be no more forceful or invasive than the exigency of the circumstances requires.

> The very conception of inherent power carries with it the implication that its use is for occasions not provided for by established methods. Only when established methods fail and the court shall determine that by observing them the assistance necessary . . . cannot be had, or when an emergency arises which the established methods cannot or do not instantly meet, then and not till then does occasion arise for the exercise of the inherent power.

Id. at 99–100 (cleaned up).

¶ 133 More specifically,

> the court's judicious use of its inherent power to reach towards the public purse must recognize two [further] critical limitations: first, it must bow to established procedural methods where these provide an alternative to the extraordinary exercise of its inherent power. Second, in the interests of the future harmony of the branches, the court in exercising that power must minimize the encroachment upon those with legislative authority in appearance and in fact. This includes not only recognizing any explicit, constitutional rights and duties belonging uniquely to the other branch, but also seeking the least intrusive remedy.

Id. at 100–101.

¶ 134 Here, the trial court concluded that given the extraordinary circumstance of this case, it was required to "provide a remedy [for the ongoing constitutional violation] through the exercise of its constitutional role." "Otherwise," the trial court concluded, "the State's repeated failure to meet the minimum standards for effectuating the constitutional right to obtain a sound basic education will threaten the integrity and viability of the North Carolina Constitution." By contrast, Legislative Defendants contend that the trial court's remedy violated the doctrine of separation of powers because the power to appropriate state funds is vested exclusively with the legislative branch.

3. Harmonizing Judicial and Legislative Duties and Powers

¶ 135 **[2]** Now, we must address the intersection of these legislative and judicial powers and duties. When considering the meaning of multiple

constitutional provisions, this Court seeks to read the provisions in harmony. "It is axiomatic that the terms or requirements of a constitution cannot be in violation of the same constitution—a constitution cannot violate itself." *Leandro I*, 346 N.C. at 352. Specifically, this case requires the interpretation of the General Assembly's powers under the Appropriations Clause in light of its duties under the Education Provisions. It likewise requires the interpretation of the judiciary's inherent power in light of the Education Provisions, the Appropriations Clause, and the Separation of Powers Clause. We address each of these constitutional crossroads in turn.

¶ 136 First, this case requires this Court to harmonize the General Assembly's powers under the Appropriations Clause in light of its duties under the Education Provisions. On the one hand, the General Assembly enjoys broad discretion over all legislative matters, including the appropriation of state funds. In conjunction with the Separation of Powers Clause, this Court has observed that "[i]n drafting the appropriations clause, the framers sought to ensure that the people, through their elected representatives in the General Assembly, had full and exclusive control over the allocation of the state's expenditures." *Cooper*, 376 N.C. at 37. On the other hand, this Court has repeatedly held that the General Assembly, as part of "the State," has a constitutional duty to "guard and maintain" the fundamental right of North Carolina schoolchildren to the opportunity to a sound basic education, including adequately funding our system of free public schools such that this right is maintained. *See generally Leandro I*, 346 N.C. 33; *Leandro II*, 358 N.C. 605.

¶ 137 In order to harmonize these principles, we hold that our Constitution requires the General Assembly to exercise its power under the Appropriations Clause in contemporaneous compliance with its duties under the Education Provisions. Under *Leandro I*, this means that the General Assembly must exercise its appropriations powers such that every student receives the opportunity to obtain a sound basic education. In other words, the General Assembly is constitutionally required to appropriate at least enough funding to public education such that every child in every school in every district is provided with the opportunity to receive at least a sound basic education. When it does not, it violates both its own constitutional duties and the constitutional rights of North Carolina schoolchildren under the Education Provisions. To hold otherwise would allow the General Assembly to ignore these duties and rights, rendering them—and, in other contexts, other constitutional duties or fundamental rights—meaningless and not subject to judicial enforcement. This our Constitution does not allow. *See Leandro I*, 346 N.C. at 345 (concluding that plaintiffs' educational adequacy claims

are not nonjusticiable political questions and that "it is the duty of this Court to address [their] constitutional challenge to the state's public education system.").

¶ 138 This principle is not novel. Since 1787, the highest Court of our state has held that because our Constitution is "the fundamental law of the land," the General Assembly may not exercise its legislative power in a manner that violates constitutional rights. *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 7 (1787). Accordingly, in *Bayard*, the Court rejected a statute that abrogated the constitutional right to a trial by jury. *Id.*

¶ 139 We have applied this same principle to voting rights. In *Stephenson v. Bartlett*, for instance, this Court stated that the principle of constitutional harmony "require[d] us to construe [the legislature's power under] Article II, Sections 3(1) and 5(1) in conjunction with [the right to equal protection of the laws under] Article I, Section 19 in such a manner as to avoid internal textual conflict." 355 N.C. 354, 378 (2002). Accordingly, the Court held that

> [t]he 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. 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.

¶ 140 More recently, this Court reaffirmed this principle in *Harper*, 2022-NCSC-17. There we again noted that "[a]lthough the task of redistricting is primarily delegated to the legislature, it must be performed in conformity with the State Constitution." *Id.* at ¶ 6 (cleaned up). Thus, we held that the General Assembly's "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 [in our Declaration of Rights]." *Id.* at ¶ 12. In these cases and others, this Court has made clear that the General Assembly may not exercise its broad legislative power in a manner that violates fundamental constitutional rights.

¶ 141 So too here. The Education Provisions obligate the General Assembly to fund a uniform system of free public schools in which every child has the opportunity to receive a sound basic education. N.C.

Const. art. I, § 15; N.C. Const. art. IX, § 2; *Leandro I*, 346 N.C. at 345. The Appropriations Clause, among other provisions, establishes the General Assembly's power to appropriate State funds. Therefore, in exercising its broad discretion within appropriations and other legislative powers, the General Assembly must fulfill its constitutional duty to maintain every child's right to the opportunity to receive a sound basic education.

¶ 142 Below, the dissent focuses exclusively on the legislature's powers while ignoring its constitutional duties. Such an approach would allow the legislature to exercise its broad powers under the Appropriations Clause (or others) in a manner that indefinitely violates the fundamental constitutional rights of the people. This interpretation would approve both constitutional dissonance and constitutional disregard in direct violation of this Court's own constitutional duties.

¶ 143 **[3]** Second and accordingly, this case requires the interpretation of the judiciary's inherent power to remedy constitutional violations in light of the Education Provisions, the Appropriations Clause, and the Separation of Powers Clause. On the one hand, the Appropriations Clause states that "[n]o money shall be drawn from the State treasury but in consequence of appropriations made by law." N.C. Const. art. V, § 7. The Separation of Powers Clause states that "[t]he 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. As applied to the Appropriations Clause, this Court has noted that the principle of separation of powers indicates "that the legislative power is supreme over the public purse." *State v. Davis*, 270 N.C. 1, 14 (1967). More recently, this Court has stated that "[i]n light of [the Appropriations Clause], the power of the purse is the exclusive prerogative of the General Assembly." *Cooper*, 376 N.C. at 37.

¶ 144 On the other hand, the judicial branch derives inherent and inalienable authority to address the violation of constitutional rights from its very status as one of three separate and coordinate branches of our state government. *See Ex Parte McCown*, 139 N.C. 95, 105–06 (1905) (citing N.C. Const. art. I, § 4); *Corum*, 330 N.C. at 783 ("It is the state judiciary that has the responsibility to protect the state constitutional right of the citizens."). As a coequal part of "the State," the judiciary—like the legislative and executive branches—is constitutionally bound by Article I, § 15 to fulfill its own unique role in guarding and maintaining the right to a sound basic education. This role requires the judiciary to assess the constitutional compliance of the other branches and—if an offending branch proves unwilling or unable to remedy the deficiency—after showing due deference, invoke its inherent power to do what is

reasonably necessary to restore constitutional rights "by imposing a specific remedy and instructing the recalcitrant state actors to implement it." *Leandro II*, 358 N.C. at 642.

¶ 145 In order to harmonize these principles, we hold that because the Constitution itself requires the General Assembly to adequately fund the state's system of public education, in exceedingly rare and extraordinary circumstances, a court may remedy an ongoing violation of the constitutional right to the opportunity to a sound basic education by ordering the transfer of adequate available state funds.

¶ 146 This holding is consistent with foundational constitutional principles. First, it upholds the will of the people. Above any statute or legislative prerogative, our Constitution "expresses the will of the people in this State and is, therefore, the supreme law of the land." *In re Martin*, 295 N.C. 291, 299 (1978). Accordingly, just as the General Assembly's authority over appropriations is grounded in its function as the elected voice of the people, *see Cooper*, 376 N.C. at 37, the requirement for adequate education funding embedded within the Education Provisions is fully consistent with the Framers' intent to give the people ultimate control over the state's expenditures.

¶ 147 Second, this holding upholds constitutional integrity. Allowing the legislature to indefinitely violate the constitutional right of North Carolina schoolchildren to a sound basic education would threaten the integrity and viability of the Constitution itself by nullifying its language without the people's consent, thus rendering this right—and therefore, perhaps others—meaningless and unenforceable. This Court has already forsworn this possibility: in *Leandro I*, the Court squarely rejected the State's contention that claims of education adequacy were judicially unenforceable. 346 N.C. at 344–45.

¶ 148 Third, this holding upholds constitutional checks and balances and the separation of powers. The North Carolina Constitution "incorporates a system of checks and balances that gives each branch some control over the others." *State ex rel. McCrory v. Berger*, 368 N.C. 633, 635 (2016). Simultaneously, "the separation of powers clause requires that, as the three branches of government carry out their duties, one branch will not prevent another branch from performing its core functions." *Id.* at 636. Although at first glance these principles may appear to be in tension—one indicating flexibility and the other rigidity—a deeper look reveals that they both support a common democratic purpose: ensuring that no single person or branch may accumulate excessive power, and thus threaten the liberty and sovereignty of the people. *See The Federalist* No. 47 (James Madison) ("The accumulation of all

powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."). As cases arise that probe the contours of these foundational constitutional principles, this Court "must look freshly at the separation of powers provision in the North Carolina Constitution, with an eye to the actual constitutional, pragmatic, and philosophical limitations on the power granted therein." *Alamance*, 329 N.C. at 96.

¶ 149 Our fresh look is informed by old sources. In *The Federalist Papers*, James Madison stated that the separation of powers between the three branches does "not mean that these departments ought to have no *partial agency* in, or no *control* over, the action of each other." *Federalist* No. 47. Rather, the separation of powers properly dictates "that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free Constitution are subverted." *Id.*[14] Indeed, Madison observed that "[i]f we look into the constitutions of the several states we find that, notwithstanding the emphasis and, in some instances, the unqualified terms in which [the separation of powers] has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct." *Id.* This marginal intersection of certain powers is necessary because "unless these departments be so far connected and blended as to give each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained." *Federalist* No. 48 (James Madison). In short, "the lesson the Founding Fathers drew was that separation of powers needed to be qualified by checks and balances lest one branch become overpowerful." Orth at 4.

¶ 150 Specifically, the founders expressed concern about an overpowerful legislature. In *The Federalist* No. 48, Madison warned that because the constitutional powers of the legislative branch are "at once more extensive, and less susceptible of precise limits, it can, with greater facility, mask, under complicated and indirect measures, the encroachment which it makes on the co-ordinate departments." *Federalist* No. 48. Accordingly, Alexander Hamilton observed in *The Federalist* No. 78 that "the courts were designed to be an intermediate body between the

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14. *See also* 2 J. Story, *Commentaries on the Constitution of the United States* 22 (1833) (observing that the "constant check . . . preserv[ing] the mutual relations of one [branch] with the other . . . can be best accomplished, if not solely accomplished, by an occasional mixture of the powers of each department with that of the others, which the separate existence, and constitutional independence are each fully provided for").

people and the legislature in order, among other things, to keep the latter within the [constitutional] limits assigned to their authority." This role does not

> suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both, and that where the will of the legislature . . . stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the later rather than the former. They ought to regulate their decisions by the fundamental laws rather than by those which are not fundamental.

Id.

¶ 151 Precedents from this Court align with these foundational authorities. This Court has long made clear that "[o]bedience to the Constitution on the part of the Legislature is no more necessary to orderly government than the exercise of the power of the Court in requiring it when the Legislature inadvertently exceeds its limitations." *State v. Harris*, 216 N.C. 746, 764 (1940). As such, for over two centuries our courts have faithfully checked legislative actions for constitutional compliance. *See Bayard*, 1 N.C. 5. "Like the jealous checks by one branch upon the encroachments of another, which the Framers viewed positively as the basis for government's critical balance, a functional overlap of powers should facilitate the tasks of each branch." *Alamance*, 329 N.C. at 97.

¶ 152 In extraordinary circumstances, this Court has held that this "functional overlap of powers" may include directing the transfer of State funds. In *Alamance*, this Court held that even within "the realm of appropriations, some overlap of power between the legislative and the judicial branches is inevitable." 329 N.C. at 97. There, the Court held "that when inaction by those exercising legislative authority threatens fiscally to undermine the integrity of the judiciary, a court may invoke its inherent power to do what is reasonably necessary for the orderly and efficient exercise of the administration of justice." *Id.* at 99. Here, we invoke our inherent authority to protect against an equally grave threat of legislative inaction: the indefinite violation of the constitutional right to the opportunity to a sound basic education.

¶ 153 Even standing apart from checks and balances, separation of power principles likewise support this holding. "[T]he separation of powers clause requires that, as the three branches of government carry out their duties, one branch will not prevent another branch from performing its core functions." *McCrory*, 368 N.C. at 636. Here, to allow the State

to indefinitely fail to meet the minimum standards for effectuating the constitutional right to obtain a sound basic education would violate this maxim by preventing the judiciary from performing its core duty of interpreting our Constitution and "protecting the state constitutional rights of the citizens." *Corum*, 330 N.C. 761.

¶ 154 Below, the dissent would abandon all notions of checks and balances in favor of an absolutely rigid interpretation of the separation of powers. Such an approach would empower the legislative or executive branch to indefinitely violate the fundamental constitutional rights of the people without consequence in direct contravention of the judiciary's own constitutional "responsibility to protect the state constitutional rights of the citizens." *Corum*, 330 N.C. at 783.

¶ 155 Finally, this holding aligns with precedent regarding equitable remedies. When extraordinary circumstances render it necessary and proper for a court to exercise its inherent authority, it is obligated and empowered to craft and order flexible equitable relief to remedy the violation of fundamental constitutional rights. "It is the unique role of the courts to fashion equitable remedies to protect and promote the principles of equity." *Lankford v. Wright*, 347 N.C. 115, 120 (1997) "It is a long-standing principle that 'when equitable relief is sought, courts claim the power to grant, deny, limit, or shape that relief as a matter of discretion.' " *Sara Lee Corp. v. Carter*, 351 N.C. 27, 36 (1999) (quoting *Roberts v. Madison County Realtors Ass'n*, 344 N.C. 394, 399 (1996)). "A court of equity traditionally has discretion to shape the relief in accord with its view of the equities or hardships of the case." *Roberts*, 344 N.C. at 401. "It is a fundamental premise of equitable relief that equity regards as done that which in fairness and good conscience ought to be done." *Thompson v. Sole*, 299 N.C. 484, 489 (1980). Intuitively, "[v]arious rights that are protected by our Declaration of Rights may require greater or lesser relief to rectify the violation of such rights, depending on the right violated and the facts of the particular case." *Corum*, 330 N.C. at 784.

¶ 156 The equitable remedy considered within this case is extraordinary, but not unprecedented. Indeed, precedent for this broad and flexible equitable remedial power can be found within this very litigation, in other cases from this Court, and in related cases from federal courts and other state courts.

¶ 157 First, emphasis on this Court's equitable remedial power can be found within the history of this very case. In *Leandro I*, after recognizing the constitutional right to a sound basic education, this Court summarized the process and standards through which a violation of that right

may be established and how the judiciary may address such a violation. 346 N.C. at 357. Because "the administration of the public schools of the state is best left to the legislative and executive branches of government," the Court emphasized that "the courts of the state must grant every reasonable deference to [those] branches when considering whether they have established and are administering a system that provides the children of the various school districts of the state a sound basic education." *Id.*

> A clear showing to the contrary must be made before the courts may conclude that they have not. Only such a clear showing will justify a judicial intrusion into an area so clearly the province, initially at least, of the legislative and executive branches as the determination of what course of action will lead to a sound basic education.

Id.

¶ 158 However, immediately following the explanation of this procedure, this Court made expressly clear that

> [l]ike the other branches of government, the judicial branch has its duty under the North Carolina Constitution. If on remand of this case to the trial court, that court makes findings and conclusions from competent evidence to the effect that defendants in this case are denying children of the state a sound basic education, a denial of a fundamental right will have been established. It will then become incumbent upon defendants to establish that their actions denying this fundamental right are necessary to promote a compelling governmental interest. If defendants are unable to do so, *it will then be the duty of the court to enter a judgment granting declaratory relief and such other relief as necessary to correct the wrong while minimizing the encroachment upon the other branches of government.*

Id. (emphasis added).

¶ 159 In *Leandro II*, this Court was even more explicit. After holding that the trial court's pre-kindergarten order was premature at that early stage of the remedial process, this Court cautioned:

> [c]ertainly, when the State fails to live up to its constitutional duties, a court is empowered to order the deficiency remedied, and *if the offending branch of government or its agents either fail to do so or have consistently shown an inability to do so, a court is empowered to provide relief by imposing a specific remedy and instructing the recalcitrant state actors to implement it.*

Leandro II, 358 N.C. at 642 (emphasis added). Today, we confirm that we meant what we said in *Leandro I* and *II*.

¶ 160 Second, prior cases likewise affirm this Court's broad equitable powers to remedy the violation of rights in a wide variety of substantive and procedural contexts. In *Alamance*, for instance, this Court addressed the inaction of county officials to adequately fund the county's court facilities. 329 N.C. at 884. This Court held that "[a]lthough the statutes do not expressly pass the duty of providing adequate judicial facilities to the court in cases of default by local authorities, the court has the inherent authority [to remedy the violation by] direct[ing] local authorities to perform that duty."[15] 329 N.C. at 99. Ultimately, the Court vacated the trial court's order because "in form and in substance the order's attempted remedy went beyond requiring the Alamance County Commissioners to do their constitutional and statutory duty" and therefore "exceeded what was reasonably necessary to the administration of justice under the circumstances of th[at] case, and in so doing strained at the rational limits of the court's inherent power." *Id.* at 106–07. A more reasonable remedy, the Court explained, would be to "call attention to [the official's] statutory duty and their apparent failure to perform that duty," and "[i]f after a hearing it was determined that the commissioners had indeed failed to perform their duty, . . . the court could order the commissioners to respond with a [remedial] plan . . . to submit to the court within a reasonable time."[16] *Id.* at 107. If at *that* point the violation persisted, the Court implied, the trial court's more invasive remedy would have been more appropriate. *See id.* at 106–07.

¶ 161 Similarly, this Court has long recognized the judiciary's broad equitable powers to remedy constitutional violations through ordering the

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15. Here, by contrast, the General Assembly *does* have an express constitutional duty to "guard and maintain" the right to a sound basic education and to fund that right "by taxation and otherwise." N.C. Const. art. I, § 15; N.C. Const. art. IX, § 2; *see generally Leandro I*, 346 N.C. 336; *Leandro II*, 358 N.C. 605.

16. Notably, this is *exactly* what the trial court has already done in this case.

transfer of State funds by mandamus. In *Wilson v. Jenkins*, this Court declared that

> the [c]ourts have no power to compel, by mandamus, the Public Treasurer to pay a debt which the General Assembly has directed him not to pay, the Auditor to give a warrant upon the Treasurer which the General Assembly has directed him not to give, *unless the act of the General Assembly be void as violating the Constitution of the United States of or this State.*

72 N.C. 5, 6 (1875) (emphasis added).

¶ 162 So too in the context of ordering certain education funding. In *Hickory v. Catawba County*, this Court affirmed the trial court's use of mandamus to compel the County and the Board of County Commissioners to assume payment of school buildings and the debt of the school district. 206 N.C. 165, 170–74 (1934). Because "[t]he defendants are public agencies charged with the performance of duties imposed by the Constitution and by statutes[,]" the Court held that "upon their failure or refusal to discharge the required duties resort may be had to the courts to compel performance by the writ of mandamus." *Id.* at 173. In *Mebane Graded School District v. Alamance County*, this Court held the same. 211 N.C. 213 (1937). There, the Court stated that

> [u]nder legal authority, the county of Alamance has assumed almost every school debt of every school district except the Mebane District. Having assumed part, it is the duty, under the facts in this case, to assume the indebtedness of the Mebane District, and from the findings of the jury mandamus will lie to compel them to do so. Technicalities and refinements should not be seriously considered in a case like this involving a constitutional mandate, but the record should be so interpreted that substantial justice should be done. Under the facts in this case and the findings of the jury, it would be inequitable and unconscionable for defendants to assume part and not all of the indebtedness of the school districts of Alamance and not assume the plaintiffs' indebtedness and give them the relief demanded.

Id. at 226–27.

¶ 163 So too in a variety of other substantive and procedural contexts. In *Lankford v. Wright*, this Court concluded that in the adoption context,

"a decree of equitable adoption should be granted where justice, equity, and good faith require it." 347 N.C. 115, 121 (1997). In *Sara Lee Corp.*, this Court relied on flexible equitable remedial power to conclude that "the trial court properly exercised its discretion in ordering that defendant's workers' compensation benefits be placed in a constructive trust." 351 N.C. at 37. In *White v. Worth*, this Court affirmed the trial court's mandamus ordering the State auditor and State treasurer to transfer state funds to pay the state's chief inspector in order to uphold the inspector's statutory right to such payment. 126 N.C. 570, 547–78 (1900). While the substantive and procedural context of these cases (and many others) are diverse, their foundational principle is unified: when addressing the violation of rights, our courts enjoy broad and flexible equitable power to ensure that the violation is justly remedied.

¶ 164 Third, federal precedents provide persuasive authority. Indeed, the Supreme Court of the United States has previously addressed the broad scope of judicial equitable remedial power in protecting the constitutional rights of marginalized students from executive and legislative violation and recalcitrance.

¶ 165 In 1954, the U.S. Supreme Court in *Brown I* declared that "in the field of public education, the doctrine of 'separate but equal' has no place." 347 U.S. at 494. In ruling that racial segregation in public schools violated the equal protection rights of Black students, the Court struck down perhaps the most visible and consequential pillar of white supremacy and racial subordination in American society. In its second ruling in the case, the Court expressly directed the federal district courts responsible for overseeing the enforcement of desegregation to engage in equitable principles:

> In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interests of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in [*Brown I*]. Courts of equity may properly take into account the public interest in

> the elimination of such obstacles in a systemic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.

Brown v. Bd. of Educ., 349 U.S. 294, 300 (1955) (footnotes omitted) (*Brown II*).

¶ 166 Yet disagreement there was. Immediately following *Brown I* and *Brown II*, many white state officials vigorously resisted and defied the Court's order to desegregate their public schools.[17] For several years, the federal judiciary largely deferred to these state officials. But as resistance to *Brown* continued and intensified, the U.S. Supreme Court in a series of rulings exercised its inherent authority to protect the constitutional rights of marginalized students by ordering broad and flexible equitable remedies.

¶ 167 In 1958 in *Cooper v. Aaron*, the Court addressed resistance to desegregation by executive and legislative officials in Arkansas. 358 U.S. 1 (1958). "The constitutional rights of respondents[,]" the Court declared, "are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and the Legislature." *Id.* at 16. While it is "quite true that the responsibility for public education is primarily the concern" of state officials, the Court noted that "it is equally true that such responsibilities, like all other state activity, must be exercised consistently with federal constitutional requirements." *Id.* at 19. Only through compliance with these principles, the Court concluded, "[is] [o]ur constitutional ideal of equal justice under law . . . made a living truth." *Id.* at 20.

¶ 168 In 1964 in *Griffin v. County School Board*, the Court spoke more forcefully. 377 U.S. 218. There, the Court addressed resistance to desegregation by state and local officials in Virginia, where "[t]he General Assembly . . . enacted legislation to close any public schools where white and colored children were enrolled together, to cut off state funds to such schools, [and] to pay tuition grants to children in nonsectarian private schools." *Id.* at 221. In addressing "the question of the kind of decree necessary and appropriate to put an end to the racial discrimination practiced against these petitioners under authority of the Virginia laws[,]" the Court noted that "all of [the state official defendants] have duties which relate directly or indirectly to the financing, supervision,

17. *See generally* Mark Tushnet, Making Civil Rights Law 247–56 (1994) (documenting the "massive resistance" against *Brown*).

or operation of the schools." *Id.* at 232. Accordingly, the Court declared that "the District Court may, if necessary to prevent further racial discrimination, *require the [applicable officials] to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system*." *Id.* at 233 (emphasis added). "An order of this kind is within the court's power if required to assure these petitioners that their constitutional rights will no longer be denied them." *Id.* at 233–34.

¶ 169 Finally, in 1971 in *Swann v. Charlotte-Mecklenburg Board of Education*, the Court further emphasized its broad and flexible power to order equitable remedies. 402 U.S. 1. There, after the district court deemed the school board's initial desegregation plan unacceptable, it "appointed an expert in education administration, Dr. John Finger, to prepare a desegregation plan." *Id.* at 8. When the district court ordered the school district to implement this plan, the school board challenged the district court's equitable remedial powers, arguing that the court had gone too far in ordering the implementation of the plan. *Id.* at 16–17.

¶ 170 On appeal, the U.S. Supreme Court unanimously affirmed the district court's expansive and adaptable authority to enact equitable remedies in the face of an ongoing constitutional violation. *Id.* at 32. "Once a right and a violation have been shown," the Court declared, "the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Id.* at 15. Indeed, it was only "because of th[e] total failure of the school board that the District Court was obligated to turn to other qualified sources, and Dr. Finger *was designated to assist the District Court to do what the board should have done*." *Id.* at 25 (emphasis added). "Thus the remedial techniques used in the District Court's order were within that court's power to provide equitable relief; implementation of the decree is well within the capacity of the school authority." *Id.* at 30.

¶ 171 Of course, notable differences exist between the circumstance of the U.S. Supreme Court enforcing *Brown* and the circumstances here. Where the rights in *Brown* originate in the federal Constitution, the rights in this case originate in the North Carolina Constitution. Where *Brown* and its progeny remedied a denial of education *access*, this case remedies a denial of education *adequacy*. Where *Brown* and its progeny considered issues of federalism, this case considers those of the separation of powers and checks and balances between coequal branches of state government.

¶ 172 Nevertheless, the broader applicability of *Brown* and its progeny to our inquiry today arises from the fundamental alignment of the question

at the heart of each case: what is the proper role of the judiciary in guarding and maintaining the constitutional rights of marginalized schoolchildren in the face of ongoing violations by state legislative and executive powers? Because of the alignment of this fundamental question, the U.S. Supreme Court's answer in the wake of *Brown* informs our answer here.

¶ 173 Fourth, rulings from other state supreme courts lend support. Many other state supreme courts have exercised broad and flexible equitable remedial powers to address ongoing violations of state constitutional education rights. In 1989, the Supreme Court of Kentucky affirmed the trial court's determination that the state's school finance system was unconstitutional and ordered the state to completely redesign it to ensure adequate funding to meet the needs of marginalized students. *See Rose v. Council for Better Educ.*, 790 S.W.2d 186, 215 (1989) ("Lest there be any doubt, the result of our decision is that Kentucky's *entire system* of common schools is unconstitutional."). In 2003, the Court of Appeals of New York (that state's highest appellate court) ordered the state to reform its school finance system to provide for a comprehensive package of foundational educational resources identified by the court. *See Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893, 930 (2003) (ordering that the State "ascertain the actual cost of providing a sound basic education in New York City" and implement subsequent reforms to "address the shortcomings of the current system by ensuring . . . that every school in New York City would have the resources necessary for providing the opportunity for a sound basic education").

¶ 174 Other supreme courts have likewise ordered the reallocation of state funds. In 2011, the Supreme Court of New Jersey ordered the state to provide approximately $500 million in additional education funding after violating its constitutional duty. *See Abbott v. Burke*, 206 N.J. 332, 376 (2011) ("We order that funding to the Abbott districts in FY 2012 must be calculated and provided in accordance with the SFRA formula."). In 2017, the Supreme Court of Kansas determined the state's education finance system was constitutionally noncompliant and ordered the legislature to enact legislation remedying the deficiency in "both adequacy and equity." *Gannon v. State*, 306 Kan. 1170, 1173 (2017). The court emphasized that continued judicial deference to the legislature's constitutional violation would "make[ ] the courts vulnerable to becoming complicit actors in the deprivation of those rights." *Id.* at 1174. Finally, the Supreme Court of Washington in 2017 affirmed the trial court's order finding the state's education funding system to be constitutionally deficient and imposing a $100,000 daily contempt sanction on the state until compliance was achieved. *See McCleary v. State*, 2017 Wash. 2017 WL 11680212, *1 (2017) ("The court will retain jurisdiction, continue to

impose daily sanctions, and reserve all enforcement options to compel compliance with its decision and orders.").

¶ 175 Of course, these cases are not binding precedent upon this Court. They arise in different jurisdictions under different facts and different constitutional language. Nevertheless, as with the federal cases noted above, they provide important national context and persuasive authority for this Court's similar ruling today.

¶ 176 Legislative Defendants and the Controller contend that declaratory relief constitutes the farthest reach of judicial power on this issue. Based on the intersection of the Appropriations Clause and the Separation of Powers Clause noted above, they argue that once a court issues such a decree, the matter is then exclusively in the hands of the voters to elect new legislators if they so choose. But compliance with our Constitution is not a mere policy choice in which legislators may align with one side or another. Indeed, the people of North Carolina have already spoken on this issue through the Constitution itself, which constitutes the supreme will of the people. There, they mandated that the State must guard and maintain the right to the opportunity to a sound basic education. *See Leandro I*, 346 N.C. 336.

* * * * *

¶ 177 In summary, constitutional violations demand a just remedy. N.C. Const. art. I, § 18. As the ultimate interpreter of our State Constitution, this Court "has the responsibility to protect the state constitutional rights of the citizens." *Corum*, 330 N.C. at 783. Correspondingly, the judiciary is empowered with "inherent constitutional power to fashion a common law remedy for a violation of a particular constitutional right." *Id.* at 784. When necessary for the proper administration of justice based on the inaction of another branch, and within important limitations, that inherent judicial power may include the authority to craft a remedy "whereby one branch exercises some activities usually belonging to one of the other two branches in order to fully and properly discharge its duties." *Alamance*, 329 N.C. at 97.

¶ 178 Here, our Constitution requires the General Assembly to exercise its power under the Appropriations Clause in contemporaneous compliance with its constitutional duties under the Education Provisions. Accordingly, in exceedingly rare and extraordinary circumstances, a court may remedy an ongoing violation of the constitutional right to a sound basic education by directing the transfer of adequate available state funds. However, a court may reach for such an extraordinary remedy "only when established methods fail," and even then must "minimize

the encroachment upon those with legislative authority in appearance and in fact." *Id.* This holding maintains the integrity of our Constitution, honors the principles of checks and balances and separation of powers, aligns with this Court's precedent on equitable remedial power, and is supported by federal and state rulings in similar contexts.

C. Application

¶ 179 Now, we must apply the constitutional analysis above to the two trial court orders in question on this appeal: the November 2021 Order and the April 2022 Order. We address each in turn. This Court reviews constitutional issues de novo.

1. November 2021 Order

¶ 180 **[4]** We first review the trial court's 10 November 2021 Order (November 2021 Order). The November 2021 Order begins with thorough findings of fact regarding the long and extraordinary history of this case. These factual findings document the trial court's previous repeated findings of a statewide constitutional violation, the State's repeated failure to adequately remedy that violation, and the trial court's repeated deference to the executive and legislative branches to do so. The Order finds that the CRP "is the *only* remedial plan that the State Defendants have presented to the [c]ourt," and that "more than sufficient funds are available to execute the current need of the [CRP]." The Order's factual findings conclude by observing: "[i]n the seventeen years since the *Leandro II* decision, a new generation of school children, especially those at-risk and socio-economically disadvantaged, were denied their constitutional right to a sound basic education. Further and continued damage is happening now, especially to at-risk children from impoverished backgrounds, and that cannot continue."

¶ 181 The November 2021 Order subsequently makes several conclusions of law. The Order concludes that "[b]ecause the State has failed for more than seventeen years to remedy the constitutional violation as the Supreme Court ordered, this [c]ourt must provide a remedy through the exercise of its constitutional role." To continue to defer, the Order concludes, "will threaten the integrity and viability of the North Carolina Constitution by . . . nullifying [its] language without the people's consent, . . . ignoring rulings of the Supreme Court of North Carolina[,] . . . and . . . violating separation of powers." The Order further concludes that the Education Provisions constitute "an ongoing constitutional appropriation of funds sufficient to create and maintain a school system that provides each of our State's students with the constitutional minimum of a sound basic education. This constitutional provision may

therefore be deemed an appropriation 'made by law.' " Finally, the Order concludes that the trial court has "minimized its encroachment on legislative authority through the least intrusive remedy" through its seventeen years of unfettered deference in every aspect of the case, including allowing the State itself to create and implement the CRP.

¶ 182 Based on these factual findings and legal conclusions, the November 2021 Order orders the OSMB and the State Budget Director, the Office of the State Controller and the State Controller, and the Office of the State Treasurer and the State Treasurer to "take the necessary actions to transfer the total amount of funds necessary to effectuate years 2 & 3 of the [CRP] from the unappropriated balance within the General Funds to the state agents and state actors with fiscal responsibility for implementing the [CRP]." The Order then specifies the dollar amounts of three transfers to DHHS, DPI, and the UNC System. The Order directs these recipients, their agents, and all other involved State actors to administer those funds and take any other actions necessary "to guarantee the opportunity of a sound basic education consistent with, and under the times frames set out in, the [CRP], including the Appendix thereto."

¶ 183 Today, this Court affirms the constitutionality of the November 2021 Order's transfer directives. We reach this holding because, given the extraordinary circumstances of this case, the trial court acted within its inherent power to address ongoing constitutional violations through equitable remedies while minimizing its encroachment upon the legislative branch.

¶ 184 In *Leandro I*, this Court established the procedure through which a court may identify and remedy a violation of the fundamental right to a sound basic education. The Court stated that

> [T]he courts of this state must grant every reasonable deference to the legislative and executive branches when considering whether they have established and are administering a system that provides the children of the various school districts of the state a sound basic education. A clear showing to the contrary must be made before the courts may conclude that they have not. . . .
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> . . . . [If a] court makes findings and conclusions from competent evidence to the effect that defendants in this case are denying children of the state a sound basic education, a denial of a fundamental right will have been established. It will then become incumbent

> upon defendants to establish that their actions denying this fundamental right are "necessary to promote a compelling governmental interest." If defendants are unable to do so, it will then be the duty of the court to enter a judgment granting declaratory relief and such other relief as necessary to correct the wrong while minimizing the encroachment upon the other branches of government.

346 N.C. at 357 (citations omitted).

¶ 185 In *Leandro II*, this Court further noted that

> when the State fails to live up to its constitutional duties, a court is empowered to order the deficiency remedied, and if the offending branch of government or its agents either fail to do so or have consistently shown an inability to do so, a court is empowered to provide relief by imposing a specific remedy and instructing the recalcitrant state actors to implement it.

358 N.C. at 642.

¶ 186 As noted above, when the action or inaction of a coequal branch of government indefinitely violates the fundamental constitutional rights of the people, a court—after showing appropriate deference—may invoke its inherent power to do what is reasonably necessary to remedy the violation. Under extraordinary circumstances, this may include directing state actors to transfer available state funds in order to guard and maintain the right of every child to the opportunity to a sound basic education.

¶ 187 Even then, important limitations apply.

> [A] court's judicious use of its inherent power to reach towards the public purse must recognize two critical limitations: first, it must bow to established procedural methods where these provide an alternative to the extraordinary exercise of its inherent power. Second, in the interests of the future harmony of the branches, the court in exercising that power must minimize the encroachment upon those branches with legislative authority in appearance and in fact . . . [by] seeking the least intrusive remedy.

Alamance, 329 N.C. at 100–01.

¶ 188 Here, the trial court faithfully complied with these procedures, powers, and limitations. First, after an extensive trial in which it granted every reasonable deference to the executive and legislative branches, it determined based on an abundance of clear and convincing evidence that the State was violating its constitutional obligation to guard and maintain the right of all North Carolina schoolchildren to the opportunity to a sound basic education as defined by *Leandro I*. While the trial court focused primarily on Hoke County as a representative district, it expressly and repeatedly made findings of fact and conclusions of law regarding a statewide violation that was not isolated to Hoke County.[18] The State has never and does not contend that this statewide violation is necessary to promote a compelling governmental interest.

¶ 189 In *Leandro II*, this Court affirmed the trial court's conclusion. 358 N.C. 605. This Court's opinion limited itself to Hoke County as a representative district but directed the trial court on remand to conduct "further proceedings that include, but are not necessarily limited to, presentations of relevant evidence by the parties, and findings and conclusions of law by the trial court" regarding other districts. *Id.* at 613 n.5. Within these further proceedings, the Court emphasized, "a broader mandate may ultimately be required." *Id.* at 633 n.15. Upon remand, this Court instructed the trial court to "proceed, as necessary, in a fashion that is consistent with the tenets outlined in this opinion." *Id.* at 648.[19]

¶ 190 So the trial court did. For about fourteen years, the trial court presided over presentations of relevant evidence by the parties in open court and made volumes upon volumes of factual findings and conclusions of law. These repeatedly affirmed the same ultimate legal conclusion: that despite its piecemeal remedial efforts, the State remained in statewide violation of its constitutional duty to provide all students with the opportunity to receive a sound basic education.

¶ 191 True, these factual findings and legal conclusions were typically issued within documents titled "Notice of Hearing and Order" rather than just "Order." But it is well within this Court's ability and authority to

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18. The State itself likewise emphasized that any remedial efforts must be directed statewide because "[t]he State . . . never understood the Supreme Court or [the trial] [c]ourt to have ordered the defendants to provide students in Hoke County or any of the other plaintiff or plaintiff-intervenor school districts special treatment, services or resources which were not available to at-risk students in other LEAs across the State."

19. Contrary to the claim of the dissent below, this Court in *Leandro II* did not expressly direct the trial court to conduct additional trials. Rather, it instructed the trial court to "proceed, as necessary, in a fashion that is consistent with the tenets outlined in this opinion." *Id.*

properly identify factual findings and legal conclusions as such, regardless of how they are labeled by a trial court. *See, e.g.*, *In re J.O.D.*, 374 N.C. 797, 807 (2020) (identifying findings of fact and conclusions of law as such despite trial court labels). Further, this Court already articulated in *Leandro II* that

> [i]n our view, the unique procedural posture and substantive importance of this case compel us to adopt and apply the broadened parameters of a declaratory judgment action that is premised on issues of great public interest. The children of North Carolina are our state's most valuable renewable resource. If inordinate numbers of them are wrongfully being denied their constitutional right to the opportunity for a sound basic education, our state courts cannot risk further and continued damage because the perfect civil action has proved elusive.

358 N.C. at 616. So too here regarding the perfectly formatted court paper.[20] "Technicalities and refinements should not be seriously considered in a case like this involving a constitutional mandate, but the record should be so interpreted that substantial justice should be done." *Mebane*, 211 N.C. at 227. Indeed, "[f]or well over a century, North Carolina courts have abided by the foundational principles that administering equity and justice prohibits the elevation of form over substance." *M.E. v. T.J.*, 380 N.C. 539, 2022-NCSC-23, ¶ 1. To cover our eyes and plug our ears to the trial court's express and repeated findings and conclusions of a statewide *Leandro* violation because of procedural imperfections would squarely violate that prohibition. Accordingly, this Court holds that the trial court, in alignment with this Court's instructions in *Leandro II*, properly concluded based on an abundance of clear and convincing evidence that the State's *Leandro* violation was statewide.[21]

¶ 192 Next, the November 2021 Order properly concluded that the trial court showed sufficient deference to the executive and legislative branches to remedy this violation. As summarized above, this conclusion is grounded in eighteen years of clear and convincing evidence. Year after year, hearing after hearing, attempt after attempt, the trial

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20. In fact, this Court has already recognized and proven itself able to handle the "free-wheeling nature" of the trial court's various and voluminous orders in *Leandro II*. 358 N.C. at 621.

21. For a summary of this evidence, see the Factual and Procedural History above.

court continued to provide the executive and legislative branches more time and space to fix the violation on their own terms. Yet year after year, hearing after hearing, attempt after attempt, they did not.

¶ 193 Over these years, the trial court made clear its increasing frustration and decreasing patience with the State's failure to remedy the violation despite its constitutional and court-ordered obligation to do so. In 2015, for instance, the trial court lamented that

> [n]o matter how many times the [c]ourt has issued Notices of Hearings and Orders regarding unacceptable academic performance, and even after the North Carolina Supreme Court plainly stated that the mandates of *Leandro* remain "in full force and effect[,]" many adults involved in education . . . still seem unable to understand that **the constitutional right to have an equal opportunity to obtain a sound basic education is a right vested in <u>each and every child</u> in North Carolina regardless of their respective age or educational needs**.

The court subsequently ordered the State to "propose a definite plan of action as to how the State of North Carolina intends to correct the educational deficiencies in the student population." Three years later, the trial court expressly warned the State that

> [the] trial court has held status conference after status conference and continues to exercise tremendous judicial restraint. . . . *The time is drawing nigh, however, when due deference to both the legislative and executive branches must yield to the court's duty to adequately safeguard and actively enforce the constitutional mandate on which this case is premised.* It is the sincere desire of this court that the legislative and executive branches heed the call.

(Emphasis added.) Three years after that, the trial court cautioned the State that "in the event the full funds necessary to implement the [CRP] are not secured . . . , the [c]ourt will hear and consider any proposals for how the [c]ourt may use its remedial powers to secure such funding." Even in the November 2021 Order itself, the trial court showed continued deference by staying its order for thirty days "to permit the other branches of government to take further action consistent with the findings and conclusions of this Order."

¶ 194 In short, the trial court demonstrated an abundance of restraint and deference to its coequal branches in compliance with this Court's instructions in *Leandro I* and *II*. Accordingly, this Court holds that the trial court's November 2021 Order properly concluded based on an abundance of clear and convincing evidence that the trial court had shown sufficient deference to the executive and legislative branches.

¶ 195 When a constitutional violation persists after extended judicial deference, "a court is empowered to provide relief by imposing a specific remedy and instructing the recalcitrant state actors to implement it." *Leandro II*, 358 N.C. at 642. As explained above, in exceedingly rare and extraordinary circumstances, a court's inherent power to remedy an ongoing violation of the constitutional right to a sound basic education includes the authority to direct the transfer of adequate available state funds to address that violation. Before doing so, however, the court must first exhaust all established alternative procedural methods. *Alamance*, 329 N.C. at 100–01. Further, a court exercising such extraordinary authority must minimize its encroachment by seeking the least intrusive remedy. *Id.*

¶ 196 Here, we hold that the trial court properly exercised its remedial authority within these limitations. First, the circumstances of this case are exceedingly rare and extraordinary. For eighteen years, the executive and legislative branches have repeatedly failed to remedy an established statewide violation of the constitutional right to the opportunity to a sound basic education. As noted by the trial court, since *Leandro II*, an entire "new generation of school children, especially those at-risk and socio-economically disadvantaged, were denied their constitutional right to a sound basic education." The court has repeatedly deferred. The State has repeatedly failed. All the while, North Carolina's schoolchildren, their families, their communities, and the state itself have suffered the incalculable negative consequences. These extraordinary circumstances demand swift and decisive remedy.

¶ 197 Second, the trial court properly exhausted all established alternative methods before directing the transfer of available State funds. For the past eighteen years, the trial court allowed the State to craft and implement its own remedies, pass new budgets, consult and engage with independent experts, establish commissions, and create its own comprehensive remedial plan. During this time, the court has stuck to more traditional judicial procedures: issuing declaratory judgments and ordering the parties to remedy the violation on their own terms. They have not. Only after exhausting these more ordinary alternatives did the

trial court reach for the extraordinary measure of ordering the transfer of available State funds.

¶ 198 Third, in doing so, the trial court minimized its encroachment by seeking the least intrusive remedy that would still adequately address the constitutional violation. On its face, the November 2021 Order does not involve the legislative branch at all; it does not order the General Assembly to pass certain legislation, raise additional state funds through taxation, conduct certain legislative proceedings, or pay a daily contempt sanction, as other state courts have ordered under similar circumstances. Such remedies would have directly forced the General Assembly's hand to take certain actions, thereby exerting a higher degree of judicial influence over legislative powers.

¶ 199 Instead, the November 2021 Order opted for a less intrusive measure: directing certain executive officials responsible for transferring State funds to make certain transfers as if the General Assembly had directed the same. This remedy minimizes encroachment by implicating legislative *duties* without directing any order toward the legislature itself. To be sure, it is safe to say that everyone involved in this litigation—including this Court—would have preferred if the *legislature* had fulfilled these legislative duties. But it has not. That leaves the judiciary with the constitutional obligation to fulfill its own role in guarding and maintaining the right to a sound basic education by directing the transfer of remedial funds.[22]

¶ 200 The invasiveness of the November 2021 Order is further minimized because these funds are readily available. The trial court found based on clear, convincing, and undisputed evidence "that more than sufficient funds are available to execute the current needs of the [CRP]." Accordingly, the November 2021 Order did not require the State to raise additional funds or to reallocate funds that had previously been allocated for other uses, which could implicate policy choices. Rather, it directs the State actors to transfer the necessary funds "from the unappropriated balance with the General Fund."[23]

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22. *See Swann*, 402 U.S. at 25 ("It was because of this total failure of the school board that the District Court was obligated to turn to other qualified sources, and Dr. Finger was designated to assist the District Court to do what the board should have done.").

23. This is not to minimize the effort required by these State officials in properly executing the transfer of these funds, which the Court recognizes as a challenging administrative task. However, it does not implicate the same policy choices that would be involved in reallocating funds between different agencies or initiatives.

¶ 201 Finally, the invasiveness of the November 2021 Order must be assessed within the broader history and context of the litigation that necessitated it. For instance, it is true that yet another declaratory judgment order—as later issued in the April 2022 Order—would have been less invasive than the November 2021 Order's transfer directive. However, given the history of this case in which the trial court issued such declaratory judgments again and again and again to no avail, issuing the same judgment one more time with crossed fingers and bated breath cannot reasonably be considered a remedy at all. Instead, the State's repeated and ongoing failure to remedy the constitutional violation after many prior such declaratory judgments required the trial court to this time do more.

¶ 202 Below, the dissent insists that affirming the November 2021 Order would allow this Court to invoke similar inherent authority in a wide variety of dissimilar contexts. This parade of horribles is—in a word—overstated. To be clear, today's ruling creates precedent for the exercise of this type of judicial remedial power in exactly one circumstance: when the recalcitrant inaction of the legislative or executive branch indefinitely violates the fundamental constitutional rights of the people after years of judicial deference.[24]

¶ 203 Finally, the dissent contends that affirming the November 2021 Order would violate the rights of the Controller. But as an executive branch official, the Controller's interests have been adequately represented throughout this litigation. A court cannot reasonably add as a party to a case every state official who may be involved in implementing a remedy; instead, the interests of those officials are represented by that agency, branch, or the State as a whole.

¶ 204 In summary, the trial court's November 2021 Order complied with its constitutional authority and limitations. We therefore affirm and reinstate the trial court's order directing certain State officials to transfer the funds required to implement years two and three of the CRP. To enable the trial court to comply with this ruling, we stay the Court of Appeals' Writ prohibiting this transfer.

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24. *See Leandro II*, 358 N.C. at 642 ("[W]hen the State fails to live up to its constitutional duties, a court is empowered to order deficiency remedied, and if the offending branch of government or its agents either fail to do so or have consistently shown an inability to do so, a court is empowered to provide relief by imposing a specific remedy and instructing the recalcitrant state actors to implement it.").

2. April 2022 Order

¶ 205 We next review the trial court's 26 April 2022 Order (April 2022 Order). The April 2022 Order recalculated the State's CRP funding shortcomings in light of the 2021 Budget Act but removed the transfer directive in favor of a declaratory judgment.

¶ 206 First, April 2022 Order confirmed the State's continued failure to fully fund the CRP. The trial court found "that significant necessary services for students, as identified in the CRP, remain unfunded and/or underfunded by the [2021] Budget Act." Specifically, the court found "the Budget Act funds approximately 63% of the total cost of the programs to be conducted during year 2 and approximately 50% of the total cost of the programs to be conducted during year three." Because the CRP remains the only comprehensive remedial plan submitted to and ordered by the trial court, this finding further confirms the present continuance of the State's statewide *Leandro* violation.

¶ 207 Next, the April 2022 Order confirmed that adequate State funds are available. The trial court found that "the total of unappropriated funds in the State's Savings Reserve [will be] $4.25 billion after the fiscal year 2022-23 legislative-mandated transfer." Accordingly, the trial court found that "the funds transferred on a discretionary basis to the State's Saving Reserve and the State's Capital and Infrastructure Reserve during the two-year budget cycle is substantially in excess of the amount necessary to fully fund the CRP during years 2 and 3 of the CRP."

¶ 208 Based on these factual findings, the trial court concluded that "the total underfunding of CRP programs during years 2 and 3 of the CRP is $785,106,248 in the aggregate." The court concluded that "[t]aking the two-year budget as a whole, the General Fund does contain sufficient unappropriated monies to make the transfer anticipated by the 10 November Order and the lesser amount of underfunding identified above."

¶ 209 However, because the Court of Appeals' writ of prohibition "determined that the trial court had no proper basis in law to direct the transfer by state officers or departments of funds to DHHS, DPI, and the UNC System," the trial court removed those direct transfer provisions from its order. Instead, it issued a declaratory judgment by decreeing that DHHS, DPI, and the UNC System "have and recover from the State of North Carolina" the specified funds and that the funds are "owed by the State to DHHS, DPI, and the UNC system."

¶ 210 Since the trial court's April 2022 Order, the State has presented no argument that it has complied with this declaratory judgment by transferring these funds.

¶ 211 Today, we vacate in part and reverse in part the trial court's April 2022 Order. First, we vacate the trial court's calculation of the amount of funds by which each portion of the CRP is underfunded. This is not because the trial court erred in its calculations, which were diligent and precise. Rather, those calculations have been functionally mooted by the State's subsequent enactment of the 2022 Budget Act. Accordingly, on remand, we direct the trial court to recalculate the appropriate transfer amounts required for compliance with years two and three of the CRP in light of the 2022 Budget Act.

¶ 212 Second, we reverse the trial court's conclusion that it lacked the legal authority to order certain State actors to transfer the available State funds to comply with years two and three of the CRP. In accordance with the principles described above, we hold that under the extraordinary circumstances of this case, the trial court was properly empowered to do so. As such, the trial court's contrary conclusion in its April 2022 Order was grounded in an error of law and is therefore reversed.

¶ 213 Accordingly, our order to the trial court on remand is threefold. First, we order the trial court to recalculate the funding required for full compliance with years two and three of the CRP in light of the 2022 Budget Act. Second, we order the trial court to reinstate its November 2021 Order transfer directive instructing certain State actors to transfer those recalculated amounts from available State funds as an appropriation under law. To enable the trial court to do so, we stay the Court of Appeals' 30 November 2021 Writ of Prohibition. Third, we order the trial court to retain jurisdiction over the case in order to monitor compliance with its order and with future years of the CRP. In future years, the General Assembly may—and is encouraged to—choose to moot the necessity for further transfer directives from the court by substantially complying with the terms of the CRP on its own accord.

¶ 214 We recognize that the remedy decreed by the trial court's November 2021 Order and reinstated by this Court today is extraordinary. It exercises powers at the outer bounds of the reach of the judiciary and encroaches into the traditional responsibilities of our coequal branches of government. We do not do so lightly. Nevertheless, years of continued judicial deference and legislative non-compliance render it our solemn constitutional duty to do so. For our Constitution to retain its integrity and legitimacy, the fundamental rights enshrined therein must be "guarded and maintained." When other branches indefinitely abdicate this constitutional obligation, the judiciary must fill the void.

D. Legislative Defendants' Assertions of Error

¶ 215 Finally, we address Legislative Defendants' various assertions of error. On appeal, Legislative Defendants raise four primary claims of error in addition to the foundational constitutional issues addressed above, most of which are also echoed by the dissent below. First, they argue that the trial court exceeded its jurisdiction and authority by imposing a statewide remedy because this case is properly "limited to just at-risk students in Hoke County." Second, they argue that the trial court erroneously failed to presume that the 2021 Budget Act satisfied the State's constitutional obligations under *Leandro*. Third, they argue that the trial court's order engaged in a non-justiciable political question by deciding the amount of State funds to be transferred to certain State agencies. Fourth, they argue that "the trial court erred in making a constitutional determination in a friendly suit."

¶ 216 These claims unequivocally fail. As an initial matter, they are untimely. Since 2004, and especially since the enactment of N.C.G.S. § 1-72.2 in 2013, Legislative Defendants have had any number of opportunities to intervene in this litigation and thereby earnestly engage with these important issues from within the arena where the parties and the trial court sought to solve the formidable problems facing our state. Besides their single Motion to Intervene regarding Pre-K issues in 2011, they have not. Instead, Legislative Defendants have largely opted to comment upon the proceedings from the sidelines, including by publicly disparaging the trial court itself. In doing so, Legislative Defendants functionally abdicated their constitutional duties and accordingly undermined their own credibility to raise these arguments at this eleventh hour.

¶ 217 In any event, these arguments are meritless. At best, they reveal a fundamental misunderstanding of the history and present reality of this litigation. At worst, they suggest a desire for further obfuscation and recalcitrance in lieu of remedying this decades-old constitutional violation. Regardless, they will not prevent this Court from exercising its inherent authority to protect the constitutional right of North Carolina children to the opportunity to a sound basic education.

1. Scope of Violation

¶ 218 First, and most enthusiastically, Legislative Defendants assert this case is properly "limited to just at-risk students in Hoke County." As such, they argue that the trial court erred by exceeding its jurisdiction and authority by imposing a statewide remedy. Legislative Defendants contend that because this Court's ruling in *Leandro II* was expressly restricted to Hoke County, "there has never been a judgment finding a

statewide violation of the right to a sound basic education." The dissent below echoes this claim.

¶ 219 To be sure, it is true that this Court's ruling in *Leandro II* was expressly limited to Hoke County as a representative district. *See* 358 N.C. at 613 n.5. However, on remand, this Court instructed the trial court to address other districts by conducting "further proceedings that include, but are not necessarily limited to, presentations of relevant evidence by the parties, and findings and conclusions of law by the trial court." *Id.* This Court further instructed the trial court to "proceed[ ] as necessary [ ] in a fashion that is consistent with the tenets outlined in this opinion." *Id.* at 648.[25]

¶ 220 On remand, the trial court did just that: it conducted further proceedings that included, but were not limited to, presentations of relevant evidence by the parties and findings and conclusions of law by the trial court regarding other districts in a fashion consistent with the tenets outlined in *Leandro I* and *II*. Based on an abundance of clear and convincing evidence, the trial court repeatedly concluded that the State's *Leandro* violation was not limited to Hoke County but was pervasive statewide. Time and time again, the trial court observed that the evidence "indicate[d] that in way too many school districts across the state, thousands of children in the public schools have failed to obtain, and are not now obtaining a sound basic education as defined by and required by the *Leandro* decisions."

¶ 221 As addressed above, the fact that the trial court's filings were often titled "Notice of Hearing and Order" instead of just "Order" does not render this Court suddenly incapable of understanding the trial court's express findings and conclusions. In any event, the trial court's factual finding and legal conclusion of a continued statewide *Leandro* violation were most recently repeated in its November 2021 Order, which was formally titled "Order" and formally enumerated "Findings of Fact" and "Conclusions of Law." These findings and conclusions were neither amended nor revoked—and indeed were functionally confirmed *again*—in the trial court's subsequent April 2022 Order.

¶ 222 Further, the State itself has consistently proposed and advocated for a statewide remedy. This is because its constitutional obligation applies not just toward marginalized students in Hoke County, but to every student in every district in the state. As such, it strains both reason and

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25. As noted above, at no point did this Court instruct the trial court to formally conduct separate trials for all of the other school districts involved in this litigation and in the state. *See id.*

judicial economy to contend that separate cases with identical facts and constitutional claims must be brought by plaintiffs in all 114 of North Carolina's other school districts in order for the State to implement a remedy that applies to each of those districts. The paramount public interest of the constitutional rights at stake in this case demand a more reasonable and efficient resolution.[26]

¶ 223 Accordingly, to contend that there has never been a finding or conclusion of a *Leandro* violation beyond Hoke County reflects, at best, a fundamental misunderstanding of the history of this case and the State's constitutional obligations. Legislative Defendants' argument is unequivocally rejected.

2. Impact of the Budget Act

¶ 224 Second, Legislative Defendants assert that the trial court erroneously failed to presume that the 2021 Budget Act satisfied the State's constitutional obligations under *Leandro*. They argue that "in reducing its assessment of the Budget to a mathematical exercise and assuming that the CRP was the only means to provide a *Leandro*-compliant education, the trial court got the analysis backwards" by "start[ing] with the assumption that the Budget was insufficient, and then skipp[ing] straight to asking whether the General Assembly had provided Plaintiffs with their chosen remedy." The dissent below likewise echoes this claim.

¶ 225 This is wrong on several fronts. First, it is true that the CRP is by no means the only path toward constitutional compliance under *Leandro*. The executive and legislative branches are—and have been—granted broad deference in crafting a remedy on their own terms. However, as the trial court repeatedly observed, the CRP is currently the *only* remedial plan that the State has presented to the court in response to its January 2020, September 2020, and June 2021 Orders. Indeed, no party in this litigation, including Legislative Defendants, have presented any alternative remedial plan. As such, the trial court did not erroneously "assum[e] that the CRP was the only means to provide a *Leandro*-compliant education." Rather, it assessed the constitutional compliance of the Budget Act against the only comprehensive remedial plan that it has been presented with in the eighteen-year long remedial phase of this case.

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26. "In declaratory actions involving issues of significant public interest, such as those addressing alleged violations of education rights under a state constitution, courts have often broadened both standing and evidentiary parameters to the extent that plaintiffs are permitted to proceed so long as the interest sought to be protected by the complainant is arguably within the 'zone of interest' to be protected by the constitutional guaranty in question." *Leandro II*, 358 N.C. at 615.

¶ 226 Second, the trial court did not erroneously fail to presume the constitutionality of the Budget Act. The constitutionality of the Budget Act was not the question before the trial court. Rather, the trial court's task was to assess the constitutional compliance of the Budget Act against the only comprehensive remedial plan that had been presented to it by the State.

¶ 227 In fact, a review of the record reveals that the trial court has already addressed and rejected this argument. In 2018, the State argued in a motion to dismiss "that legislation enacted by . . . [the] General Assembly now adequately addresses those criteria that our Supreme Court has decreed constitute a 'sound basic education' . . . [and] that these enactments must be presumed by this court to be constitutional." In rejecting this argument, the trial court explained that

> [t]his court indeed indulges in the presumption of constitutionality with respect to each and every one of the legislative enactments cited by the [State]. That these enactments are constitutional and seek to make available to children in this State better educational opportunities is not the issue before this court. The issue is whether the court should continue to exercise such remedial jurisdiction as may be necessary to safeguard and enforce the much more fundamental *constitutional right* of every child to have the opportunity to receive a sound basic education. Again, the evidence before this court upon the [State's] motion is wholly inadequate to demonstrate that these enactments translate into substantial compliance with the constitutional mandate of *Leandro* measured by applicable educational standards.

¶ 228 So too here. Neither the Plaintiff-parties nor the State dispute the presumed constitutionality of the passage of the 2021 Budget Act as a general procedural matter. But that was not the issue before the trial court and is not the issue before this Court. The more specific question in the context of this case is the extent to which the 2021 Budget Act remedies the State's longstanding statewide *Leandro* violation. As such, the Budget Act must be assessed against the terms of the only comprehensive remedial plan thus far presented by the parties to the court. The mere passage of a state budget—even one that enjoys a general presumption of constitutionality—is insufficient to meet that more specific

burden. Accordingly, the trial court did not err in its evaluation of the 2021 Budget Act.[27]

¶ 229 Finally, it bears emphasizing that the CRP is not the "Plaintiffs['] . . . chosen remedy." The CRP was created by neither Plaintiff-parties nor the trial court, but by the State itself. It is therefore the *State's* chosen remedy, and thus far the only viable remedy presented by any party in this litigation.

3. Political Question

¶ 230 Third, Legislative Defendants argue that the trial court's November 2021 and April 2022 Orders impermissibly engaged in a non-justiciable political question by deciding the amount of State funds to be transferred to certain State agencies. Doing so, Legislative Defendants contend, requires the trial court to engage in policy-based prioritization that "is precisely the type of determination the people must make through their elected representatives."

¶ 231 This argument likewise ignores the history and prior rulings of this case. In *Leandro I*, this Court squarely rejected the State's threshold argument that courts may not assess issues of educational adequacy because they are non-justiciable political questions. 346 N.C. at 344–45. The Court held that "it is the duty of this Court to address plaintiff-parties' constitutional challenge to the state's public education system." *Id.* at 345.

¶ 232 More specifically, the trial court did not err by assessing the adequacy of the 2021 Budget Act. The court did not make its own policy determination. Rather, after concluding based on undisputed evidence that sufficient unappropriated State funds were available, it ordered that certain funds be transferred in order to comply with the terms of the only comprehensive plan for *Leandro* compliance presented to it by the State. Put differently, the court assessed the State's compliance

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27. Relatedly, the dissent contends that the CRP—and thus the November 2021 Order enforcing it—unduly focuses on education funding when the real problem is implementation. To be sure, this case is not just about money; it is also about competent and qualified teachers and principals, support for high-poverty school districts, effective state assessment and accountability systems, and adequate and accessible early education opportunities, among many other programs outlined at length in the CRP. Of course, just as no one would reasonably expect the Department of Public Safety or Department of Transportation to implement their various programs and responsibilities without adequate funding, none of these educational priorities can be implemented and sustained with fidelity without adequate education funding. Minimally adequate funding is a necessary means to that end.

with *the State's own determination* of constitutional educational adequacy, not the court's. Constitutional compliance is not a policy choice; it is a mandate that this Court is obligated to protect.

4. Friendly Suit

¶ 233 Finally, Legislative Defendants argue that "the trial court erred in making a constitutional determination in a friendly suit." They argue that there is no genuine controversy in this case because after the trial court's 2018 order requiring the parties to craft a comprehensive remedial plan, "Plaintiffs, Plaintiff-Intervenors, and [the State] have worked together to obtain judicial orders mandating their desired policies." The dissent below likewise echoes this claim.

¶ 234 Again, this is wrong on several fronts. First, this argument ignores the decades of history summarized above in which this case was hotly contested and the State repeatedly asserted either that it had achieved constitutional compliance or that the trial court no longer had jurisdiction over the case. While Legislative Defendants' Hoke County argument functionally disregards everything that occurred in this litigation after 2004, their friendly suit argument functionally disregards everything before 2018. Neither approach appreciates the complete past and present reality of this case, which provide vital context for the two trial court orders in question on this appeal.

¶ 235 Further, the State's efforts to achieve constitutional compliance after 2018 do not render this suit friendly. Rather, they reflect the State's commitment—at long last—to honor its constitutional duty to guard and maintain the right of North Carolina schoolchildren to a sound basic education. If the State's Comprehensive Remedial Plan aligns with the interests of Plaintiff-parties, it is because during the remedial phase this litigation—in which parties are *encouraged* to create a collaborative solution that will settle their respective rights and duties—both the State and Plaintiff-parties seek to align with the requirements of the Constitution. A shared commitment to constitutional compliance does not render this suit friendly. Legislative Defendants' argument to the contrary is rejected.

III. Conclusion

¶ 236 The ultimate wisdom of *Leandro*, whispered through the ages from the Framers' vision in 1868 to the Plaintiffs' Complaint in 1994 to the untold and untapped potential of our schoolchildren today, is that public education is a public good. That is, when the State ensures that a child has the opportunity to receive a sound basic education, it is not only *that*

child who benefits. It is not only that child's *family* that benefits. It is not only that child's *community* that benefits. Rather, when a child receives a sound basic education—one that prepares her "to participate fully in society as it exist[s] in . . . her lifetime"—*we all* benefit. *Leandro I*, 346 N.C. at 348.

¶ 237 Accordingly, our Constitution not only guarantees all children the right to the opportunity to a sound basic education, it establishes that "it is the duty of the *State* to guard and maintain that right." N.C. Const. art. I, § 15 (emphasis added). "[I]nitially, at least," it is the responsibility of the executive and legislative branches to fulfill that constitutional obligation. *Leandro I*, 346 N.C. at 357. But when those branches indefinitely "fail[ ] to live up to [their] constitutional duties . . . or have consistently shown an inability to do so, a court is empowered to provide relief by imposing a specific remedy and instructing the recalcitrant state actors to implement it." *Leandro II*, 358 N.C. at 642.

¶ 238 For a quarter-century, the judiciary has deferred to the executive and legislative branches to remedy this statewide constitutional violation. Yet overwhelming evidence clearly demonstrates that it persists today. In 2004, the *Leandro II* Court lamented that "the instant case commenced ten years ago," and that "[i]f in the end it yields a clearly demonstrated constitutional violation, ten classes of students . . . will have already passed through our state's school system without benefit of relief. We cannot similarly imperil *one more class* unnecessarily." *Id.* at 616 (emphasis added). Today, that figure is twenty-eight years, and twenty-eight classes of students. The *children* of the original *Leandro* plaintiffs could well have entered or graduated from high school by now, all under a well-established constitutionally inadequate education system. As noted in Plaintiffs' original 1994 Complaint, this cycle "entails enormous losses, both in dollars and in human potential, to the State and its citizens." All the while, the judiciary has continued—patiently but with increasing concern—to defer.

¶ 239 Today, that deference expires. At this point, to continue to condone delay and evasion would render this Court complicit in the constitutional violation. Ultimately, "[i]t 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*, 330 N.C. at 783.

¶ 240 Today, we must fulfill that obligation. To do so, this Court exercises its power "to provide relief by imposing a specific remedy and instructing the recalcitrant state actors to implement it." *Leandro II*, 358 N.C.

at 642. Specifically, we reinstate the trial court's November 2021 Order directing certain State officials to transfer available state funds to implement years two and three of the Comprehensive Remedial Plan. On remand, we narrowly direct the trial court to recalculate the appropriate distributions in light of the State's 2022 Budget. Once that calculation is complete, we instruct the trial court to order the applicable State officials to transfer these funds as an appropriation under law. Accordingly, we stay the Court of Appeals' 30 November 2021 Writ of Prohibition. Finally, we order the trial court to retain jurisdiction over this matter to ensure the implementation of this order and to monitor continued constitutional compliance.

¶ 241 Given these remand instructions, this ruling will not be the final page in the *Leandro* litigation. Nevertheless, it is the sincere hope of this Court that it will serve as the start of a new chapter—one in which the parties lay down old divisions and distrust to forge a spirit of collaboration in good faith toward a common goal: constitutional compliance. The same recalcitrant approach would only yield the same inadequate outcomes. Instead, this Court calls upon the parties to imagine a future in which all North Carolina children receive the opportunity to a sound basic education, then honor their constitutional oaths by working together to make that future real. Indeed, our Constitution's Declarations of Rights is neither aspirational nor advisory; it is a mandate.

¶ 242 Until that mandate is fulfilled, the judiciary will stand ready to carry out its constitutional duties. We too comprise "the State," and we too must honor our constitutional obligations. While we recognize the primacy of the executive and legislative branches in creating and implementing our system of public education, we cannot and will not tolerate the ongoing violation of constitutional rights.

¶ 243 "Today, education is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship." *Brown I*, 347 U.S. at 493. "Assuring that our children are afforded the chance to become contributing, constructive members of society is paramount. Whether the State meets this challenge remains to be determined." *Leandro II*, 358 N.C. at 649. Accordingly, this Court once more "remands to the lower court[,] and ultimately into the hands of the legislative and executive branches, one more installment in the 200-plus year effort to provide an education to the children of North Carolina." *Id.* We do so with hope that the parties will chart a new course, firmness in our resolve to uphold our Constitution, and faith that the brightest days for our schoolchildren and our state lie still ahead.

IT IS SO ORDERED.

Justice BERGER dissenting.

¶ 244 "Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699, 108 S. Ct. 2597, 2623 (1988) (Scalia, J., dissenting).

¶ 245 "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny." *The Federalist* No. 47 (James Madison). "By tyranny, . . . [Madison] means arbitrary, capricious, and oppressive rule by those possessing any two of these powers." George W. Carey & James McClellan, *Reader's Guide to The Federalist*, The Federalist, at lxx (George W. Carey & James McClellan, eds., Gideon ed. 2001). We see in this opinion the arbitrary usurpation of purely legislative power by four justices. The majority affirms the trial court order which strips the General Assembly of its constitutional power to make education policy and provide for its funding. Indeed, this wolf comes as a wolf.

¶ 246 "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. This clear and unambiguous principle "is the rock upon which rests the fabric of our government. Indeed, the whole theory of constitutional government in this State and in the United States is characterized by the care with which the separation of the departments has been preserved and by a marked jealousy [against] encroachment" by another branch. *Pers. v. Bd. of State Tax Comm'rs*, 184 N.C. 499, 502, 115 S.E. 336, 339 (1922).

¶ 247 Without question, the General Assembly, in which our constitution vests the legislative power of the State, N.C. Const. art. II, § 1, is "the policy making agency of our government[.]" *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169, 594 S.E.2d 1, 8 (2004). The General Assembly is the policymaking agency because "[a]ll political power is vested in and derived from the people," N.C. Const. art I, § 2, and the people act through the General Assembly, *State ex rel. Ewart v. Jones*, 116 N.C. 570, 570, 21 S.E. 787, 787 (1895); *see also Pope v. Easley*, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001) (per curiam) ("[P]ower remains with the people and is exercised through the General Assembly, which functions as the arm of the electorate."). The General Assembly possesses both plenary and express lawmaking authority, and, as provided by the text of the state

constitution, the legislative branch enacts policy through statutory directives and appropriations.

¶ 248 Relevant here, the Declaration of Rights in our constitution provides that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." N.C. Const. art. I, § 15. This provision within the Declaration of Rights must be considered with the related, more specific provisions in Article IX that outline the General Assembly's responsibilities with regard to public education. 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," *Demenski ex rel. C.E.D. v. State Bd. of Educ.*, 377 N.C. 406, 2021-NCSC-58, ¶ 14. This Court has explained that "these two provisions work in tandem," *id.*, to "guarantee every child in the state an opportunity to receive a sound basic education[.]" *Silver v. Halifax Cnty. Bd. of Comm'rs*, 371 N.C. 855, 862, 821 S.E.2d 755, 760 (2018) (emphasis added).

¶ 249 The state constitution explicitly recognizes that it is for the General Assembly to develop educational policy and to provide for its funding in keeping with its legislative authority. Article IX, section 2 requires that "[t]he General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students." N.C. Const. art. IX, § 2. The General Assembly creates the system through policy and funds it through taxation and appropriations. The text then tasks the State Board of Education with "supervis[ing] and administer[ing]" that system with "needed rules and regulations" that remain "subject to laws enacted by the General Assembly." N.C. Const. art. IX, § 5.

¶ 250 The "power of the purse," or the legislative authority to direct or deny appropriations, represents policy decisions made solely by the General Assembly. For that reason, our constitution provides that "[n]o money shall be drawn from the State treasury but in consequence of appropriations made by law[.]" N.C. Const. art. V, § 7(1).

¶ 251 As this Court unanimously noted just two years ago, "*the appropriations clause states in language no man can misunderstand that the legislative power is supreme over the public purse.*" *Cooper v. Berger*, 376 N.C. 22, 36–37, 852 S.E.2d 46, 58 (2020) (emphasis added); *see also Wilson v. Jenkins*, 72 N.C. 5, 6 (1875) ("The General Assembly has absolute control over the finances of the State."). By way of historical explanation, this Court stated:

> In light of this constitutional provision, the power of the purse is the exclusive prerogative of the General Assembly, with the origin of the appropriations clause dating back to the time that the original state constitution was ratified in 1776. In drafting the appropriations clause, the framers sought to ensure that the people, through their elected representatives in the General Assembly, had full and exclusive control over the allocation of the state's expenditures.

Cooper, 376 N.C. at 36–37, 852 S.E.2d at 58 (cleaned up). These constitutional principles remain true when the legislative branch enacts educational policy through appropriations.

¶ 252 If legislative power over appropriations is absolute, then the judicial branch has no role in this endeavor. Clear and unambiguous language that "no man can misunderstand," *id.*, should yield results that no reasonable person can question.

¶ 253 As set out in the constitutional text and this Court's precedent, the General Assembly determines and develops educational policy through statutes and appropriations. However, a review of this case's lengthy litigation reveals that the General Assembly was notably excluded. Due process requires notice and an opportunity to be heard—legislative defendants have been denied the protection of this fundamental fairness.

¶ 254 From the filing of the initial complaint until January 2011, the Attorney General represented the executive and legislative branches (the State). In 2011, the majority party of General Assembly, both House and Senate, changed. The Attorney General, then asserting a purported conflict of interest, ceased to represent the General Assembly at that time. The Attorney General noted that executive branch defendants refused to waive this conflict. The General Assembly attempted to intervene in the case, but the trial court rejected intervention because the issue in the case was not the legislature's education policy or funding, but the implementation of that policy by the executive branch.

¶ 255 Judge Howard Manning, perhaps the one individual most familiar with this case, later stated in a memorandum that educational shortcomings did not result from legislative failures:

> Our children that cannot read by the third grade are by and large doomed not to succeed by the time they get to high school. As shown by the record in this case, that is a failure of classroom instruction.

. . .

> Reduced to essentials, in my opinion the children are not being provided the opportunity because after all the millions spent, 90% of school costs are for adult salaries and benefits, and the data show as it did years ago and up to now the educational establishment has not produced results.

In other words, Judge Manning clearly understood that the problem is not with education policy or funding; rather, the problem is with implementation and delivery by the education establishment.

¶ 256 Moreover, the focus of this litigation post-*Leandro* has been the general implementation and delivery of educational opportunities to the "at risk" children in plaintiffs' counties. *See Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 612 n.1, 599 S.E.2d 365, 375 n.1 (2004) (the only issue which "faces scrutiny in the instant appeal [is] whether the State has failed in its constitutional duty to provide Hoke County school children with the opportunity to receive a sound basic education.").[1] Despite the express directive of this Court in Hoke County, the trial court failed to conduct any other trial. Furthermore, given that the education statutes and policy changed significantly through the years, the original *Leandro* claims and resulting decision have become stale.

¶ 257 When Judge Manning withdrew for health reasons in 2016, a new judge, in collaboration with executive branch defendants and plaintiffs, dramatically changed the direction of this litigation to focus on policy and funding statewide, rather than problems with implementation and delivery in plaintiffs' counties as originally pled. In November 2021, the new judge entered an order stripping the General Assembly of its constitutional authority, setting educational policy, and judicially appropriating taxpayer monies to fund his chosen policy. Only then did the legislative defendants receive the opportunity to intervene as they sought appellate review of this judicial invasion into their constitutional powers.

¶ 258 Because of the collusive nature of this litigation, the majority today now joins in denying legislative defendants due process, the fundamental fairness owed to any party, and usurps the legislative power by crafting policy and directly appropriating funds. Further, this Court approves the deprivation of due process to other non-parties by affirming

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1. Because the distinction is meaningful, we refer to *Hoke County Board of Education v. State* as *Hoke County*, not *Leandro II*. See discussion at *Hoke County Board of Education v. State*, 367 N.C. 156, 158 n.2, 749 S.E.2d 451, 453 n.2 (2013).

the trial court order which required certain state officials to violate their oaths and circumvent the constitutionally and statutorily required lawful method of appropriating monies from the general fund.

¶ 259 In addition, the majority takes it upon itself to resolve issues in this case without notice and in the face of this Court's order to the contrary. In March 2022, this Court entered a special order holding "in abeyance [certain issues] with no other action, including the filing of briefs, to be taken until further order of the Court." Despite the fact that no notice has been provided to any party, and briefing has not been done, this Court exerts its will by summarily deciding the matter. In so doing, the majority ignores due process.

¶ 260 Fundamentally, and contrary to what plaintiffs, executive branch defendants, and the majority would have the public believe, this case is not about North Carolina's failure to afford its children with the opportunity to receive a sound basic education. The essence of this case is power—who has the power to craft educational policy and who has the authority to fund that policy.

¶ 261 While a properly restrained judiciary has "neither FORCE nor WILL, but merely judgment," *The Federalist* No. 78 (Alexander Hamilton), we once again address the pernicious extension of judicial power by this Court at the expense of the constitutionally prescribed power of the legislature. Once again, the subversion of constitutional order is engineered by a bare majority through unprecedented and dangerous reasoning. Couched this time as its "inherent authority," the majority once again "unilaterally reassigns constitutional duties." *N.C. State Conf. of Nat'l Ass'n for the Advancement of Colored People v. Moore*, 2022-NCSC-99, ¶ 77 (Berger, J., dissenting).

¶ 262 Relying on a gross misapplication of our caselaw, the majority's Oppenheimer-esque reshaping of the appropriations clause and usurpation of legislative function has no apparent concern for constitutional strictures or the limits of this Court's power. The judicial branch now assumes boundless inherent authority to reach any desired result, ignoring the express boundaries set by the explicit language of our constitution and this Court's precedent. Because "[t]his power in the judicia[ry] will enable [judges] to mold the government into almost any shape they please," Brutus, Essay XI, The Essential Anti-Federalist 190 (W. B. Allen and Gordon Lloyd, eds., 2nd ed. 2002), I respectfully dissent.

I. Factual and Procedural Background

¶ 263 The issues in this case are neither unprecedented nor extraordinary. Had the trial court below, and the majority here, understood precisely

what this Court held in *Leandro* and *Hoke County*, much litigation would have been avoided. As this case is the latest chapter of a dispute this Court first considered more than twenty-four years ago, our prior decisions constitute the law of the case and are binding on the courts. *See Hayes v. City of Wilmington*, 243 N.C. 525, 536, 91 S.E.2d 673, 681–82 (1956) ("[W]hen an appellate court passes on a question and remands the cause for further proceedings, the questions there settled become the law of the case, both in subsequent proceedings in the trial court and on subsequent appeal[.]").

A. *Leandro*

¶ 264 In *Leandro v. State of North Carolina*, 346 N.C. 336, 342, 488 S.E.2d 249, 252 (1997) (*Leandro*), plaintiffs brought an action against the State and the State Board of Education seeking declaratory and injunctive relief, alleging that children in their school districts were not "receiving a sufficient education to meet the minimal standard for a constitutionally adequate education." The original plaintiffs were "students and their parents or guardians from the relatively poor school systems in Cumberland, Halifax, Hoke, Robeson, and Vance Counties and the boards of educations for those counties." *Id.* at 342, 488 S.E.2d at 252. Those plaintiffs were joined by plaintiff-intervenors, "students and their parents or guardians from the relatively large and wealthy school systems of the City of Asheville and of Buncombe, Wake, Forsyth, Mecklenburg, and Durham counties and the boards of education for those systems." *Id.* at 342, 488 S.E.2d at 252.

¶ 265 Although plaintiffs' and plaintiff-intervenors' claims differed, they were similar in one significant respect:

> Both plaintiffs and plaintiff-intervenors (hereinafter "plaintiff-parties" when referred to collectively) allege in their complaints in the case resulting in this appeal that they have a right to adequate educational opportunities which is being denied them by defendants under the current school funding system. Plaintiff-parties also allege that the North Carolina Constitution not only creates a fundamental right to an education, but it also guarantees that every child, no matter where he or she resides, is entitled to equal educational opportunities.

Id. at 342, 488 S.E.2d at 252.

¶ 266 Defendants responded to plaintiff-parties' complaints by filing a motion to dismiss, contending in part that "plaintiff-parties had failed to

state any claim upon which relief could be granted." *Id.* at 344, 488 S.E.2d at 253. The trial court denied defendants' motion, and defendants timely appealed. *Id.* at 344, 488 S.E.2d at 253. The Court of Appeals reversed the trial court and dismissed all of plaintiffs' claims. *Id.* at 344, 488 S.E.2d at 253. It concluded that "the right to education guaranteed by the North Carolina Constitution is limited to one of equal access to the existing system of education and does not embrace a qualitative standard." *Id.* at 344, 488 S.E.2d at 253 (citing *Leandro v. North Carolina*, 122 N.C. App. 1, 11, 468 S.E.2d 543, 550 (1996)).

¶ 267 Plaintiff-parties petitioned this Court for discretionary review. We granted the petition to address "whether the people's constitutional right to education has any qualitative content, that is, whether the state is required to provide children with an education that meets some minimum standard of quality." *Id.* at 345, 488 S.E.2d at 254. In answering that question in the affirmative, this Court stated:

> We conclude 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. For purposes of our Constitution, a "sound basic education" is one that will provide the student with at least: (1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student's community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.

Id. at 347, 488 S.E.2d at 255 (emphasis added).

¶ 268 Plaintiff-parties also argued that "Article IX, Section 2(1), requiring a 'general and uniform system' in which 'equal opportunities shall

be provided for all students,' mandates equality in the educational programs and resources offered the children in all school districts in North Carolina." *Id.* at 348, 488 S.E.2d at 255. This Court expressly rejected this argument, stating "we are convinced that the equal opportunities clause of Article IX, Section 2(1) does not require substantially equal funding or educational advantages in all school districts." *Id.* at 349, 488 S.E.2d at 256. Thus, we affirmed the Court of Appeals' decision to dismiss this claim.

¶ 269 As is especially relevant here, this Court made it clear that plaintiff-parties' proposed constitutional requirement of "substantial equality of educational opportunities in every one of the various school districts of the state would almost certainly ensure that *no matter how much money was spent on the schools of the state*, at any given time some of those districts would be out of compliance." *Id.* at 350, 488 S.E.2d at 256–57 (emphasis added). Thus, this Court delineated between (1) a requirement for the state to provide all students with the *opportunity* to receive a sound basic education, and (2) a requirement for the state to provide the *same* opportunities to all students statewide.

¶ 270 Further, we drew a sharp distinction between the right *to* a sound basic education and the right to the *opportunity* to receive a sound basic education. This Court discussed at length the "[s]ubstantial problems [that] have been experienced in those states in which the courts have held that the state constitution guaranteed the right *to* a sound basic education." *Id.* at 350–51, 488 S.E.2d at 257 (emphasis added). We listed multiple cases from various jurisdictions involving, as is particularly relevant here, decisions of divided courts "striking down the most recent efforts of the [state] legislature and for the third time declaring a funding system for the schools of that state to be in violation of the state constitution." *Id.* (citing *Abbot v. Burke*, 149 N.J. 145, 693 A.2d 417 (1997)).[2] In addition to referencing the flood of litigation brought forth in states that guarantee a right *to* a sound basic education, this Court also noted law review articles which described "the difficulty in understanding and implementing the mandates of the courts" and "the lack of an adequate remedy" in these states. *Id.* (citing William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future*

2. The majority cites to a continuation of *Abbott v. Burke* as an example to justify its "extraordinary" remedy. It is extraordinary that the majority cites to cases and theories that have been *expressly* disavowed by this Court. Further, the citations to cases from Kansas and Washington make little sense as neither of those cases involve the judicial exercise of legislative authority over the public purse.

of Public School Finance Reform Litigation, 19 J.L. & Legal Educ. 219 (1990); Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 Harv. L. Rev. 1072, 1075–78 (1991)).

¶ 271 This Court "conclude[d] that the framers of our Constitution did not intend to set such an impractical or unattainable goal." *Id.* at 351, 488 S.E.2d at 257. Accordingly, we held that "Article IX, Section 2(1) of the North Carolina Constitution requires that all children have the *opportunity* for a sound basic education, but it *does not require* that equal educational opportunities be afforded students in all of the school districts of the state." *Id.* (emphasis added).

¶ 272 This Court was acutely aware of the potential dangers of its holding in *Leandro*. We defined the opportunity to receive a sound basic education with "some trepidation[ ]" because "judges are not experts in education and are not particularly able to identify in detail those curricula best designed to ensure that a child receives a sound basic education." *Id.* at 354, 488 S.E.2d at 259. Recognizing the General Assembly's crucial role in this issue, this Court stated:

> We acknowledge that the legislative process provides a better forum than the courts for discussing and determining what educational programs and resources are most likely to ensure that each child of the state receives a sound basic education. The members of the General Assembly are popularly elected to represent the public for the purpose of making just such decisions. The legislature, unlike the courts, is not limited to addressing only cases and controversies brought before it by litigants. The legislature can properly conduct public hearings and committee meetings at which it can hear and consider the views of the general public as well as educational experts and permit the full expression of all points of view as to what curricula will best ensure that every child of the state has the opportunity to receive a sound basic education.

Id. at 355, 488 S.E.2d at 259.

¶ 273 As is clear from our opinion, this Court was well aware of the murky waters it entered in *Leandro*. We took care to provide examples of what factors should be considered by trial courts and what weight should be given to such factors. This Court held that "[e]ducational goals and standards adopted by the legislature," "the level of performance of the

children of the state and its various districts on standard achievement tests[,]" and "the level of the state's general educational expenditures and per-pupil expenditures[ ]" were all relevant factors. *Id.* at 355, 488 S.E.2d at 259–60. We noted that one factor alone was not determinative.

¶ 274 Additionally, we directly addressed the basis of the trial court's order at issue before us today—whether courts of this state may rely solely on expenditures as a remedy to an alleged violation of this right. In answering no, the Court stated:

> We agree with the observation of the United States Supreme Court that
>
> > The very complexity of the problems of financing and managing a statewide public school system suggests that there will be more than one constitutionally permissible method of solving them, and that within the limits of rationality, the legislature's efforts to tackle the problems should be entitled to respect. *On even the most basic questions in this area the scholars and educational experts are divided.* Indeed, one of the major sources of controversy concerns the extent to which there is a demonstrable correlation between educational expenditures and the quality of education . . . .

Id. at 355–56, 488 S.E.2d at 260 (cleaned up) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42–43, 93 S. Ct. 1278, 1301–02 (1973)).

¶ 275 This Court went further regarding the flawed notion of any reliable causal relationship between increased expenditures and educational outcomes:

> More recently, one commentator has concluded that "available evidence suggests that substantial increases in funding produce only modest gains in most schools." The Supreme Court of the United States recently found such suggestions to be supported by the actual experience of the Kansas City, Missouri schools over several decades. The Supreme Court expressly noted that despite massive court-ordered expenditures in the Kansas City schools which had provided students there with school "facilities and opportunities not available anywhere else in the county," the Kansas City students had not come

> close to reaching their potential, and "learner outcomes" of those students were "at or below national norms at many grade levels."

Id. (quoting William H. Clune, *New Answers to Hard Questions Posed by Rodriguez: Ending the Separation of School Finance and Educational Policy by Bridging the Gap Between Wrong and Remedy*, 24 Conn. L. Rev. 721, 726 (1992) and *Missouri v. Jenkins*, 515 U.S. 70, 70 115 S. Ct. 2038, 2040 (1995)).

¶ 276 This Court was gravely concerned with preventing judicial interference in the legislative realm. To that end, before reversing the decision of the Court of Appeals and remanding the case to Wake County Superior Court, we provided guidance to future courts:

> In conclusion, we reemphasize our recognition of the fact that *the administration of the public schools of the state is best left to the legislative and executive branches of government.* Therefore, the courts of the state *must grant every reasonable deference to the legislative and executive branches* when considering whether they have established and are administering a system that provides the children of the various school districts of the state a sound basic education. *A clear showing to the contrary* must be made before the courts conclude that they have not. *Only such a clear showing will justify a judicial intrusion* into an area so clearly the province, initially at least, of the legislative and executive branches as the determination of what course of action will lead to a sound basic education.

Id. at 357, 488 S.E.2d at 261 (emphasis added).

¶ 277 Thus, this Court in *Leandro* explicitly stated that: (1) there are multiple methods of ensuring children's opportunity to receive a sound basic education; (2) the legislature's efforts to do so are entitled to great deference; (3) any reliance on a correlation between educational spending and education quality is suspect at best; and (4) a clear showing that children's opportunity to receive a sound basic education has been violated must be made before a court takes any action.

B. *Hoke County*

¶ 278 Seven years after deciding *Leandro*, we again addressed children's opportunity to receive a sound basic education in *Hoke County Board of*

Education v. State, 358 N.C. 605, 599 S.E.2d 365 (2004) (*Hoke County*). At the conclusion of *Leandro*, this Court had remanded the case to Wake County Superior Court to decide the following claims:

> (1) [W]hether the State ha[d] failed to meet its constitutional obligation to provide an opportunity for a sound basic education to plaintiff parties; (2) whether the State has failed to meet its statutory obligation, pursuant to Chapter 115C of the General Statutes, to provide the opportunity for a sound basic education to plaintiff parties; and (3) whether the State's supplemental school funding system is unrelated to legitimate educational objectives and, as a consequence, is arbitrary and capricious, resulting in a denial of equal protection of the laws for plaintiff-intervenors.

Id. at 612, 599 S.E.2d at 374–75. This Court noted the issues were further refined because "[t]he issue of whether the State has failed in its statutory duty to provide Hoke County school children with a sound basic education has been subsumed . . . by the constitutional question[,]" and the supplemental funding issue was not ripe. *Id.* In so stating, we recognized that education policy as set forth in the relevant statutes was consistent with the constitution.

¶ 279 Upon remand, "two of the trial court's initial decisions limited the scope of the case[.]" *Id.* at 613, 599 S.E.2d at 375. First, the trial court, with the consent of the parties, bifurcated the case into two separate actions—one addressing the claims of the plaintiffs from rural school districts and one addressing the claims of the plaintiff-intervenors from larger urban districts. *Id.* Because of this bifurcation, and because plaintiff-intervenors' trial had not yet been held, "our consideration of the case [wa]s properly limited to those issues raised in the rural districts' trial." *Id.* Second, "the trial court ruled that the evidence presented in the rural districts' trial should be further limited to claims as they pertain to a single district." *Id.* Hoke County was "designated as the representative plaintiff district," and the "evidence in the case w[as] restricted to its effect on Hoke County." *Id.*

¶ 280 Then, to determine the Hoke County claims, the trial court held a trial which "lasted approximately fourteen months and resulted in over fifty boxes of exhibits and transcripts, an eight-volume record on appeal, and a memorandum of decision that exceeds 400 pages." *Id.* at 610, 599 S.E.2d at 373.

¶ 281 This procedural posture had a significant effect on the impact of our holdings in *Hoke County*. As this Court made abundantly clear at the outset, "our consideration of this case is properly limited to the issues relating *solely* to Hoke County as raised at trial." *Id.* (emphasis added). As the case before us today is a continuation of *Hoke County*, and because *Hoke County* constitutes the law of this case, we are bound by this Court's previous language:

> [B]ecause this Court's examination of the case is premised on evidence as it pertains to Hoke County in particular, *our holding mandates cannot be construed to extend to the other four rural districts named in the complaint*. With regard to the claims of named plaintiffs from the other four rural districts, the case is remanded to the trial court for further proceedings that include, but are not necessarily limited to, *presentation of relevant evidence by the parties, and findings and conclusions of law by the trial court*.

Id. n.5 (emphasis added).

¶ 282 What this means in plain language is that our decision in *Hoke County* concerned *only* Hoke County and that no part of that decision attempted to determine whether any other county was failing to provide students with the opportunity to a sound basic education. Consistent with our holding in *Leandro*, a "judicial intrusion" into any other county's system would require an adversarial hearing complete with the presentation of relevant evidence and findings of fact. The evidence and factual findings would then need to support the conclusion of law that a "clear showing" had been made that the county was denying children the opportunity to a sound basic education. *See Leandro*, 346 N.C. at 357, 488 S.E.2d at 261. Absent any separate trial for another county, the assertion that the trial court's order reviewed in *Hoke County* addressed any county other than Hoke County is plainly wrong and blatantly contradicts the clear language of this Court.

¶ 283 Not only did our decision in *Hoke County* only address the Hoke County claims, but we also noted that the trial court's order was limited to claims involving "at-risk" students in Hoke County. Accordingly, we stated that:

> As a consequence, while we must limit our review of the trial court's order to its conclusions concerning 'at-risk' students, we cannot and do not offer any opinion as to whether non 'at-risk' students in Hoke

> County are either obtaining a sound basic education or being afforded their rightful opportunity by the State to obtain such an education.

Hoke County, 358 N.C. at 634, 599 S.E.2d at 388.

¶ 284 After these express limitations, we first examined whether the evidence established "a clear showing" supporting "the trial court's conclusion that the constitutional mandate of *Leandro* has been violated in the Hoke County School System . . . ." *Id.* at 623, 599 S.E.2d at 381 (cleaned up). We next reviewed two categories of evidence presented at trial.

¶ 285 First, we reviewed the trial court's consideration of evidence of "comparative standardized test score data[,] . . . student graduation rates, employment potential, [and] post-secondary education success" for Hoke County and its comparison of that data to data regarding North Carolina students statewide. *Id.* We determined that evidence of this type fell "under the umbrella term of 'outputs,' a term used by educators that, in sum, measures student performance." *Id.* Second, we reviewed the trial court's use of evidence of "deficiencies pertaining to the educational offerings in Hoke County schools" and "deficiencies pertaining to the educational administration of Hoke County schools." *Id.* We determined that evidence of this type fell "under the umbrella term of 'inputs,' a term used by educators that, in sum, describes what the State and local boards provide to students attending public schools." *Id.*

¶ 286 This Court examined: (1) whether these types of evidence were relevant in determining Hoke County's *Leandro* compliance; and, if so, (2) whether the evidence presented supported the trial court's determination that *Leandro*'s mandate was being violated in Hoke County.

¶ 287 We first determined that the trial court was correct in using various standardized test scores to compare the proficiency of Hoke County students to that of other students in North Carolina. The trial court determined that the comparison "clearly show[ed] Hoke County students are failing to achieve [grade-level] proficiency in numbers far beyond the state average." *Id.* at 625, 599 S.E.2d at 383. Further,

> [i]n analyzing the test score data and the opinions of those who testified about them, the trial court noted that the score statistics showed that throughout the 1990s, Hoke County students in all grades trailed their statewide counterparts for proficiency by a considerable margin. For example, in 1997–98, only 46.9% of Hoke students scored at Level III or above in algebra

> while the state average was 61.6%. Similar disparities occurred in other high school subjects such as Biology, English, and American History. Other test data reflected commensurate results in lower grades. For example, in grades 3–8, Hoke County students trailed the state average in each grade, with gaps ranging from 11.7% to 15.1%.

Id. at 625–26, 599 S.E.2d at 383.

¶ 288 A wide range of tests confirmed that Hoke County students were deficient when compared to statewide averages. The trial court made extensive detailed findings of fact that this deficiency was confirmed by evidence regarding Hoke County graduation rates, dropout rates, employment rates and prospects, and post-secondary education performance. *Id.* at 625–30, 599 S.E.2d at 382–386. We stated that

> [i]n the realm of "outputs" evidence, we hold that the trial court properly concluded that the evidence demonstrates that over the past decade, an inordinate number of Hoke County students have consistently failed to match the academic performance of their statewide public school counterparts and that such failure, measured by their performance while attending Hoke County schools, their dropout rates, their graduation rates, their need for remedial help, their inability to compete in the job markets, and their inability to compete in collegiate ranks, constitute a clear showing that they have failed to obtain a *Leandro*-comporting education.

Id. at 630, 599 S.E.2d at 386.

¶ 289 We then addressed "inputs," asking whether the evidence supported the trial court's conclusion that the defendants were responsible for the deficiency of Hoke County students in comparison to other students statewide. First, and most relevant to the current appeal, this Court affirmed the trial court's conclusion that the statewide education policy and funding were constitutionally sound.

> In sum, the trial court found that the State's general curriculum, teacher certifying standards, funding allocation systems, and education accountability standards met the basic requirements for providing students with an opportunity to receive a sound

> basic education. As a consequence, the trial court concluded that "the bulk of the core" of the State's "Educational Delivery System ... is sound, valid and meets the constitutional standards enumerated by *Leandro*."

Id. at 632, 599 S.E.2d at 387. Simply stated, we held that the General Assembly's statutory schemes creating and funding our education system complied with our state constitution as interpreted in *Leandro*.

¶ 290 Despite the trial court's conclusion on this issue, it determined that neither the State, nor the Hoke County School System, were "strategically allocating the available resources to see that at-risk children have the equal opportunity to obtain a sound basic education." *Id.* at 635, 599 S.E.2d at 388.[3] We summarized the trial court's remedial action as such:

> Although the trial court explained that it was leaving the "nuts and bolts" of the educational resources assessment in Hoke County to the other branches of government, it ultimately provided general guidelines for a *Leandro*-compliant resource allocation system, including the requirements: (1) that "every classroom be staffed with a competent, well-trained teacher"; (2) "that every school be led by a well-trained competent principal"; and (3) "that every school be provided, in the most cost effective manner, the resources necessary to support the effective instructional program within that school so that the educational needs of all children, including *at-risk* children, to have the equal opportunity to obtain a sound basic education, can be met." Finally, the trial court ordered the State to keep the court advised of its remedial actions through written reports filed with the trial court every ninety days.

Id. at 636, 599 S.E.2d at 389 (emphasis added).

¶ 291 Notably, the trial court "refused to step in and direct the 'nuts and bolts' of the reassessment effort." *Id.* at 638, 599 S.E.2d at 390. The trial

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3. The "available resources" are the funds appropriated by the General Assembly in the State Budget. The failure to "strategically allocate[]" these available funds is a failure on the part of the State Board of Education—not the General Assembly. *See* N.C.G.S. § 115C-408(a) ("The [State] Board shall have general supervision and administration of the educational funds provided by the State . . . ."). As the trial court stated, "the funds presently appropriated and otherwise available are not being effectively and strategically *applied* so as to meet the [ ] principles from *Leandro*." (emphasis added).

court "deferred to the expertise of the executive and legislative branches" because it "acknowledg[ed] that the state's courts are ill-equipped to conduct, or even to participate directly in, any reassessment effort." *Id.* This Court explicitly approved of such deference in affirming the trial court's order:

> [W]e note that the trial court also demonstrated admirable restraint by refusing to dictate how existing problems should be approached and resolved. Recognizing that education concerns were the shared province of the legislative and executive branches, the trial court instead afforded the two branches an unimpeded chance, "initially at least," to correct constitutional deficiencies *revealed at trial*. In our view, the trial court's approach to the issue was sound and its order reflects both *findings of fact that were supported by the evidence* and *conclusions that were supported by ample and adequate findings of fact*. As a consequence, we affirm those portions of the trial court's order that conclude that there has been a clear showing of the denial of the established right of *Hoke County students* to gain their opportunity for a sound basic education and those portions of the order that require the State to *assess* its education-related allocations to the county's schools so as to correct any deficiencies that presently prevent the county from offering its students the opportunity to obtain a *Leandro*-conforming education.

Id. at 638, 599 S.E.2d at 390–91 (emphasis added).

¶ 292 This Court entered two additional holdings. First, we reversed the trial court's decision that it could specifically determine the age for school eligibility. This Court held the issue was nonjusticiable, stating that "[o]ur reading of the constitutional and statutory provisions leads us to conclude that the determination of the proper age for school children has indeed been squarely placed in the hands of the General Assembly." *Id.* at 639, 599 S.E.2d at 391. We noted that an issue is nonjusticiable when either "the Constitution commits an issue, as here, to one branch of government," or "satisfactory and manageable criteria or standards do not exist for judicial determination of the issue." *Id.* (citing *Baker v. Carr*, 369 U.S. 186, 210, 82 S. Ct. 691, 706 (1962)). This Court determined that the issue of the proper age for school children met both tests for nonjusticiability. *Id.* In addition, we affirmed the trial court's decision

to consider all available resources, including those provided by the federal government, when evaluating our state's educational system. *Id.* at 645–47, 599 S.E.2d at 395–96.

¶ 293 This Court's clear and deliberate language established several crucial points that should control our determination of the instant case. First and foremost, education policy and funding are legislative responsibilities, while the executive is tasked with administration of the education system. *Id.* at 643, 599 S.E.2d at 393. Second, our holding in *Hoke County* was based on review of a 400-page, detailed order, which resulted from the trial court receiving evidence over a fourteen-month period on whether at-risk students in Hoke County were receiving the opportunity to a sound basic education. The trial court determined that the educational opportunities provided by Hoke County were deficient when it compared Hoke County to their contemporaries across the state. Finally, our holding in *Hoke County* was expressly limited to Hoke County.

¶ 294 We concluded our opinion by directing the trial court to conduct proceedings, consistent with the strictures above, monitoring Hoke County compliance and holding trials. Executive branch agencies were required to propose methods to reallocate existing resources to address the deficiencies in Hoke County. In addition, the trial court was to hold trials "involving either other rural school districts or [the five] urban school districts, . . . in a fashion that is consistent with the tenets outlined in this opinion." *Id.* at 648, 599 S.E.2d at 397.

¶ 295 Thus, this case as refined by our opinions in *Leandro* and *Hoke County* did not present a statewide claim that the education system in North Carolina was deficient, and there has never been any such holding. To the contrary, the Court approved the use of statewide averages to help determine if students in a particular county were underperforming.[4]

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4. In reviewing the trial court's conclusion that at-risk students in Hoke County were denied the opportunity to a sound basic education, this Court explicitly approved of Judge Manning's use of a comparative analysis in which Hoke County was measured against other counties in this state. This use of better-performing counties as measuring sticks was only possible because students in these other counties were receiving a *Leandro* conforming education, and this fact is reflected in Judge Manning's determinations regarding funding adequacy and implementation inadequacy.

No such analysis could conceivably support Judge Lee and the education establishment's assertion that students in all counties in this state are being denied the opportunity to a sound basic education—without at least one *Leandro* compliant county, the measuring stick evaporates. Put another way, the existence of *Leandro* compliant counties for which comparison is possible defeats any suggestion that there is a statewide violation.

C. Post-*Hoke County*

¶ 296 Following our decision in *Hoke County*, this matter was remanded to Wake County Superior Court for further proceedings under Judge Howard E. Manning, Jr. Unfortunately, none of the trials required by this Court's decision occurred between July 2004 and October 7, 2016, when Judge Manning had to withdraw. While no trial occurred and no formal order was rendered—unlike the trial that led to *Hoke County*—there were various hearings and reports during this twelve-year period which the majority erroneously claims amounted to a trial and order. A careful reading of the record reveals that there was no trial and the trial court made no findings of fact or conclusions of law amounting to an appealable order. We address the four trial court filings highlighted by the majority.

¶ 297 On September 9, 2004, the trial court entered one of several filings entitled "Notice of Hearing and Order Re: Hearings." In that filing, the Court "noticed" hearings to occur on October 7 and 25, 2004, and "ordered" the parties to attend. The trial court recounted some of the history of the case, including excerpts from this Court's then recent *Hoke County* decision. In reviewing certain data, the trial court made the following observation:

> This Court believes that DPI and the State Board of Public Instruction are heading down the right track towards assessing problems, developing common sense solutions and providing LEAS with guidance and assistance in developing cost-effective, targeted solutions that can be measured for success and accountability.
>
> Now that the appeal is over and *Leandro II* is in full force and effect, it is time for the DPI and State Board to outline and present its plans as to how it will continue to proceed to ensure that the children of North Carolina will be afforded the opportunity to a sound basic education.

¶ 298 On February 9, 2005, certain Mecklenburg County parents and students (Penn Intervenors), represented by current Justice Anita Earls, filed a complaint seeking to intervene and raising education and race-based claims. On August 19, 2005, the trial court allowed intervention solely for the education claim and denied participation concerning any race-based claims.

¶ 299 Thereafter, on September 30, 2005, Justice Earls filed an amended complaint on behalf of the Penn Intervenors, which further developed the education claim allowed by the trial court and sought to add additional plaintiffs.[5] On May 4, 2006, all of the original intervening parties, except the Charlotte-Mecklenburg Board of Education, voluntarily dismissed their claims.

¶ 300 The next trial court filing referenced by the majority was again entitled "Notice of Hearing Order Re: Hearing." The "order" again simply ordered the parties to appear at the noticed hearing. The trial court noted that the hearing was "non-adversarial" and explained its purpose was to provide executive branch defendants the "opportunity to report to the court concerning the actions that the Executive Branch will take with regard to the Halifax County Public School system." The trial court made the following observations concerning Halifax County Schools:

> The bottom line is that Halifax County Public School children are suffering from a breakdown in system leadership, school leadership and a breakdown in classroom instruction by and large from elementary school through high school.
>
> . . .
>
> Financial data furnished by DPI shows that the cost to the taxpayers to provide school level expenditures, the majority of which are salaries and benefits, has exceeded $75,000,000.00 for the past three years.
>
> . . .
>
> With all of this expense being paid to the adults whose responsibility it is to provide an equal opportunity to obtain a sound basic education to each and every child in the Halifax County Public School system, there seems to be little trickle down benefit to the children entrusted to the adults in these schools.
>
> . . .
>
> [I]t is time for the State to exert itself and exercise command and control over the Halifax County Public Schools beginning in the school year 2009-2010, nothing more and nothing less.

5. That claim remains part of this case, and Justice Earls' former clients participated in this appeal.

> . . .
>
> [T]he Court is providing the Executive Branch the opportunity, initially at least, to exercise its constitutional authority over the Halifax County School system to remedy the academic disaster which is occurring there[.]
>
> . . .
>
> The Court will entertain no excuses or whining by the adults in the educational establishment in Halifax County about how it's the children's fault, not theirs, for failing to provide the academic environment where children can obtain a sound basic education. If these children had Leandro compliant school leadership and teachers, they could learn and obtain a sound basic education rather than fail and drop out of school doomed to a lifetime of poverty and its multiple damages.

¶ 301 Subsequently, on May 5, 2014, the trial court entered a filing entitled "Report from the Court Re: The Reading Problem." In it, the trial court observed that the goal of N.C.G.S. § 115C-83.1 et seq. was "on all fours with the Leandro I definition of a sound basic education." After citing with approval the legislative enhancements to education, the trial court placed the blame for students' reading shortfalls squarely on principals and teachers.

> The bottom line is that the principals that sit in the office, fail to analyze the assessment data a[t] their fingertips and do not become proactive in seeing the K-3 assessment system is being properly and effectively used by all teachers to drive individualized instruction in literacy, are not performing at a level that is expected to provide their students and faculty with the leadership needed to be successful and have all children obtain a sound basic education and proficiency in reading. This principal is not a *Leandro* compliant principal.

Similarly, teachers who fail to utilize the assessment tools properly "are not *Leandro* compliant."

¶ 302 The trial court issued this summary observation directed to school principals and teachers:

> Bottom line requirement: Do the formative assessment and use the information to meet the needs of the individual child. Do not put the data in the folder and continue on with the instruction for the entire class on one level. (What about this do you not understand?)

¶ 303 The final trial court filing relied on by the majority was another "Notice of Hearing and Order Re: Hearing" dated March 17, 2015. In that filing, the trial court expressed concern that the State Board of Education and the Department of Public Instruction were diminishing educational standards.

> Regardless of whatever excuse or reason reducing or eliminating academic standards and assessments may be based on, including education leaders and parent pressure, politics or an unconditional desire to reduce children's equal opportunities to obtain a sound basic education, the reduction of academic standards and elimination of assessments and EOC and EOG tests would be a direct violation of the *Leandro* mandate regarding assessments and testing to determine whether each child is obtaining a sound basic education.
>
> The bottom line is that in 2014, the SBE and DPI through their actions in redefining achievement levels, has begun to nibble away at accountability and academic standards[.]

¶ 304 Judge Manning further noted:

> As a result of today's heightened awareness and available data relating to individual school and student academic achievement in each classroom, the natural reaction by the affected adults who are in education, is to seek a way to eliminate the source of the data that holds them accountable. The only way out from under the microscope of accountability is to eliminate the assessments and the tests themselves.
>
> Helping non[-]Leandro compliant teachers and principals escape from public scrutiny and accountability by eliminating is invalid, simply wrong and in violation of the children's rights[.]

> Teaching to the test is a "red herring" phrase to draw attention away from the real problem – a failure of basic classroom instruction.

¶ 305 Judge Manning's filings reflect his summary of the proceedings in the trial court. Notably, in a memorandum he provided the trial court judge who succeeded him, Judge Manning stated:

> Our children that cannot read by the third grade are by and large doomed not to succeed by the time they get to high school. As shown by the record in this case, that is a failure of classroom instruction.
>
> . . .
>
> Reduced to essentials, in my opinion the children are not being provided the opportunity because after all the millions spent, 90% of school costs are for adult salaries and benefits, and the data show as it did years ago and up to now the educational establishment has not produced results.

¶ 306 Judge Manning, who presided over this case for almost 20 years, reiterated time and time again that the problem is not education policy or funding. The problem is a failure of the educational establishment and classroom instruction, i.e., implementation and delivery.

¶ 307 During the twelve years between this Court's decision in *Hoke County* and the case's reassignment to Judge Lee, the record reveals that Judge Manning entered sixteen Notices of Hearings and Orders re: Hearings, four Court Memos Confirming Hearing Date and Time, one Memorandum of Decision and Order Re: Pre-Kindergarten Services for At-Risk Four Year Olds,[6] and one Report from the Court Re: The Reading Problems. The record demonstrates that, contrary to this Court's express direction, no trials were conducted for any other school districts or counties, and the parties have failed to point this Court to anything in the record indicating that any such trials ever occurred. Moreover, at oral argument in this case, the parties were unable to direct this Court to any order finding a statewide violation. *See* Oral Argument at 36:20, *Hoke Cnty. Bd. of Educ. v. State of North Carolina*, No. 425A21-2, https://www.youtube.com/watch?v=NOuFCf2rYdY.

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6. This amounted to the only actual court order, and it was vacated on appeal as discussed herein. *See Hoke Cnty. Bd. of Educ. v. State*, 367 N.C. 156, 749 S.E.2d 451 (2013).

¶ 308 Significant to a proper analysis by this Court of the current appeal, on August 15, 2011, the General Assembly sought to intervene in this action. Prior to 2011, the General Assembly, the Governor, and other executive branch entities involved in formulating education policy were all of the same political party. However, as a result of the 2010 midterm elections, the majority in the State House and Senate changed parties.

¶ 309 The Attorney General notified the legislature that it would no longer represent the General Assembly's interests in the case. The Attorney General noted a conflict of interest between the General Assembly and the remaining State defendants, and that neither the Governor nor the Department of Public Instruction would waive the conflict. Thereafter, the General Assembly moved to intervene.

¶ 310 In denying the General Assembly's motion to intervene, the trial court acknowledged that the "obligation[ ] to establish and maintain public schools is the 'shared province of the executive and legislative branches,' " but specifically declined to "put[ ] itself, or the judiciary, in the middle of this political dispute." The trial court denied the motion to intervene, in part because it recognized that the case concerned implementation of policy, and, therefore, focused on executive branch defendants. Thus, the legislative defendants were denied an opportunity to participate in this litigation.

¶ 311 This case again reached this Court in 2013. *See Hoke Cnty. Bd. of Educ. v. State*, 367 N.C. 156, 749 S.E.2d 451 (2013). There, we vacated an actual order entered by the trial court finding unconstitutional certain limitations on access to early childhood education. *Id.* at 159–60, 749 S.E.2d at 454–55. Because the General Assembly had revised the contested statute, we held the case should be dismissed as moot with the orders of the Court of Appeals and the trial court vacated. *Id.* at 160, 749 S.E.2d at 455.

¶ 312 Of note, Justice Earls filed an amicus brief in this matter on behalf of an organization she had founded, the Southern Coalition for Social Justice. Justice Earls argued that the trial court had the constitutional authority to order remedial relief by the legislative branch, just as the majority holds today. *See* New Brief of *Amici Curiae*, at 11, *Hoke Cnty. Bd. of Educ. v. State*, 367 N.C. 156 (2013) (No. 5PA12-2). In the brief, she contended that when "the other branches refuse to fulfill [constitutional] obligations, our state courts are not only empowered, but are obligated, to act to ensure the constitutional rights of North Carolinians are not compromised." Interestingly, she made various arguments in the brief similar to those now adopted by the majority, citing many of the

same cases and using some of the same quotes. *Compare* New Brief of *Amici Curiae*, at 11–13, *Hoke Cnty.*, 367 N.C. 156 (No. 5PA12-2) *and supra* ¶¶ 162–71.[7]

¶ 313 At the time of Judge Manning's medical retirement, the remaining plaintiffs in this matter were the original five rural counties, the Charlotte-Mecklenburg Board of Education, and certain students from Mecklenburg County (the Penn Intervenors). The state defendants were executive branch defendants who were represented by the Attorney General. The General Assembly was not represented and was not a participant in the action due to the prior denial of its motion to intervene.

¶ 314 After being appointed, Judge David Lee took the litigation in a far different direction, appointing a third-party consultant to make education policy and funding decisions. This was done despite this Court's explicit holding in *Hoke County* that the state's education policy and its funding met constitutional standards. *See Hoke County*, 358 N.C. at 387, 599 S.E.2d at 632. The trial court did not limit its directives to the specific plaintiffs or their specific claims; rather, the trial court greatly expanded the scope of this litigation while knowing that the branch designated by the constitution to make education policy and funding decisions was not a party to the proceedings.

¶ 315 The following occurred after Judge Lee was assigned to preside over this case on October 7, 2016:

(1) July 24, 2017: The State Board of Education filed a Motion for Relief from Judge Manning's 2002 Judgment, based on its assertion that "the factual and legal landscapes have significantly changed," and that "the original claims, as well as the resultant trial court findings and conclusions, are divorced from the current laws and circumstances."

(2) February 1, 2018: Judge Lee entered a Case Management and Scheduling Order noting that "the Plaintiff parties [including Penn-Intervenors] and the State have jointly nominated, for the Court's consideration and appointment, an independent, non-party consultant to develop detailed, comprehensive,

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7. Justice Earls also signed an amicus brief in this case in December 2004 while representing the UNC School of Law Center for Civil Rights. *See* Memorandum of Law as *Amici Curiae*, at 15, *Hoke Cnty. Bd. of Educ. v. State*, No. 95-CVS-1158 (N.C. Wake County Sup. Ct. Dec 3, 2004). There, her brief criticized executive branch defendants for not seeking significantly more money from the General Assembly and urging immediate court action. Subsequently, the Center for Civil Rights moved to participate as if it represented a party and also began to represent new plaintiffs seeking to intervene in this action.

written recommendations for specific actions necessary to achieve sustained compliance with constitutional mandates articulated in this case."

(3) March 13, 2018: Judge Lee denied the State Board of Education's Motion for Relief from Judgment.

(4) March 13, 2018: Judge Lee entered a consent order appointing WestEd as an "independent, non-party consultant" to assist with the case.

(5) December 2019: WestEd submits its plan for North Carolina.

(6) January 21, 2020: The parties, including the State Board of Education, enter a consent order that "[b]ased upon WestEd's findings, research, and recommendations and the evidence of record in this case, the Court and parties conclude that a definite plan of action for the provision of the constitutional *Leandro* rights must ensure a system of education," that, at a minimum, included seven components described in the order. The order required the parties to submit a status report on the "specific actions that State Defendants must implement in 2020 to begin to address the issues identified by WestEd."

(7) June 15, 2020: Parties submitted a Joint Report to the Court on remedial steps the State planned to take in the next year.

(8) September 1, 2020: Judge Lee entered a consent order, noting that the parties agreed that the steps outlined in the June 15, 2020 Joint Report "are the necessary and appropriate actions needed in Fiscal Year 2021 to begin to adequately address the constitutional violations in providing the opportunity for a sound basic education to all children in North Carolina." The Court ordered defendants to implement the remedial actions in the Joint Plan by June 30, 2021, and required the parties to develop a Comprehensive Remedial Plan (CRP) by December 31, 2020.

(9) March 15, 2021: State defendants submitted a Comprehensive Remedial Plan to the Court.

(10) June 11, 2021: Judge Lee entered an order providing that the "actions, programs, policies, and resources propounded by and agreed to [by] the State Defendants, and described in the Comprehensive Remedial Plan are necessary to remedy the continuing constitutional violations and to provide

the opportunity for a sound basic education . . . .” Judge Lee ordered that the “Comprehensive Remedial Plan shall be implemented in full” and set forth deadlines for doing so.

(11) August 6, 2021: The State filed its first progress report on the status of implementing the Comprehensive Remedial Plan.

(12) September 8, 2021: Judge Lee held a hearing on the status of implementing the Comprehensive Remedial Plan.

(13) September 22, 2021: Judge Lee entered an order on the First Progress report filed by the State. He noted that the parties had not yet secured full funding for the first two years of the Comprehensive Remedial Plan but noted that the State “has available fiscal resources needed to implement Years 2 and 3 of the” Plan. Judge Lee ordered that another hearing be held on October 18, 2021 “to inform the Court of the State’s progress in securing the full funds necessary to implement the” CRP. Judge Lee noted that “in the event full funds necessary to implement the CRP are not secured by that date, the Court will hear and consider any proposals for how the Court may use its remedial powers to secure funding.”

(14) October 18, 2021: Judge Lee entered an order finding that the CRP had not, as of that date, been fully funded by “an appropriations bill.” Judge Lee gave the parties until November 8, 2021, to submit memoranda of law what on remedial steps the court could take.

(15) November 10, 2021: Judge Lee entered the order requiring relevant State actors to transfer over a billion dollars from the General Fund to appropriate State agencies to fund years 2 and 3 of the CRP. Judge Lee stayed the order for 30 days.

(16) November 18, 2021: The General Assembly passed the Budget Act of 2021. The budget appropriated $10.6 billion in FY 2021-2022 and $10.9 billion in FY 2022-2023 for K-12 education. These figures do not include over $3.6 billion dollars in federal coronavirus funding for North Carolina school districts. The budget was signed by the Governor.

(17) November 30, 2021: Judge Lee entered an order noticing a hearing for December 13, 2021, for the State “to inform the Court of the specific components of the Comprehensive Remedial Plan for years 2 & 3 that are funded by the Appropriations Act and those that are not.” Judge Lee also ordered that his

November 10, 2021 transfer order be stayed for ten days after the December 13, 2021 hearing.

(18) December 7, 2021: The State appealed from the November 10, 2021 order.

(19) December 8, 2021: The intervening legislative defendants filed a notice of appeal from the November 10, 2021 order.

¶ 316 As is evident from the timeline above, after the case was reassigned to Judge Lee, no trials or adversarial hearings took place to determine whether a statewide violation of *Leandro* existed. The State Board of Education raised this exact issue before the trial court as part of its Motion for Relief filed July 10, 2017. The State Board of Education requested that the trial court "relinquish [remedial] jurisdiction," in part because "[f]or over a decade, the Superior Court has retained and exercised jurisdiction in this case, [but] this Superior Court has not [ ] held a trial as to any other plaintiff school board." Further, the State Board of Education noted the current direction of the case far

> "exceed[ed] the jurisdiction established by the original pleadings in this action." The State Board of Education recognized numerous statutory and administrative changes since the Hoke County decision. It stated that "[t]he cumulative effect of these changes is that the State's current educational system is so far removed from the factual landscape giving rise to the complaint, trial, and 2002 Judgment that the superior court is now retaining jurisdiction over a 'future school system' which was not the subject of the original action."

¶ 317 On March 13, 2018, eight months after the State Board filed its motion, Judge Lee denied the motion without addressing these crucial issues. In a footnote to the order, Judge Lee indicated that all of the parties were now working together; the proceedings were now taking on a radically different character. The record reflects that the parties entered into three consent orders, with the first occurring on March 13, 2018.[8] In this first consent order, the trial court, upon the parties' request, appointed a San Francisco-based consulting company, WestEd, to serve as an

8. Notably, as discussed further below, the legislature was not a party to the case at this point because its motion to intervene was denied in 2011. Therefore, both its interests and, commensurately, the interests of the taxpayers, voters, and people of this State, were not represented.

"independent non-party consultant." According to a Case Management and Scheduling Order dated February 1, 2018, WestEd's role was to recommend "specific actions" that the state should take:

> a. To provide a competent, well-trained teacher in every classroom in every public school in North Carolina;
>
> b. To provide a well-trained, competent principal for every public school in North Carolina; and
>
> c. To identify the resources necessary to ensure that all children in public school, including those at risk, have an *equal* opportunity to obtain a sound basic education, as defined in *Leandro I*.[9] (emphasis added).

¶ 318 In December 2019, WestEd released its "Action Plan for North Carolina."[10] This report became the basis for two further consent orders between the parties—a Consent Order Regarding Need for Remedial, Systemic Actions for the Achievement of *Leandro* compliance, filed January 21, 2020, and a Consent Order on Leandro Remedial Action for Fiscal Year 2021, filed September 11, 2020.

¶ 319 In addition, WestEd's report formed the basis for the "Comprehensive Remedial Plan." The CRP resulted from the trial court's order for "State Defendants, in consultation with Plaintiffs to develop and present a Comprehensive Remedial Plan to be fully implemented by the end of 2028 . . . ." There is no doubt that the CRP was crafted by the parties, as "State Defendants ha[d] regularly consulted with the plaintiff-parties in the development of the Comprehensive Remedial Plan." The CRP contains hundreds of action steps for the state to complete over the

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9. It is notable that the trial court misconstrued our holding in *Leandro*. As discussed above, this Court expressly rejected the contention that our constitution requires all students to have "an *equal* opportunity to obtain a sound basic education." *See Leandro*, 346 N.C. at 350, 488 S.E.2d at 256–57 (emphasis added) ("A constitutional requirement to provide substantial equality of educational opportunities . . . would almost certainly ensure that no matter how much money was spent on the schools of the state, at any given time some of those districts would be out of compliance.").

10. On the first page of its report, WestEd wrongly asserted that this Court's decision in *Leandro* "affirmed that the state has a constitutional responsibility to provide every student with an *equal opportunity* for a sound basic education and that the state was failing to meet that responsibility." (Emphasis added.) This is simply wrong. This Court has never affirmed a *Leandro* violation outside of Hoke County, let alone a violation occurring on a statewide basis.

course of eight years, which would require billions of dollars in taxpayer money to fund. On June 7, 2021, the trial court entered its Order on Comprehensive Remedial Plan and directed that "the Comprehensive Remedial Plan shall be implemented in full and in accordance with the timelines set forth therein . . . ."

¶ 320 The CRP includes definitions of "responsible parties" who must implement the plan's "action steps." While our state constitution provides that the General Assembly has exclusive authority to allocate taxpayer money, the General Assembly is consistently identified by WestEd as a responsible party for each of these action steps. However, the General Assembly was never joined as a necessary party by the trial court, nor was it consulted during the development of the CRP. As previously noted, the legislature had moved to intervene in this case in 2011, but the trial court denied its motion to intervene.

¶ 321 Following the trial court's June 7 2021 order directing that the CRP be implemented in full, the trial court entered an order on November 10, 2021, in which it ordered that:

> The Office of State Budget and Management and the current State Budget Director ("OSBM"), the Office of the State Controller and the current State Comptroller ("Controller"), and the Office of the State Treasurer and the current State Treasurer ("Treasurer") shall take the necessary actions to transfer the total amount of funds necessary to effectuate years 2 & 3 of the Comprehensive Remedial Plan, from the unappropriated balance within the General Fund to the state agents and state actors with fiscal responsibility for implementing the Comprehensive Remedial Plan as follows:
>
> (a) Department of Health and Human Services ("DHHS"): $189,800,000.00
>
> (b) Department of Public Instruction ("DPI"): $1,522,053,000.00
>
> (c) University of North Carolina System: $41,300,000.00

¶ 322 In addition to ordering the transfer of more than $1.7 billion in state funds, the trial court also ordered that "OSBM, the Controller, and the Treasurer, are directed to treat the foregoing funds as an appropriation from the General Fund . . . ."

¶ 323 The day before Judge Lee entered the November 10 order, Judge Manning sent a memorandum to the General Assembly, the Governor, and the Superintendent of Public Instruction. Judge Lee was copied on the memorandum, which stated:

> At the present time there is a media-induced frenzy about the Leandro judge proposing to enter an order requiring the General Assembly to appropriate over $1 billion for the educational establishment. As the press is licking its lips for 15 minutes on the 6:00 news, I will refer all to the following decisions from our Supreme Court and other decisions relating specifically to the power of the Judicial Branch.
>
> You might enjoy reading Able Outdoor, Inc. v. Harrelson 341 N.C. 167 (1995) by Justice Webb (a Democrat) as follows:
>
> *We hold, however, that the Court of Appeals erred in affirming Judge Cashwell's orders allowing execution against the State. In Smith v. State, 289 NC 303 (1976), we held that . . . if a plaintiff is successful in establishing his claim, he cannot obtain execution to enforce the judgment. We said '[t]he judiciary will have performed its function to the* ***limit*** *of its constitutional powers. Satisfaction will depend upon the manner in which the General Assembly discharges its constitutional duties.' Pursuant to Smith, we do* ***not believe*** *the Judicial Branch of our State government has the power to enforce an execution against the Executive Branch.*
>
> You should also read the following decisions attached to this memorandum, which also declare the limits of the Court's power to execute or require the Legislative and Executive branches of government to appropriate money.
>
> Finally, Leandro requires that the children, not the educational establishment, have the Constitutional right to the equal opportunity to obtain a sound, basic education. This has not and is not happening now as the little children are not being taught to read and write because of a failure in classroom instruction as required by Leandro. 358 NC 624, 625, 626 ("First,

> that every classroom be staffed with a competent, certified, well-trained teacher who is teaching the standard course of study by implementing effective educational methods that provide differentiated individualized instruction, assessment and remediation to the students in that classroom.").
>
> This is not happening now.
>
> Our children that cannot read by the third grade are by and large doomed not to succeed by the time they get to high school. As shown by the record in this case, that is a failure of classroom instruction. This conclusion is supported further by the Report from the Court: The Reading Problem (2014) as well as annual statewide academic performance data, including ACT statewide results for 2020–21 and several years before.
>
> Reduced to essentials, in my opinion the children are not being provided the opportunity because after all the millions spent, 90% of school costs are for adult salaries and benefits, and the data shows as it did years ago and up to now the educational establishment has not produced results.

'*A Failure of Classroom Instruction.' Read Retired Judge's Memo on NC School Funding*, The News & Observer (Nov. 10, 2021, 6:36 PM), https://www.newsobserver.com/news/local/education/article255713686.html.[11]

¶ 324 Eight days after the trial court entered the November 10 order, the General Assembly passed, and the Governor signed, the Current Operations and Appropriations Act of 2021, 2021 N.C. Sess. L. 180 (State Budget).

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11. History and common sense tell us that increased funding alone is not a silver bullet. By way of example, a young baseball player can have the best bat, glove, batting gloves, cleats, and helmet money can buy. Mom and dad can fork out a fortune for top-notch hitting and pitching coaches, showcase teams, and field time. But, if these coaches prioritize teaching the young player to cook or play a musical instrument, you will see little improvement in the sport of baseball.

The same is true with educating children. Schools can have the best teachers along with state-of-the-art programs, equipment, and materials, but educational outcomes will not improve if use of available resources does not prioritize reading, writing, and arithmetic.

¶ 325 The State appealed to the Court of Appeals.[12] It was at this point that Legislative Intervenors intervened as of right pursuant to N.C.G.S. § 1-72.2(b) and also filed a Notice of Appeal.[13]

¶ 326 The State Controller, who was not a party to this action, also petitioned the Court of Appeals for a writ of prohibition, temporary stay, and writ of supersedeas, arguing that the trial court lacked jurisdiction over the Controller and that the November 10 order violated our state constitution. On November 30, 2021, the Court of Appeals issued a writ of prohibition restraining the trial court from enforcing the transfer provisions of its November 10 order and stated that "[u]nder our Constitutional system, that trial court lacks the power to impose that judicial order."

¶ 327 Following the Court of Appeals' issuance of the writ of prohibition, multiple parties, including the State, filed petitions and notices of appeal in this Court, seeking review of the decision of the Court of Appeals and bypass review of issues arising from the November 10 order. On March 21, 2022, this Court allowed defendant State of North Carolina's and plaintiffs' petitions for bypass review (425A21-2) but held in abeyance the direct appeal of review of the writ of prohibition (425A21-1). However, this matter was first remanded to Wake County Superior Court "for the purpose of allowing the trial court to determine what effect, if any, the enactment of the State Budget has upon the nature and extent of the relief that the trial court granted . . . ." Judge Michael Robinson was assigned the task of overseeing the proceedings on remand.[14]

¶ 328 On remand, Judge Robinson concluded "that the 10 November order should be amended to remove a directive that State officers or employees transfer funds from the State Treasury to fully fund the CRP" but also concluded that "the State of North Carolina has failed to comply with the trial court's prior order to fully fund years 2 and 3 of the CRP." In addition, Judge Robinson concluded that because the State Budget in fact funded portions of CRP programs:

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12. This appeal is curious, as the November 10 order attempted to fund a plan that the State defendants crafted. Counsel for the State could not provide an answer when asked why the State had appealed and stated "I don't think the State disagreed with the adoption of that plan."

13. It is notable that not only could the legislative defendants not intervene as of right prior to the passage of the State Budget, but their prior motion to intervene was denied in 2011.

14. The matter was assigned to Judge Robinson because Judge Lee "had reached the mandatory retirement age for judges in January." *David Lee, Judge who Oversaw School Funding Case, Dies at 72*, North State Journal, Oct. 12, 2022, at A5.

> The Order should be further amended to determine specifically that the additional amounts that are due to DHHS, DPI, and the UNC System for undertaking the programs called for in years 2 and 3 of the CRP should be modified and amended as follows:
>
> a. The amount to be provided to DHHS should be reduced from $189,800,000 to $142,900,000
>
> b. The amount to be provided to DPI should be reduced from $1,522,053,000 to [$]608,006,248
>
> c. The amount to be provided to the UNC System should be reduced from $41,300,000 to $34,200,000.

¶ 329 With a proper understanding of the history and current posture of this case, our analysis is set forth below.

II. Analysis

A. Collusion

¶ 330 The courts of this state "have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, declare social status, [or] deal with theoretical problems . . . ." *Little v. Wachovia Bank & Trust Co.*, 252 N.C. 229, 243, 113 S.E.2d 689, 700 (1960), *overruled on other grounds by Citizens Nat'l Bank v. Grandfather Home for Children, Inc.*, 280 N.C. 354, 185 S.E.2d 836 (1972). When an issue has not been "drawn into focus by [court] proceedings," any decision of our courts would "be to render an unnecessary advisory opinion." *Wise v. Harrington Grove Cmty. Ass'n, Inc.*, 357 N.C. 396, 408, 584 S.E.2d 731, 740 (2003) (citing *City of Greensboro v. Wall*, 247 N.C. 516, 519, 101 S.E.2d 413, 416 (1958)). "It is no part of the function of the courts, in the exercise of the judicial power vested in them by the Constitution, to give advisory opinions . . . ." *Poore v. Poore*, 201 N.C. 791, 792, 161 S.E. 532, 533 (1931).

¶ 331 Because "*[c]lear and sound judicial decisions*" can only be reached when adverse parties and their legal theories "*are tested by fire in the crucible of actual controversy*," suits lacking adversity are properly barred from our courts. *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 345, 323 S.E.2d 294, 307 (1984) (emphasis in original) (quoting *City of Greensboro v. Wall*, 247 N.C. at 520, 101 S.E.2d at 416). "So-called friendly suits, where, regardless of form, all parties seek the same result, are quicksands of the law." *City of Greensboro v. Wall*, 247 N.C. at 520, 101 S.E.2d at 416.

¶ 332 Our State's long-standing judicial policy to decline consideration of issues not drawn into focus by adversarial court proceedings is in harmony with the approach of the Supreme Court of the United States. "[F]ederal courts will not entertain friendly suits, or those which are feigned or collusive in nature." *Flast v. Cohen*, 392 U.S. 83, 100, 88 S. Ct. 1942, 1953 (1968) (cleaned up). As stated by the Supreme Court in 1850 when voiding a judgment of the Circuit Court of the United States for the District of Maine:

> The court is satisfied, upon examining the record in this case . . . that there is no real dispute between the plaintiff and defendant. On the contrary, it is evident that their interest in question brought here for decision is one and the same, and not adverse; and that in these proceedings the plaintiff and defendant are attempting to procure the opinion of this court upon a question of law, in the decision of which they have a common interest opposed to that of other persons, who are not parties to this suit, who had no knowledge of it while it was pending in the Circuit Court, and no opportunity of being heard there in defence of their rights. And their conduct is the more objectionable, because they have brought up the question upon a statement of facts agreed on between themselves, without the knowledge of the parties with whom they were in truth in dispute, and upon a judgment pro forma entered by their mutual consent, without any actual judicial decision by the court.

Lord v. Veazie, 49 U.S. 251, 254 (1850).

¶ 333 As stated by Justice Brewer for the Supreme Court in 1892:

> Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, state or federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real,

> earnest, and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.

Chicago & G.T. Ry. Co. v. Wellman, 143 U.S. 339, 345, 12 S. Ct. 400, 402 (1892).

¶ 334 As stated by the Supreme Court per curiam in 1943:

> Such a suit is collusive because it is not in any real sense adversary. It does not assume the honest and actual antagonistic assertion of rights to be adjudicated—a safeguard essential to the integrity of the judicial process, and one which we have held to be indispensable to adjudication of constitutional questions by this Court. Whenever in the course of litigation such a defect in the proceedings is brought to the court's attention, it may set aside any adjudication thus procured and dismiss the cause without entering judgment on the merits. It is the court's duty to do so where, as here, the public interest has been placed at hazard by the amenities of parties to a suit conducted under the domination of only one of them.

U.S. v. Johnson, 319 U.S. 302, 305, 63 S. Ct. 1075, 1076–77 (1943) (cleaned up).

¶ 335 Here, the trial court disregarded both this Court's precedent and the long-standing guidance of the Supreme Court of the United States by judicially sanctioning a collusive suit between friendly parties. While this case originally "was filed as a declaratory judgment action pursuant to section 1-253 of the General Statutes," *Hoke County*, 358 N.C. at 617, 599 S.E.2d at 378, the Uniform Declaratory Judgment Act nevertheless "preserves inviolate the ancient and sound juridic concept that the inherent function of judicial tribunals is to adjudicate genuine controversies between antagonistic litigants . . . ." *Lide v. Mears*, 231 N.C. 111, 118, 56 S.E.2d 404, 409 (1949). Further, "an action for a declaratory judgment will lie only in a case in which there is an actual or real existing controversy *between parties having adverse interests in the matter in dispute*." *Id.* (emphasis added).

¶ 336 An examination of the record in this case leaves no doubt that although the parties' interests may have once been adverse, any such

adversity dissipated years ago. As early as February 1, 2018, the trial court's Case Management and Scheduling Order noted that "[t]he Plaintiff Parties and the State have jointly nominated . . . an independent, non-party consultant," i.e., WestEd, "to develop detailed, comprehensive, written recommendations for specific actions" to remedy the purported statewide violations of *Leandro*.

¶ 337 This Case Management and Scheduling Order was followed by multiple consent orders, including a Consent Order Regarding Need for Remedial, Systematic Actions For the Achievement of *Leandro* Compliance. In this consent order, the trial court stated "the parties to this case . . . are in agreement that the time has come" to proceed with WestEd's recommendations. This consent order also reveals that, despite executive branch defendants' alignment with plaintiff-parties, the trial court was only "hopeful that the parties, with the help of the Governor, can obtain the support necessary from the General Assembly."

¶ 338 This was all done to the exclusion of the one entity that controlled what the parties wanted to accomplish—the General Assembly. Put another way, executive branch bureaucrats and government actors, sanctioned by the court, agreed to a process that called for the expenditure of taxpayer money without consultation from the branch of government to which that duty is constitutionally committed. The trial court's denial of the General Assembly's motion to intervene in 2011, and the majority's dismissal of legislative defendants' arguments today, raise the grave specter of executive and judicial collusion designed to subvert our constitutional framework and, by extension, the will of the people. It is only when "the judiciary remains truly distinct from both the legislature and the Executive" that liberty is safeguarded. *The Federalist* No. 78 (Alexander Hamilton).[15]

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15. It appears that the majority attempts to support its plundering of legislative authority by arguing that our Founding Fathers contemplated an ephemeral separation of powers. Such an interpretation is not just revisionist history; it is plainly wrong. We could spend much time discussing the majority's misuse of selections from the Federalist Papers to justify judicial intrusion into the legislative arena. Discussion here, however, is intentionally limited.

The Founding Fathers understood that "maintaining in practice the necessary partition of power among the several departments" was the primary protection against tyranny. *The Federalist* No. 51 (James Madison). To more clearly understand the founders' view of separation of powers, however, one must also appreciate the concern expressed by anti-federalist writers, to which the federalists responded, over the blending of functions in the Constitution. *See* The Dissent of the Minority of the Convention of Pennsylvania, The Essential Anti-Federalist, Allen and Lloyed (2002) at 43. For example, the United States Constitution explicitly provides for the Senate's involvement in executive appointments and treaties, and its role in the trial of impeachments. Any encroachment upon the power

¶ 339 Here, counsel for executive branch defendants admitted at oral argument that the General Assembly had no "insight" into the crafting of the remedy because "the General Assembly was not a party." Oral Argument at 58:24, *Hoke Cnty. Bd. of Educ. v. State of North Carolina*, No. 425A21-2, https://www.youtube.com/watch?v=NOuFCf2rYdY. Further, counsel readily admitted that executive branch defendants "certainly wanted plaintiffs to be involved in th[e] process" of crafting the remedy because executive branch defendants "wanted to have *dominion*[16] over the issue . . . and so getting sign-off from plaintiffs ensured that the trial court would adopt this program." Oral Argument at 59:15, *Hoke Cnty. Bd. of Educ. v. State of North Carolina*, No. 425A21-2, https://www.youtube.com/watch?v=NOuFCf2rYdY. (emphasis added).

¶ 340 Thus, this case presents a situation in which the parties' interests are aligned, and "[s]uch a suit is collusive because it is not in any real sense adversary." *U.S. v. Johnson*, 319 U.S. at 305, 63 S. Ct. at 1076–77. The legal issues involved in this case have been "determined" through entry of consent orders by outcome-aligned parties, not "tested by fire in the crucible of actual controversy." *City of Greensboro v. Wall*, 247 N.C. at 520, 101 S.E.2d at 417. The colluding parties agreed upon a remedy, one which directly involved the General Assembly, without ever seeking input from that third party. In so doing, they have attempted to "procure the opinion of" this Court "in the decision of which they have a common interest opposed to that of other persons, who are not parties to this suit," and based upon "a statement of facts agreed on between themselves . . . upon a judgment pro forma entered by their mutual consent." *Lord v. Veazie*, 49 U.S. 251, 254 (1850).

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of another branch was *expressly granted by the Constitution*, and, as Hamilton stated in *The Federalist* Nos. 65 and 66, involved not separation of powers concerns, but essential checks on power. *See* George W. Carey & James McClellan, *Reader's Guide to The Federalist*, The Federalist, at lxxvii (George W. Carey & James McClellan, eds., Gideon ed. 2001).

Commandeering the appropriations clause through the judiciary's supposed "inherent authority" is a usurpation of a constitutionally committed function, not an essential check on power expressly granted by the constitution. As Madison stated in *The Federalist* No. 51, "[i]n framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place, oblige it to controul itself." There can be no rational argument that our Founding Fathers, the Constitution of the United States, or the Constitution of the State of North Carolina contemplated meaningless barriers which permit the aggrandizement of judicial power as accomplished by this Court's lack of restraint and control. After all, "the judiciary is beyond comparison the weakest of the three departments of power." *The Federalist* No. 78 (Alexander Hamilton).

16. Dominion is defined by Webster's Dictionary as "supreme authority" or "absolute ownership."

¶ 341 Further, it bears repeating that these collusive orders were entered without a trial on the merits to determine the validity of the actual plaintiffs' claims. A statewide violation was simply assumed without a trial or final order. The trial court erred in permitting this suit to continue after it became clear that the parties were working in concert to bypass the General Assembly and achieve their mutual goals via consent orders. As discussed further below, this collusion between plaintiffs, executive branch defendants, and the trial court grossly violated the General Assembly's due process rights. In addition, the trial court further erred in attempting to achieve the parties' collusive efforts by imposing an unconstitutional remedy in its November 10 order.

B. Separation of Powers

1. The Trial Court

¶ 342 Even if this case had not been transformed into a friendly suit, the trial court would still lack authority to impose its chosen remedy for four clear reasons. First, the trial court ignored this Court's explicit holdings that a remedy may be imposed only after the evidence establishes a clear showing of a *Leandro* violation. Second, the trial court violated the legislative defendants' right to due process, which requires that the General Assembly be joined as a necessary party when the essence of the case is whether the current education policy and funding are constitutionally adequate. Third, even if the trial court had properly held a trial with all parties in which such a clear showing established a statewide violation of *Leandro*, any judicial remedy ordering the transfer of state funds violates our constitution. Finally, even if a proper trial had been conducted, and even if the trial court's order did not otherwise offend our constitution, the trial court lacked jurisdiction to enter an order against the State Controller who was not a party.

a. A Remedy Without a Violation

¶ 343 As we made clear in *Hoke County*, our "examination of the case [wa]s premised on evidence as it pertain[ed] to Hoke County in particular." *Hoke County*, 358 N.C. at 613 n.5, 599 S.E.2d at 375 n.5. "[O]ur holding mandates" in that case "cannot be construed to extend to the other four rural districts named in the complaint." *Id.* Thus, the establishment of alleged *Leandro* violations in any other district beyond Hoke County would require further proceedings that must include "presentation of relevant evidence by the parties, and findings and conclusions of law by the trial court." *Id.*

¶ 344 Further, the trial court's remedy goes far beyond that justified by the pleadings in this case. The remaining plaintiffs are the five Boards of

Education in Hoke, Halifax, Robeson, Cumberland, and Vance counties and students from each county. The remaining intervening plaintiffs are the Charlotte-Mecklenburg Board of Education and some Mecklenburg County students and parents. In none of their surviving pleadings do they purport to represent all of the students of the State, or even all counties. To the contrary, they allege that they represent children in their own counties. This Court's decision in *Leandro*, affirming the dismissal of most of the original claims, significantly narrowed the remaining issue. As we said:

> This litigation started primarily as a challenge to the educational funding mechanism imposed by the General Assembly that resulted in disparate funding outlays among low wealth counties and their more affluent counterparts. With the *Leandro* decision, however, the thrust of this litigation turned from a funding issue to one requiring the analysis of the qualitative educational services provided to the respective plaintiffs and plaintiff-intervenors.

Hoke County, 358 N.C. at 609, 599 S.E.2d at 373. In other words, the issue became the methods chosen by school administrators to provide the classroom instruction that was needed should a deficiency be shown as to students in a particular county.

¶ 345 The proper standards for proving such alleged violations have been twice stated by this Court. First, the trial court "must grant every reasonable deference to the legislative and executive branches when considering whether they have established and are administering a system that provides . . . a sound basic education." *Id.* at 622–23, 599 S.E.2d at 381 (quoting *Leandro*, 346 N.C. at 357, 488 S.E.2d at 261). Second, plaintiffs must prove their allegations by making "a clear showing to the contrary," i.e., plaintiffs must make a clear showing that the strictures of *Leandro* are being violated in their districts. *Id.* (quoting *Leandro*, 346 N.C. at 357, 488 S.E.2d at 261). Finally, the imposition of a remedy is expressly barred absent such a clear showing, as "[o]nly such a clear showing will justify a judicial intrusion[.]" *Id.* (quoting *Leandro*, 346 N.C. at 357, 488 S.E.2d at 261).

¶ 346 It is notable that, in *Hoke County*, the trial court's determination that at-risk students were not receiving the opportunity to a sound basic education was premised on fourteen months of adversarial hearings. That ultimate determination was reached in a 400-page Order that recounted these hearings.

¶ 347 Here, the record is devoid of any proceedings in which the trial court concluded as a matter of law that plaintiffs had presented relevant evidence establishing a clear showing of *Leandro* violations in other districts beyond Hoke County. There was no trial establishing a violation in any other county and certainly no trial establishing a statewide violation. If it took the trial court fourteen months and a 400-page Order to determine that a subsection of students in one county were not receiving the opportunity to a sound basic education, then surely a clear showing of a statewide violation would require exponentially more. The fact that the record below fails to establish a similar in-depth adversarial hearing for *any* other county, and contains no trace of the kind of monumental undertaking needed to demonstrate a statewide violation, speaks volumes. Absent such a clear showing of a statewide violation, the trial court lacked authority to impose *any* remedy.[17]

¶ 348 The majority ignores this. By failing to hold an actual *trial* for any other county in the last fourteen years, the trial court judges failed to abide by this Court's express directions in *Hoke County*. The majority apparently imagines the existence of trial court orders from nonexistent trials. The majority's focus on the title of the trial court's routine scheduling "Notice of Hearing and Orders" completely misses the mark. A *trial* is required for appellate review of this extremely fact-intensive issue because an appellate court requires a record from which it may *meaningfully* review the trial court's findings and conclusions. Certainly, given the significance of the subject matter of this case and the separation of powers concerns, this Court should require at least a standard record of a trial and a final order.

¶ 349 The record in this case is not the record of an adversarial trial. It is the record of trial court judges accepting studies and statistics, taking them at face value without any real inquiry into their veracity, and then opining about the condition of this State's education system.[18] If

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17. One could argue that this Court's finding of a statewide violation, despite the failure of any party to plead such a claim, raises jurisdictional concerns. There has never been a finding in the trial court that violations through implementation and delivery occurred outside of Hoke or Halifax counties. Without the presence of the other unrepresented counties, the remaining plaintiffs and plaintiff intervenors may lack standing to plead a statewide violation, and the trial court therefore may lack jurisdiction to consider such a claim.

18. Each year, U.S. News ranks "how well states are educating their students." North Carolina is ranked seventh out of fifty states overall and fifteenth out of fifty states with respect to Pre-K to 12th grade education. Brett Ziegler, *Education Rankings*, U.S. News, https://www.usnews.com/news/best-states/rankings/education (last visited Oct. 24, 2022). One wonders how the trial court and the San Francisco based consulting firm's diminished view of our education system can be so inconsistent. U.S. News, whose rankings of North

the General Assembly had been allowed to intervene, then perhaps there would be a record which reflects facts derived from the crucible of an adversarial trial.

¶ 350 It is judicial malpractice for the majority to suddenly ignore the importance of court orders when it comes to appellate review. The majority simply declares that the trial court "properly concluded based on an abundance of clear and convincing evidence that the State's *Leandro* violation was statewide." The majority declines to explain *what* this evidence was, when it was produced, or how the majority knows it is reliable enough to form the basis of an explosive change in constitutional order and massive transfer of taxpayer monies to fund a program crafted by a San Francisco based consulting firm. Fundamentally, this Court cannot determine whether a "clear showing" has been made establishing a statewide *Leandro* violation because the lack of an adversarial trial renders our review purely speculative.

¶ 351 As but one example, it would have been inconceivable for this Court to review the proceedings in *Harper v. Hall*, 380 N.C. 317, 2022-NCSC-17, if the trial court had failed to hold an adversarial hearing and instead merely accepted at face value the arguments and evidence presented by the legislative defendants in that case. So too here. Issues of constitutional magnitude require facts and arguments to be "tested by fire in the crucible of actual controversy." *City of Greensboro v. Wall*, 247 N.C. at 520, 101 S.E.2d at 417. These requirements cannot be cast aside for political or judicial expediency.

¶ 352 However, even if the trial court had properly conducted a trial in which a statewide violation of *Leandro* had been established, the trial court would still lack the authority to impose *this* remedy. The problem arises not only because the trial court imposed a remedy without first establishing a violation, but because the chosen remedy clearly violates our constitution.

b. The Limitation on Judicial Power

¶ 353 Separation of powers is fundamental to our republican system of self-governance, and our constitution accordingly provides that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const.

Carolina's universities are celebrated, concludes that North Carolina has one of the best K-12 education systems in the country. A cynic could argue that WestEd's mercenary report only utilized data from 44 of North Carolina's one hundred counties. But, this is the type of information that is best tested in an actual trial instead of blindly accepted by the parties and court that hired the consultant.

art. I, § 6. This division of governmental power acknowledges that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny." *The Federalist* No. 47 (James Madison).

¶ 354 In *Hoke County*, this Court acknowledged the separation of these various powers and recognized the outer boundaries of our judicial power. We stated:

> The state's legislative and executive branches have been endowed by their creators, the people of North Carolina, with the authority to establish and maintain a public school system that ensures all the state's children will be given their chance to get a proper, that is, a *Leandro*-conforming, education. As a consequence of such empowerment, those two branches have developed a shared history and expertise in the field that dwarfs that of this and any other Court. While we remain the ultimate arbiters of our state's Constitution, and vigorously attend to our duty of protecting the citizenry from abridgments and infringements of its provisions, we simultaneously *recognize our limitations in providing specific remedies for violations committed by other government branches* in service to a subject matter, such as public school education, that is within their primary domain.

358 N.C. at 644–45, 599 S.E.2d at 395 (emphasis added).

¶ 355 "The legislative power of the State shall be vested in the General Assembly[.]" N.C. Const. art. II, § 1. This Court has long acknowledged that one of the many powers designated exclusively to the legislative branch is the power to spend public funds. *See Wilson v. Jenkins*, 72 N.C. 5, 6 (1875) ("The General Assembly has absolute control over the finances of the State."); *see also Shaffer v. Jenkins*, 72 N.C. 275, 279 (1875) ("[T]he money in the Treasury is within the exclusive control of the General Assembly.").

¶ 356 "No money shall be drawn from the State Treasury but in consequence of appropriations made by law[.]" N.C. Const. art. V, § 7. The interpretation of this clause has never before been a matter of debate in this Court. In fact, Justice Ervin recently stated for the Court that:

> In light of this constitutional provision, the power of the purse is the exclusive prerogative of the

> General Assembly, with the origin of the appropriations clause dating back to the time that the original state constitution was ratified in 1776. In drafting the appropriations clause, the framers sought to ensure that the people, through their elected representatives in the General Assembly, had full and exclusive control over the allocation of the state's expenditures. As a result, the appropriations clause states in language no man can misunderstand that the legislative power is supreme over the public purse.

Cooper v. Berger, 376 N.C. 22, 37, 852 S.E.2d 46, 58 (2020) (cleaned up).

¶ 357 In the realm of educational funding, the constitution is even more explicit. "The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public school . . . ." N.C. Const. art. IX, § 2(1). The constitution provides two funding mechanisms to supplement state tax revenue on a county level.

¶ 358 County school funds are supplied by "the clear 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, [which] shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools." N.C. Const. art IX, § 7(a). In addition, "the clear proceeds of all civil penalties, forfeitures, and fines which are collected by State agencies . . . shall be faithfully appropriated by the General Assembly, on a per pupil basis, to the counties, to be used exclusively for maintaining public schools." N.C. Const. art. IX, § 7(b). In contrast, the "State school fund" is ultimately funded by "so much of the revenue of the State as may be set apart for that purpose . . . [and] faithfully appropriated and used exclusively for establishing and maintaining a uniform system of free public schools." N.C. Const. art. IX, § 6.[19]

¶ 359 Of course, the "revenue" contemplated by Article IX's funding provisions must primarily be "provided by taxation . . . ." N.C. Const. art. IX, § 2(1). On this point, the constitution is clear. "Only the General Assembly shall have the power to classify property for taxation, which power shall

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19. The constitution also provides that the State school fund shall be funded by "the proceeds of all lands that have been or hereafter may be granted by the United States to this State . . . ; all moneys, stocks, bonds, and other property belonging to the State for purpose of public education; the net proceeds of all sales of the swamp lands belonging to the State; and all other grants, gifts, and devises that have been or hereafter may be made to the State [ ] and not otherwise appropriated by the State . . . ." N.C. Const. art. IX, § 6.

be exercised only on a State-wide basis and shall not be delegated." N.C. Const. art. V, § 2(2).

¶ 360 The constitution commits these dual powers—the power to raise state funds for education, and the power to spend state funds on education—exclusively to the General Assembly.[20] That is why this Court recognized its "limitations in providing specific remedies for violations committed by other government branches in service to a subject matter, such as public school education, that is within their primary domain." *Hoke County*, 358 N.C. at 645, 599 S.E.2d at 395. Such limitations are a necessary consequence of our constitutional structure that separates government functions to preserve government by the people.

¶ 361 Without such limitations, there would be no conceivable constraints to this Court's power. Consider the situation in which the state found itself in 2009, when Governor Perdue "ordered a half-percent pay cut for all state employees and teachers" to try and reduce a "$3 billion-plus shortfall for the [ ] fiscal year." *Governor Cuts Pay, Calls for Furloughs for State Employees*, WRAL News (Apr. 28, 2009, 7:02 PM), https://www.wral.com/news/local/story/5037937/. If this Court had determined that such a pay cut violated children's right to the opportunity to a sound basic education, could this Court have exercised its power to increase education funding by raising taxes? Could this Court rewrite the State Budget and reappropriate funds from other programs to fund education?

¶ 362 No, our constitution says. The constitution commands all branches of our government to stay within their spheres of power, and this command must be heeded with extreme obedience by the judiciary. As this Court is the final arbiter on what our constitution says, the people of this state must be ever wary of a court which declares "rare" or "extraordinary" the repeated usurpation of constitutional power.

¶ 363 Here, the trial court ignored both the clear language of the appropriations clause and this Court's binding precedent establishing the General Assembly's exclusive power to draw funds from the State Treasury. Rather than following our constitution, the trial court invented two novel theories to justify its unconstitutional exercise of legislative power.

¶ 364 First, the trial court determined that assumption of legislative duties was not barred by the appropriations clause because "Article I, Section

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20. While the General Assembly is primarily responsible for *funding* education, the State Board of Education "ha[s] general supervision and administration of the educational funds provided by the State . . . ." N.C.G.S. § 115C-408(a).

15 of the North Carolina Constitution represents an ongoing constitutional appropriation of funds" and constitutes an appropriation "made by law." This conclusion is a legal fiction created out of whole cloth and has no support in either our constitution or our directly on-point precedent. As discussed in more detail further below, the separation of powers clause and the legislative powers clause do not provide for any exceptions. These constitutional provisions do not merely encompass "some" or "most" of the legislative powers—they encompass *all* legislative powers.

¶ 365 The entire text of Article I, section 15 provides that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." The plain language of this section makes no mention of educational funding, and to read in such non-existent language is an amendment of our constitution by judicial fiat.

¶ 366 "Our constitution clearly states that amending the constitution is a duty designated to the General Assembly and the people of this State." *Moore*, 2022-NCSC-99, ¶ 152 (Berger, J., dissenting). A trial court may not exercise this power. Neither may a trial court judge choose to "interpret" a constitutional provision in a manner that contradicts this Court's holdings.

¶ 367 In addition to its unconstitutional interpretation of Article I, section 15, the trial court stated that it could order the transfer of state funds as an exercise of its "inherent and equitable powers." This is nonsense. This usurpation of legislative authority is blatantly unconstitutional and threatens the very foundation of our republican form of self-governance.

> It is the proud boast of our democracy that we have "a government of laws and not of men." Many Americans are familiar with that phrase; not many know its derivation. It comes from Part the First, Article XXX, of the Massachusetts Constitution of 1870, which reads in full as follows:
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> "In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men."

Morrison v. Olson, 487 U.S. 654, 697, 108 S. Ct. 2597, 2622 (1988) (Scalia, J., dissenting).

¶ 368 The majority's response to our adherence to this fundamental requirement is simply that we have a "rigid interpretation of separation of powers." Indeed, we do, because separation of powers is not a suggestion. It is an inexorable command upon which the entire notion of government by the people either stands or falls. As this Court has stated:

> [T]he relief sought could not be obtained in any event without the exercise of legislative functions, and the plaintiff's fatal error is found in the assumption that such functions may be exercised by the courts, notwithstanding the constitutional separation of the several departments of the government. The Declaration of Rights provides: "The legislative, executive, and supreme judicial powers of the government ought to be forever separate and distinct from each other."
>
> As to the wisdom of this provision there is practically no divergence of opinion—it is the rock upon which rests the fabric of our government. Indeed, the whole theory of constitutional government in this state and in the United States is characterized by the care with which the separation of the departments has been preserved and by a marked jealousy of encroachment by one upon the other. . . .
>
> The courts have absolutely no authority to control or supervise the power vested by the Constitution in the General Assembly as a co-ordinate branch of government. They concede . . . that their jurisdiction is limited to interpreting and declaring the law as it is written. It is only when the Legislature transcends the bounds prescribed by the Constitution, and the question of the constitutionality of a law is directly and necessarily involved, that the courts may say, "Hitherto thou shalt come, but no further."

Pers. v. Bd. of State Tax Comm'rs, 184 N.C. 499, 502–04, 115 S.E. 336, 339 (1922).

¶ 369 The majority justifies its assault on legislative authority in part by purporting to rely on *In re Alamance County Court Facilities*, 329 N.C. 84, 405 S.E.2d 125 (1991). It is clear, however, this case does not support

the majority's position; it undermines it. *Alamance County*'s discussion of inherent judicial power destroys the majority's own argument. A thorough discussion of this case is warranted.

¶ 370 The Alamance County Superior Court convened a grand jury to inspect the Alamance County court facilities and jail. *Id.* at 89, 405 S.E.2d at 126. The grand jury reported that there were "numerous courthouse and jail defects" and recommended that the courthouse, which was constructed in 1924, be "remodeled and converted to other uses, [and] that a new courthouse be built[.]" *Id.* Following the grand jury's report, the trial court scheduled a hearing "to make inquiry as to the adequacy of the Court Facilities" in Alamance County, and the sheriff served the five Alamance County Commissioners with notice of the hearing. *Id.* Four of the Commissioners made various motions to either dismiss the case or demand a jury trial. *Id.* at 89, 405 S.E.2d at 127. However, the trial court "struck these motions, stating that the movants were not parties to the action and thus were without standing." *Id.*

¶ 371 At the hearing, the trial court reiterated the grand jury's findings regarding the Alamance County court facilities, which included:

> [C]itation to the statutory duties of the Clerk of Court to secure and preserve court documents, to statutory provisions requiring secrecy of grand jury proceedings, to statutory requisites that counties in which a district court has been established provide courtrooms and judicial facilities, and to the open courts provision—all of which were potentially violated by the condition of pertinent facilities in Alamance County. In addition, the findings stated that the right to a jury trial assured in Article I, §§ 24 and 25 of the N.C. Constitution was jeopardized where jury and grand jury deliberations were not dependably private and secure and that litigants' due process rights were similarly at risk for lack of areas where they could confer confidentiality with their attorneys.

Id. at 89–90, 405 S.E.2d at 127.

¶ 372 Additionally, the trial court stated that the county's failure to provide adequate court facilities violated the constitutional limitation under Article IV, section 1 of the North Carolina Constitution, which prohibits the General Assembly from "depriving the judicial department of any power or jurisdiction rightfully pertaining to it as a coordinate department of government." *Id.* at 90, 405 S.E.2d at 127. This prohibition

extended to Alamance County, since it was delegated the legislative responsibility of providing adequate court facilities. *See id.*

¶ 373 The trial court determined that it possessed jurisdiction over the matter, in part, because of its "inherent power necessary for the existence of the Court, necessary to the orderly and efficient exercise of its jurisdiction, and necessary for this Court to do justice." *Id.* at 90, 405 S.E.2d at 127. In its order, the court concluded that the inadequacies of the court facilities "thwart[ed] the effective assistance of counsel to litigants in violation of the law of the land, jeopardize[ed] the right to trial by jury in civil and criminal cases, and . . . constituted a clear and present danger to persons present at criminal judicial proceedings as well as the public at large." *Id.*

¶ 374 Based upon these inadequacies and their effects, the trial court directed the county, "acting through its commissioners," to provide new facilities and modify the existing courthouse. *Id.* at 91, 405 S.E.2d at 128. Specifically, the trial court found that the county "was financially able to provide adequate judicial facilities" because there were "undesignated unreserved funds of $15,655,778.00 . . . with which the commissioners could begin construction of a new courthouse." *Id.* The trial court then ordered the county to "immediately" provide adequate facilities that met the Court's approved design features. *Id.* at 91–92, 405 S.E.2d at 128.

¶ 375 For example, the trial court determined that the adequate facilities must include a Superior Court courtroom of at least 1600 square feet with a minimum of two bathrooms, a Superior Court jury deliberation room of at least 300 square feet, a room for the Superior Court Court Reporter that was at least 80 square feet, and a Superior Court Judge's Chambers "consisting of a conference area of at least 160 square feet, minimum, and a toilet of 40 square feet, minimum," among other similar requirements. *Id.* at 91, 405 S.E.2d at 128.

¶ 376 Members of the Alamance County Board of Commissioners petitioned this Court for a writ of supersedeas, which this Court granted. *Id.* at 92, 405 S.E.2d at 128. In reviewing the superior court's order, this Court described the issues presented as "whether this case presents the circumstances under which a court's 'inherent power' may be invoked and whether the superior court here followed proper procedures in the exercise of its power." *Id.* at 93, 405 S.E.2d at 128–29.

¶ 377 The majority's "analysis" of *Alamance County* quotes most of this Court's discussion of inherent power, and all of it need not be repeated here. However, some of this Court's precise language is ignored by the majority. This language clearly recognizes the constitutional limits of a court's inherent authority and is worthy of emphasis.

¶ 378 The judiciary's "inherent power" is "plenary *within the judicial branch*," which means that constitutional provisions—like the Apportionments Clause at issue here, "do not curtail the inherent power of the judiciary, plenary *within its branch*, but serve to delineate the boundary between the branches, beyond which each is powerless to act." *Id.* at 93, 95, 405 S.E.2d at 129–30 (emphasis added).

¶ 379 However, this Court noted that in the specific circumstances of *Alamance County*, where the superior court was literally unable to properly fulfill its constitutional duties *within the judicial branch*, that boundary may be stretched to protect the judiciary's ability to exercise its *own* constitutionally committed powers. "In the realm of appropriations, some overlap of power between the legislative and the judicial branches is inevitable, for one branch is exclusively responsible for raising the funds that *sustain the other and preserve its autonomy*." *Id.* at 97, 405 S.E.2d at 131 (emphasis added).

¶ 380 Thus, this Court announced its limited holding that "when inaction by those exercising legislative authority threatens *fiscally* to undermine the integrity of the judiciary, a court may invoke its inherent power to do what is reasonably necessary for 'the orderly and efficient exercise of the administration of justice.' " *Id.* at 99, 405 S.E.2d at 132 (emphasis added) (quoting *Beard v. N.C. State Bar*, 320 N.C. 126, 129, 357 S.E.2d 694, 696 (1987)). In other words, when legislative inaction renders judicial branch facilities inadequate "to serve the functioning of the judiciary within the borders of those political subdivisions," the judiciary may take limited action *only* to ensure that the facilities are adequate to perform the court's constitutional duties. *Id.*

¶ 381 And, in part of this Court's holding the majority selectively omits, "[e]ven in the name of its inherent power, the judiciary may not arrogate a duty reserved by the constitution exclusively to another body." *Id.*

¶ 382 Moreover, following its general discussion of inherent power, this Court asked whether, "[u]nder the circumstances, [ ] an *ex parte* order *implicitly* mandating the expenditure of public funds for *judicial facilities* [was] reasonably necessary for the proper administration of justice?" *Id.* at 103, 405 S.E.2d at 135 (emphasis added).

¶ 383 In answering this question in the negative, this Court first noted that:

> The means chosen by a court to compel county commissioners to furnish suitable court facilities is of critical importance to the question whether the court

> has unreasonably exercised its inherent power, for it signals the extent of the judiciary's intrusion on the county's legislative authority. The efficacy of mandatory writs or injunctions, unlike *ex parte* orders and contempt proceedings, rests less on the expansive exercise of judicial power than on the statutory and constitutional duties of those against whom they are issued. Their use thus avoids to some extent the arrogance of power palpable in an *ex parte* order. Moreover, they compel the performance of the ministerial duty imposed by law, but give the defaulting officials room to exercise discretionary decisions regarding how that duty may best be fulfilled.

Id. at 104–05, 405 S.E.2d at 135–36.

¶ 384 This Court also emphasized that because the superior court's order in *Alamance County* "stopped short of ordering the commissioners to release funds," it also stopped short of "leaving the constitutional sphere of its inherent powers." *Id.* at 106, 405 S.E.2d at 137. Nevertheless, the "*ex parte* nature of the order overreached the minimal encroachment onto the powers of the legislative branch that must mark a court's judicious use of its inherent power," because "[n]o procedure or practice of the courts, however, even those exercised pursuant to their inherent powers, may abridge a person's substantive rights." *Id.* at 106–07, 405 S.E.2d at 137. This remedy was a misuse of the judiciary's inherent authority. Thus, this Court held that the superior court's order "must be, and is VACATED." *Id.* at 108, 405 S.E.2d at 138.

¶ 385 Thus, *Alamance County* does not support the unconstitutional judicial assumption of the legislative spending power.[21] *Alamance County* instead reaffirms the following fundamental principles:

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21. As with *Alamance County*, the other cases on which the majority relies do not justify its extreme remedy. *See Wilson v. Jenkins*, 72 N.C. 5, 10 (1875) (affirming a trial court's denial of the plaintiff's request for a writ of mandamus to compel the State Treasurer to pay certain coupons on state bonds because "[t]he General Assembly has absolute control over the finances of the State" and "[t]he Public Treasurer and Auditor are mere ministerial officers, bound to obey the orders of the General Assembly"); *White v. Worth*, 126 N.C. 570, 36 S.E. 132, 136 (1900) (relying heavily on *Hoke v. Henderson*, 15 N.C. 1 (1833), a case that was expressly overruled in 1903 by *Mial v. Ellington*, 134 N.C. 131, 46 S.E. 961 (1903)). *See also Hickory v. Catawba Cnty.*, 206 N.C. 165, 173–74, 173 S.E. 56, 60–61 (1934) (affirming a trial court's writ of mandamus that required Catawba County to assume payment for a local school building as required by the constitution and General Statutes but did not require the spending of specific funds for specific expenditures), *Mebane Graded Sch. Dist. v. Alamance Cnty.*, 211 N.C. 213, 226–27, 189 S.E. 873,

¶ 386 First, the judiciary's "inherent power" applies only to matters within the judicial branch. Second, a legislative failure to fiscally support the judicial branch, when such failure threatens the judiciary's existence, may justify a *limited* exercise of "inherent power" to preserve the judiciary. Third, even under such circumstances, that limited exercise of "inherent power" may not assume legislative powers, such as the spending power, as doing so would depart from the court's "constitutional sphere of its inherent powers." Finally, even if the exercise of limited inherent power is justified by such a threatened underfunding of the judiciary, and even if the court does *not* order a state actor to spend funds, any such court action must be vacated if the action is carried out via an *ex parte* order, as such an order violates the substantive rights of the relevant state actor.

¶ 387 Thus, faithfully applying *Alamance County* to this case renders the decision a simple one. The trial court's order must be vacated because: (1) its exercise of "inherent power" does not relate to matters within the judicial branch; (2) its exercise of "inherent power" is not justified by a legislative failure which threatens the judiciary's existence; (3) its exercise of "inherent power" departs from the judiciary's "constitutional sphere" because it assumes the legislative spending power; and (4) its exercise of "inherent power" was carried out via an *ex parte* order that violated the substantive rights of the State Controller and the General Assembly.

¶ 388 This straightforward analysis did not make its way in the majority's nearly one-hundred-and-forty-page opinion, and the majority summarily dismisses the State Controller's arguments with a conclusory statement that his rights were not violated. The trial court's order must be vacated for violating the Controller's substantive rights, and the failure to properly discuss the Controller's arguments demonstrates a hastily crafted opinion by the majority.

¶ 389 As this Court has stated, the power to transfer state funds is a power designated exclusively to the legislative branch. *See Cooper v. Berger*, 376 N.C. at 37, 852 S.E.2d at 58 ("[T]he appropriations clause states in language no man can misunderstand that the legislative power is supreme over the public purse."). In fact, we announced this fundamental truth nearly one hundred and fifty years ago:

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882 (1937) (affirming a trial court's writ of mandamus that required Alamance County to assume the debt of its local school district but did not direct the spending of specific funds for specific expenditures). These cases in no way support the majority's proposition that this Court's precedent sanctions the judicial exercise of legislative power.

> If the Legislature by way of contract, has specifically appropriated a certain fund, to a certain debt, or to a certain individual, or class of individuals, and the State Treasurer having that fund in his hands, refuses to apply it according to the law, he may be compelled to do so by judicial process.
>
> If any case goes farther than this, we conceive that it cannot be supported on principal, and that it *oversteps the just line of demarcation between the legislative and judicial powers*.

Shaffer v. Jenkins, 72 N.C. 275, 280 (1875) (emphasis added).

¶ 390 The inherent remedial and equitable powers of our courts may be vast, but "[e]ven in the name of its inherent power, the judiciary may not arrogate a duty reserved by the constitution exclusively to another body," nor may the judiciary "abridge a person's substantive rights." *Alamance County*, 329 N.C. at 99, 107, 405 S.E.2d at 133, 137.[22]

c. Due Process

¶ 391 "No rule of procedure or practice shall abridge substantive rights or abrogate or limit the right of trial by jury." N.C. Const. art. IX, § 13(2). One of the substantive rights enjoyed by the people of this state is found in Article I, section 19 of our constitution, which provides in relevant part that "[n]o person shall be taken . . . in any manner deprived of his life, liberty, or property, but by the law of the land."

¶ 392 "Procedural due process restricts governmental actions and decisions which 'deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.' " *Peace v. Emp't Sec. Comm'n*, 349 N.C. 315, 321, 507 S.E.2d 272, 277 (1998) (quoting *Matthews v. Eldridge*, 424 U.S. 319, 322, 96 S. Ct. 893, 901 (1976)). "The fundamental premise of procedural due

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22. While the majority attempts to cabin its exercise of "inherent authority" as an "extraordinary remedy," *supra* ¶ 178, this newfound power may be wielded by any future majority of this Court. Moving forward, now that the constitutional boundaries enshrining separation of powers are demolished, any four members of this Court could invoke "inherent authority" to exercise powers constitutionally committed to other branches as they desire. If this Court can exercise power under the appropriations clause, it could also invoke its "inherent authority" to deem ratified a vetoed budget or increase statutory court fines because they fund the education system under Article IX, section 7. Further, any majority could increase judicial branch salaries The abuse of such power is exactly why our constitution demands that the legislative, executive, and judicial powers "shall be forever separate and distinct from each other." N.C. Const. art. I, § 6.

process protection is notice and the opportunity to be heard." *Id.* at 322, 507 S.E.2d at 278 (citing *Cleveland Bd. of Educ. V. Loudermill*, 470 U.S. 532, 542, 105 S. Ct. 1487, 1493 (1985)).

¶ 393 The State Controller's authority to transfer or spend funds is set forth in Chapter 143C of our General Statutes, which ensures that "[i]n accordance with Section 7 of Article V of the North Carolina Constitution, no money shall be drawn from the State treasury but in consequence of appropriations made by law." N.C.G.S. § 143C-1-2(a) (2021). "This Chapter establishes procedures for the following: (1) [p]reparing the recommended State budget[;] (2) [e]nacting the State budget[;] [and] (3) [a]dministering the State budget." N.C.G.S. § 143C-1-1(c).

¶ 394 Chapter 143C includes penalties for violating the procedures contained therein. In relevant part, "[i]t is a Class 1 misdemeanor for a person to knowingly and willfully . . . (1) [w]ithdraw funds from the State treasury for any purpose not authorized by an act of appropriation." N.C.G.S. § 143C-10-1(a). Further, "[a]n appointed officer or employee of the State . . . forfeits his office or employment upon conviction of an offense under this section." N.C.G.S. § 143C-10-1(c).

¶ 395 Here, as is evident from Chapter 143C of our General Statutes, the State Controller would be subject both to a Class 1 misdemeanor and termination of employment were he to comply with the November 10 order. As the State Controller was never made a party to the proceedings in the trial court, was never given notice of the proceedings, and was never afforded an opportunity to be heard in these proceedings, the trial court had no jurisdiction to enter an order that affected the State Controller's substantive rights in this manner. As the Court of Appeals correctly noted in its order granting the State Controller's petition for a writ of prohibition, "the trial court's conclusion that it may order petitioner to pay unappropriated funds from the State Treasury is constitutionally impermissible and beyond the power of the trial court."

¶ 396 In addition to violating the State Controller's due process rights, the trial court also violated the due process rights of the General Assembly.[23] The majority makes much of the fact that the General Assembly was not represented in this suit until after the Nov. 10 order—but rather than recognizing the obvious due process concerns, the majority insists that the General Assembly itself is to blame. Such an interpretation ignores factual and legal realities.

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23. In addition, it is arguable the trial court also violated the due process rights of all counties not represented in this suit, yet nonetheless responsible for any implementation or funding under WestEd's CRP.

¶ 397 As discussed in much detail above, neither the proceedings under Judge Manning that led to our decision in *Hoke County*, nor the proceedings under Judge Manning that followed, implicated the General Assembly or its constitutionally committed functions. Judge Manning consistently found, and this Court agreed, that the legislative funding mechanisms and education policies were sound and complied with our constitution. In fact, when the General Assembly *did* move to intervene in this case because it was no longer represented by the Attorney General, Judge Manning denied its motion specifically because the issue was never that the General Assembly's funding mechanisms or education policies were inadequate—the issue was, and remains, the implementation and delivery of these policies and the application of these funds by the education establishment.

¶ 398 The majority would apparently prefer that the General Assembly renewed its motion to intervene on a regular basis, despite Judge Manning's denial and despite the absence of any issue implicating the General Assembly's authority or actions. However, the *status quo* was radically altered once Judge Lee took over the case and this became a collusive suit. The consent order entered by Judge Lee appointing WestEd fundamentally changed the nature of the proceedings. This was an egregious error that necessitated input from the General Assembly.

¶ 399 At this point, or, at the very latest, when he received the WestEd report naming the General Assembly as the primary "responsible party," Judge Lee erred by failing to join the General Assembly as a necessary party. *See* N.C.G.S. §1A-1, Rule 19(a) and (d); *see also Gaither Corp. v. Skinner*, 238 N.C. 254, 256, 77 S.E.2d 659, 661 (1953) ("Necessary or indispensable parties are those whose interests are such that no decree can be rendered which will not affect them, and therefore the court cannot proceed until they are brought in.").

¶ 400 The trial court's failure to join the General Assembly in this matter created a situation where the people of this State, acting through their elected representatives, were not afforded notice and the opportunity to be heard. Rather than allow the General Assembly, which is the policymaking branch of our government, to defend its heretofore adjudged adequate educational funding policies, Judge Lee delegated the task of policymaking to an out-of-state third party. In delegating this crucial task to WestEd, Judge Lee effectively usurped legislative authority by appointing a special master—not unlike the special masters appointed in redistricting. To delegate such authority to an out-of-state third party, to fail to join the General Assembly as an obviously necessary party, and to attempt to enforce what was, in essence, an *ex parte* order that

exercises a power constitutionally committed exclusively to the General Assembly, is to abandon all pretense of judicial propriety.

¶ 401 Thus, the trial court erred in multiple ways. Because the trial court never conducted a trial and never concluded as a matter of law that plaintiffs had made a clear showing of a statewide *Leandro* violation, the trial court never had jurisdiction to impose any remedy in this case. Further, even if such a conclusion had been reached after a trial, the trial court's chosen remedy far exceeds the judiciary's inherent power and violates our constitution. Finally, the transfer provisions of the November 10 order cannot be permitted to stand because they violated the State Controller's substantive rights and arguably denied the General Assembly due process of law.

¶ 402 Accordingly, the transfer provisions of the trial court's November 10 order were properly struck by Judge Robinson on remand. However, Judge Robinson nevertheless also erred on remand.

¶ 403 Although the trial court on remand properly considered the Court of Appeals' writ of prohibition and properly struck the transfer provisions, it nevertheless erred in upholding the CRP as an appropriate remedy.

2. The Trial Court on Remand

¶ 404 After granting the State's bypass petition, this Court remanded this case to Judge Robinson "for the purpose of allowing the trial court to determine what effect, if any, the enactment of the State Budget ha[d] upon the nature and effect of the relief that the trial court granted." Thus, the trial court's proper role on remand was to consider how the passage of the State Budget, a valid law passed by the General Assembly, affected the trial court's conclusion that the CRP was the appropriate remedy for the alleged statewide violation of *Leandro*. Because the trial court on remand failed to properly analyze the effect of this valid legislative act, it erred in concluding that the CRP was an appropriate remedy.

¶ 405 When reviewing whether a valid legislative act violates a constitutional right, "we presume that laws enacted by the General Assembly are constitutional, and we will not declare a law invalid unless we determine that it is unconstitutional beyond a reasonable doubt." *Cooper*, 376 N.C. at 33, 852 S.E.2d at 56. "All power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution." *State ex rel. Martin v. Preston*, 325 N.C. 438, 448–49, 385 S.E.2d 473, 478 (1989) (citing *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961)).

¶ 406 Thus, to comport with our precedent, the trial court on remand was required to afford the State Budget a presumption of constitutionality. In this context, that required the trial court to presume the State Budget comported with *Leandro* and provided students statewide an opportunity to receive a sound basic education. Only a clear showing by plaintiffs that the State Budget and the programs within failed to provide this opportunity would trigger the trial court's consideration of the CRP as a remedy as directed by this Court.

¶ 407 Instead of following established framework for analyzing constitutional challenges to legislative acts, the trial court on remand stated:

> The Court also declines to determine, as Legislative Intervenors urge, that the Budget Act as passed presumptively comports with the constitutional guarantee for a sound basic education. To make a determination on the compliance of the Budget Act with the constitutional right to a sound basic education would involve extensive expert discovery and evidentiary hearings. This Court does not believe that the Supreme Court's Remand Order intended the undersigned, in a period of 30 days, or, as extended, 37 days, to perform such a massive undertaking.

In other words, the haste with which this Court was determined to act prevented proper consideration and resolution of the issues by the trial court.

¶ 408 Setting aside the fact the trial court on remand mischaracterized the right announced in *Leandro*, which was the right to the *opportunity* to receive a sound basic education, the trial court on remand got the analysis backwards. Affording the State Budget the presumption of *Leandro* conformity requires no extensive expert discovery and evidentiary hearings—hence the word "presumption." The need for expert discovery, evidentiary hearings, findings of fact, and conclusions of law arises precisely to overcome this presumption. The "massive undertaking" required is the burden plaintiffs bear to make a clear showing that the State Budget resulted in a statewide violation of *Leandro*. As plaintiffs have not yet met this burden, the trial court on remand should have vacated the November 10 order and allowed plaintiffs to bring claims actually challenging the State Budget.

¶ 409 Instead, the trial court on remand erred by seemingly affording the CRP, not the State Budget, this presumption of *Leandro* conformity. The trial court on remand used the CRP as a *Leandro* benchmark and

analyzed whether the State Budget funded each of the CRP's measures. In so doing, it not only got the analysis backwards but also ignored our guidance in *Leandro* that "there will be more than one constitutionally permissible method of solving" statewide public school issues, 346 N.C. at 356, 488 S.E.2d at 260, and our holding in *Hoke County* that any remedy for an alleged violation must "correct the failure with minimal encroachment on the other branches of government." 358 N.C. at 373–74, 588 S.E.2d at 610.

¶ 410 The majority merely brushes away this Court's directly on point and well-established precedent. Bafflingly, the majority states that "[n]either the Plaintiff-parties nor the State dispute the presumed constitutionality of the passage of the 2021 Budget Act as a general procedural matter." *Supra* ¶ 228. What then, is this case about? Surely the majority must concede, at the very least, that if the State Budget is *constitutional*, then it does not violate the *constitutional* right of children to have the opportunity to receive a sound basic education. The majority simply cannot have its cake and eat it too. Either the State Budget is constitutional, and there is no statewide violation of *Leandro*, or there *is* a statewide violation of *Leandro* because the State Budget fails to afford children the opportunity to a sound basic education.

¶ 411 This case, when boiled down to its irreducible core, must be about the state failing to provide *Leandro* conforming expenditures. That is why the CRP requires the transfer of such vast amounts of taxpayer dollars. The only way for the state to provide educational expenditures is through the State Budget. Thus, plaintiff-parties challenge *must* be related to the adequacy of the State Budget's ability to provide constitutional, i.e., *Leandro* conforming, educational expenditures.

¶ 412 However, according to the majority, "that was not the issue before the trial court and is not the issue before this Court." *Supra* ¶ 228. Rather than analyzing the State Budget in accordance with our long-standing precedent of presumptive constitutionality, i.e., *Leandro* conformity, the majority decrees that "the Budget Act must be assessed against the terms of the only comprehensive remedial plan thus far presented by the parties to the court." *Supra* ¶ 229.

¶ 413 Again, nonsense. Shall every legislative act now be compared not to our constitution, but to whatever "plan" or "standard" that friendly parties agree to and present to a trial court? The majority's position is a perversion of this Court's proper role. Because the trial court on remand failed to afford the State Budget the presumption of *Leandro* conformity, its analysis and decision were error.

¶ 414 Finally, this Court not only sanctions due process violations but exacerbates the error by, on its own initiative, deciding the appeal in 425A21-1. The Court had previously held this direct appeal in abeyance while we considered discretionary review in 425A21-2. Now, without briefing or argument, the majority summarily decides the issue it had previously held in abeyance, and for which there exists a right to appeal based upon the dissent in the Court of Appeals. *See* N.C.G.S. § 7A-30. Once again, the majority wields its unbounded power in the face of fundamental fairness and basic legal tenets.

¶ 415 As stated only a few months ago:

> The majority restructures power constitutionally designated to the legislature, plainly violates the principles of non-justiciability, and wrests popular sovereignty from the people.
>
> When does judicial activism undermine our republican form of government guaranteed in Article IV, Section 4 of the United States Constitution such that the people are no longer the fountain of power? At what point does a court, operating without any color of constitutional authority, implicate a deprivation of rights and liberties secured under the Fourteenth Amendment?

Moore, 2022-NCSC-99, ¶¶ 153–54 (Berger, J., dissenting).

III. Conclusion

¶ 416 Today's decision is based on a process that was grossly deficient. Hearings were not held as required by our decision in *Hoke County*. The rush to find a statewide violation in the absence of input by the legislature, the collusive nature of this case, the ordering of relief not requested by the parties in their pleadings or permitted by our prior decisions, and the blatant usurpation of legislative power by this Court is violative of any notion of republican government and fundamental fairness. The trial court orders dated November 10, 2021 and April 26, 2022 should be vacated, and this matter should be remanded for a remedial hearing on the Hoke County claims as required by our decision in *Hoke County*. In addition, because there have never been hearings held or orders entered as to any other county, those matters must be addressed separately as per our decision in *Hoke County*.

¶ 417 Under no circumstance, however, should this Court take the astonishing step of proclaiming that "inherent authority" permits the judiciary

to ordain itself as super-legislators. This action is contrary to our system of government, destructive of separation of powers, and the very definition of tyranny as understood by our Founding Fathers.

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

IN THE MATTER OF L.N.H.

No. 393PA20

Filed 4 November 2022

1. Child Abuse, Dependency, and Neglect—underlying case files—admitted in previous hearing—judicial notice—failure to object—waiver of appellate review

In a juvenile case, by failing to lodge an objection, respondent-mother waived appellate review of the trial court's decision to take judicial notice of medical records that had been admitted at a previous hearing regarding nonsecure custody of her juvenile.

2. Child Abuse, Dependency, and Neglect—underlying case files—judicial notice—no objection—effective assistance of counsel

In a juvenile case, the decision of respondent-mother's counsel not to object to the trial court taking judicial notice of certain medical records did not constitute ineffective assistance of counsel where the trial court had already allowed testimony regarding how respondent had burned and struck her infant and where the medical records contained the same information about the source of the infant's injuries. Counsel stated that his reason for not objecting was because the records were already in evidence; in addition, neither appellate court had directly addressed whether a trial court may, at a later adjudication hearing, judicially notice evidence that has previously been admitted at a hearing regarding continuance of nonsecure custody.

3. Child Abuse, Dependency, and Neglect—adjudication—conditions existing at the time of the petition's filing—alternative placement with family

The trial court did not err in adjudicating a child as dependent by examining the conditions existing at the time the petition was filed as required by N.C.G.S. § 7B-802 (rather than at the time of

the adjudication) and determining that—at the time the petition was filed—the child, whose mother had committed a felony assault causing serious bodily injury to the child, had no alternative placement options with family because the alleged father's whereabouts were unknown and no home studies with other relatives had been completed.

4. Child Abuse, Dependency, and Neglect—initial disposition—elimination of reunification efforts—written findings—felony assault resulting in serious bodily injury to the child—remand

In a juvenile case arising from reports that respondent-mother had burned and struck her infant, although the trial court's written findings were insufficient to support the elimination of reunification efforts as an initial disposition following adjudication, the record did contain sufficient evidence to support elimination of reunification efforts as an initial disposition based on respondent's commission of a felony assault resulting in serious bodily injury to the infant, pursuant to N.C.G.S. § 7B-901(c)(3)(iii). Therefore, the relevant portion of the trial court's order was vacated and the matter was remanded for entry of appropriate findings on the matter.

Appeal pursuant to N.C.G.S. § 7A-31 from a unanimous, unpublished decision of the Court of Appeals, 272 N.C. App. 695, 2020 WL 4462550 (2020), reversing in part, vacating in part, and remanding the trial court's order entered on 23 August 2019 by Judge Marcus A. Shields in District Court, Guilford County. Heard in the Supreme Court on 23 May 2022 in session in the Old Burke County Courthouse in the City of Morganton pursuant to N.C.G.S. § 7A-10(a).

Mercedes O. Chut, *for appellant Guilford County Department of Health and Human Services.*

Matthew D. Wunsche, *for appellant Guardian ad Litem.*

Jeffrey L. Miller, *for appellant respondent-mother.*

BERGER, Justice.

¶ 1 Appellant Guilford County Department of Health and Human Services (DSS) appeals from a decision of the Court of Appeals which reversed in part and vacated in part the trial court's adjudications of abuse, neglect, and dependency, as well as the disposition and

permanency planning order in the matter of L.N.H. *In re L.N.H.*, 272 N.C. App. 695, 2020 WL 4462550 (2020) (unpublished). DSS filed a petition for discretionary review on September 8, 2020. Respondent-mother filed a conditional petition for discretionary review on September 28, 2020. We allowed both petitions on December 14, 2021.

I. Factual and Procedural Background

¶ 2 Lea[1] was born in February 2019. On May 7, 2019, DSS began an investigation after receiving a report regarding Lea's hospitalization. The report alleged that respondent-mother punched Lea in the chest, sprayed a green liquid on Lea, waved a lighter near Lea's face, and burned Lea's feet with a lighter. The report also alleged that Lea was subsequently left outside on the porch unattended. Respondent-mother was arrested and charged with felony child abuse inflicting serious injury and held in the Guilford County Jail under a $500,000.00 bond. Medical records obtained by DSS from the hospital confirmed that Lea suffered burns to her feet.

¶ 3 Social worker Jerin Elliot interviewed respondent-mother in jail on May 8, 2019. Consistent with her statement to another social worker on the day of the incident, respondent-mother told Elliott that she did not remember the events leading to Lea's hospitalization; she only remembered that she had put the child to bed, drank alcohol, and then went to sleep. Respondent-mother admitted she suffered from depression and had not been taking her medication. She further identified Bruce Rutledge as Lea's father, but she did not have his contact information. Elliott's investigation further revealed that respondent-mother told her mother that when Lea was taken to the hospital for treatment, respondent-mother thought the child was still in the home.

¶ 4 On May 8, 2019, Lea's maternal great-grandmother and other family members informed DSS that they would be willing to take care of Lea; however, no home study had been completed when the petition was filed. Lea's family members also identified respondent-father as the child's father and stated that he had been in and out of prison and had active warrants against him.[2]

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1. Pseudonyms are used in this opinion to protect the juvenile's identity and for ease of reading.

2. Respondent-father was subsequently located and served. He submitted to DNA testing which confirmed that he was Lea's biological father. However, at the time the petition was filed, paternity had not been established. The trial court ordered that reunification efforts with respondent-father should continue and that he should have visitation with the child.

¶ 5 On May 9, 2019, DSS obtained nonsecure custody of Lea after filing a petition alleging that Lea was abused, neglected, and dependent.

¶ 6 On July 31, 2019, the trial court held an adjudication, disposition, and permanency planning hearing. At the hearing, Elliot testified about the investigation. When asked if DSS had received a report regarding the family, respondent-mother objected to testimony concerning the report on hearsay grounds. DSS argued the report was not being offered for the truth of the allegations set forth in the report, but to show why DSS became involved with the family. The trial court overruled the objection and allowed Elliot to testify.

¶ 7 Later, Elliot testified that DSS had received medical records regarding Lea's injuries. The trial court took judicial notice of a medical records exhibit, which the court had admitted in a previous nonsecure custody hearing without objection.[3] The medical records detailed how Lea was transferred to the hospital. The summary stated, "[Lea] is a 2 month old female . . . who was transferred from [a different] hospital where she was initially brought . . . by [Lea's] neighbors who witnessed [respondent-]mother abusing [Lea] physically." The medical records further contained a History of Present Illness section, which stated, "the neighbors saw [respondent-]mother burning [Lea]'s feet with [a] cigarette light[er], punching her in the abdomen and spraying her face with Windex."

¶ 8 On August 23, 2019, the trial court adjudicated Lea an abused, neglected, and dependent juvenile. The trial court found that Lea had sustained injuries related to respondent-mother "punching [her] in the chest, allowing green liquid to be placed across [her] face, and allowing [her] to sustain serious burns to her feet, as [a result of respondent-] mother being under the influence of alcohol, based upon her own admission." The trial court also determined that Lea was left outside on the steps of the home after sustaining these injuries.

¶ 9 The trial court ordered that legal and physical custody remain with DSS, but that custody be transferred to Lea's relatives once they complied with certain requirements. The court also found that reunification with respondent-mother would be unsuccessful and ordered DSS to cease reunification efforts with her. Respondent-mother's visitation rights with Lea were terminated.

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3. At oral argument, respondent-mother's counsel conceded that respondent-mother was represented by counsel at the hearing in which these medical records were originally admitted.

¶ 10 Respondent-mother appealed. On August 4, 2020, the Court of Appeals held that respondent-mother was denied a fair hearing and the trial court erred in adjudicating Lea an abused, neglected, and dependent juvenile. *In re L.N.H.*, 272 N.C. App. 695, 2020 WL 4462550, at *6. Specifically, the Court of Appeals determined that respondent-mother's counsel provided ineffective assistance by failing to object to the admission of Lea's medical records and that the trial court improperly considered Elliot's testimony regarding the neighbors' report as substantive evidence. *Id.* at *5–6. Further, the Court of Appeals reversed the adjudication of dependency, stating that "the trial court erroneously based its adjudication of dependency on conditions existing at the time the petition was filed instead of the time of the adjudication." *Id.* at *7. As a result, the Court of Appeals vacated the disposition and permanency planning order and remanded the case to the trial court. *Id.*

¶ 11 On September 8, 2020, DSS filed a petition for discretionary review under N.C.G.S. § 7A-31(c). On September 28, 2020, respondent-mother filed a conditional petition for discretionary review in response. This court allowed both petitions on December 14, 2021, and the matter was heard on May 23, 2022.

II. Analysis

¶ 12 **[1]** First, we address the argument by DSS that the Court of Appeals erred in determining that the trial court improperly admitted and considered witness reports of abuse contained in Lea's medical records.

¶ 13 "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) (2021); *see also In re E.D.*, 372 N.C. 111, 116, 827 S.E.2d 450, 454 (2019). As this Court has stated, "a respondent's failure to object to the trial court's taking judicial notice of underlying juvenile case files waives appellate review of the issue." *In re A.C.*, 378 N.C. 377, 2021-NCSC-91, ¶ 17 (cleaned up).

¶ 14 Here, the trial court took judicial notice of the medical records previously admitted without objection at a May 10, 2019 hearing on nonsecure custody in which respondent-mother was represented by counsel. When counsel for DSS offered the medical records for admission there, the following exchange occurred:

> [DEPARTMENT COUNSEL]: Your Honor, I'm not going to introduce an extensive amount of medical

> records; however, previously admitted into evidence on May 10th, 2019, are a portion of the medical records. Since those have already been admitted into evidence, I would ask at this time that you take judicial notice of those.
>
> THE COURT: Any objection?
>
> UNIDENTIFIED SPEAKER: No objection, Your Honor.
>
> [RESPONDENT-MOTHER'S COUNSEL]: No objection, already in evidence.
>
> THE COURT: All right. So admitted. The Court will take judicial notice.

¶ 15 The medical records included reports that Lea had been brought to the hospital by her neighbors after the neighbors witnessed respondent-mother burn Lea's feet with a cigarette lighter, punch Lea in the abdomen, and spray Lea in the face with Windex. Elliot also provided testimony regarding the reports that respondent-mother burned Lea's feet and left her on the porch. As this Court stated in *In re A.C.*, the failure to object to the trial court taking judicial notice of such records waives appellate review of the issue. *Id.* Thus, respondent-mother's failure to object waives appellate review.

¶ 16 **[2]** DSS next argues that the Court of Appeals erred in determining that respondent-mother received ineffective assistance when counsel did not object to admission of the medical records.

¶ 17 A party alleging ineffective assistance of counsel "must show that counsel's performance was deficient and the deficiency was so serious as to deprive [the party] of a fair hearing." *In re B.B.*, 381 N.C. 343, 2022-NCSC-67, ¶ 39 (quoting *In re G.G.M.*, 337 N.C. 29, 2021-NCSC-25, ¶ 35). In order to show deprivation of a fair hearing, the party "must prove that there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Id.* (emphasis omitted). "[I]f a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 249 (1985).

¶ 18 There is "a strong presumption that counsel's conduct falls within the range of reasonable professional assistance." *State v. Roache*, 358 N.C. 243, 280, 595 S.E.2d 381, 406 (2004) (quoting *Strickland*

v. Washington, 466 U.S. 668, 688 (1984)). "Counsel is given wide latitude in matters of strategy, and the burden to show that counsel's performance fell short of the required standard is a heavy one for [a party] to bear." *State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001); *see also State v. Goss*, 361 N.C. 610, 623, 651 S.E.2d 867, 875 (2007) ("This Court indulges the presumption that trial counsel's representation is within the boundaries of acceptable professional conduct, giving counsel wide latitude in matters of strategy." (cleaned up)).

¶ 19 Here, counsel for respondent-mother objected to admission of Elliot's testimony regarding the report to DSS about Lea's injuries. The trial court overruled the objection and allowed Elliot's testimony. Elliot testified:

> A report was received alleging that on May 7th, 2019, [Lea], who at the time was reported as an unidentified child weighing 11 pounds, was transported to the emergency room after being assaulted by [respondent-mother]. [Respondent-mother] was observed punching the minor child in the chest area. [Respondent-mother] spray[ed] unknown green liquid in [Lea]'s face, then pulled out a lighter and swiped the flame of the lighter across [Lea]'s face. [Respondent-mother] was seen burning [Lea]'s feet with the lighter. [Respondent-mother] then laid [Lea] on the steps of the porch. [Lea] was then taken from [respondent-]mother by observers, and law enforcement was called.

¶ 20 Subsequently, DSS requested the trial court to take judicial notice of Lea's medical records and stated that the medical records were "previously admitted into evidence on May 10, 2019." Counsel for respondent-mother was asked if there was any objection to the court taking judicial notice and responded, "[n]o objection, already in evidence."

¶ 21 These medical records contained the same information about the source of Lea's injuries as testified to by Elliot:

> [Lea] is a 2 month old female . . . who was . . . initially brought . . . by [Lea]'s neighbor who witnessed [respondent-]mother abusing [Lea] physically. Per report, [respondent-]mother was burning [Lea]'s feet with [a] cigarette light[er], punching her in the abdomen and spraying her face with Windex. She has <1% TBSA partial thickness burns to the soles of her feet.

¶ 22 The record reflects that respondent-mother's counsel stated that he expressed no objection to the trial court's decision to take judicial notice of the relevant medical records and that he declined to exercise his right to object because those records were "already in evidence." Thus, in this case, unlike in many other cases, the record contains an explanation for the failure of respondent-mother's counsel to lodge the objection that respondent-mother now claims should have been made. In addition, we note that neither this Court nor the Court of Appeals has directly addressed the issue of whether a trial court is entitled to judicially notice evidence that has previously been admitted into evidence at a hearing held for the purpose of determining whether a juvenile should continue in non-secure custody at a subsequent adjudication hearing, with reasonable arguments in support of and in opposition to the admissibility of this evidence having been advanced in the parties' briefs before this Court. For that set of circumstances, we are unable to conclude that respondent-mother's counsel's conduct was "unreasonable" given "prevailing professional norms." *Strickland*, 466 U.S. at 688. As a result, we hold that respondent-mother's ineffective assistance of counsel claim lacks merit.

¶ 23 **[3]** DSS next contends that the Court of Appeals erred in reversing the trial court's adjudication of dependency because the trial court did not consider post-petition evidence.

¶ 24 "The adjudicatory hearing shall be a judicial process designed to adjudicate the existence or nonexistence of any of the conditions alleged in a petition." N.C.G.S. § 7B-802 (2021).

> Unlike in the dispositional stage, where the trial court's primary consideration is the best interest of the child and any evidence which is competent and relevant to a showing of the best interest of that child must be heard and considered by the trial court, evidence in the adjudicatory hearing is limited to a determination of the items alleged in the petition.

In re A.B., 179 N.C. App. 605, 609, 635 S.E.2d 11, 14 (2006) (cleaned up). Thus, the conditions underlying determination of whether a juvenile is an abused, neglected, or dependent juvenile are fixed at the time of the filing of the petition. This inquiry focuses on the status of the child at the time the petition is filed, not the post-petition actions of a party.

¶ 25 Here, the Court of Appeals held that "[t]he trial court erroneously based its adjudication of dependency on conditions existing at the time the petition was filed instead of the time of the adjudication." *In*

re L.N.H., at *7. The Court of Appeals determined that the trial court erred in adjudicating Lea as dependent because "the trial court failed to make specific findings with respect to Lea's father's ability to provide or arrange care for her," and because respondent-mother's family members presented themselves as placement alternatives. *Id.* at *7.

¶ 26 This holding does not follow the plain language of N.C.G.S. § 7B-802. At the time the petition was filed, respondent-father's whereabouts were unknown and paternity had not been established. Further, there were no alternative placements available for Lea because home studies had not been completed. Thus, although relatives had been identified as potential alternative placements at the time the petition was filed, no acceptable relative placements were available.

¶ 27 The trial court correctly found that, at the time the petition was filed, "[respondent-]mother did not provide any other alternative[] placements with family members who presented themselves to the department, [and respondent-]mother was unable to provide any information as it related to [respondent-father], who at the time, his location was unknown and the means to communicate with him remained unknown."

¶ 28 For these reasons, the trial court did not err in adjudicating Lea a dependent juvenile.

¶ 29 **[4]** Finally, respondent-mother contends that the trial court erred by eliminating reunification efforts as an initial disposition following adjudication. At the time of the hearing in this case, N.C.G.S. § 7B-906.2(b) provided that

> [a]t any permanency planning hearing, the court shall adopt concurrent permanent plans and shall identify the primary plan and secondary plan. Reunification shall remain a primary or secondary plan *unless* the court made written findings under [N.C.G.S. §] 7B-901(c) or makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety.

(emphasis added). In this case, the trial court ordered DSS to cease reunification efforts with respondent-mother as part of the initial dispositional hearing. As a result, the trial court was required to make written findings under N.C.G.S. § 7B-901(c) before eliminating reunification as a primary or secondary plan. *See In re J.M.*, 255 N.C. App. 483, 499, 804 S.E.2d 830, 840–41 (2017) (holding, that "because the trial court ceased reunification efforts in an order entered following an initial disposition

hearing, N.C.G.S. § 7B-901(c) was necessarily implicated."), *disc. rev. improvidently allowed*, 371 N.C. 132, 813 S.E.2d 847 (2018).

¶ 30 At the time of the hearing in this case, N.C.G.S. § 7B-901(c) provided that

> [i]f the disposition order places a juvenile in the custody of a county department of social services, the court shall direct that reasonable efforts for reunification as defined in [N.C.G.S. §] 7B-101 shall not be required if the court makes written findings of fact pertaining to any of the following, unless the court concludes that there is compelling evidence warranting continued reunification efforts:
>
> (1) A court of competent jurisdiction determines or has determined that aggravated circumstances exist because the parent has committed or encouraged the commission of, or allowed the continuation of, any of the following upon the juvenile:
>
> a. Sexual abuse.
>
> b. Chronic physical or emotional abuse.
>
> c. Torture.
>
> d. Abandonment.
>
> e. Chronic or toxic exposure to alcohol or controlled substances that causes impairment of or addiction in the juvenile.
>
> f. Any other act, practice, or conduct that increased the enormity or added to the injurious consequences of the abuse or neglect.
>
> (2) A court of competent jurisdiction terminates or has terminated involuntarily the parental rights of the parent to another child of the parent.
>
> (3) A court of competent jurisdiction determines or has determined that (i) the parent has committed murder or voluntary manslaughter of another child of the parent; (ii) has aided,

> abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child or another child of the parent; (iii) has committed a felony assault resulting in serious bodily injury to the child or another child of the parent; (iv) has committed sexual abuse against the child or another child of the parent; or (v) has been required to register as a sex offender on any government-administered registry.

Thus, before eliminating reunification efforts with respondent-mother, the trial court in this case was required to make written findings pertaining to one of the circumstances listed above. *See J.M.*, 255 N.C. App. at 500, 804 S.E.2d at 841.

¶ 31 In its order, the trial court found that "[r]eunification efforts with the mother would be clearly unsuccessful and inconsistent with the juvenile['s] health and safety" and that "[t]here are aggravating circumstances that exist as it relates to the mother and juvenile, whereas the mother's conduct caused serious injuries to the juvenile." Although the trial court did not specifically cite N.C.G.S. § 7B-901(c), its reference to "aggravating circumstances" is sufficient to invoke that statutory provision. *See In re A.P.W.*, 378 N.C. 405, 2021-NCSC-93, ¶ 20 (noting that "[t]he trial court's written findings must address the statute's concerns but need not quote its exact language") (quoting *In re L.M.T.*, 367 N.C. 165, 168, 752 S.E.2d 453, 455 (2013)). Thus, the question before this Court on review is

> limited to whether there is competent evidence in the record to support the findings of fact and whether the findings of fact support the conclusions of law. The trial court's findings of fact are conclusive on appeal if supported by any competent evidence. Uncontested findings are binding on appeal. The trial court's dispositional choices—including the decision to eliminate reunification from the permanent plan—are reviewed for abuse of discretion. An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision.

Id., ¶ 14–15 (cleaned up). Given that respondent-mother has challenged the sufficiency of the evidence to support the trial court's finding of aggravated circumstances under N.C.G.S. § 7B-901(c), we review those

findings to determine if they were supported by competent evidence. *See In re B.C.T.*, 265 N.C. App. 176, 186–87, 828 S.E.2d 50, 57 (2019).

¶ 32 As an initial matter, the trial court's mere declaration that "there are aggravating circumstances that exist," without explaining what those circumstances are, is not sufficient to constitute a valid finding for purposes of N.C.G.S. § 7B-901(c). *Cf.*, *In re A.W.*, 377 N.C. 238, 2021-NSCS-44, ¶ 31–32 (holding that there was sufficient evidence to support the trial court's finding that the parent's conduct with respect to the juvenile "increase[d] the enormity and add[ed] to the consequences of the neglect of [the juvenile] where the parents had "consistently worked together to conceal" the abuse and neglect that had led to the death of the juvenile's sister given that "there is no means by which [the trial court] can address what caused the death of [the sister] and thereby [e]nsure the safety of [the juvenile]"). Although the trial court noted that "[respondent-]mother's misconduct caused serious injuries to the juvenile," the evidence presented in this case cannot support a finding of any of the aggravated circumstances listed in N.C.G.S. § 7B-901(c)(1)a–e.

¶ 33 In apparent recognition of this fact, DSS relies on N.C.G.S. § 7B-901(c)(1)f, which permits the trial court to cease reunification efforts if it makes written findings of "[a]ny other act, practice, or conduct" on the part of the respondent-parent "that increased the enormity or added to the injurious consequences of the abuse or neglect." DSS contends that the trial court's findings show that Lea sustained severe burns on the soles of her feet while in respondent-mother's care, that respondent-mother recalled drinking alcohol before Lea was injured while lacking any memory of hurting Lea, that Lea was left alone on the front porch of respondent-mother's house, and that Lea's injuries were severe enough to require hospitalization for two days and continued medical treatment for several weeks thereafter, so that "[respondent-mother's] conduct and actions toward Lea on 7 May 2019 'increased the enormity' and 'added to the injurious consequences' of evidence supporting the court's adjudications of abuse and neglect within the meaning of [N.C.G.S. §] 7B-901(c)(1)f."

¶ 34 The fundamental defect in DSS's argument is that it relies upon evidence necessary to support the trial court's adjudication of abuse and neglect to show the existence of conduct that exacerbated the consequences of that abuse and neglect. In other words, although DSS argues that respondent-mother's conduct in burning Lea's feet and leaving her on the porch increased the enormity and added to the injurious consequences of burning Lea's feet and leaving her on the porch, N.C.G.S. § 7B-901(c)(1)f requires a showing of the existence of "any *other* act,

practice, or conduct," which seems to us to require that the evidence in aggravation involve something in addition to the facts that rise to the initial adjudication of abuse and/or neglect. *See A.W.*, ¶ 32; *see also In re C.L.K.*, 2022 WL 4841743, 2022-NCCOA-661, ¶ 14 (unpublished) (concluding that the trial court's extensive findings of fact demonstrated how the respondent-mother's conduct "increased the enormity or added to the injurious consequences of the abuse [and] neglect" of her children, with the trial court having found that the respondent-mother continued to allow her boyfriend to live in the house for months despite knowledge that he was sexually abusing one of her children and that respondent-mother was failing to provide appropriate care for her daughter despite awareness of her daughter's extensive medical needs). As a result, since the allegation that respondent-mother burned Lea's feet and left her on the porch cannot serve as conduct that "increase[ed] the enormity" or "add[ed] to the injurious consequences" of that conduct, the evidence does not support a determination that any of the aggravating factors specified in N.C.G.S. § 7B-901(c)(1) exist in this case.

¶ 35 On the other hand, we do believe that there *is* sufficient evidence in the record to support a determination by the trial court that reunification efforts were not required pursuant to N.C.G.S. § 7B-901(c)(3)(iii), which allows the cessation of reunification efforts in an initial dispositional order in the event that the parent "has committed a felony assault resulting in serious bodily injury to the child[.]" As noted above, following the events that led to Lea's removal from respondent-mother's custody, respondent-mother was arrested and charged with felony child abuse inflicting serious injury. In our view, the record developed before the trial court contains ample evidence that tends, if believed, to show that respondent-mother's actions in burning Lea's feet involved the commission of a felonious assault upon the child that resulted in serious bodily injury. Although the trial court did not make the findings necessary to permit the cessation of reunification efforts with respondent-mother based upon N.C.G.S. § 7B-901(c)(3)(iii), it certainly could have done so had it chosen to make such a determination. As a result, we vacate that portion of the trial court's order ceasing reunification efforts with respondent-mother based on a finding the existence of aggravated circumstances and remand to the trial court with instructions to enter appropriate findings addressing the issue of whether efforts to reunify respondent-mother with Lea should be ceased pursuant to N.C.G.S. § 7B-901(c). *See In re L.R.L.B.*, 377 N.C. 311, 2021-NCSC-49, ¶ 38 (remanding to the trial court where it failed to make written findings as required by N.C.G.S. § 7B-906.2(d)(3)).

III. Conclusion

¶ 36 For the foregoing reasons, we hold that the trial court did not err in adjudicating the child abused, neglected, and dependent, and did not err in eliminating reunification efforts with respondent-mother. We also hold that respondent-mother's counsel provided effective assistance. We reverse the decision of the Court of Appeals and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA EX REL. JOSHUA H. STEIN, ATTORNEY GENERAL
v.
E. I. DU PONT DE NEMOURS AND COMPANY; THE CHEMOURS COMPANY; THE CHEMOURS COMPANY FC, LLC; CORTEVA, INC.; DUPONT DE NEMOURS, INC.; AND BUSINESS ENTITIES 1-10

No. 436A21

Filed 4 November 2022

1. Jurisdiction—personal—over corporate successor—by imputation of predecessor's liabilities—due process

In the State's action against a chemical company and its two out-of-state corporate successors, where the State alleged that the chemical company—which faced mounting liabilities for releasing harmful chemicals into the environment—underwent significant corporate restructuring and transferred its assets to the successors in order to limit its future liability, due process permitted the trial court to exercise personal jurisdiction over the successors (even though they had no direct contacts with North Carolina) where the chemical company was subject to personal jurisdiction in North Carolina and where North Carolina law permitted the court to impute the chemical company's liabilities to the successors on two grounds: first, the successors expressly agreed to assume those liabilities by written agreement, and second, the State sufficiently alleged in its complaint that the successors participated in an asset transfer intended to defraud the State as a creditor.

2. Jurisdiction—personal—Calder jurisdiction—applicability—unnecessary

In the State's action against a chemical company and its two out-of-state corporate successors, where the State alleged that the

chemical company—which faced mounting liabilities for releasing harmful chemicals into the environment—underwent significant corporate restructuring and transferred its assets to the successors in order to limit its future liability, the Supreme Court declined to determine whether personal jurisdiction over the successors would be proper under *Calder v. Jones*, 465 U.S. 783 (1984), where it had already determined that both due process and North Carolina law permitted the trial court to exercise personal jurisdiction by imputing the chemical company's liabilities to the successors.

Appeal as of right directly to the Supreme Court pursuant to N.C.G.S. § 7A-27(a)(2) from an order and opinion, entered on 9 September 2021 by Judge Michael L. Robinson, Special Superior Court Judge for Complex Business Cases, in Superior Court, Cumberland County, after being designated a mandatory complex business case pursuant to N.C.G.S. § 7A-45(b). Heard in the Supreme Court on 19 September 2022.

Joshua H. Stein, Attorney General, by Ryan Y. Park, Solicitor General, Daniel S. Hirschman, Senior Deputy Attorney General, and Marc Bernstein, Special Deputy Attorney General; and Kelley Drye & Warren LLP, by David Zalman, pro hac vice, Levi Downing, pro hac vice, Elizabeth N. Krasnow, pro hac vice, Julia Schuurman, pro hac vice, and Lauren H. Shah, pro hac vice, for plaintiff-appellee.

Bradley Arant Boult Cummings LLP, by Robert R. Marcus, C. Bailey King, Jr., and Brian M. Rowlson; and Bartlit Beck LLP, by Katherine L.I. Hacker, pro hac vice, and Joshua P. Ackerman, pro hac vice, for defendant-appellants.

EARLS, Justice.

¶ 1 Individuals and corporate entities have a "liberty interest in not being subject to the binding judgments of a forum with which [they] ha[ve] no meaningful contacts, ties, or relations" *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)). That liberty interest is protected by requiring courts—both state and federal—to have personal jurisdiction over a party before subjecting it to legal proceedings. Where personal jurisdiction exists, it follows that individuals or entities had a "fair warning" they might be subject to legal proceedings in that forum. *Id.* In this sense, personal jurisdiction is a shield—not a sword.

Though it protects against the threat of litigation in arbitrary jurisdictions, it is not a tool to be weaponized against claimants by enabling defendants to evade accountability for potentially tortious conduct. But according to the State, that is precisely what E.I. DuPont de Nemours and Company ("Old DuPont") sought to do when, facing liability for releasing harmful chemicals into the environment in North Carolina over a period of decades, it underwent a significant corporate reorganization and transferred millions of dollars in assets to out-of-state companies, creating substantial losses for itself. This appeal concerns whether the Due Process Clause allows North Carolina courts to exercise personal jurisdiction over the companies that received those assets, even though they do not have any contacts of their own in this state. We hold that due process indeed allows as much.

I. Factual Background

A. Old DuPont's Use of Per- and Polyfluoroalkyl Substances ("PFAS")

¶ 2 Old DuPont is a chemical company that produces agricultural and other specialty products. In 2020, North Carolina (the State) brought an action against Old DuPont and its corporate successors, including Chemours, New DuPont, and Corteva,[1] alleging that Old DuPont knowingly operated a plant in North Carolina that released harmful chemicals called per- and polyfluoroalkyl substances ("PFAS") into the environment for over forty years.

¶ 3 PFAS are a class of manmade chemicals nicknamed "forever chemicals" because they are resistant to degradation and thus persist in the environment. In the 1950s, Old DuPont began using various kinds of PFAS, such as perfluorooctanoic acid ("PFOA"), at chemical plants around the country.[2] In 1969, Old DuPont purchased the Fayetteville Works plant, located in Fayetteville, North Carolina, and began producing PFAS at that location in the early 1970s.

¶ 4 PFOA, one of the most widely studied PFAS, is highly soluble, meaning it can be freely transported through water and soil. Thus, because it does not degrade, it can cause environmental damage over long distances.

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1. The legal names of these entities are The Chemours Company, The Chemours Company FC, LLC, Corteva, Inc., and DuPont de Nemours, Inc.

2. Unless otherwise indicated, throughout this opinion, we rely on the facts as stated in the State's complaint and take them as true for purposes of this motion to dismiss under Rule 12(b)(2).

PFOA accumulates and persists in people and other organisms, and it has been shown to be carcinogenic at very low concentrations.

¶ 5 The State alleges that, as early as 1961, company scientists warned Old DuPont of the risks associated with PFOA. The warnings were based on internal studies concluding that PFOA caused liver damage in rats and dogs. These early studies led company scientists to caution that PFOA should be handled with extreme care and should not come into direct contact with skin. Old DuPont continued to conduct studies about the health effects of PFOA on plant workers throughout the late 1970s and early 1980s, which similarly concluded that the chemical is toxic and causes adverse health effects. The State also alleges that by 1984, Old DuPont was aware of PFOA's lasting environmental effects. The State alleges that, despite knowing of the consequences associated with PFOA, Old DuPont both concealed such knowledge and refused to adopt technologies that would reduce its PFOA output and thus its human and environmental impact. In 2002, Old DuPont's supplier ceased production of PFOA, leading the company to begin producing its own, including at Fayetteville Works. According to the State's brief, by 2006, Fayetteville Works was the only facility in the United States still producing PFOA. Publicly, the company maintained that PFOA did not cause adverse health or environmental consequences.

B. Old DuPont's Restructuring

¶ 6 Since approximately 2000, Old DuPont's liabilities arising from its PFOA use have been mounting around the country, including a $10.25 million fine paid to the EPA stemming from its failure to report the risks associated with PFOA exposure, a class action settlement for over $300 million arising out of its PFOA discharges at a facility in West Virginia, and a settlement in federal multidistrict litigation for approximately $670 million. The State alleges that, recognizing the scope of its liability for contamination caused by its PFAS and PFOA use, Old DuPont chose to restructure its business to limit future liability and protect its remaining assets. The restructuring took form over three stages.

¶ 7 First, Old DuPont transferred its Performance Chemicals Business, which included its PFOA and other PFAS-related assets, such as Fayetteville Works, to a wholly-owned subsidiary called Chemours.[3] Old DuPont then spun off Chemours as a separate public company, but the State claims that Chemours was intentionally undercapitalized and unable to satisfy Old DuPont's PFAS liabilities. For instance, aside from

3. Chemours is a defendant in this litigation, but it is not an appellant here.

assuming Old DuPont's PFAS liabilities, Chemours transferred approximately $3.4 billion to Old DuPont as a cash dividend and issued promissory notes with a principal amount totaling $507 million. Following the spinoff, Chemours reported that its assets totaled $6.298 billion, while its liabilities totaled $6.168 billion. The State alleges that this figure was an underestimate, and had the estimate been accurate, Chemours would have been deemed insolvent at the time of the spinoff. In fact, in an unrelated lawsuit brought by Chemours against Old DuPont, Chemours made a similar argument and contended that Old DuPont intentionally downplayed the extent of its PFAS liability. *See Chemours Co. v. DowDuPont Inc.*, No. 2019-0351-SG, 2020 WL 1527783, at *7 (Del. Ch. Mar. 30, 2020) (unpublished), *aff'd*, 243 A.3d 441 (Del. 2020) (unpublished order). Because Old DuPont knew that Chemours would be unable to satisfy all of Old DuPont's PFAS-related liabilities, the State argues that Old DuPont also knew that it remained responsible for them.

¶ 8 After the Chemours spinoff, the next step in Old DuPont's reorganization plan was a merger with a company called The Dow Chemical Company ("Old Dow"). But, according to the State's brief, instead of completing the merger as originally announced, Old DuPont and Old Dow formed a new holding company called DowDuPont. Old DuPont and Old Dow became subsidiaries of DowDuPont. During this step of the reorganization, DowDuPont executed numerous business segment and product line realignments and divestitures, which reallocated a substantial portion of Old DuPont's assets to DowDuPont.

¶ 9 Finally, during the third stage in the reorganization, the State argues DowDuPont took additional steps to shield its remaining good assets. As part of this reorganization, DowDuPont formed three separate business lines: (1) the Materials Science Business; (2) the Agriculture Business; and (3) the Specialty Products Business. It then formed two new companies called Dow, Inc. ("New Dow"), which holds Old Dow as a subsidiary, and Corteva, which holds Old DuPont. DowDuPont also renamed itself DuPont de Nemours, Inc ("New DuPont"). The Materials Science Business was transferred to New Dow, the Agriculture Business was transferred to Corteva, and New DuPont retained ownership of the Specialty Products Business. The Business Court found that Old DuPont transferred these business lines for less than their assets' value. The court further found that, since these transfers took place, Old DuPont's value has dropped continuously, at one point falling at least as low as negative $1.125 billion. In 2019, New DuPont spun off Corteva and New Dow as separate public companies. Corteva and New DuPont are the corporate successors that bring this appeal. New Dow is not a party in this litigation.

¶ 10 A Separation and Distribution Agreement ("the Separation Agreement"), dated 1 April 2019, governs the separation of Corteva and New Dow from New DuPont. In June 2019, the parties entered into a Letter Agreement ("the Letter Agreement"), which amended certain provisions in the Separation Agreement.[4] Based on the Separation Agreement, in conjunction with the Letter Agreement, the Business Court found that New DuPont agreed to assume all the Specialty Products liabilities and Corteva agreed to assume all the Agriculture Business liabilities.

C. Defendant's Motion to Dismiss and the Business Court's Order

¶ 11 In 2020, North Carolina brought an action against Old DuPont, Corteva, New DuPont, and Chemours asserting claims of negligence, trespass, public nuisance, fraud, and fraudulent transfer related to Old DuPont's use of PFAS at Fayetteville Works and its subsequent reorganization to avoid liability. New DuPont and Corteva moved to dismiss the State's action, arguing that the trial court could not exercise personal jurisdiction over them because they are Delaware holding companies that do not conduct business in North Carolina. They assert that they never owned or operated the Fayetteville Works plant, nor have they ever made, sold, distributed, or discharged PFAS. Rather, Corteva and New DuPont assert that they are "just holding companies" that exist only in Delaware. At this stage, Corteva and New DuPont did not, however, contest the State's allegations regarding Old DuPont's fraudulent restructuring.

¶ 12 Relying on a significant body of case law from both state and federal courts, the Business Court held that the Due Process Clause permits jurisdiction to be exercised over a corporate successor when (1) the predecessor is subject to jurisdiction in the forum; and (2) state law subjects the successor to liability. Recognizing that the first requirement was easily established given Old DuPont's history in North Carolina, the Business Court focused on the second factor and identified the extent to which North Carolina law imputes the liabilities of a predecessor to its successors. Citing a previous Court of Appeals decision, the Business Court first explained that "[a] corporation which purchases all, or substantially all, of the assets of another corporation is generally not liable for the old corporation's debts or liabilities." *State ex rel. Stein v. E.I. du Pont de Nemours & Co.*, No. 20 CVS 5612, 2021 WL 4127106, at *6, 2021 NCBC 54, ¶ 44 (N.C. Super. Ct. Cumberland County (Bus. Ct.) Sept. 9, 2021) (unpublished) (alteration in original) (quoting *Budd Tire Corp.*

4. Certain terms of these agreements have been filed under seal, and we therefore do not disclose them here.

v. Pierce Tire Co., 90 N.C. App. 684, 687 (1988)). But in *Budd Tire*, the Court of Appeals recognized four exceptions to this principle—two of which the Business Court found to be relevant here. The first exception the Business Court applied imputes the liabilities of a predecessor to its successor when "there is an express or implied agreement by the purchasing corporation to assume the debt or liability." *Budd Tire*, 90 N.C. App. at 687. The second exception imputes liability to the successor when "the transfer of assets was done for the purpose of defrauding the corporation's creditors." *Id.*

¶ 13 In its opposition to the motion to dismiss, the State argued that, as an alternative ground for jurisdiction, defendants' allegedly fraudulent conduct was aimed at North Carolina and justified exercising direct jurisdiction over Corteva and New DuPont under the Supreme Court's decision in *Calder v. Jones*. 465 U.S. 783 (1984). In *Calder*, the Court held that courts may exercise jurisdiction over defendants who commit "intentional, and allegedly tortious, actions" outside the forum that "were expressly aimed at" the forum. *Id.* at 789. Exercising *Calder* jurisdiction would obviate the need to conduct the imputation analysis to determine whether personal jurisdiction is proper under North Carolina law. The Business Court declined to address this argument, however, finding it an unnecessary step because jurisdiction was established by imputing Old DuPont's liabilities to Corteva and New DuPont.

II. Analysis

¶ 14 There are two questions on appeal. The first is whether the Due Process Clause permits personal jurisdiction over out-of-state corporate successors to be based on the contacts of their in-state predecessor company by imputing the conduct and liabilities of the predecessor to its successors. Second, the State asks this Court to determine whether Old DuPont's allegedly fraudulent conduct was expressly aimed at North Carolina, justifying the exercise of direct jurisdiction pursuant to the United States Supreme Court's decision in *Calder v. Jones*.

A. Personal Jurisdiction

¶ 15 **[1]** When the parties have submitted affidavits and other documentary evidence, a trial court reviewing a motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2) must determine whether the plaintiff has established that jurisdiction exists by a preponderance of the evidence. *See Bauer v. Douglas Aquatics, Inc.*, 207 N.C. App. 65, 68 (2010). The documentary evidence may include "any allegations in the complaint that are not controverted by the defendant's affidavit." *Banc of Am. Sec. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 693-94 (2005)

(quoting *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615-16 (2000) (citations omitted)). As an appellate court, we consider whether the trial court's determination regarding personal jurisdiction is supported by competent evidence in the record. *Toshiba Glob. Com. Sols., Inc. v. Smart & Final Stores LLC*, 381 N.C. 692, 2022-NCSC-81, ¶ 8 (2022) ("[W]hether personal jurisdiction exists is a question of fact and . . . appellate courts . . . assess whether the determination is supported by competent evidence in the record"). "However, when the pertinent inquiry on appeal is based on a question of law[,] we conduct de novo review." *Id.* (citing *Da Silva v. WakeMed*, 375 N.C. 1, 5 (2020)).

¶ 16 Determining whether a nonresident defendant is subject to personal jurisdiction in this State's courts involves a two-step analysis. *Beem USA Ltd.-Liab. Ltd. P'shp v. Grax Consulting LLC*, 373 N.C. 297, 302 (2020). "First, jurisdiction over the defendant must be authorized by N.C.G.S. § 1-75.4—North Carolina's long-arm statute." *Id.* Relevant here, § 1-75.4 states that personal jurisdiction exists where a party "[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) (2021). This statute is "intended to make available to the North Carolina courts the full jurisdictional powers permissible under federal due process." *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 676 (1977). Therefore, in this case, the statutory analysis merges with the due process analysis.

¶ 17 Second, "if the long-arm statute permits consideration of the action, exercise of jurisdiction must not violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution." *Beem USA*, 373 N.C. at 302 (quoting *Skinner v. Preferred Credit*, 361 N.C. 114, 119 (2006)). Exercising jurisdiction over an out-of-state defendant comports with the Due Process Clause when 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.* (alteration in original) (quoting *Int'l Shoe*, 326 U.S. at 316 (internal quotation marks omitted)). Minimum contacts, in turn, result from "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." *Id.* at 303 (quoting *Skinner*, 361 N.C. at 133).

¶ 18 There are two types of personal jurisdiction: general jurisdiction and specific jurisdiction. *See Daimler AG v. Bauman*, 571 U.S. 117, 126–27 (2014). General jurisdiction exists when the defendant's "affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (quoting *Int'l Shoe*, 326 U.S. at 317).

Specific jurisdiction, however, exists only when "the suit 'arise[s] out of or relate[s] to the defendant's contacts with the forum.' " *Daimler*, 571 U.S. at 127 (alterations in original) (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984)). The parties here agree that Corteva and New DuPont are not subject to general jurisdiction. The question then is whether these out-of-state successors of Old DuPont can be subject to specific jurisdiction in North Carolina courts based on Old DuPont's conduct and liabilities in the State.

¶ 19 "The great weight of persuasive authority permits imputation of a predecessor's actions upon its successor *whenever* forum law would hold the successor liable for its predecessor's actions."[5] *City of Richmond v. Madison Mgmt. Grp., Inc.*, 918 F.2d 438, 454 (4th Cir. 1990) (quoting *Simmers v. Am. Cyanamid Corp.*, 576 A.2d 376, 385 (Pa. Super. Ct. 1990) (emphasis in original); *see also Patin v. Thoroughbred Power Boats, Inc.*, 294 F.3d 640, 653 (5th Cir. 2002) (explaining that "federal courts have consistently acknowledged that it is compatible with due process for a court to exercise personal jurisdiction over an individual or a corporation that would not ordinarily be subject to personal jurisdiction in that court when the individual or corporation is an alter ego or successor" of an entity that is subject to jurisdiction there).

¶ 20 "The theory underlying these cases is that, because the two corporations . . . are the *same entity*, the jurisdictional contacts of one *are* the jurisdictional contacts of the other for the purposes of the *International Shoe* due process analysis." *Patin*, 294 F.3d at 653. Further, as the Business Court acknowledged, declining to impute contacts for jurisdictional purposes in all cases would enable corporations to "avoid

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5. *See, e.g.*, *Hawkins v. i-TV Digitális Távközlési zrt.*, 935 F.3d 211, 227 (4th Cir. 2019) ("[W]here one corporation has succeeded to another's liabilities, the predecessor corporation's forum contacts can be imputed to the successor corporation."); *Perry Drug Stores v. CSK Auto Corp.*, 93 F. App'x 677, 681 (6th Cir. 2003) (opining that "[a] court may impute the jurisdictional contacts of a corporate predecessor to its successor where the successor expressly assumed the liability of the predecessor" and explaining that "a contrary result would allow corporations to 'immunize themselves by formalistically changing their titles' ") (quoting *Duris v. Erato Shipping, Inc.*, 684 F.2d 352, 356 (6th Cir. 1982), *aff'd sub nom*, *Pallas Shipping Agency, Ltd. v. Duris*, 461 U.S. 529 (1983)); *Williams v. Bowman Livestock Equip. Co.*, 927 F.2d 1128, 1132 (10th Cir. 1991) ("A corporation's contacts with a forum may be imputed to its successor if forum law would hold the successor liable for the actions of its predecessor."); *Jeffrey v. Rapid Am. Corp.*, 529 N.W.2d 644, 654-55 (Mich. 1995) ("We hold that the actions of a constituent corporation may be attributed to a surviving corporation following a merger for purposes of determining the surviving corporation's amenability to personal jurisdiction for liabilities allegedly incurred by the constituent corporation . . . [W]e find the rule equally applicable when a corporation expressly assumes the liabilities of its predecessors.").

all consequences . . . by just reforming in some other jurisdiction[.]" *Madison Mgmt. Grp.*, 918 F.2d at 455; *see also E.I. du Pont de Nemours*, 2021 WL 4127106, at *6, 2021 NCBC 54, ¶ 43.

¶ 21 Cases from other jurisdictions reaching the same conclusion are instructive. In *Simmers v. American Cyanamid Corp.*, for example, a Pennsylvania court held that a company not otherwise operating in the state that purchased a product line from a second in-state company and expressly assumed the second company's related liabilities could be subject to personal jurisdiction in Pennsylvania. *See Simmers*, 576 A.2d at 387. In so holding, the court "recognize[d] the realities of modern corporate law and the ever increasing frequency of corporate reorganizations." *Id.* at 389. It reasoned that refusing to impute a predecessor's liabilities to its successor would allow the successor to "avoid the jurisdiction of the very forum where the liability accrued simply because it never did business within that forum." *Id.* at 390. The court explained that this would be an "absurd" result, particularly when "the assets purchased by the successor, at least in part, were derived from the forum and the successor no doubt had knowledge of its predecessor's presence within the forum." *Id.* We find this reasoning persuasive and hold that due process permits courts to exercise successor jurisdiction whenever (1) the predecessor is subject to personal jurisdiction in a particular forum; and (2) that forum's law permits courts to impute the liabilities of the predecessor to its successors.[6] Because neither party disputes that Old DuPont is subject to jurisdiction in North Carolina, this appeal focuses on the second factor.

¶ 22 It is true that, in North Carolina, "[a] corporation which purchases all, or substantially all, of the assets of another corporation is generally not liable for the old corporation's debts or liabilities." *Budd Tire*, 90 N.C. App. at 687; *see also McAlister v. Am. Ry. Express Co.*, 179 N.C. 556, 561 (1920) ("As a general rule [ ] the mere purchase of the assets and franchise[s] of one corporation by another will not imply a promise on the part of the new to pay or satisfy the debts and obligations of the old.") (quoting 5 Seymour D. Thompson, *Commentaries on the Law of Corporations* § 6090 (2d Ed.)). But there are several exceptions to this principle, which the Court of Appeals encapsulated in *Budd Tire*, where:

> (1) there is an express or implied agreement by the purchasing corporation to assume the debt or

6. As explained below, forum law dictates the extent to which imputation to establish both liability and jurisdiction is permissible. The predecessor company's liability alone is not enough to establish successor jurisdiction.

> liability; (2) the transfer amounts to a de facto merger of the two corporations; (3) the transfer of assets was done for the purpose of defrauding the corporation's creditors, or; (4) the purchasing corporation is a "mere continuation" of the selling corporation in that the purchasing corporation has some of the same shareholders, directors, and officers.

Budd Tire Corp. v. Pierce Tire Co., 90 N.C. App. at 687 (citations omitted); *see also McAlister*, 179 N.C. at 560. If any one of these circumstances is present, North Carolina law permits a predecessor company's liabilities to be imputed to its corporate successors, making jurisdiction over out-of-state successors proper under the Due Process Clause.[7]

¶ 23 Importantly, exercising jurisdiction over out-of-state successors in these circumstances does not offend "our traditional conception of fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 324. Where any of these conditions exist, it cannot be said that a successor's contacts are "random, fortuitous, or attenuated." *See Burger King*, 471 U.S. at 475 (cleaned up). Rather, in these situations, a successor likely has or should have notice of the liabilities of its predecessor in a given jurisdiction.

¶ 24 The court in *Simmers* put it well. In holding that due process permits jurisdiction to be established by imputing a predecessor company's contacts to its out-of-state successors, the court explained, "[n]o doubt in today's sophisticated world of corporate takeovers, a corporation, which assumes another's liabilities . . . seriously considers the possible extent of any liabilities and where those liabilities may exist." *Simmers*, 576 A.2d at 3. Here, for instance, the Business Court found that both Corteva and New DuPont expressly assumed Old DuPont's PFAS-related liabilities via the April 2019 Separation Agreement and the June 2019 Letter Agreement. And "[w]hen a successor corporation assumes the liabilities of its corporate predecessors, the successor in effect consents to be held liable in the same locations where its predecessor would have been exposed." *Id.* By assuming the liabilities of Old DuPont, Corteva and New DuPont's "conduct and connection with the forum State are such that [they] should reasonably anticipate being haled into court" in North Carolina. *See Burger King*, 471 U.S. at 474 (quoting *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

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7. We clarify, however, that this list is not exhaustive. Additional circumstances may arise that warrant expanding these limitations. Such circumstances are not before us now, and we need not decide what they might be.

¶ 25 Corteva and New DuPont argue that imputing Old DuPont's contacts to establish personal jurisdiction is inappropriate because they are not the corporate continuations or embodiments of Old DuPont, which continues to exist as its own entity. They argue that the cases that allow personal jurisdiction to be established for out-of-state successors through imputation have involved actual or de facto mergers. *See, e.g.*, *Synergy Ins. Co. v. Unique Pers. Consultants, Inc.*, No. 3:16CV611, 2017 WL 5474058, at *2 (W.D.N.C. Nov. 14, 2017) (unpublished order) (finding that an entity was a corporate successor when, among other things, it purchased all assets and took over the headquarters, satellite branches, phone numbers, and website content of its predecessor); *Simmers*, 576 A.2d at 386–88 (imputing predecessors' contacts to establish jurisdiction over corporate successors after de facto mergers).[8]

¶ 26 We decline to recognize mergers as the sole circumstance in which successor jurisdiction is appropriate. Such a holding would result in the very consequence described above: Companies could avoid liability for tortious conduct simply by forming a new, out-of-state company instead of effectuating a merger. Moreover, where, as here, a company has explicitly assumed certain liabilities or reorganized to avoid the very liability for which it is brought to court, requiring a merger or a corporate continuation to establish successor jurisdiction would serve no additional purpose.

¶ 27 Recognizing successor liability and jurisdiction in these narrow circumstances ensures that a company that merely receives assets from another entity does not, without more, become saddled with all of the transferor's debts and liabilities. *See Madison Mgmt. Grp.*, 918 F.2d at 450. But a company may take certain affirmative steps that justify both the imputation of those liabilities and the exercise of jurisdiction. Actual and de facto mergers are one such example, in part because the merging companies know in advance that they will become responsible for each other's liabilities, and they thus weigh the associated

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8. Instead, Corteva and New DuPont argue they should be treated as assignees and point out that "[t]he expectations of a corporate successor and an assignee are different." *See Ostrem v. Prideco Secure Loan Fund, LP*, 841 N.W.2d 882, 895 (Iowa 2014). Citing the Iowa Supreme Court's opinion in *Ostrem*, they argue that unlike a successor, "an assignee . . . assumes a limited bundle of rights, obligations, and expectations." *Id.* Corteva and New DuPont contend that they assumed only limited assets and corresponding liabilities from Old DuPont and should thus be treated as assignees. This argument fails, however, because it ignores the other circumstances in which successor jurisdiction is appropriate—circumstances that we hold exist here. But even if we were to treat Corteva and New DuPont as assignees, the "limited bundle of . . . obligations," *id.*, they assumed include the liabilities that are the subject of this litigation.

risks.[9] Assuming certain liabilities or intentionally reorganizing to avoid them similarly requires a party to weigh the risks at hand and affirmatively decide whether to become legally responsible for them or, as alleged here, attempt to fraudulently evade them. When a party has engaged in such conduct, successor jurisdiction is equally appropriate. Thus, like many other courts that have decided this question, we are satisfied that due process permits jurisdiction to be exercised over out-of-state corporate successors where there is jurisdiction over the predecessor and North Carolina law would impute the predecessor's liability to its successors.

¶ 28 Here, the Business Court found that North Carolina law permits liability to be imputed to Corteva and New DuPont, thereby creating personal jurisdiction over the companies, because: (1) the parties expressly agreed to assume Old DuPont's liabilities in the April 2019 Separation Agreement and the June 2019 Letter Agreement; and (2) the State alleged sufficient facts at the motion to dismiss stage to support the claim that Old DuPont transferred its assets to Corteva and New DuPont in an attempt to defraud the State in its position as a creditor.

¶ 29 As to the first exception, the Business Court made detailed findings of fact regarding the meaning of the April 2019 Separation Agreement and the June 2019 Letter Agreement. Key to this analysis, the court pointed to plain contractual language stating that Corteva and New DuPont expressly assumed Old DuPont's PFAS-related liabilities. *E.I. du Pont de Nemours*, 2021 WL 4127106, at *7, 2021 NCBC 54, ¶ 48. The Business Court found that "[i]t is clear that by execution of the DowDuPont Separation Agreement and the Letter Agreement, Corteva and New DuPont assumed certain liabilities related to Old DuPont's manufacturing of PFAS." *Id.* at *8, 2021 NCBC 54, ¶ 51. The court rejected Corteva and New DuPont's argument that Chemours exclusively assumed all of the PFAS liabilities when it was spun off as a separate company because "Chemours' assumption of PFAS liabilities as a legal matter does not preclude Corteva and New DuPont from assuming those same PFAS liabilities and [Corteva and New DuPont] do not cite any authority supporting this position." *Id.* at *8, 2021 NCBC 54, ¶ 53. The court also rejected the argument that Corteva and New DuPont agreed to indemnify each

9. *See, e.g.*, *McAlister v. Am. Ry. Express Co.*, 179 N.C. at 564 ("Where two corporations effect a consolidation (or merger), and one of them goes entirely out of existence, and no arrangements are made respecting its liabilities, the resulting consolidated (or merged), corporation will, as a general rule, be entitled to all the property and answerable for all the liabilities of the corporation thus absorbed." (quoting *Atlanta, B. & A.R. Co. v. Atl. Coast Line R.R. Co.*, 75 S.E. 468, 470 (1912) (parentheticals added))).

other for PFAS-related losses but did not assume such liabilities. *Id.* at *8, 2021 NCBC 54, ¶ 53. The court found that the relevant term within the Separation Agreement was sufficiently broad to permit "the interpretation that Corteva and New DuPont not only agreed to indemnify against certain liabilities but additionally assume the same liabilities."[10] *Id.* at *8, 2021 NCBC 54, ¶ 53.

¶ 30 On appeal, Corteva and New DuPont argue that the language of these Agreements is merely "the starting point of the analysis," and the Business Court should have gone on to "evaluate whether those assumptions of liability were such that Corteva and New DuPont reasonably could have expected to be subject to jurisdiction in North Carolina." They contend that the answer to this question is no, in part because, through those Agreements, "Corteva, New DuPont, and Dow were allocating liabilities amongst themselves against the backdrop of Historic DuPont's previous divestiture of its PFAS business to Chemours." Corteva and New DuPont do not, however, respond to the Business Court's decision that Chemours' assumption of the PFAS liabilities did not preclude them from assuming these liabilities as well. Furthermore, nothing in the record suggests that Chemours validly assumed all PFAS-related liabilities to the exclusion of all parties that would otherwise be liable. Corteva and New DuPont's assertion on this point is therefore unconvincing.

¶ 31 Corteva and New DuPont also argue that assuming liability through the Agreements was insufficient to put them on notice that they may be subject to jurisdiction in North Carolina because those liability provisions pertain to Old DuPont's operations broadly, without specifying *where* they would be liable. This argument, too, is unavailing. A company cannot expressly assume liabilities from its predecessor, fail to limit those liabilities geographically, and then disclaim liability based on the notion that it did not expect to be brought to court in a particular forum. Such a holding would nullify the relevant provisions entirely because the

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10. Section 1.1(144) of the April 2019 Separation Agreement defines "Indemnifiable Loss" and "Indemnifiable Losses" as:

> any and all Damages, losses, deficiencies, Liabilities, obligations, penalties, judgments, settlements, claims, payments, fines, interest, costs, and expenses (including the costs and expenses of any and all Actions and demands, assessments, judgments, settlements, and compromises relating thereto and the reasonable costs and expenses of attorneys', accountants', consultants' and other professionals' fees and expenses incurred in the investigation or defense thereof or the enforcement of rights hereunder).

lack of geographic specificity would mean that there is *no* jurisdiction in which Corteva and New DuPont expected to be held liable. Moreover, to reiterate what we have already explained, when companies undergo complicated transactions like that between Old DuPont, Corteva, and New DuPont, they conduct extensive due diligence, and the new parties either are aware of, or should be aware of, the liabilities they might acquire. Old DuPont's PFAS liabilities were no secret—before the corporate reorganization, it had already paid millions in well-publicized fines and settlements. Corteva and New DuPont had ample notice then that they might become liable in any venue where Old DuPont acquired PFAS liability.

¶ 32 In sum, the Business Court's interpretation of the plain language of the Agreements is well supported, and we uphold its finding that Corteva and New DuPont expressly assumed Old DuPont's PFAS liabilities, including those liabilities arising in North Carolina.

¶ 33 The Business Court also found that Old DuPont's PFAS liabilities could be imputed to its successors because the State sufficiently alleged that Old DuPont fraudulently engaged in the reorganization transactions that created Corteva and New DuPont to prevent the State and other creditors from holding the company liable to the full extent. The State alleged that "these transactions have resulted in (1) Old DuPont having a negative net worth; (2) Chemours being undercapitalized and unable to satisfy Old DuPont's PFAS liabilities; and (3) the transfer of valuable assets from Old DuPont to Corteva and New DuPont for far less consideration than those assets were worth." *Id.* at *9, 2021 NCBC 54, ¶ 57. Relying on the same evidence that was before the Business Court, this Court finds that the complaint alleged sufficient facts from which to conclude that Old DuPont engaged in a corporate reorganization to defraud its creditors. For example, the State alleges that, as part of its plan to insulate its assets, Old DuPont spun off Chemours, its wholly owned subsidiary. As part of the spinoff, Chemours agreed to accept all of Old DuPont's PFAS liabilities, transferred to Old DuPont approximately $3.4 billion as a cash dividend, and issued promissory notes with a principal amount of $507 million. The State then alleges that, knowing Chemours would be unable to satisfy the full extent of its PFAS liabilities, Old DuPont proceeded with the series of transactions that eventually created New DuPont, Corteva and New Dow. After the corporate reorganization was complete, the value of Old DuPont's tangible assets had decreased by $20.85 billion. As the State points out, this loss came at a time when Old DuPont knew it faced potentially billions of dollars in liability.

¶ 34 These examples support the State's theory that Old DuPont engaged in the corporate reorganization to fraudulently deprive its creditors of judicial recourse. The State's allegations are extensive, and we hold that they are sufficient to support the Business Court's conclusion that, at this stage of the proceedings, the State has adequately pleaded that Corteva and New DuPont acted fraudulently. Thus, there is a second, independent ground upon which to hold the successors liable for Old DuPont's debts and liabilities and therefore, to find jurisdiction over Corteva and New DuPont in this state.[11]

B. *Calder* Jurisdiction

¶ 35 **[2]** The State asserts an alternative ground for jurisdiction under the U.S. Supreme Court's decision in *Calder v. Jones*. In *Calder*, the Court held that it may be appropriate for a court to exercise jurisdiction over a defendant who commits "intentional, and allegedly tortious, actions" outside the forum that "were expressly aimed at" the forum. 465 U.S. at 789. *Calder* involved an allegedly libelous story that was written and edited in Florida about events that occurred in California and concerned a California resident. *Id.* at 784–86. The story's sources were from California and the alleged harm was suffered in California. *Id.* In holding that the authors of the story could be sued in California, the Supreme Court opined that it was foreseeable that the effects of the story would be felt in California, and that "[a]n individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California." *Id.* at 790.

¶ 36 The Business Court declined to decide whether jurisdiction here was proper under *Calder* because it found that personal jurisdiction could be established through the imputation analysis alone. Still, the State argues

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11. Courts in other jurisdictions presiding over litigation related to Old DuPont's use of PFAS have reached similar conclusions. *See, e.g.*, *State of New Hampshire v. 3M Company*, No. 216-2019-CV-0045 (Sup. Ct., Merrimack Co. July 8, 2021) (unpublished) (holding that New Hampshire law permits imputation of a predecessor corporation's contacts to establish successor jurisdiction and finding that the State made a prima facie showing that jurisdiction existed over Corteva and New DuPont based on (1) their express assumption of Old DuPont's PFAS liabilities; and (2) their fraudulent efforts to help Old DuPont evade liability); *State of Ohio ex rel. DeWine v. E.I. du Pont de Nemours and Co.*, No. 180T32 (Ct. Common Pleas, Wash. Co. Aug. 4, 2021) (unpublished) (denying Corteva and New DuPont's motion to dismiss for lack of jurisdiction and granting the State's cross-motion regarding their assumption of Old DuPont's liabilities); *Suez Water New Jersey, Inc. v. E.I. DuPont de Nemours, et al.*, No. 2:20-CV-19906 (D.N.J. Oct. 14, 2021) ("If Corteva and New DuPont expressly assumed some PFAS-related liability from Old DuPont's activities in New Jersey, this would provide minimum contacts with the forum state sufficient to support personal jurisdiction.").

that this Court should determine whether *Calder* applies because, if so, the Business Court could exercise direct jurisdiction over the defendants for all fraud claims without needing to revisit the imputation analysis to determine whether personal jurisdiction exists after the pleadings stage. We conclude that determining whether *Calder* jurisdiction exists is unnecessary under these circumstances. Our rulings here establish that North Carolina courts have personal jurisdiction over Corteva and New DuPont. Even if, after the motion to dismiss stage, the Business Court determines that Corteva and New DuPont did not attempt to defraud creditors for purposes of the third *Budd Tire* exception for imputing liability, jurisdiction is conclusively established under *Budd Tire's* other relevant exception—that Corteva and New DuPont expressly assumed Old Dupont's PFAS-related liabilities. The parties do not dispute that Old DuPont is subject to specific jurisdiction in North Carolina based on its PFAS-related liabilities. Thus, the Business Court has jurisdiction over Corteva and New DuPont for all of the State's claims arising out of and related to Old DuPont's PFAS-related activities in North Carolina.

III. Conclusion

¶ 37 We follow the "great weight of persuasive authority," *Madison Mgmt. Grp.*, 918 F.2d at 454, and hold that the Due Process Clause permits a predecessor's liabilities to be imputed to its corporate successors to establish personal jurisdiction even where the successor itself has no direct contact with the forum state. Successor liability comports with both due process and North Carolina law at least where (1) a party assumes another entity's debts or liabilities through an express or implied agreement; (2) the transfer constitutes an actual or de facto merger of corporations; (3) a transfer of assets occurred for the purpose of defrauding the corporation's creditors; or (4) the purchasing corporation is a continuation of the selling corporation because it has the same shareholders, directors, and officers.

¶ 38 Because personal jurisdiction can be established through the imputation analysis for all of the State's claims arising out of or related to Old DuPont's PFAS-related activities in North Carolina, we need not determine whether *Calder* would permit the Business Court to exercise direct jurisdiction.

¶ 39 Accordingly, we affirm the decision of the Business Court denying Corteva and New DuPont's motion to dismiss under Rule 12(b)(2) of the North Carolina Rules of Civil Procedure and remand this case to that court for additional proceedings not inconsistent with this opinion.

AFFIRMED.

STATE v. HARVIN

[382 N.C. 566, 2022-NCSC-111]

STATE OF NORTH CAROLINA
v.
CASHAUN K. HARVIN

No. 485PA19

Filed 4 November 2022

Constitutional Law—right to counsel—forfeiture—defendant did not act egregiously

Defendant was entitled to a new trial for murder and related charges where the trial court violated defendant's right to counsel by determining that defendant had forfeited that right. Throughout the pendency of the case—during which defendant had five different court-appointed attorneys (two of whom withdrew of their own volition, two others withdrew at defendant's request due to differences related to the preparation of his defense, and one was appointed as standby counsel), he waived his right to counsel and agreed to proceed pro se, and he subsequently requested assistance of counsel due to the difficulties he was having in preparing his defense—defendant remained courteous and engaged with his case, he did not exhibit aggressive or disruptive behavior, and his actions did not rise to the level of serious obstruction of the trial proceedings.

Justice BERGER dissenting.

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

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b)[1] to review a divided decision of the Court of Appeals, 268 N.C. App. 572 (2019), vacating judgments entered on 8 May 2018 by Judge Phyllis M. Gorham in Superior Court, New Hanover County and ordering that defendant is entitled to a new trial. Heard in the Supreme Court on 11 May 2022.

Joshua H. Stein, Attorney General, by Marissa K. Jensen, Assistant Attorney General, for the State-appellant.

Marilyn G. Ozer for defendant-appellee.

1. As discussed in more detail herein, the State lost its appeal of right where a decision of the Court of Appeals includes a dissent as a result of the State's failure to timely give notice of appeal. N.C.G.S. § 7A-30(2) (2021).

MORGAN, Justice.

¶ 1 In this case we consider whether defendant Cashaun K. Harvin was wrongly denied his constitutional right to counsel when the trial court compelled him to proceed pro se to trial on multiple serious felonies, including first-degree murder. At the conclusion of the trial, defendant was found guilty of all charges. This Court's review of the record in this case does not support the trial court's determination that defendant's actions were sufficiently obstructive to constitute a forfeiture of defendant's right to counsel. Accordingly, defendant is entitled to a new trial, and we affirm the decision of the Court of Appeals which vacated the judgments entered upon defendant's convictions.

I. Factual background and procedural history

A. Defendant's alleged crimes, resulting indictments, and proceedings prior to defendant's trial date

¶ 2 The Court's resolution of the matters presented by this case is predicated primarily upon the facts and circumstances which occurred following defendant's arrest and during the pretrial proceedings in his case, and therefore, we present only a brief summary of the facts regarding defendant's alleged serious crimes. The evidence at defendant's trial tended to show the following: On 2 February 2015, Tyler Greenfield arranged to purchase marijuana from the victim in this case, Robert Scott, Jr., as a pretext for Greenfield and defendant to rob Scott. Scott instructed Greenfield to come to Scott's apartment for the drug transaction and was surprised when defendant arrived with Greenfield. Nonetheless, Scott allowed both Greenfield and defendant to enter the living room of Scott's home. Once inside the residence, Greenfield produced a handgun and demanded money from Scott.

¶ 3 Unbeknownst to defendant and Greenfield, Scott's girlfriend Azariah Brewer had been resting in a bedroom of the apartment. When she overheard the confrontation taking place in the living room, Brewer retrieved a gun. When defendant, armed with a handgun, entered the bedroom where Scott kept a safe, defendant saw Brewer and yelled, "She has a gun!"[2] Greenfield ordered Brewer to bring her gun into the living room and threatened to shoot Scott if Brewer resisted. Brewer complied and placed her gun onto a coffee table in the living room. Scott

2. During the alleged robbery, Greenfield accidentally "pocket-dialed" Scott on a cellular telephone, and Scott's voicemail recorded portions of the alleged robbery as well as the killing of Scott.

then attempted to grab the gun from the coffee table, at which point defendant and Greenfield both began shooting, ultimately firing twelve rounds of ammunition in total. Scott was able to shoot at least once, striking Greenfield. Scott and Brewer were both shot several times, and Scott died from his injuries.

¶ 4 Defendant, who was seventeen years of age, was summoned from his high school classroom and arrested on 6 February 2015. Attorney Bruce Mason was appointed as defendant's counsel on 9 February 2015. On 26 May 2015, defendant was indicted on charges of first-degree murder, attempted first-degree murder, attempted robbery with a dangerous weapon, and assault with a deadly weapon with intent to kill inflicting serious injury. On 25 July 2016, Attorney Mason withdrew due to circumstances unrelated to defendant. During his approximately eighteen months of representation of defendant, Mason made three filings: a discovery motion on or about 18 February 2015, an objection to joinder of defendant's and Greenfield's charges, and a motion to substitute counsel on 25 July 2016 in which Mason's law partner Alex Nicely was recommended for appointment.

¶ 5 Upon Mason's withdrawal, attorney Alex Nicely was assigned as substitute counsel. During the nearly ten months that he represented defendant, Nicely filed numerous motions on defendant's behalf, including a motion to suppress certain statements that defendant made to law enforcement officers. On 31 October 2016, the New Hanover County grand jury indicted defendant on the same charges recounted above by means of the return of a superseding indictment. In December 2016, the State agreed to a sentence which included probation for a cooperating witness in the case in exchange for that witness's testimony at defendant's trial.

¶ 6 On 20 March 2017, after the conclusion of Greenfield's trial on charges arising from the robbery and killing of Scott and the shooting of Brewer,[3] the New Hanover County grand jury issued a second superseding indictment, charging defendant with the same four offenses included in the original indictment and the first superseding indictment—first-degree murder, attempted first-degree murder, attempted robbery

3. Greenfield was tried separately and was found guilty by a jury of "first-degree murder based on the felony murder rule with the assault charge as the underlying felony. The jury also found [Greenfield] guilty of second-degree murder, but the trial court set that verdict aside. The jury found [Greenfield] not guilty of attempted first-degree murder and attempted robbery with a deadly weapon." *State v. Greenfield*, 375 N.C. 434, 438 (2020). On appeal, this Court granted Greenfield a new trial on all charges. *Id.* at 447. The record in Greenfield's case is before this Court.

with a dangerous weapon, and assault with a deadly weapon with intent to kill inflicting serious injury—along with additional charges of robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. On 12 May 2017, the State offered defendant a plea agreement which, if defendant had accepted it, would have potentially resulted in defendant serving a sentence of 144 to 185 months in prison. Defendant rejected the plea offer. On the same date of 12 May 2017, Nicely withdrew as defense counsel due to circumstances unrelated to defendant, and the trial court then appointed attorney J. Merritt Wagoner to represent defendant. The State announced that it was ready to proceed with the trial of defendant and that it had hoped to schedule the matter for the 5 June 2017 trial calendar; however, the State and the trial court agreed that in light of defendant's new counsel just having been appointed, such a trial date of 5 June 2017 was not realistic and the parties looked instead to an administrative calendar date of 14 July 2017 which focused on pending murder cases.

¶ 7 On 28 September 2017, Wagoner filed a motion to withdraw as defense counsel, stating that defendant had asked Wagoner to withdraw and asserting that "the attorney client relationship with this defendant has been irreparably severed."[4] Wagoner's motion to withdraw was granted, and Shawn Robert Evans was immediately appointed as replacement counsel on 28 September 2017 to represent defendant. On 8 December 2017, Evans filed a motion seeking to withdraw as defendant's attorney, relating that defendant had verbally fired Evans on that date and representing that there had "been a complete breakdown of the attorney-client relationship" with defendant.

¶ 8 At a 12 December 2017 hearing before the Honorable Ebern T. Watson, III, Evans's motion to withdraw as defendant's court-appointed attorney was addressed. Defendant's trial had already been scheduled to begin on 28 January 2018. Evans explained to the trial court that defendant had expressed a desire to represent himself at trial; defendant confirmed Evans's statements to the trial court. Attorney Evans's motion to withdraw as defense counsel was allowed by the trial court. Defendant stated to the trial court that he desired assistance from standby counsel, and attorney Paul Mediratta was appointed by the trial court to serve in the role of standby counsel on behalf of defendant. Also at the 12 December 2017 hearing, the State registered its opposition to any postponement of defendant's 28 January 2018 trial date given that the

4. Wagoner never filed any motions on behalf of defendant during Wagoner's representation of defendant.

case had already been pending for three years. However, the State did not divulge to the trial court that the State had elected to try Greenfield before bringing defendant's case to trial or that the State—the party which typically scheduled trial dates—had first noted that defendant's case was ready for trial in May 2017, some seven months previously. The trial court stated in open court that it did "not find at this point in time that [defendant] has vacated his right to request counsel, nor that any of his actions have forfeited his opportunity to have assigned counsel."

¶ 9 On 28 December 2017, defendant, defendant's standby counsel Mediratta, and the State appeared before the trial court with Judge Phyllis M. Gorham again presiding. The State noted that defendant had asked previously to proceed pro se, but the State expressed concern that the mandatory inquiry set forth in N.C.G.S. § 15A-1242 regarding defendant's election to represent himself may not have been fully satisfied. Accordingly, the State asked that the trial court undertake the statutory inquiry. The trial court thereupon engaged in the statutorily required colloquy with defendant. Defendant indicated to the trial court that he understood the implications of representing himself[5] but expressed concern about the legal resources to which he had access while incarcerated and also noted that some of the charges pending against him were new and unfamiliar to defendant, citing defendant's past interactions with his appointed counsel. The State acknowledged that it intended to hand deliver updated discovery materials, including "the most recent indictment," to defendant during the hearing. In addition, defendant's standby counsel had alerted the State that defendant desired a continuance. Although the State opposed a continuance, the trial court nonetheless postponed defendant's trial date to 23 April 2018.

¶ 10 On 26 March 2018, defendant again appeared before the trial court, with the Honorable Joshua Willey presiding. The State informed the trial court that it had offered a plea agreement to defendant which would have resulted in a sentence of 144 to 192 months and defense countered with a possible sentence of "about ten years which would be 120 months" for defendant. Defendant rejected the State's plea offer and instead, moved to continue the trial.[6] The State suggested that the motion to continue the trial be considered by Judge Gorham as the assigned trial judge. Defendant then responded with a motion to have Judge Gorham removed from defendant's case due to Judge Gorham's alleged lack of impartiality in that she had previously presided over Greenfield's trial

5. Defendant also signed a waiver of counsel on 28 December 2017.

6. Apparently, the defense never made a formal counteroffer to the State's plea offer.

and therefore "has knowledge of disputable evidentiary facts of the proceeding." The trial court noted that it would be setting the recusal motion for consideration by Judge Gorham at a future date, at which point defendant expressed concern about the potential delay which would result:

> And I filed [the recusal motion], but it seems as though, like, they keep on telling me, well, that won't be heard until the trial date. Well, if I get a continuance, then that means I have to wait another additional six months or three months in order for that motion to be heard, and I don't see why it doesn't seem as though it's an appropriate time to hear it and, you know, the next week or next couple of days, like --

¶ 11 The State then stated that it would be ready to address the recusal motion in April 2018 and inquired about defendant's affirmative defenses. Defendant expressed that he was "not all the way sure" about such defenses, and he then engaged in a discussion with the trial court about affirmative defenses versus assertions of innocence. At the conclusion of the exploration of these subjects regarding his trial preparation, defendant stated that the trial court's rulings on his motions would affect defendant's decisions on the manner in which to proceed in the case. Defendant also renewed his previous request for internet access for purposes of legal research. At this juncture, defendant addressed the trial court as follows:

> So my question is is it unreasonable for my request for proper learning tools, reviewing different cases, making reference to case laws, and allow me to look at things from a scientific perspective considering that the prosecutor has at least 5 years in training and law and at least 7 years in experience compared to my limited knowledge of 8 months, and I also ask that it may be considered that I recently been provided with a new statutory law book so anything prior was of old context, indeed irrelevant.
>
> . . . .
>
> It may be contested that my lawyer should provide me with these things. One, I'm not sure about what -- well one, if I'm not sure about what I am looking for, then a request cannot even be formulated and the purpose for the internet is for me to learn the law. It's not like I fully understand and it's possible for me

> to be oblivious to certain things pertaining to the law. Also, it is difficult for me to contact my lawyer most of the times -- and most of the times my messages don't get delivered so I don't receive a response, plus I have minimum outside support and even if my lawyer did decide to come see me every week, I would still have to wait when it may be something important at the present moment.
>
> So considering my circumstances -- I mean, my circumstance and my lawyer's, it may be inconvenient for both of us. He cannot provide me assistance every day if needed and I need the assistance. I would still need him for updates, filing motions and as bystand [sic] counsel in case I decide to step down from pro se and also for mediation purposes.
>
> So Your Honor, I ask that I am granted internet access for the purpose of research and because one of the disks requires the web and this was told for me to bring to your attention by the captain of New Hanover County.

¶ 12 The State responded that defendant "has the same resources" as the State, despite the State's acknowledgement that defendant was only able to conduct research using a non-internet-connected computer which could search "disks." The State further posited to the trial court that allowing internet access to defendant for purposes of legal research "sets a dangerous precedent regarding inmate access to resources that could be dangerous and, you know, have negative consequences in the community, as well as the jail." Defendant countered that he had to ask jail staff to print various items for him and that the lack of internet access limited defendant's ability, as a person without a college education, to research and understand matters relevant to his presentation. The prosecutor then replied:

> The issue in my understanding is the deputies told me that he was asking for cases on self-defense, a topic, and I told them they can't do that. It's legal advice, basically providing cases on a certain topic. That's what a lawyer has to do and bailiffs are certainly not going to do that kind of thing, so that's what I advised them not to do.

> As far as cases, Judge, go, if there's an issue of him getting a specific case, let us know what case, we'll make sure he gets it. We do have a list, the bailiff did send us all the books that he has been provided in the library there. One of which is a criminal procedure book, one is an arrest, search and seizure book, the statutes, the crimes book, the Prisoner Self-Help Litigation Manual, the Black's Law Dictionary, another copy of the arrest, search and investigation. Judge, he would have all the resources that a prosecutor would be using in preparation of a case, Judge. Again, the only issue of the internet access again is because the personnel needed to monitor that is just not available at the jail.

Without any comment regarding the State's candid acknowledgement that it was advising jail personnel about the type of legal research materials to provide to defendant or that the State was advised of defendant's access to specific research materials, the trial court denied defendant's request for internet access; additionally, the recusal motion and the trial continuance motion were continued until April 2018 in order to permit Judge Gorham to decide them.

¶ 13 On 3 April 2018—three weeks before defendant's scheduled trial date of 23 April 2018—defendant appeared before Judge Gorham and again raised his motion for her recusal—along with his motion for continuance of the trial date. Judge Gorham denied defendant's motion for Judge Gorham to recuse herself from defendant's case. With regard to his motion to continue the trial date, defendant represented that he "need[ed] more time to prepare for [his] case sufficiently." Specifically, defendant noted his difficulty in contacting an investigator who was working on defendant's case and the delay that defendant experienced in obtaining a DVD[7] player and laptop computer in order to review portions of the discovery materials which had been provided to defendant by the State. Defendant further expressed his belief that "other lawyers [who had represented defendant previously in the matter], they were allowed to prepare [ ] for the case within no less than a year, but me, it seems as though like I'm being compelled to take upon, you know, the actions of defending myself when I have lack of resources and lack of knowledge," noting that he had received "5,000 pages of discovery." The State objected to another continuance of the trial, citing the length of

7. This is an acronym for "digital video disc."

time that defendant's case had already been pending, emphasizing that defendant would have five months to prepare for trial after receiving full discovery from the State, and asserting that the State would be prejudiced by a continuance due to the upcoming early June 2020 expiration of the probation period of the State's witness referenced earlier[8] who had been placed on supervised release with a condition that he testify truthfully in defendant's case. After raising the issue of inadequate access to potential expert witnesses and after expressing his frustration with his current investigator, defendant stated that he did not feel prepared to proceed to trial.

¶ 14 At the conclusion of the hearing, the trial court denied defendant's motion to continue. At that point, Mediratta reminded the trial court that he had only been preparing for trial in his role as standby counsel and indicated that he would need several weeks to prepare if he was asked to assume full representation of defendant, also noting that defendant had asked for representation of counsel at the 26 March 2018 hearing before Judge Willey. The trial court responded that its "understanding from [defendant] today is that he still intends to represent himself . . . So unless he says that to me, that he does not want to represent himself anymore, then at that point I can appoint you, but that's not what [defendant] has said."

B. Proceedings on defendant's trial date

¶ 15 On 23 April 2018, Judge Gorham considered pretrial motions in defendant's case, beginning with defendant's pro se motion which was couched as an ineffective assistance of counsel claim:

> [DEFENDANT]: There are some things that I would like to address before the Court today before we proceed with, you know, the trial motions and stuff. I would like to address the situation of ineffective assistance of counsel, Your Honor.
>
> THE COURT: Let me stop you right there. You don't have an attorney so there is no ineffective assistance of counsel claim that you can raise.
>
> [DEFENDANT]: But having -- have I not -- is he not by stand [sic] counsel to provide me with assistance in things that I do not understand?

---

8. The State described the witness as "the co-defendant who . . . allegedly drove . . . defendant and Tyler Greenfield away after the shooting."

> THE COURT: He is standby counsel but he is not your attorney. You have waived your right to all counsel.
>
> [DEFENDANT]: Yes, ma'am.
>
> THE COURT: So Mr. Mediratta is not your attorney, so what is your question?
>
> [DEFENDANT]: So if it was the decision that he was able to replace me or take over the case, like, that's what I was told by Judge Watts[9] [sic]. He said if I wanted to, that he could take over my case at any time if I had decided.
>
> THE COURT: If you decide that you no longer wish to represent yourself --
>
> [DEFENDANT]: Yes, ma'am.
>
> THE COURT: -- and you wish for counsel, that the Court has assigned a standby counsel to take over and try your case, that is correct.
>
> [DEFENDANT]: Yes, ma'am.
>
> THE COURT: But until that happens, standby counsel is not your attorney.
>
> [DEFENDANT]: Yes, ma'am, I understand.
>
> This is what I wanted to present to you, Your Honor, so you can in your discretion you can make a ruling upon it.

Defendant continued to demonstrate his confusion about Mediratta's potential ability to "take over and represent" defendant if defendant determined at some point that defendant could not adequately represent himself and also continued to express his dissatisfaction with Mediratta's honesty, knowledge, and commitment to assisting defendant in this matter.

¶ 16 The trial court then began to address defendant in a fashion typifying the colloquy required under N.C.G.S. § 15A-1242 when a defendant wishes to engage in self-representation, apparently possibly in response

9. Defendant apparently intended to refer to Judge Watson, who had presided over a hearing in defendant's case on 26 March 2018.

to Mediratta's comment at the close of the 3 April 2018 hearing which informed Judge Gorham that defendant had expressed a desire for representation to Judge Willey during the 26 March 2018 hearing:

> THE COURT: All right, let me ask you, Mr. Harvin, do you still wish to represent yourself at this trial?
>
> [DEFENDANT]: If it –
>
> THE COURT: Let me ask you some questions.
>
> [DEFENDANT]: Yes, ma'am.
>
> THE COURT: Are you able to hear and understand me?
>
> [DEFENDANT]: Yes, ma'am.
>
> THE COURT: Are you now under the influence of any alcohol, narcotics, drugs, medicines, pills, or any other substance?
>
> [DEFENDANT]: No, ma'am.
>
> THE COURT: How old are you?
>
> [DEFENDANT]: 21 at this time.
>
> THE COURT: What is the highest grade you completed in school?
>
> [DEFENDANT]: The 10th grade, Your Honor.
>
> THE COURT: And what grade level can you read and write?
>
> [DEFENDANT]: I would believe the 10th grade, Your Honor.
>
> THE COURT: Do you presently suffer from any . . . mental or physical disabilities?
>
> . . . .
>
> [DEFENDANT]: Yes, ma'am.

The trial court and defendant then spent some time discussing defendant's representation that he had been diagnosed with attention deficit disorder while defendant was a student before returning to a discussion of the defendant's potential self-representation:

THE COURT: I'm just asking you questions about your representation, about whether or not you want to continue to represent yourself.

[DEFENDANT]: And what are, like, if I decide to proceed --

THE COURT: No, I just need to know, do you have any questions about what I just said to you about that?

[DEFENDANT]: Can you read the last part, please?

THE COURT: I'm going to read the next question to you.

Do you still wish to waive your right to the assistance of an attorney and do you voluntarily and intelligently decide to represent yourself in this case?

[DEFENDANT]: *No, ma'am.*

THE COURT: *You do not wish to represent yourself?*

[DEFENDANT]: *No, ma'am.*

THE COURT: *So what are you asking the Court for today?*

[DEFENDANT]: Your Honor, what I was asking for initially was asking was that, like I said, I be provided with adequate by stand [sic] counsel and I was asking for more sufficient time to prepare my own defense. And what I was going to address was that *I don't feel like I should relinquish my rights as counsel*, I just need more time to prepare and understand the law.

. . . .

THE COURT: *The question I have for you today: Are you going to continue to represent yourself in your case*?

[DEFENDANT]: *No, ma'am.*

THE COURT: *What are you asking for?*

[DEFENDANT]: *I'm asking for effective assistance of counsel.*

THE COURT: *You are asking to be represented by an attorney?*

[DEFENDANT]: *Yes, ma'am.*

THE COURT: *And you are asking this court to once again appoint an attorney to represent you in your case?*

[DEFENDANT]: *Yes, ma'am.*

THE COURT: *Mr. Harvin, you understand that if I choose to appoint an attorney to represent you --*

[DEFENDANT]: *Yes, ma'am.*

THE COURT: -- that it will be over from that point? You can't come back in here and say you don't like that particular attorney.

[DEFENDANT]: Yes, ma'am.

THE COURT: Because by law, you will have forfeited your right to have any attorney to represent you.

Do you understand that?

[DEFENDANT]: Yes, ma'am.

THE COURT: And you will be back in the same position that you are now.

Do you understand that?

[DEFENDANT]: Yes, ma'am.

(Emphases added.)

¶ 17 Defendant then started to return to his ineffective assistance of counsel argument. The trial court reprised its explanation to defendant that defendant could not lodge a claim of ineffective assistance of counsel because he no longer had an attorney representing him. The trial court also reiterated the distinction between the status of representation by counsel and the status of proceeding pro se with standby counsel. During the end of this exchange, defendant confirmed twice more that he did not want to represent himself:

THE COURT: Do you understand that if you have an attorney appointed to represent you, it is your attorney who will try your case and not you?

[DEFENDANT]: But it's my right.

THE COURT: Listen to me.

[DEFENDANT]: Yes, ma'am.

THE COURT: *If an attorney is appointed to represent you, your attorney tries your case, you don't try your case. Are you willing to give up that right?*

[DEFENDANT]: *Yes, ma'am.*

THE COURT: *Because you have a right to represent yourself.*

[DEFENDANT]: Yes, ma'am.

THE COURT: Do you understand that?

[DEFENDANT]: Yes, ma'am.

THE COURT: *And you still choose to give up that right today?*

[DEFENDANT]: *Yes, ma'am.*

(Emphases added.) At this point in the pretrial hearing, defendant had informed the trial court nine times that he did not want to represent himself at trial. The prosecutor then asked to be heard, emphasizing that "defendant now wants an attorney" and expressing his belief that defendant was "playing games with the system," restating his concern about the expiration of the probationary period of the State's witness, and representing that the State would be prejudiced by any delay caused by the appointment of another attorney to be defendant's counsel of record.

¶ 18 The trial court asked of Mediratta if he was prepared to proceed as defendant's counsel. Mediratta replied that he had only been preparing to serve at trial in his appointed role as standby counsel and that he was not ready to serve as counsel of record for trial, echoing his similar statement to the trial court during the 3 April 2020 hearing. After further discussion of defendant's concerns about defendant's ability to access information provided by the State in discovery, the trial court took a two-hour recess, during which the trial court contacted defendant's previous appointed attorneys who had been allowed to withdraw from the case and asked them to appear. Attorney Mason told the trial court

that he had experienced a scheduling conflict that required defendant's case to be "transferred" to Mason's colleague, Attorney Nicely in July 2016, some sixteen months after Mason had been appointed to represent defendant. Attorney Nicely testified that he represented defendant for approximately ten months until May 2017, and that he withdrew due to his changing employment. Attorney Wagoner testified that he had represented defendant from May 2017 to September 2017 and had withdrawn at defendant's request. Attorney Evans testified that he had represented defendant from late September 2017 until December 2017, at which point he also withdrew at the request of defendant.

¶ 19 After the evidentiary portion of the hearing, the State informed the trial court that the State believed that defendant's "willful actions" warranted a conclusion that defendant had forfeited his right to counsel, citing *State v. Boyd*, 200 N.C. App. 97 (2009), while specifically noting that defendant had "fired two different attorneys" and had requested counsel "on the day of trial." The State further asserted that defendant bore the burden of showing "good cause" in order for the trial court to permit defendant to "rescind" his previous waiver of counsel, citing *State v. Clark*, 33 N.C. App. 628 (1977) and *State v. Banks*, 250 N.C. App. 823 (2016) (unpublished), and emphasizing the issues of timing and delay as dispositive in determinations of forfeiture.

¶ 20 In responding to the State's depiction of his actions, defendant denied any attempt on his part "to frustrate" the trial court, while restating his position that he had not had sufficient time to prepare for trial to represent himself. The trial court first found that defendant was competent to proceed to trial and then concluded

> that [defendant] had no good cause as of today, the day of trial, to ask this [c]ourt for an attorney to represent him. That in fact this [c]ourt believes that based upon the defendant's actions from the time that . . . Wagoner was appointed to represent him on May 12, 2017; . . . Evans was appointed to represent him on September 28, 2017, the defendant requesting that both of these attorneys withdraw from representing him, finds that the defendant has forfeited his right to have an attorney to represent him at this trial; that his actions have been willful and that he has obstructed and delayed these court proceedings.
>
> Therefore the [c]ourt finds that the defendant has forfeited his right to have an attorney represent him at this trial.

¶ 21 Upon the trial of this case, the jury returned verdicts of guilty on all of the offenses charged. Defendant was sentenced to life in prison with the possibility of parole for the first-degree murder conviction. For the remaining convictions, the trial court sentenced defendant to 200 to 254 months for attempted first-degree murder, 60 to 84 months for attempted robbery with a dangerous weapon, 60 to 84 months for assault with a deadly weapon with intent to kill inflicting serious injury, 60 to 84 months for robbery with a dangerous weapon, and 25 to 42 months for conspiracy to commit robbery with a dangerous weapon, with all terms of incarceration to run consecutively. Defendant appealed.

C. Decision by the Court of Appeals

¶ 22 Upon defendant's appeal to the Court of Appeals which was heard on 7 August 2019, he presented two arguments: (1) defendant's conduct at the trial court level was not egregious so as to permit the trial court to conclude that defendant had forfeited his constitutional right to the assistance of counsel, and (2) the trial court committed plain error in instructing the jury that the jury could find defendant guilty of all of the charges against him under the theory of acting in concert. In a decision from a divided Court of Appeals panel, the lower appellate court addressed only the first issue in concluding that the trial court had erred in the trial court's determination that defendant had forfeited his right to counsel at trial and that, due to the deprivation of this constitutional right, defendant was entitled to a new trial. *State v. Harvin*, 268 N.C. App. 572, 573 (2019).

¶ 23 In reaching this result, the Court of Appeals majority first noted that, in addition to forfeiture—the loss of the constitutional right to counsel as a result of a defendant's misconduct—a defendant may elect to waive his right to the assistance of an attorney, so long as such decision is made "knowingly, intelligently, and voluntarily." *Id.* at 593. In order to ensure compliance with this constitutional mandate, the North Carolina General Assembly enacted N.C.G.S. § 15A-1242 which delineates the inquiry that a trial court must make of a defendant who has expressed the desire to proceed pro se and which provides that the failure to engage in the statutorily defined colloquy constitutes prejudicial error requiring the award of a new trial. *Id.* at 592–93. The majority of the lower appellate court observed that, at the 23 April 2018 hearing, the trial court had begun the statutory colloquy to permit waiver of counsel after defendant requested to replace his standby counsel, but that during defendant's exchange with the trial court during the execution of the statutory colloquy under N.C.G.S. § 15A-1242, defendant actually *invoked* his right to

the assistance of counsel, "stating no fewer than *five* times that he did not wish to represent himself at trial." *Id.* at 595.

¶ 24 With specific regard to the issue of forfeiture, the Court of Appeals majority focused upon defendant's conduct in light of the forum's decision in *State v. Simpkins*, which held that a defendant who had engaged in extended discussions with the trial court and attempted to raise arguments that were not legally sound had not forfeited his right to counsel where the defendant had not been "combative or rude" or "did not intentionally delay the process," and whose actions, although causing evident frustration on the part of the trial court, merely "reflected his lack of knowledge or understanding of the legal process." *Id.* at 596 (quoting *State v. Simpkins*, 265 N.C. App. 325, 337 (2019), *aff'd*, 373 N.C. 530 (2020)). In the present case, the Court of Appeals majority similarly found that defendant had remained courteous in all of his interactions with the trial court albeit expressing confusion about the different roles of standby and primary counsel. *Id.* at 595. The decision further acknowledged that defendant had received assistance from a series of five court-appointed attorneys during the course of his case but emphasized that two of those attorneys had withdrawn for their own professional reasons rather than as a result of defendant's behest or defendant's conduct, while two other appointed attorneys withdrew "due to differences related to the *preparation* of [d]efendant's defense" and not because "[d]efendant was refusing to *participate* in preparing a defense." *Id.* Defendant's other appointed attorney—Mediratta—had been designated as standby counsel after defendant expressed his desire to represent himself on 12 December 2017. *Id.* at 593. In light of these circumstances, the Court of Appeals majority determined that "[t]he trial court deprived [d]efendant of his constitutional right to counsel by concluding that he had forfeited this right," and thus awarded defendant a new trial. *Id.* at 596. As a result, the Court of Appeals did not address defendant's jury instruction challenge regarding the theory of acting in concert. *Id.*

¶ 25 The dissenting judge at the lower appellate court, while conceding that a defendant who has previously waived his right to counsel "should generally be able to withdraw his waiver by simply informing the trial court that he now wants to be represented," *id.* at 597 (Dillon, J., dissenting), opined that if the trial court's appointment of counsel under such circumstances "would require that the trial judge continue the trial to another term, our case law suggests that the defendant must generally show 'good cause,' " *id.* at 598 (first citing *State v. Blankenship*, 337 N.C. 543, 553 (1994), *overruled in part on other grounds by State v. Barnes*, 345 N.C. 184, 230 (1997); and then citing *State v. McFadden*, 292 N.C. 609, 616 (1977)). The dissent expressed the belief

> that the "good cause" standard and the "forfeiture" standard are generally treated similarly. That is, a *pro se* defendant's desire to be represented by counsel, in and of itself, generally constitutes "good cause" to justify a continuance. But the additional fact that defendant has been dilatory in making his request may support a finding that the defendant has failed to show "good cause" for a delay or otherwise has "forfeited" his right . . . to counsel where the invocation of the right would require a delay.

Id. at 599. In light of this approach, the dissent would have found no error by the trial court based on the trial court's statements during the 23 April 2018 hearing that defendant had "no *good cause*" to request appointment of counsel on the day of trial and that forfeiture of defendant's right to counsel was appropriate because his willful actions had "obstructed and delayed these court proceedings." *Id.* at 599–600 (emphasis omitted). The dissenting opinion found further support for the trial court's forfeiture of counsel determination based upon the dissent's perception that defendant had "admitted that he was only asking for his stand-by counsel to represent him as a way to delay the trial, as he made the request only moments after his request that his appointed stand-by counsel be replaced was denied and his subsequent motion to continue was denied." *Id.* at 602 (emphasis omitted).

¶ 26 Finally, upon consideration of defendant's argument that the trial court "plainly erred by instructing the jury that [d]efendant could be found guilty on a theory of acting in concert," the dissent simply offered that, upon review of the record, "the instruction was supported by the evidence," and even if the instruction had been erroneous, "such error did not rise to the level of plain error." *Id.* at 603.

¶ 27 On 19 December 2019, the State filed a motion for temporary stay, along with a petition for writ of supersedeas, pursuant to Rule 23(e) of the North Carolina Rules of Appellate Procedure. The motion for temporary stay was allowed by this Court on 20 December 2019, but the Court reserved determination of the petition for writ of supersedeas until the State filed its projected notice of appeal based upon the dissenting Court of Appeals opinion, lodged pursuant to N.C.G.S. § 7A-30(2). But, on 6 February 2020, defendant moved this Court to lift the temporary stay, submitting that the Court of Appeals decision in this case was filed on 3 December 2019 and that the issue date for opinion mandates for the lower appellate court's 3 December 2019 opinions was 23 December 2019. The State's notice of appeal based upon the dissent

in the Court of Appeals was due within fifteen days of the 23 December 2019 mandate—namely, by 7 January 2020—and as defendant observed, the State had not filed its notice of appeal as of the time of defendant's 6 February 2020 motion to lift the temporary stay. *See* N.C. R. App. P. 14(a). Accordingly, defendant asked this Court to refrain from suspending the North Carolina Rules of Appellate Procedure requiring the timely filing of a notice of appeal and to lift the temporary stay.

¶ 28 Later on the same day of 6 February 2020, the State filed a motion to maintain the stay, along with a petition for writ of certiorari in which the State requested review of the Court of Appeals decision. The State acknowledged that it had inadvertently missed the deadline for filing its notice of appeal, and cited Appellate Rule 21, which provides that the writ of certiorari "may be issued by the Supreme Court in appropriate circumstances to permit review of the decisions and orders of the Court of Appeals when the right to prosecute an appeal of right or to petition for discretionary review has been lost by failure to take timely action." *Id.* 21(a)(2). On 29 April 2020, this Court allowed the State's motion to maintain stay. The Court also allowed the State's petition for writ of certiorari on 29 April 2020.

II. Analysis

A. Precedent regarding waiver and forfeiture of the right to counsel

¶ 29 "The right to assistance of counsel is guaranteed by the Sixth Amendment to the Federal Constitution and by Article I, Sections 19 and 23 of the Constitution of North Carolina." *State v. McNeill*, 371 N.C. 198, 217 (2018) (quoting *State v. Sneed*, 284 N.C. 606, 611 (1974)). The right to counsel in criminal proceedings is not only guaranteed but is considered to be "fundamental in character." *Powell v. Alabama*, 287 U.S. 45, 70 (1932) (citations omitted). "This means more than simply that the State cannot prevent the accused from obtaining the assistance of counsel. The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek this assistance." *Maine v. Moulton*, 474 U.S. 159, 170–71 (1985). "The core of this [Sixth Amendment] right has historically been, and remains today, 'the opportunity for a defendant to consult with an attorney and to have him investigate the case and prepare a defense for trial.' " *Kansas v. Ventris*, 556 U.S. 586, 590 (2009) (quoting *Michigan v. Harvey*, 494 U.S. 344, 348 (1990)). Nonetheless, there are certain circumstances in which a criminal defendant may relinquish or lose his or her constitutional right to assistance of counsel.

¶ 30 One of the methods by which a criminal defendant may surrender the right to assistance of counsel is through voluntary waiver. "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), *overruled in part on other grounds by Edwards v. Arizona*, 451 U.S. 477 (1981). North Carolina's General Assembly has enacted a carefully crafted statutory framework to ensure that a criminal defendant's right to counsel is protected and that its entrenchment can only be waived where the trial court is satisfied that the waiver is knowing, intelligent, and voluntary. *See* N.C.G.S. § 15A-1242 (2021). In the state courts of North Carolina, "[b]efore allowing a defendant to waive in-court representation by counsel, . . . the trial court must insure that constitutional and statutory standards are satisfied." *State v. Thomas*, 331 N.C. 671, 673 (1992). The first of these standards is that the waiver must be expressed "clearly and unequivocally." *Id.* at 673–74 (quoting *State v. McGuire*, 297 N.C. 69, 81 (1979)); *see also State v. Hutchins*, 303 N.C. 321, 339 (1981) ("Given the fundamental nature of the right to counsel, [this Court] ought not to indulge in the presumption that it has been waived by anything less than an express indication of such an intention."). The second standard is that "the trial court . . . must determine whether the defendant knowingly, intelligently, and voluntarily waives the right to in-court representation by counsel." *Thomas*, 331 N.C. at 674 (citing *Faretta v. California*, 422 U.S. 806, 835 (1975)).

¶ 31 Section § 15A-1242 provides that:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

If the trial court abides by and complies with the dictates of N.C.G.S. § 15A-1242, then it "fully satisfies the constitutional requirement that waiver of counsel must be knowing and voluntary." *State v. Thacker*, 301 N.C. 348, 355 (1980).

¶ 32 Another means by which an accused may forego the constitutional right to counsel is the forfeiture of the right to legal representation based upon his or her conduct. "Forfeiture of counsel is separate from waiver because waiver requires a 'knowing and intentional relinquishment of a known right' whereas forfeiture 'results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right.' " *State v. Schumann*, 257 N.C. App. 866, 879 (quoting *State v. Montgomery*, 138 N.C. App. 521, 524 (2000)), *disc. rev. denied*, 370 N.C. 693 (2018). In other words, if a defendant has forfeited his or her right to counsel, then a trial court "is not required to determine, pursuant to [N.C.G.S.] § 15A-1242, that [the] defendant knowingly, understandingly, and voluntarily waived such right before requiring him to proceed *pro se*." *State v. Leyshon*, 211 N.C. App. 511, 518, *appeal dismissed*, 365 N.C. 338 (2011); *see also United States v. Goldberg*, 67 F.3d 1092, 1100 (3d. Cir. 1995) ("Unlike waiver, which requires a knowing and intentional relinquishment of a known right, forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right.").

¶ 33 While the aforementioned appellate cases reflect an extensive line of case law generated by the Court of Appeals regarding forfeiture of the constitutional right to counsel, this Court's opportunity to address the issue of forfeiture has not been as robust. But in *State v. Simpkins*, 373 N.C. 530, 535 (2020), we held that, "in situations evincing egregious misconduct by a defendant, a defendant may forfeit the right to counsel." *Id.* at 535. While we reiterated in *Simpkins* that "[t]he purpose of the right to counsel 'is to assure that in any criminal prosecution, the accused shall not be left to his own devices in facing the prosecutorial forces of organized society,' " *id.* at 535–36 (quoting *Moran v. Burbine*, 475 U.S. 412, 430 (1986) (extraneity omitted)), nonetheless we also recognized that a defendant may in certain circumstances forfeit the right to counsel because there is a need to consider not only the constitutional concerns of the defendant's right to counsel, but also a trial court's obligation to manage its proceedings because in forfeiture situations, "a defendant's actions frustrate the purpose of the right to counsel itself and prevent the trial court from moving the case forward." *Id.* at 536.

¶ 34 Misconduct by a criminal defendant which has been deemed sufficiently egregious to permit a trial court to conclude that the accused

has forfeited the right to counsel occurs in two general circumstances. The first category includes a criminal defendant's display of aggressive, profane, or threatening behavior. *See*, *e.g.*, *id.* at 536–39 (first citing *State v. Montgomery*, 138 N.C. App. 521 (2000) (finding forfeiture where a defendant, *inter alia*, disrupted court proceedings with profanity and assaulted his attorney in court); then citing *State v. Brown*, 239 N.C. App. 510, 519 (2015) (finding forfeiture where a defendant "refus[ed] to answer whether he wanted assistance of counsel at three separate pretrial hearings [and] repeatedly and vigorously objected to the trial court's authority to proceed"); then citing *State v. Joiner*, 237 N.C. App. 513 (2014) (finding forfeiture where a defendant, *inter alia*, yelled obscenities in court, threatened the trial judge and a law enforcement officer, and otherwise behaved in a belligerent fashion); then citing *United States v. Leggett*, 162 F.3d 237 (3d Cir. 1998) (finding forfeiture where a defendant physically attacked and tried to seriously injure his counsel); and then citing *Gilchrist v. O'Keefe*, 260 F.3d 87 (2d Cir. 2001) (same)). This type of misconduct did not occur in the case at bar in that defendant remained polite and calm throughout all of his trial court appearances and during defendant's interactions in trial proceedings with his various appointed attorneys.

¶ 35 The second broad type of behavior which can result in a criminal defendant's forfeiture of the constitutional right to counsel is an accused's display of conduct which constitutes a "[s]erious obstruction of the proceedings." *Simpkins*, 373 N.C. at 538. Examples of obstreperous actions which may justify a trial court's determination that a criminal defendant has forfeited the constitutional right to counsel include the alleged offender's refusal to permit a trial court to comply with the mandatory waiver colloquy set forth in N.C.G.S. § 15A-1242, "refus[al] to obtain counsel after multiple opportunities to do so, refus[al] to say whether he or she wishes to proceed with counsel, refus[al] to participate in the proceedings, or [the] continual hir[ing] and fir[ing of] counsel and significantly delay[ing] the proceedings." *Id.* at 538. In *Simpkins*, we further cited the decisions of the Court of Appeals in *Montgomery* and *Brown*, *inter alia*, as additional illustrations of this second mode of misconduct which can result in the forfeiture of counsel.

¶ 36 In *State v. Montgomery*, the lower appellate court considered potential constitutional error where, just as in the present case, a trial court failed to conduct the waiver of counsel colloquy with an accused pursuant to N.C.G.S. § 15A-1242 and went on to require the defendant to proceed to trial pro se with only the assistance of standby counsel. 138 N.C. App. at 522–23. The defendant changed counsel three times over the

span of thirteen months preceding his original trial date, then insisted on the scheduled date for commencement of his trial that his counsel be allowed to withdraw; however, the trial court denied counsel's motion to withdraw. On the following day of the trial proceedings, the defendant became disruptive and profane, resulting in the trial court's determination that the accused was in contempt of court and consequently would serve thirty days in jail. *Id.* Counsel for the defendant informed the trial court that the defendant had refused to allow key witnesses to meet with him, and the defendant subsequently was found to be in contempt of court at least twice more, including such a determination by the trial court after the defendant assaulted his attorney in court. *Id.* In *Simpkins*, we noted our agreement with the outcome which the Court of Appeals reached in *Montgomery* as we commented that the lower appellate court properly concluded that "[t]hese facts demonstrate forfeiture of the right to counsel because the defendant's actions totally undermine the purposes of the right itself by making representation impossible and seeking to prevent a trial from happening at all." *Simpkins*, 373 N.C. at 536.

¶ 37 In *State v. Brown* the defendant, "when asked whether he wanted a lawyer to represent him, . . . replied that he did not and, alternatively, when the trial court explained that [the] defendant would proceed without counsel, [the] defendant objected and stated he was not waiving any rights." 239 N.C. App. at 518. The defendant maintained his stance of both refusing to accept court-appointed counsel and refusing to waive the right to counsel, while exacerbating the situation in open court by asserting challenges to the trial court's jurisdiction and its authority to proceed. *Id.* at 518–19. The Court of Appeals concluded in *Brown* that the defendant had forfeited his right to counsel because his behavior "amounted to willful obstruction and delay of trial proceedings and, therefore, defendant forfeited his right to counsel." *Id.* at 519. In *Simpkins* this Court observed that "[b]y refusing to make an election as to whether to proceed with counsel and by using the appointment and firing of counsel to delay the proceedings, the defendant in *Brown* completely frustrated his own right to assistance, warranting a finding of forfeiture." 373 N.C. at 537.

¶ 38 The defendant in *Simpkins* was arrested in the course of a traffic stop, during which he refused to produce his driver's license and vehicle registration after a law enforcement officer researched the vehicle's license plate and discovered that the defendant "had a suspended driver's license and a warrant out for his arrest." *State v. Simpkins*, 265 N.C. App. 325, 326 (2019), *aff'd*, 373 N.C. 530 (2020). "[D]uring the proceedings in

district court, the court noted on an unsigned waiver of counsel form that Simpkins refused to respond to the court's inquiry. . . . [A] waiver of counsel form, signed by the trial judge, with a handwritten note indicat[ed] that Simpkins refused to sign the form." *Simpkins*, 373 N.C. at 532. After being convicted of resisting a public officer, failing to carry a registration card, and driving with a revoked license, the defendant appealed to the superior court. *Id.* Throughout the superior court proceedings, the defendant challenged the court's jurisdiction, repeatedly spoke out of turn, argued with and questioned the trial court, and requested appointed counsel "not paid for by the State" but "later acquiesc[ed] when the court suggested he be appointed standby counsel." *Id.* at 539. Upon those circumstances, this Court concluded that "[defendant]'s conduct, while probably highly frustrating, was not so egregious that it frustrated the purposes of the right to counsel itself." *Id.*

B. Application of precedent to defendant's case

¶ 39 Defendant's behavior which is at issue in the present case is markedly different from the conduct exhibited by the respective defendants in *Montgomery* and *Brown*, as well as the actions displayed by the defendant in *Simpkins*, in that the demeanor of defendant here is far short of the degree of egregiousness demonstrated by the defendants in *Montgomery* and *Brown*, and even less than any disruption of the trial proceedings precipitated by the defendant in *Simpkins*, so as to constitute a forfeiture of the constitutional right to counsel. In all of his interactions with the trial court and throughout all of the trial proceedings, defendant did not use any profanity, make any threats, or act in an assaultive, aggressive, or discourteous manner. Defendant did not show any contempt for the trial court's authority; further, defendant incessantly extended deference and respect to the trial court and its determinations regarding defendant's desire for answers to his questions and clarification of his confusion in light of defendant's limited education and understanding. In proceeding pro se, defendant's zealous representation of his own legal interests should not be conflated with disrespect for the trial court, the trial proceedings, the legal system, or the legal process. In light of defendant's limitations which he identified in open court, coupled with the seriousness of the criminal charges which he faced as the time of his trial neared, defendant operated within proper bounds during the trial proceedings to protect his rights and to advocate for himself.

¶ 40 Unfortunately, the dissent fixates upon our determination that defendant was polite and cooperative in defendant's interactions with the trial court in the dissent's attempt to cast our view of defendant's

conduct as the dispositive feature which we have considered in concluding that defendant did not forfeit his right to counsel. The dissent's conveniently narrow focus to justify its position, however, serves to preclude its ability to properly see the broader scope of additional considerations which we realize have been established by appellate case law—namely, an indication of a defendant's knowing, intelligent, and voluntary waiver of the right to counsel; the performance of actions by a defendant to frustrate the trial court's management of its proceedings; and a serious obstruction of trial proceedings by a defendant—in order to fairly and correctly evaluate the articulated standard of the egregiousness of a criminal defendant's conduct with regard to the denial of the individual's protected constitutional right to counsel. Despite the cited appellate case authorities which have addressed the particular facts and circumstances presented in these respective cases, the dissent would set the standard for forfeiture of counsel perilously low.

¶ 41 As we focus more specifically upon the trial court's determination that defendant "forfeited his right to have an attorney to represent him at this trial" due to having "obstructed and delayed these court proceedings" in that defendant asked the trial court "on the day of trial . . . for an attorney to represent him" after defendant had already requested that "[A]ttorneys [Wagoner and Evans] withdraw from representing him," we agree with the evaluation of this circumstance by the Court of Appeals that it did not constitute forfeiture of counsel by defendant. *Harvin*, 268 N.C. at 595. While four of defendant's five court-appointed attorneys had been relieved of their responsibilities to defendant by the trial court during the pendency of his matter,[10] two of them withdrew of their own volition and the remaining two withdrew at defendant's request. The two defense attorneys who filed motions to withdraw as a result of their respective incompatible attorney-client relationships with defendant did so *not* because of defendant's willful tactics of obstruction and delay, as the trial court found, but in the determination of the Court of Appeals, "due to differences related to the *preparation* of [d]efendant's defense" rather than defendant's "refus[al] to *participate* in preparing a defense." *Harvin*, 268 N.C. App. at 595.

¶ 42 Once again, the dissent is riveted by one feature with which it becomes fascinated, to the exclusion of other impactful considerations. The dissent concentrates upon the trial court's findings of fact chronicling defendant's representation by court-appointed attorneys Mason,

10. Defendant's standby trial counsel, who was defendant's fifth court-appointed attorney, remained in this role until the conclusion of the trial.

Nicely, Wagoner, Evans, and standby counsel Mediratta; emphasizes the great deference which is to be afforded to a trial court's findings of fact where constitutional matters such as the right to counsel are reviewed de novo; accentuates the binding nature on appeal of findings of fact if they are supported by competent evidence; and underscores the need for the findings of fact to support the conclusions of law. I agree with *all* of the recitations of these established, unassailable legal principles which the dissent gleans from appellate case decisions. Unfortunately, the dissent's fixation with the trial court's findings of fact which mentioned the five attorneys assigned to aid defendant have prompted the dissent to neglect the importance of the reality that the trial court's conclusions of law only identified the relevance of two court-appointed attorneys for defendant—Wagoner and Evans—in the trial court's determination

> that based upon the defendant's actions from the time that Mr. Merritt Wagoner was appointed to represent him on May 12, 2017; Mr. Shawn Evans was appointed to represent him on September 28, 2017, the defendant requesting that both of these attorneys withdraw from representing him, finds that the defendant has forfeited his right to have an attorney to represent him at this trial. . . .

Id. at 589. In our de novo review of this case's facts and circumstances, the trial court's unequivocal conclusion of law that defendant's request that two court-appointed attorneys withdraw from representing him constituted forfeiture of counsel does not satisfy this Court's determination in *Simpkins* that "[i]f a defendant . . . *continually* hires and fires counsel and significantly delays the proceedings, then a trial court may appropriately determine that the defendant is attempting to obstruct the proceedings and prevent them from coming to completion." *Simpkins*, 373 N.C. at 538 (emphasis added). Although the dissent attempts to inflate the importance of the foundational findings of fact which mention defendant's five court-appointed attorneys and endeavors to deflate the significance of the dispositional conclusions of law which expressly based defendant's forfeiture of counsel upon the withdrawal of two court-appointed attorneys, we recognize that the trial court's conclusions of law cannot be discounted or ignored, and must be evaluated de novo here in conjunction with prevailing precedent.

¶ 43 In sum, defendant's first two changes of counsel, which occurred in his case over the course of two-and-one-half years between his arrest on 9 February 2015 and Wagoner's withdrawal from the case on 28 September 2017, were totally unrelated to defendant's actions. After

the withdrawal of his first two appointed attorneys for their own individual respective reasons, in the subsequent two-and-one-half month period from 28 September 2017 to 12 December 2017, defendant requested the withdrawal of two other appointed attorneys. On 28 December 2017, the trial court completed the statutory waiver inquiry and defendant agreed to represent himself. Afterwards, through three additional hearings and until his trial began on 23 April 2018, defendant, while remaining cooperative and polite, continued to represent himself zealously while attempting to preserve his legal rights and pursue his legal strategies as he attempted to prepare for trial.

¶ 44 We conclude that defendant's actions, up to and including the day on which his trial was scheduled to begin, did not demonstrate the type or level of obstructive and dilatory behavior which allowed the trial court here to permissibly conclude that defendant had forfeited the right to counsel. During the course of his case, defendant did not ever display aggressive, profane, or threatening behavior. Likewise, defendant did not ever act in a manner which constituted "[s]erious obstruction of the proceedings" as exemplified in *Montgomery* and *Brown*, and as further discussed in *Simpkins*. *Simpkins*, 373 N.C. at 538. On the other hand, defendant engaged courteously and constructively with the relevant processes regarding the engagement and withdrawal of appointed counsel throughout his case, complied responsibly with the waiver colloquy undertaken by the trial court on 28 December 2017, and, shortly thereafter, expressly and repeatedly requested the assistance of counsel at trial on the basis that defendant did not consider himself to be in a position to proceed effectively pro se in light of the numerous challenges that he deferentially, though tenaciously, related to the trial court.

III. Conclusion

¶ 45 Defendant did not engage in the type of egregious misconduct that would permit the trial court to deprive defendant of his constitutional right to counsel; therefore, defendant is entitled to a new trial. Accordingly, we affirm the decision of the Court of Appeals which vacated the judgments entered by the trial court upon defendant's convictions and remand this case to the Court of Appeals for further remand to the trial court for a new trial on all charges.

AFFIRMED AND REMANDED.

Justice BERGER dissenting.

¶ 46 Defendant's trial was scheduled to begin on January 28, 2018. On December 8, 2017, Shawn R. Evans, defendant's attorney filed a motion to withdraw. Within the motion, Mr. Evans explained the following about his reasons for withdrawing as counsel: "[d]efendant verbally fired the undersigned counsel on December 8, 2017"; [d]efendant has refused to follow or even consider the advice of counsel and will not communicate with counsel about his case or defense"; "[d]efendant also refused to accept written correspondence from Counsel"; and "[c]ommunication has become impossible." Thus, "there is nothing counsel can do to rehabilitate the attorney client relationship, despite efforts to do the same."

¶ 47 Judge Ebern T. Watson III heard Mr. Evans's motion to withdraw on December 12, 2017. Defendant informed the court that he would like to represent himself but would like "assistance, perhaps." Judge Watson described the role of standby counsel to defendant and stated, "[A]t any point in time, if you chose to then request standby counsel to be made first chair, then that would put you in the position to have to speak to another judge about that at the appropriate time."

¶ 48 Defendant asked the court to appoint another attorney besides Mr. Evans as standby counsel, and Judge Watson appointed Paul Mediratta. Defendant waived his right to counsel in open court; a signed waiver of counsel dated December 28, 2017, is in the record. As a result, defendant's trial was delayed.

¶ 49 On April 3, 2018, Judge Phyllis M. Gorham heard defendant's motion to continue. The court denied the motion, and the court announced that defendant's trial would begin on April 23. During the April 3 hearing, Mr. Mediratta suggested that if defendant wanted him to take over as first chair, he would need to know to "prepare in a different way." Judge Gorham stated, "My understanding from [defendant] today is that he still intends to represent himself." Defendant did not say anything to the contrary.

¶ 50 On the day of trial, April 23, 2018, defendant requested new standby counsel, stating that he "would like to address the situation of ineffective assistance of counsel." Judge Gorham informed defendant that he could not assert ineffective assistance of counsel, as he only had standby counsel and did not have an attorney representing him. Defendant then explained to Judge Gorham that he was "asking for basically someone to replace [Mr. Mediratta] as standby counsel to provide [him] with assistance, someone adequate." Defendant also explained to the trial

court that he was "going to try to proceed without [Mr. Mediratta]," but defendant felt "like [he couldn't] adequately prepare . . . considering the limited time that [he] was given." Judge Gorham then began and completed the colloquy required under N.C. Gen. Stat. § 15A-1242. When the trial court asked Mr. Mediratta whether he was ready to proceed with the case, he responded as follows:

> I am not. Your Honor, I'm appearing as standby counsel. [Defendant] has not been communicating, he is not willing to work with me. Even with the discovery, we've had serious communication problems. I am not prepared to take this case to trial today, Your Honor.

¶ 51 Judge Gorham requested that the State have all the attorneys who were previously appointed to represent defendant appear in court. They all appeared and provided testimony regarding their roles in the case, their opinion of defendant's competency, and their reasons for withdrawing. The court also heard from the State and the defendant on the issues of capacity to proceed and forfeiture of counsel. Defendant stated that he did not believe he could provide himself with "the representation that's required by law."

¶ 52 On capacity to proceed, the court made findings that defendant was competent and that he had "been representing himself in a rational and reasonable manner." The court then made the following findings of fact on the issue of forfeiture:

> Now as to the defendant's request on the day of trial for an attorney, that on February 9, 2015, the Court appointed Bruce Mason through the Public Defender who requested Mr. Mason to represent the defendant. Mr. Mason represented the defendant from February of 2015 to July 25th of 2016. Mr. Mason testified that he had to withdraw because he had other matters that were pressing, and that Mr. Nicely substituted to represent the defendant on or about July 25, 2016. . . .
>
> Mr. Nicely testified and the record reflects that he was appointed on or about July 25, 2016, until May 12, 2017, when Merritt Wagoner was appointed by the Court to represent the defendant. Mr. Nicely testified that he represented him up until the time that he went to work in the Brunswick County District Attorney's Office. . . .

On or about May 12, 2017, the Court appointed Merritt Wagoner to represent the defendant and he represented the defendant until on or about September 28, 2017. Mr. Wagoner testified that he filed a motion to withdraw from the defendant's case at the defendant's request and was allowed to withdraw from the case on September 28, 2017. . . .

That on or about September 28, 2017, the Court allowed Mr. Wagoner to withdraw. The Court appointed Shawn Robert Evans to represent the defendant. Mr. Evans represented the defendant until he was removed from the case December 12, 2017.

. . . .

That on December 12, 2017, Mr. Evans filed a motion to withdraw as counsel for the defendant at the defendant's request. On December 12, 2017, the defendant at that time informed the Court that he wished to represent himself. Judge Watson at that time—the defendant at that time signed a waiver of his right to all counsel. Judge Watson at that time appointed Paul Mediratta as standby counsel.

That on December 28, 2017, this defendant was in front of this judge. At that time, he still intended to waive his right to counsel. This court advised defendant of his waiver of counsel. At that time he still intended to represent himself and he signed a waiver of his right to counsel.

At that time he did not wish to have an attorney, he wished to represent himself. That the defendant has had multiple opportunities to ask the Court for an attorney to represent him on his cases. That on January 28, 2018, the defendant was before this Court and at that time if he wished to have an attorney to represent him, he had the opportunity to ask the Court for an attorney and he did not.

On March 26, 2018, he was before Judge Willey and at that time he had an opportunity to inform the Court of his—to ask the Court for an attorney. He did not.

> On April 3, 2018, the defendant was again before this Court. At that time, he had an opportunity to ask the Court for an attorney, he did not.

¶ 53 Based on these findings of fact, the trial court ultimately determined that defendant forfeited his right to counsel, explaining as follows:

> The Court finds that he had no good cause as of today, the day of trial, to ask this Court for an attorney to represent him. That in fact this Court believes that based upon the defendant's actions from the time that Mr. Merritt Wagoner was appointed to represent him on May 12, 2017; Mr. Shawn Evans was appointed to represent him on September 28, 2017, the defendant requesting that both of these attorneys withdraw from representing him, finds that the defendant has forfeited his right to have an attorney to represent him at this trial; that his actions have been willful and that he has obstructed and delayed these court proceedings.
>
> Therefore[,] the Court finds that the defendant has forfeited his right to have an attorney represent him at this trial. . . .

¶ 54 In sum, defendant's third attorney was appointed on May 12, 2017, and subsequently withdrew in September of that year. His fourth attorney was appointed before he withdrew less than three months later in December, as the January trial loomed. Still, defendant's issues with counsel persisted; on April 23, 2018, defendant's trial date, defendant expressed his displeasure with standby counsel and sought to have that attorney replaced, which would have further delayed trial.

I. Analysis

¶ 55 While constitutional matters, such as the right to counsel, are reviewed de novo, a trial court's findings of fact are afforded great deference. This Court has stated that "[a]n appellate court reviews conclusions of law pertaining to a constitutional matter de novo. The trial court's findings of fact are binding on appeal if they are supported by competent evidence, and they must ultimately support the trial court's conclusions of law." *State v. Bowditch*, 364 N.C. 335, 340, 700 S.E.2d 1, 5 (2010) (cleaned up).

¶ 56 In *State v. Simpkins*, and as the majority does here as well, the Court employed a de novo standard of review, substituting its judgment

for that of the trial court. 373 N.C. 530, 533, 838 S.E.2d 439, 444 (2020). Yet, in footnote 3 of *Simpkins*, the Court recognized that in that case the trial court never concluded that defendant had forfeited his right to counsel; however, we explained that "[i]f it had, and had made findings of fact supporting that conclusion, then those findings would be entitled to deference." *Id.* at 533 n.3, 838 S.E.2d at 444 n.3 (citing *Bowditch*, 364 N.C. at 340, 700 S.E.2d at 5).

¶ 57 Both the majority and dissenting opinions in *Simpkins* showed concern for the deference given to trial courts. Dissenting in *Simpkins*, then-Justice Newby, joined by Justice Morgan, pointed out that "the majority finds facts from a cold record to reverse the trial court's determination," and opined that "[t]he majority's decision undermines the trial court's fundamental authority over the courtroom." *Simpkins*, 373 N.C. at 542, 838 S.E.2d at 450 (Newby, J., dissenting). Further, the dissent explained that "[o]nly the trial courts could evaluate defendant's tone of voice, emotions, body language, and other non-verbal communication cues accompanying his words to assess his sincerity . . . . The trial court could truly understand defendant's actions to know when to protect the court proceedings from undue disruption and delay." *Id.* at 545, 838 S.E.2d at 452 (Newby, J., dissenting).

¶ 58 Here, unlike the trial court in *Simpkins*, the trial court made findings of fact which are entitled to deference. The trial court made appropriate findings that defendant "obstructed and delayed" the court's proceedings. In its findings, the trial court listed numerous times when defendant could have had an attorney represent him rather than use standby counsel and did not, while also detailing the times defendant asked his attorneys to withdraw. The trial court determined these behaviors to be willful and obstructive. These findings were supported by the evidence in the record and are entitled to deference by this Court. Rather than defer to the trial court, the majority makes findings from the record that defendant was "polite" and "cooperative" to conclude that defendant did not forfeit his right to counsel.

¶ 59 The Sixth Amendment and Fourteenth Amendment to the United States Constitution and article I of the North Carolina Constitution guarantee a criminal defendant's right to counsel. There are two circumstances where "a defendant may no longer have the right to be represented by counsel": (1) waiver and (2) forfeiture. *State v. Blakeney*, 245 N.C. App. 452, 460, 782 S.E.2d 88, 93 (2016); *see also State v. Thomas*, 331 N.C. 671, 673, 417 S.E.2d 473, 475 (1992); *Simpkins*, 373 N.C. at 541, 838 S.E.2d at 449.

¶ 60 A defendant may waive his Sixth Amendment right to counsel, but "[w]aiver of the right to counsel and election to proceed pro se must be expressed clearly and unequivocally." *Blakeney*, 245 N.C. App. at 459, 782 S.E.2d at 93 (cleaned up). "Once a defendant clearly and unequivocally states that he wants to proceed *pro se*, the trial court, to satisfy constitutional standards, must determine whether the defendant knowingly, intelligently, and voluntarily waives the right to in-court representation by counsel." *Thomas*, 331 N.C. at 674, 417 S.E.2d at 476. "In order to determine whether the waiver meets that standard, the trial court must conduct a thorough inquiry." *Id.* The inquiry required by N.C.G.S. § 15A-1242 satisfies this constitutional requirement. *Id.*

¶ 61 Forfeiture is the second circumstance in which a defendant may lose his right to Sixth Amendment counsel. *Blakeney*, 245 N.C. App. at 460, 782 S.E.2d at 93. "Unlike waiver, which requires a knowing and intentional relinquishment of a known right, forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right." *State v. Montgomery*, 138 N.C. App. 521, 524, 530 S.E.2d 66, 69 (2000) (quoting *United States v. Goldberg*, 67 F.3d 1092, 1100 (3d Cir. 1995)).

¶ 62 In *Simpkins*, this Court held that "in situations evincing egregious misconduct by a defendant, a defendant may forfeit the right to counsel." 373 N.C. at 535, 838 S.E.2d at 446. Further, this Court recognized that

> in rare circumstances a defendant's actions frustrate the purpose of the right to counsel itself and prevent the trial court from moving the case forward. In such circumstances, a defendant may be deemed to have forfeited the right to counsel because, by his or her own actions, the defendant has totally frustrated that right. If one purpose of the right to counsel is to justify reliance on the outcome of the proceeding, then totally frustrating the ability of the trial court to reach an outcome thwarts the purpose of the right to counsel.

Id. at 536, 838 S.E.2d at 446 (cleaned up). The Court also noted that

> [i]f a defendant . . . continually hires and fires counsel and significantly delays the proceedings, then a trial court may appropriately determine that the defendant is attempting to obstruct the proceedings and prevent them from coming to completion. In that circumstance,

> the defendant's obstructionist actions completely undermine the purpose of the right to counsel.

Id. at 538, 838 S.E.2d at 447.

¶ 63 In this case, defendant forfeited his right to counsel by engaging in "egregious misconduct" which "frustrat[ed] the ability of the trial court to reach an outcome" by repeatedly acquiring and disposing of counsel. *See id.* at 535–36, 838 S.E.2d at 447. Defendant asked his third attorney to withdraw. Then, as the trial date drew near, defendant fired his fourth attorney. Mr. Evans's motion to withdraw paints a different picture from what the majority finds to be a "cooperative" defendant. Finally, as the new date for the trial approached, defendant challenged the assistance he received from standby counsel and sought to have standby counsel replaced. He waived counsel, and then seemed to request counsel again.

¶ 64 As his trial approached, defendant attempted to delay the proceedings by having his counsel removed and replaced. Defendant's "obstructionist actions completely undermine[d] the purpose of the right to counsel"—rather than utilizing counsel to prepare for trial, defendant refused to engage with his attorneys and hired and fired counsel to delay his trial. *See id.* at 538, 838 S.E.2d at 447. As the trial court determined, defendant's conduct rises to the level of egregious conduct that should result in a forfeiture of the right to counsel.

¶ 65 In concluding that defendant did not forfeit his right to counsel, the majority divides forfeiture into two categories, ultimately concluding that neither apply. *Supra* ¶ 34. The first category includes "aggressive, profane, or threatening misbehavior." *Supra* ¶ 34. In this case, because "defendant remained polite and calm throughout all of his . . . appearances and . . . interactions," this category of forfeiture does not apply. *Supra* ¶ 34. The majority's second category requires that defendant seriously obstruct the proceedings. *Supra* ¶ 35 (quoting *Simpkins*, 373 N.C. at 538, 838 S.E.2d at 447). To seriously obstruct proceedings, according to the majority, defendant could engage in any of the following behaviors: refusing to permit a trial court to comply with the mandatory waiver colloquy of N.C.G.S. § 15A-1242; refusing to obtain counsel after multiple opportunities to do so; refusing to participate in the proceedings;[1] or continually hiring and firing counsel which significantly delays the proceedings. *Supra* ¶ 35.

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1. One could argue that the failure of a defendant to engage with counsel appropriately in preparing a defense could constitute a refusal to participate in the proceedings.

¶ 66 The majority ultimately concludes that defendant's conduct here did not rise to the level of forfeiture under these criteria despite facts in the record that defendant delayed the resolution of his matter by refusing to engage with counsel and hiring and firing counsel.

¶ 67 The majority argues that defendant's conduct is "far short" of being so egregious that it obstructed the trial court and constituted a forfeiture of his constitutional right to counsel. *Supra* ¶ 39. The majority supports this conclusion by pointing out that "defendant did not use profanity, make any threats, or act out in an assaultive, aggressive, or discourteous manner" in court. *Supra* ¶ 39.

¶ 68 However, a defendant's civility in the courtroom is not the gatekeeper for forfeiture of counsel as a matter of law. One need not use profanity, threaten anyone, act aggressively, become physically violent with counsel, or act discourteously to delay a trial and frustrate the judicial process. This Court embarks on an unwise path if a defendant may engage in delay tactics so long as he refrains from foul language, violence, and threats of violence in front of a judge.

¶ 69 Next, the majority looks at this case from inception to conclusion, determining that defendant's first two attorneys withdrew for reasons beyond defendant's control. The majority finds that thirty months of the delay were not attributable to defendant. However, the majority brushes past the fact that "[a]fter the withdrawal of his first two appointed attorneys . . . in the subsequent two and one-half month period from 28 September 2017 to 12 December 2017, defendant requested the withdrawal of two other appointed attorneys." *Supra* ¶ 43.

¶ 70 The majority again points out the civility of defendant in noting that from December 28, 2017 to April 23, 2018, defendant remained "cooperative and polite," while "attempting to preserve his legal rights and to pursue his legal strategies as he attempted to prepare for trial." *Supra* ¶ 43. Further, the majority asserts that "defendant engaged courteously and constructively" with the trial court and thus his behavior did not amount to egregious conduct sufficient to forfeit a right to counsel. *Supra* ¶ 44.

¶ 71 Overall, the majority's reliance on its finding of the civility of defendant is misplaced. This focus puts trial courts in an impossible position. Even when a trial court makes findings that a defendant acted willfully and delayed the resolution of his case, as the trial court did here, this Court engages in fact finding from a cold record to conclude that defendant was "polite" and thus did not forfeit counsel. Trial courts cannot be expected to know when enough is enough and are left to wonder how "rude" a defendant must be before he may be found to have forfeited counsel.

II. Conclusion

¶ 72 For this Court to conclude from a cold record that defendant was "polite" and "courteous," and thus entitled to continue to delay his trial by hiring and firing counsel strikes the wrong balance between the rights of criminal defendants and judicial efficiency. While criminal defendants enjoy a right to counsel, they also have the responsibility to cooperate with counsel and not obstruct the judicial process. As the trial court determined, defendant's conduct was sufficiently egregious to forfeit counsel, and I respectfully dissent.

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

STATE OF NORTH CAROLINA
v.
EDGARDO GANDARILLA NUNEZ

No. 255PA20

Filed 4 November 2022

On writ of certiorari pursuant to N.C.G.S. § 7A-32(c) to review an order denying defendant's petition for writ of certiorari entered on 23 September 2019 by Judge Paul C. Ridgeway in Superior Court, Wake County. On 15 December 2020, pursuant to N.C.G.S. § 7A-31(a) and (b), and Rule 15(e)(1) of the North Carolina Rules of Appellate Procedure, the Supreme Court allowed defendant's petition for discretionary review prior to determination by the Court of Appeals. On 30 June 2020, this Court allowed the motion of the defendant in *State v. Diaz-Tomas*, 2022-NCSC-115, to consolidate these cases for oral argument. Heard in the Supreme Court on 6 January 2022.

Joshua H. Stein, Attorney General, by Joseph L. Hyde, Assistant Attorney General, for the State-appellee.

Glenn Gerding, Appellate Defender and Nicholas C. Woomer-Deters, Assistant Appellate Defender, for defendant-appellant.

Erwin Byrd and Law Offices of Amos Tyndall PLLC, by Thomas K. Maher, for North Carolina Advocates for Justice, amicus curiae.

PER CURIAM.

¶ 1 For the reasons stated in *State v. Diaz-Tomas*, 2022-NCSC-115, the superior court's order is affirmed.

AFFIRMED.

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

STATE OF NORTH CAROLINA
v.
HAROLD EUGENE SWINDELL

No. 294A21

Filed 4 November 2022

Criminal Law—jury instructions—possession of a firearm by a felon—requested instruction—justification defense

After defendant's trial for murder and possession of a firearm by a felon, in which the trial court denied defendant's request for a jury instruction on justification as an affirmative defense to the firearm charge and he was subsequently convicted, the Court of Appeals' decision holding that defendant was entitled to the instruction (and to a new trial) was reversed because the evidence—even when viewed in the light most favorable to defendant—indicated that defendant at least negligently placed himself in a situation where he would be forced to engage in criminal conduct. Specifically, defendant went to the scene of a gang fight to rescue his brother, left after breaking up the fight, but then returned and remained at the scene for twenty-five minutes (resulting in the confrontation at issue at trial) despite witnessing the fight, knowing he was in gang territory, hearing his brother express a willingness to fight again, and being threatened by a gang member.

Justice MORGAN dissenting.

Justices HUDSON and EARLS join in this dissenting opinion.

STATE v. SWINDELL

[382 N.C. 602, 2022-NCSC-113]

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 278 N.C. App. 758, 2021-NCCOA-408, finding prejudicial error in the trial court's denial of defendant's request for a jury instruction on justification as a defense to the charge of possession of a firearm by a felon and reversing the judgment entered on 27 November 2018 by Judge Jeffery K. Carpenter in Superior Court, Bladen County. Heard in the Supreme Court on 29 August 2022.

Joshua H. Stein, Attorney General, by Marc X. Sneed, Special Deputy Attorney General, for the State-appellant.

Leslie Rawls for defendant-appellee.

BERGER, Justice.

¶ 1 A Bladen County jury convicted defendant of second-degree murder and possession of a firearm by a felon. Based upon a dissent in the Court of Appeals, the issue before this Court is whether the Court of Appeals erred in determining the trial court committed prejudicial error in denying defendant's request for a jury instruction on justification as a defense to the charge of possession of a firearm by a felon. For the reasons stated below, we reverse the decision of the Court of Appeals.

I. Factual and Procedural Background

¶ 2 On June 5, 2017, defendant was charged with one count of first-degree murder and one count of possession of a firearm by a felon. Defendant's matter came on for trial on November 13, 2018.

¶ 3 At trial, the evidence tended to show that on May 17, 2017, defendant received a phone call from his brother, Darryl Swindell. Darryl "got into it with some guys" to whom he owed drug money. Defendant and his friend Broadus Justice drove to Darryl's residence at Oakdale Apartments and observed three men, Anthony Smith, Bobby Lee, and Cequel Stephens, "beating on" Darryl. Defendant helped break up the fight, and as defendant was pulling the men off his brother, Anthony Smith screamed: "You don't belong out here . . . [t]his is NFL [gang] territory. . . . You really ain't got no business out here anyway." It took defendant about three minutes to break up the fight, after which he left Oakdale Apartments with Darryl and Broadus. The three men returned to defendant's residence.

¶ 4 Darryl received a phone call from his wife who was still at Oakdale Apartments. When she expressed concern for her safety, Darryl asked

defendant to take him back to Oakdale Apartments. Darryl stated that if there was additional trouble, "you know, I'll fight them." Defendant and Broadus drove Darryl back to Oakdale Apartments and then spent approximately twenty-five minutes "hanging out" outside the apartments. Defendant testified that he returned to Oakdale Apartments to ensure that no fights took place.

¶ 5 At some point, defendant noticed Cequel Stephens, Bobby Ratliff, Anthony Smith, and Anthony's brother, Lonnie Smith, walking towards him. Defendant knew of Lonnie and believed him to be "the leader," "pretty brutal," and to have a "bad reputation" for violence. Lonnie asked defendant if he had fought his brother, Anthony, earlier in the day and defendant responded that he was trying to break up a fight. Lonnie then threw several punches at defendant, and a crowd formed as the two began to fight.

¶ 6 Defendant testified that he fell backwards onto the ground during the fight when he slipped on "some form of trash[.]" According to defendant, Anthony Smith yelled at the people in the crowd to "[b]ack the F up." Defendant testified that he observed Broadus and Darryl back away. According to defendant, Broadus is a large man, and defendant thought that Lonnie had a gun when he saw Broadus back away.

¶ 7 At that point, defendant testified that he saw "a gun on the ground," heard Anthony Smith say "[p]op him[,] [p]op him," and heard Darryl say "[w]atch out[,] [h]e got a gun." Defendant testified that he saw Lonnie reach for the gun, at which point defendant "picked it up, basically, and fired."

¶ 8 A witness to the altercation, Shawbreana Thurman, testified that defendant "never f[e]ll" during the fight with Lonnie. Ms. Thurman testified that Cequel Stephens approached the side of Lonnie and appeared as if "he wanted to fight [defendant] too." At that point, defendant drew a gun from the front of his pants and said "[b]ack up." According to Ms. Thurman, Cequel then fled and Lonnie was "trying to run" when defendant shot him. Ms. Thurman testified that Lonnie fell to the ground and defendant approached Lonnie and shot him again.

¶ 9 An autopsy revealed that defendant shot Lonnie two or three times. One projectile entered Lonnie's back and passed through his right kidney and liver before exiting from the left part of his chest. Lonnie also sustained gunshot wounds to both of his thighs, although the medical examiner was unable to determine whether these wounds were the result of one or two shots. The medical examiner testified that the first gunshot wound, which entered Lonnie's back, would have been fatal.

¶ 10 During trial, defendant's counsel requested a jury instruction on justification as a defense to the charge of possession of a firearm by a felon. The trial court denied this request, and defendant's counsel properly preserved an objection to this denial after the jury was instructed on the charges. On November 27, 2018, defendant was convicted of second-degree murder and possession of a firearm by a felon. He was sentenced to prison for 300–372 months and 19–32 months, respectively. Defendant timely appealed to the Court of Appeals.

¶ 11 On appeal, defendant argued that the trial court erred in refusing to provide a jury instruction on justification as an affirmative defense to the charge of possession of a firearm by a felon. *State v. Swindell*, 278 N.C. App. 758, 2021-NCCOA-408, ¶ 10. Relying on this Court's precedent in *State v. Mercer*, 373 N.C. 459, 838 S.E.2d 359 (2020), a divided panel of the Court of Appeals reversed defendant's conviction and remanded for a new trial after determining that defendant was entitled to a jury instruction on justification and that the trial court committed prejudicial error by denying defendant's requested instruction. *Swindell*, 278 N.C. App. 758, 2021-NCCOA-408, ¶ 24. The State appealed based upon a dissent.

¶ 12 The State contends that the Court of Appeals erred in reversing defendant's conviction and remanding for a new trial based upon its conclusion that the trial court had committed prejudicial error in denying defendant's request for a jury instruction on justification. Specifically, the State argues that the evidence in this case does not support all four elements of the justification defense as required by *Mercer*. We agree and conclude that the Court of Appeals erred in reversing defendant's conviction and remanding for a new trial.

II. Analysis

¶ 13 It is unlawful for "any person who has been convicted of a felony to . . . possess, or have in his custody, care, or control any firearm." N.C.G.S. § 14-415.1(a) (2021). However, this Court has held that "in narrow and extraordinary circumstances," the affirmative defense of "justification may be available as a defense to a charge under N.C.G.S. § 14-415.1." *State v. Mercer*, 373 N.C. 459, 463, 838 S.E.2d 359, 362 (2020).

¶ 14 The affirmative defense of justification "does not negate any element of" the offense charged, and "a defendant has the burden to prove his or her justification defense to the satisfaction of the jury." *Id.* at 463, 838 S.E.2d at 363. There are four elements that a defendant must show to establish justification as a defense to a charge pursuant to

N.C.G.S. § 14-415.1:

> (1) that the defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury; (2) that the defendant did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) that the defendant had no reasonable legal alternative to violating the law; and (4) that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

Id. at 464, 838 S.E.2d at 363 (quoting *U.S. v. Deleveaux*, 205 F.3d 1292, 1297 (11th Cir. 2000)).

¶ 15 "To resolve whether a defendant is entitled to a requested instruction, we review de novo whether each element of the defense is supported by the evidence, when taken in the light most favorable to defendant." *Id.* at 462, 838 S.E.2d at 362 (citing *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988)). "If a 'request be made for a special instruction which is correct in itself *and supported by evidence*, the court must give the instruction at least in substance.' " *State v. Lamb*, 321 N.C. 633, 644, 365 S.E.2d 600, 605–06 (1988) (emphasis added) (quoting *State v. Hooker*, 243 N.C. 429, 431, 90 S.E.2d 690, 691 (1956)).

¶ 16 Thus, to determine whether the trial court erred in denying defendant's request for a justification instruction, we analyze whether the evidence, taken in the light most favorable to defendant, establishes the elements of the defense as set forth in *Mercer*. However, because the dissenting opinion in the Court of Appeals concluded that the second and third elements of the defense were not supported by the evidence, we limit our analysis to these elements only.[1] *See Clifford v. River Bend Plantation, Inc.*, 312 N.C. 460, 463, 323 S.E.2d 23, 25 (1984) ("When 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."); *see also* N.C. R. App. P. 16(b).

¶ 17 The second element of the justification defense requires that a defendant show he "did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct . . . ."

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1. Here, there is no dispute that defendant violated N.C.G.S. § 14-415.1. The parties are in agreement that defendant was a convicted felon at the time he possessed and used a firearm to fatally shoot Lonnie Smith.

Mercer, 373 N.C. at 464, 838 S.E.2d at 363. Defendant has failed to meet his burden.

¶ 18 Defendant first visited Oakdale Apartments on May 17 because his brother "got into it with some guys." After breaking up a "fight" in which his brother was being beaten by three men, defendant was warned by Anthony Smith that he did not "belong out here" and that the area was "NFL territory." Having been warned that he was not welcome in this gang's territory and having very recently been involved in a physically violent confrontation with members of that gang, defendant acted reasonably in immediately leaving the neighborhood and returning home.[2]

¶ 19 However, defendant's decision to return to Oakdale Apartments shortly after the initial altercation, and his decision to remain there for twenty-five minutes, are of a different character. Even if we assume that defendant's temporary return to such a volatile environment was reasonable, his decision to remain was not. Given the prior physical confrontation, threats, and his brother's indication that he was willing to fight again, defendant reasonably should have known that his continued presence in the area could be the catalyst for another confrontation. Defendant's justification for returning, namely, to prevent more fights from happening, only proves that he knew and appreciated the fact that another fight was possible. Based on defendant's own testimony, taken in the light most favorable to him, we conclude that defendant at least negligently "place[d] himself in a situation where he would be forced to engage in criminal conduct . . . ." *Mercer*, 373 N.C. at 464, 838 S.E.2d at 363.

¶ 20 Because a defendant bears the burden to establish each element of the justification defense, and because we conclude that defendant failed to meet his burden as to the second element, we need not analyze the third element. Thus, the evidence at trial, taken in the light most favorable to defendant, failed to support each element of the requested jury instruction on justification as a defense to the charge of possession of a firearm by a felon.

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2. We do not suggest that members of the alleged gang had the right to impose any limitation on defendant's presence in an area in which he had a lawful right to be. However, the warning is properly considered as a factor under the totality of the circumstances when determining whether defendant "negligently or recklessly place[d] himself in a situation where he would be forced to engage in criminal conduct." *Mercer*, 373 N.C. at 464, 838 S.E.2d at 363.

III. Conclusion

¶ 21 For the foregoing reasons, we conclude that defendant was not entitled to a jury instruction on justification as a defense to the charge of possession of a firearm by a felon, and we reverse the decision of the Court of Appeals.

REVERSED.

Justice MORGAN dissenting.

¶ 22 I respectfully dissent from the opinion of this Court's majority, choosing instead to align with the Court of Appeals majority in its determination that the trial court committed prejudicial error in declining to give defendant's requested instruction to the jury on the affirmative defense of justification upon the jury's consideration of defendant's alleged commission of the offense of possession of a firearm by a felon. From my perspective, the lower appellate court correctly concluded that defendant satisfied the four factors which we established in *State v. Mercer*, 373 N.C. 459 (2020), and as adopted from the federal appeals court case of *United States v. Deleveaux*, 205 F.3d 1292 (11th Cir. 2000), based upon the evidence presented in support of the justification defense which must be viewed in the light most favorable to defendant. *See State v. Swindell*, 278 N.C. App. 758, 2021-NCCOA-408, ¶ 22. Although my distinguished colleagues in the majority here have cited the pertinent law and have recognized the appropriate standards, nonetheless they have failed to apply the controlling law and the governing standards to reach the correct outcome in this case. Because I consider defendant to have satisfactorily fulfilled the requirements of the *Mercer* factors through the presentation of evidence which was required to be taken in the light most favorable to him, I would conclude that defendant was entitled to have the trial court instruct the jury on the existence of justification as an affirmative defense to the alleged offense of possession of a firearm by a felon. Accordingly, I am of the opinion that the decision of the Court of Appeals in this case should be affirmed, therefore reversing the judgment of the trial court for its commission of prejudicial error and remanding the matter for a new trial.

¶ 23 This Court's decision in *Mercer* offers significant and persuasive guidance through the salient principles which it provides. "When determining whether the evidence is sufficient to entitle a defendant to jury instructions on a defense or mitigating factor, courts must consider the evidence in the light most favorable to defendant." *Mercer*, 373 N.C.

at 464 (quoting *State v. Mash*, 323 N.C. 339, 348 (1988)). "[T]his Court reviews de novo whether each element of the defense is supported by substantial evidence when taken in the light most favorable to the defendant." *State v. Meader*, 377 N.C. 157, 2021-NCSC-37 ¶ 15 (citing *Mash*, 323 N.C. at 348). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Franklin*, 327 N.C. 162, 171 (1990).

¶ 24 Further indication of the significance and persuasiveness of *Mercer* here is this Court's inaugural recognition, by way of our decision in *Mercer* "that in narrow and extraordinary circumstances, justification may be available as a defense to a charge under N.C.G.S. § 14-415.1," *Mercer*, 373 N.C. at 463, the statute which defendant in the present case allegedly violated. "[L]ike other affirmative defenses, a defendant has the burden to prove his or her justification defense to the satisfaction of the jury." *Id.* This Court announced in *Mercer*

> that to establish justification as a defense to a charge under N.C.G.S. § 14-415.1, the defendant must show:
>
> (1) that the defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury; (2) that the defendant did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) that the defendant had no reasonable legal alternative to violating the law; and (4) that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

Id. at 464 (quoting *Deleveaux*, 205 F.3d at 1297).

¶ 25 While the majority decided that it was only necessary to conclude, in its estimation, that defendant here did not meet his burden of proof to establish the second *Mercer* factor, and therefore, the majority determined that it was unnecessary to address the third *Mercer* factor which the dissenting opinion in the Court of Appeals also opined was inadequately shown by defendant in addition to the second *Mercer* factor, I take the position that the evidence adduced at trial was sufficiently ample to require the trial court to give defendant's requested instruction on the affirmative defense of justification to the jury because defendant satisfied his burden of proof to warrant the jury instruction.

¶ 26 Defendant testified at trial that he received a telephone call from his brother in which defendant's brother expressed concern and anticipation

that the brother "was expecting some guys to do something—something to him" at the apartment complex where defendant's brother and his wife resided. As a result of this telephone conversation, defendant went to his brother's apartment complex and, when defendant arrived, saw that his brother "was on the ground" and that three or four men "were already beating on him." Defendant helped to break up the fight, which defendant subsequently learned concerned debt for illegal drugs. Defendant and his brother were able to depart the area and to proceed safely to defendant's residence without further incident. Subsequently, the wife of defendant's brother contacted her husband by telephone to ask him to return home to her and their children. Consequently, defendant transported his brother, along with a friend, by vehicle back to the apartment complex where the fight had earlier occurred, accompanying his brother "just to make sure that no fights happened." Upon arrival, defendant did not see any of the men who had been involved in the altercation with defendant's brother, and defendant testified that the situation was "peaceful." While defendant engaged in conversation with several residents of the apartment complex, defendant then saw Lonnie Smith approaching him. Smith was accompanied by James Ratliff, Bobby Lee Ratliff, Cequel Stephens, and Anthony Smith—the four men who were involved in the prior fisticuffs with defendant's brother. Defendant had known Lonnie Smith for a number of years, was aware that Lonnie Smith was the brother of Anthony Smith, and was familiar with Lonnie Smith's reputation as a "pretty tough guy" and as "being pretty brutal." Defendant testified that Lonnie Smith made a comment to defendant about defendant's physical interaction with Lonnie Smith's brother Anthony Smith during the fight earlier in the day, to which defendant responded that defendant was just "trying to diffuse the situation" and "was just trying to break up the—break up a fight." Defendant said to Lonnie Smith during their exchange, "I didn't jump on your brother."

¶ 27 Each testimonial account rendered by witnesses at trial, including the version given by defendant, indicated that Lonnie Smith initiated physical contact with defendant by striking defendant upon the side of defendant's face or head. A brief fight ensued, with Lonnie Smith punching defendant several times in the face and head region of defendant's body. Defendant testified that defendant "slipped" and "fell backwards," landing on the ground. While seated on the ground, defendant saw Anthony Smith and Cequel Stephens approach defendant from defendant's right side. Next, according to defendant's testimony at trial, he heard his brother call out a warning to defendant about Anthony Smith, exclaiming, "Watch out. He got a gun." Defendant noticed a firearm on the ground in front of him, about one foot or two feet away. As he saw

the gun, defendant hurried to grab it before Lonnie Smith could get it, particularly after defendant heard Anthony Smith yell the phrase "pop him," which defendant interpreted to mean that Lonnie Smith was being encouraged by his brother Anthony Smith to shoot defendant. Defendant testified that he was in "complete fear" as he observed Lonnie Smith also reaching for the gun which lay on the ground, because defendant was afraid that Lonnie Smith would shoot defendant with the gun if Lonnie Smith obtained it. Upon successfully gaining possession of the gun before Lonnie Smith did, defendant testified that defendant wanted to acquire the weapon despite his inability to lawfully possess a firearm as a convicted felon because defendant could not think of "any other reasonable way to get out of th[e] situation." Defendant testified that he then shot Lonnie Smith because defendant believed that defendant was about to be killed. Defendant then returned to his vehicle, drove away from the apartment complex, and contacted authorities to report the incident.

¶ 28 Recounting the evidence presented by defendant in support of his claimed affirmative defense of justification and viewing the evidence in the light most favorable to defendant, I regard the evidence to be sufficient to support defendant's requested jury instruction on justification as an affirmative defense to the alleged crime of possession of a firearm by a felon. The evidence is amply substantial, in my view, to qualify as relevant evidence that a reasonable mind *might* accept as adequate to support a conclusion. *Franklin*, 327 N.C. at 171. Likewise, I evaluate this evidence at issue to satisfactorily fulfill the four factors which this Court delineated in *Mercer* in order to warrant a defendant's entitlement to the jury instruction on justification.

¶ 29 In light of the foregoing analysis, I would affirm the well-reasoned decision of the Court of Appeals in this case, thereby reversing the trial court's judgments entered against defendant and remanding the case so that defendant could receive a new trial.

Justices HUDSON and EARLS join in this dissenting opinion.

STATE v. HOOPER

[382 N.C. 612, 2022-NCSC-114]

STATE OF NORTH CAROLINA
v.
IVAN GERREN HOOPER

No. 382A21

Filed 4 November 2022

1. Appeal and Error—preservation of issues—criminal case—denied request for jury instruction—self-defense—request constituted objection

In a prosecution for assault on a female and other related charges, defendant properly preserved for appellate review his challenge to the trial court's refusal to instruct the jury on self-defense where, although defendant expressly agreed to the trial court's planned instructions during the charge conference and again after the court finished instructing the jury, defendant's request for a self-defense instruction—which he made right before the court instructed the jury—constituted an "objection" for purposes of Appellate Rule 10(a)(2). Further, defendant's failure to file a pre-trial notice of his intent to assert self-defense as required under N.C.G.S. § 15A-905(c)(1) did not preclude him on appeal from challenging the trial court's refusal to instruct on self-defense, where the court's decision did not appear to be the imposition of a discovery sanction under section 15A-910(a)(4) and, even if that had been the court's intent, it failed to take the procedural steps necessary to justify such a sanction.

2. Assault—on a female—self-defense—jury instruction—sufficiency of evidence

In a prosecution for assault on a female and other charges arising from an altercation between defendant and his child's mother, in which the woman shot defendant after he choked and punched her, the trial court did not err by denying defendant's request for a jury instruction on self-defense where the evidence—which presented multiple versions of what happened during the altercation—did not indicate that defendant assaulted the woman based on a perceived need to protect himself against unlawful force on the woman's part. Even under the version of events most favorable to defendant—where the woman brandished the gun, defendant asked her to relinquish the weapon, she fired one shot, a scuffle ensued, and then the woman shot defendant's leg—there was no evidence that the woman pointed the gun in the absence of provocation by defendant,

especially given testimony stating the woman feared that defendant would kill her if she did not have the gun.

Chief Justice NEWBY concurring in part and dissenting in part.

Justices BERGER and BARRINGER join in this concurring in part and dissenting in part opinion.

Justice EARLS concurring in part and dissenting in part.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 279 N.C. App. 451, 2021-NCCOA-500, finding no error after appeal from a judgment entered on 7 March 2018 by Judge Stanley L. Allen in Superior Court, Rockingham County. Heard in the Supreme Court on 23 May 2022 in session in the Old Burke County Courthouse in the City of Morganton pursuant to N.C.G.S. § 7A-10(a).

Joshua H. Stein, *Attorney General*, *by Jasmine McGhee*, *Special Deputy Attorney General*, *and Zachary Ezor*, *Solicitor General Fellow*, *for the State-appellee.*

Glenn Gerding, *Appellate Defender*, *by John F. Carella*, *Assistant Appellate Defender*, *for defendant-appellant.*

ERVIN, Justice.

¶ 1 The issue before the Court in this case is whether a request made by defendant's trial counsel that the trial court instruct the jury concerning the law of self-defense that was made after the conclusion of the jury instruction conference and prior to the delivery of the trial court's instructions to the jury properly preserved defendant's challenge to the trial court's refusal to deliver the requested instruction for purposes of appellate review and whether the trial court erred by denying defendant's request for the delivery of a self-defense instruction. The Court of Appeals held that defendant had waived the right to appellate review of the trial court's refusal to deliver a self-defense instruction on the basis of the invited error doctrine and that the trial court did not commit prejudicial error by refusing to deliver the requested self-defense instruction. After careful consideration of defendant's challenge to the trial court's judgment in light of the applicable law, we modify and affirm the Court of Appeals' decision.

I. Background

A. Substantive Facts

1. State's Evidence

¶ 2 On either 1 or 2 March 2017, Ashley Thomas; her uncle Wilbert Reaves; the son that she and defendant had had together; and defendant attended the funeral of defendant's great aunt. Following the funeral, the group went to lunch, after which defendant asked to be taken to a store at which he could obtain cigarettes and purchase bullets, with Ms. Thomas denying both having provided defendant with any assistance in procuring ammunition and having had any conflict with defendant on that day. Similarly, Mr. Reaves testified that the group had gone to lunch together after the funeral, that Ms. Thomas had taken defendant to get cigarettes, and that defendant had asked "a couple of times [for Ms. Thomas] to purchase him bullets."

¶ 3 Ms. Thomas stated she and her son had visited defendant at the Reidsville Quality Inn on 4 March 2017 in response to a request that defendant had made to Ms. Thomas at her mother's residence that Ms. Thomas come to talk with him and allow him to visit with their son. Upon her arrival at defendant's hotel room, Ms. Thomas testified that she placed her son on the bed and took a seat in a chair by the door. After Ms. Thomas refused defendant's request to get out of the chair, defendant pulled up a chair "directly in front of [her] face" and began to question Ms. Thomas about her relationship with an individual with whom defendant assumed that Ms. Thomas had become romantically involved. When Ms. Thomas asked defendant "[i]s this really why you called me here?," defendant responded, "[w]ell honestly, I don't care. I don't want you anyway, so you can really dismiss yourself." At that point, Ms. Thomas rose to pick up her son and leave.

¶ 4 As Ms. Thomas rose, defendant "g[ot] in [her] face," pushed her, and began to punch her in the face and stomach before hurling her onto the bed as he continued to hit her face. As defendant did this, Ms. Thomas screamed for him to stop and to refrain from acting in this manner in front of their son. Ms. Thomas testified that, as he struck her, defendant stated that "[n]obody is going to be able to save you, but [your son], and even he is not going to be able to save you today. I'm going to kill you, bitch." At that point, Ms. Thomas claimed that she feared for her life.

¶ 5 After Ms. Thomas "nudged" defendant, the two of them stood up, at which point defendant threw Ms. Thomas on the floor and choked her with his hands. As she was being choked, Ms. Thomas kneed defendant

in the groin, causing him to stand up, at which point she ran to the mirror in the rear of the hotel room "to see what [defendant] actually did to [her]." Ms. Thomas did not attempt to leave the hotel room given that defendant had forcibly detained her when she had attempted to depart from his presence at an earlier time.

¶ 6 After examining herself in the mirror, Ms. Thomas grabbed her phone and attempted to return a call that she had received from Mr. Reaves during the course of defendant's assault so that she could let him know that she needed help. As she did so, defendant knocked the phone out of Ms. Thomas' hand, causing the phone to hit the wall of the hotel room and the screen to shatter. Although the phone remained functional, the damage that it had sustained made it difficult for Ms. Thomas to make things out on the screen.

¶ 7 Eventually, Ms. Thomas' attention was drawn to the television stand, on which she saw a firearm. After she picked upon the weapon, defendant grabbed their son and held him between Ms. Thomas and himself. At that point, Ms. Thomas told her son to come to her and informed defendant that, in the event that he refused to let her leave with her son, she had no choice except to shoot. As a result of the fact that defendant acted as if he was going to lunge towards her, Ms. Thomas pulled the trigger at a time when the gun was pointed at the floor, at which point defendant exclaimed, "I've been shot," grabbed her hand, and asked that she relinquish possession of the weapon, a step that Ms. Thomas refused to take. However, when defendant asked "if I let it go, can I leave with you?," Ms. Thomas acquiesced in that request. As soon as defendant released her hand, however, Ms. Thomas grabbed their son, ran to her automobile, returned to her home, and contacted the Reidsville Police Department. Subsequently, Ms. Thomas told Mr. Reaves that "she had shot [defendant] because he was beating her."

¶ 8 Although a friend had given her a .22 caliber pistol about a week prior to 4 March 2017, Ms. Thomas denied having had that weapon in her possession at the time of her encounter with defendant at the Quality Inn. In addition, Ms. Thomas denied that she had had any intention of harming defendant at the time that she went to meet him at the hotel. On the other hand, Ms. Thomas had previously informed one of her friends that she had a weapon and had insinuated that she would use it to protect herself from defendant.

¶ 9 At approximately 5:15 p.m. on 4 March 2017, Ms. Thomas called the Reidsville Police Department to report an alleged assault that had allegedly occurred at the Quality Inn. Ms. Thomas told Officer Scott Brown

of the Reidsville Police Department that she had gotten into an altercation with defendant, who is the father of her three-year-old son. At the time of her conversation with Officer Brown, Ms. Thomas' face and neck were visibly bruised and swollen.

¶ 10 In the course of discussing the incident with Officer Brown, Ms. Thomas stated that, at defendant's request, she had visited him at a room that he had rented at the Quality Inn and that, following her arrival, defendant began questioning her about her relationship with another man. After defendant began acting in an aggressive manner, the two of them became involved in an altercation. Ms. Thomas stated that, when defendant attempted to obtain possession of a firearm that was already in the hotel room, she reached for it as well. According to Ms. Thomas, the gun discharged in the ensuing struggle, at which point Ms. Thomas returned home with their child. Officer Brown retrieved a Rossi .357 Magnum revolver that contained two spent shell casings and four live rounds from Ms. Thomas' home.

¶ 11 At the time that Sergeant Kenneth Mitchell of the Reidsville Police Department spoke with Ms. Thomas, he observed that she had bruises across the bridge of her nose and eyes, bruises and red marks around both sides of her neck, a laceration on her cheek, and scratches running down her chest. On 8 March 2017, Sergeant Mitchell examined the hotel room in which the incident between defendant and Ms. Thomas had occurred and identified the location at which a projectile had hit the floor. In view of the fact that the carpet in the hotel room had been placed directly over a concrete floor, there was no way to identify the path at which that projectile had been travelling. Sergeant Mitchell determined that, based upon information that had been provided to him by Ms. Thomas and the damage that he observed to the bedspread, the box springs, and the floor, a bullet had ricocheted off the floor and struck defendant in his left calf. According to Sergeant Mitchell, the fact that both participants in the altercation admitted to having had their hands on the firearm and that no fingerprints had been detected on the weapon made it pointless for him to have any testing performed upon any of the blood that had been detected in the hotel room.

¶ 12 At 11:50 p.m. on 5 March 2017, Officer Jason Joyce of the Reidsville Police Department responded to a report that an individual who had sustained a gunshot wound had come to Cone Health Annie Penn Hospital. Defendant, who was the person in question, told Officer Joyce that Ms. Thomas had brought their child to the Quality Inn, that their conversation had turned into an argument, and that Ms. Thomas had pulled out a gun and shot him in the leg. According to defendant, after Ms.

Thomas pulled out the firearm, he had advanced towards Ms. Thomas for the purpose of taking the gun from her, and that, as he did so, the two of them struggled, she shot him, and then she left the hotel room with their child.

2. Defendant's Evidence

¶ 13 The mother of one of defendant's sons, Marcelina Machoca, testified that, prior to 4 March 2017, she and Ms. Thomas had communicated using electronic messages after Ms. Machoca had driven defendant to the hospital to visit his ailing great aunt. Ms. Machoca testified that Ms. Thomas was upset that Ms. Machoca and defendant had been around each other; that Ms. Thomas had stated that defendant "was just using [Ms. Machoca]"; and that Ms. Thomas and defendant were trying to get back together. Ms. Thomas told Ms. Machoca "that [defendant] had been going to [Ms. Thomas'] house almost every morning" and that, "since he was hanging around [Ms. Machoca,] . . . he needed to stop coming around [Ms. Thomas'] house because one of her guy friends had [given] her a gun, and if he came around again, she wouldn't have no problem using it." Marsena Jones, a cousin to both Ms. Thomas and defendant, testified that defendant did not own a firearm and that Ms. Thomas had not mentioned either shooting defendant or otherwise discharging a firearm during her conversations with Ms. Jones.

¶ 14 Felicia Donnell, who was defendant's mother and one of Ms. Thomas' acquaintances, testified that she had contacted Ms. Thomas on 3 March 2017 for the purpose of communicating defendant's request that Ms. Thomas come to see him at the Quality Inn. At that time, Ms. Donnell had advised Ms. Thomas against seeing defendant because "their relationship is like nitro and glycerin." In addition, Ms. Donnell testified that she had received a call from Ms. Thomas after 4:00 p.m. on 4 March 2017 and that Ms. Thomas had seemed to be very upset during that conversation. According to Ms. Donnell, Ms. Thomas stated that, "I shot him. I shot your son"; that Ms. Thomas claimed to have gone to see defendant; that Ms. Thomas had feared for her life during their encounter; and that Ms. Thomas had possessed a firearm during her encounter with defendant. In addition, Ms. Donnell testified that Ms. Thomas told her that she pointed the gun at defendant, that she had asked defendant if he was going to kill her, that defendant had responded by demanding that Ms. Thomas give him the weapon, and that a shot had been fired. According to Ms. Donnell, Ms. Thomas had stated that, after the shot had been fired, a scuffle had ensued, that another shot had been fired during the scuffle, and that defendant had looked at his leg. Ms. Thomas also told Ms. Donnell that defendant had choked and punched her during the

interval between the two shots and had exclaimed, "you shot me, you shot me," after the firing of the second shot. Ms. Thomas did not tell Ms. Donnell how she had come to be in possession of the firearm from which the shot that struck defendant had been fired. After speaking with Ms. Thomas, Ms. Donnell called defendant and told him that he needed to go to the hospital to seek medical treatment. On the following day, defendant told Ms. Donnell that he was going to the hospital and knew that he would be placed under arrest once he did that.

B. Procedural History

¶ 15 On 10 April 2017, the Rockingham County grand jury returned bills of indictment charging defendant with assault by strangulation, communicating threats, assault on a female, interfering with an emergency communication, and possession of a firearm by a felon. On 5 February 2018, the Rockingham County grand jury returned a bill of indictment charging defendant with having attained the status of a habitual felon.

¶ 16 The charges against defendant came on for trial before the trial court and a jury at the 5 March 2018 criminal session of Superior Court, Rockingham County. At the jury instruction conference that the trial court conducted with counsel for both the State and defendant, the trial court described the instructions that it intended to deliver to the jury without making any mention of the issue of self-defense. After some discussion, neither the prosecutor nor defendant's trial counsel expressed any objections to the trial court's proposed jury instructions or requested the trial court to deliver any additional instructions. On the following morning, however, the following proceedings occurred:

> THE COURT: All right, Sheriff, bring the jury in, please.
>
> [DEFENSE COUNSEL]: Your Honor, may I have just one moment?
>
> THE COURT: Yes.
>
> . . . .
>
> [DEFENSE COUNSEL]: Your Honor, I think it's reasonable based on information that has been presented that the . . . self-defense component in this particular jury instruction would be appropriate, as well, the 308.40 to be elicited here in this particular matter.
>
> Also secondly with that, Your Honor, I do have a case to hand up. I think that would be reflective of

> that, as well, based on the evidence that has been presented at this time.
>
> THE COURT: Okay. Well, you said yesterday you were satisfied with the instructions as the Court had outlined is going to give.
>
> [DEFENSE COUNSEL]: And Your Honor, *(inaudible)* back where we started in that component, so I wanted to make sure that *(inaudible)* would be appropriate, Your Honor.
>
> THE COURT: And you want to be heard further?
>
> [DEFENSE COUNSEL]: Yes, Your Honor. Simply as we look at this particular matter, the *State v. Jennings*, ... This particular matter . . . reflects to a slightly more serious [crime]—it's a murder allegation, but still when it reflects what takes place with a self-defense proposition, that should be provided to the jurors. The piece here, I think, that falls in line with this particular matter is that obviously whatever has been charged, whatever was done, the fact still remains that this particular matter that's in front of the Court today, it is most appropriate that this particular test here for self-defense should be appropriated—is appropriate and should be provided to the jurors.
>
> With that, the actions that were done, the timeliness of the actions, all of those components are supported and would be prudent to make sure that the jurors are aware of this particular action that will be most beneficial, I think, in this matter.

In response, the prosecutor argued that defendant had not given the statutorily-required notice that he intended to rely upon self-defense and that the record evidence did not support the delivery of a self-defense instruction given defendant's failure to testify in his own behalf. At the conclusion of the colloquy initiated by defendant's request for the delivery of a self-defense instruction, the trial court stated that:

> Well, I have to agree with the State. . . . [T]here was no notice given of affirmative defense . . . and because we don't know what was in . . . [d]efendant's mind because he exercised his constitutional right not to

> testify, we don't know what he was thinking or what he believed. And there's been no other evidence that . . . anything was done in self-defense. The request for a self-defense instruction is denied.
>
> Bring the jury in, please, Sheriff.

At the conclusion of the trial court's jury instructions, the trial court inquired whether there were "any requests for additional instructions or for corrections or any objections to the instructions given to the jury" without drawing any further objections, proposed corrections, or requests for additional instructions from counsel for either the State or defendant.

¶ 17 On 7 March 2018, the jury returned verdicts convicting defendant of assault by strangulation, communicating threats, assault on a female, and interfering with an emergency communication and acquitting defendant of possession of firearm by a felon. At the conclusion of a separate proceeding conducted on the same date, the jury found that defendant had attained the status of an habitual felon. Based upon these jury verdicts, the trial court consolidated defendant's convictions for judgment and sentenced defendant to a term of sixty-five to ninety months imprisonment. On 12 August 2019, defendant filed a petition seeking the issuance of a writ of certiorari authorizing review of the trial court's judgment, with the Court of Appeals having issued the requested writ of certiorari on 27 August 2019.

C. Court of Appeals Decision

¶ 18 In seeking relief from the trial court's judgment before the Court of Appeals, defendant argued that the trial court had erred by rejecting his request that the jury be instructed that it could acquit defendant on the grounds of self-defense given that the record contained evidence that would have allowed the jury to make such a determination. *State v. Hooper*, 279 N.C. App. 451, 2021-NCCOA-500, ¶¶ 12–13. In rejecting defendant's challenge to the trial court's judgment, the Court of Appeals held that "[d]efendant's failure to object [to the planned instructions] during the charge conference or after the instructions were given to the jury, along with his express agreement during the charge conference and after the instructions were given to the jury, constitutes invited error" and "waive[d] any right to appellate review concerning the invited error, '*including plain error review*,' " *id.* ¶ 18 (quoting *State v. Barber*, 147 N.C. App. 69, 74 (2001)), with the Court of Appeals having reached this result in reliance upon *State v. White*, 349 N.C. 535 (1998), in which we held that:

> [c]ounsel . . . did not object when given the opportunity either at the charge conference or after the charge had been given. In fact, defense counsel affirmatively approved the instructions during the charge conference. Where a defendant tells the trial court that he has no objection to an instruction, he will not be heard to complain on appeal.

Hooper, ¶ 19 (quoting *White*, 349 N.C. at 570). According to the Court of Appeals, "[t]he tardiness of [d]efendant's purported request followed by his counsel's express agreement following the jury instructions as given waive[d] appellate review." *Hooper*, ¶ 19. In addition, the Court of Appeals held that, even if the trial court had erred by rejecting defendant's request for the delivery of a self-defense instruction, defendant could not "carry his burden to show the court's refusal of his requested instruction 'had a probable impact on the jury's [decision to find] that defendant was guilty,' " *id.* ¶ 20 (quoting *State v. Lawrence*, 365 N.C. 506, 517 (2012)), given that, "where the evidence against a defendant is overwhelming and uncontroverted[, a] defendant cannot show that, absent the error, the jury probably would have returned a different verdict" and given that the evidence against defendant in this case was both "overwhelming and uncontroverted," *Hooper*, ¶¶ 21, 23 (first alteration in original) (quoting *State v. Chavez*, 378 N.C. 265, 2021-NCSC-86, ¶ 13). As a result, the majority at the Court of Appeals held that no error had occurred in the proceedings leading to the entry of the trial court's judgment.

¶ 19 In a dissenting opinion, Judge Murphy expressed disagreement with his colleagues' conclusion that defendant had invited any error that the trial court might have committed in the course of refusing to instruct the jury concerning the law of self-defense and concluded that the trial court had committed prejudicial error by refusing to instruct the jury that it was entitled to acquit defendant on the basis of self-defense. *Hooper*, ¶¶ 25–26, 50 (Murphy, J., dissenting). In support of his determination that defendant had not invited the trial court's alleged error in refusing to instruct the jury concerning the law of self-defense and that defendant had properly preserved this issue for purposes of appellate review, Judge Murphy pointed to *State v. Rowe*, 231 N.C. App. 462 (2013), which held that "a request for instructions constitutes an objection" as required by N.C. R. App. P. 10(a)(2). *Hooper*, ¶ 35 (Murphy, J., dissenting) (quoting *Rowe*, 231 N.C. App. at 469). As a result of the fact that "[d]efendant [had] specifically requested the trial court to include a jury instruction on [self-defense] and argued that point before the [trial] court," Judge Murphy had "properly preserved this issue for appellate

review." *Hooper*, ¶ 37 (Murphy, J., dissenting) (third and fourth alterations in original) (quoting *Rowe*, 231 N.C. App. at 469–70).

¶ 20 In Judge Murphy's view, his colleagues' reliance upon *White* was misplaced given that, in *White*, the defendant's trial counsel had specifically agreed with the language that he later claimed to have been erroneous. *Hooper*, ¶ 38 (Murphy, J., dissenting) (citing *White*, 349 N.C. at 568–70). In addition, Judge Murphy noted that the defendant's trial counsel in *White* had failed to object to the challenged trial court instruction both before and after that instruction had been delivered, *Hooper*, ¶ 38 (Murphy, J., dissenting) (citing *White*, 349 N.C. at 568–70), while, in this case, defendant's request for the delivery of a self-defense instruction had been rejected by the trial court, *Hooper*, ¶ 39 (Murphy, J., dissenting).

¶ 21 Finally, Judge Murphy concluded that the record contained sufficient evidence to support the delivery of the requested self-defense instruction and that the trial court's refusal to deliver that instruction constituted error. *Hooper*, ¶ 47 (Murphy, J., dissenting). In Judge Murphy's opinion, the evidence, when taken in the light most favorable to defendant, tended to show that Ms. Thomas had fired a shot before the altercation began and that defendant reasonably believed "that the conduct [was] necessary to defend himself . . . against [Ms. Thomas'] imminent use of unlawful force." *Hooper*, ¶¶ 46–47 (Murphy, J., dissenting) (first alteration in original) (quoting N.C.G.S. § 14-51.3(a) (2019)). Finally, arguing in reliance upon *State v. Gomola*, 257 N.C. App. 816 (2018), Judge Murphy would have held that the trial court's failure to deliver the requested self-defense instruction "deprived the jury of the ability to decide the issue of whether [defendant's] participation in the altercation was lawful," *Hooper*, ¶ 48 (Murphy, J., dissenting) (quoting *Gomola*, 257 N.C. App at 823), a determination which, if made, would "have compelled the jury to return a verdict of 'not guilty,' especially in light of the jury finding that [d]efendant was not guilty of possession of a firearm," *Hooper*, ¶ 49 (Murphy, J., dissenting). Defendant noted an appeal from the Court of Appeals' decision to this Court based upon Judge Murphy's dissent.

II. Analysis

A. Standard of Review

¶ 22 This Court reviews decisions of the Court of Appeals for the purpose of determining whether they contain any error of law. N.C. R. App. P. 16(a). In deciding whether a defendant is entitled to the delivery of a requested jury instruction, we conduct a de novo review for the purpose

of determining "whether each element of the defense is supported by the evidence, when taken in the light most favorable to defendant." *State v. Mercer*, 373 N.C. 459, 462 (2020) (citing *State v. Mash*, 323 N.C. 339, 348 (1988)).

B. Preservation and Invited Error

¶ 23 **[1]** In seeking to persuade us that he had properly preserved his challenge to the trial court's refusal to instruct the jury concerning the law of self-defense for purposes of appellate review, defendant begins by noting that N.C. R. App. P. 10(a)(2) provides that:

> [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, stating distinctly that to which objection is made and the grounds of the objection; provided that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

According to defendant, "a request for an instruction 'constitutes an objection,' " citing *Rowe*, 231 N.C. App. at 469. In addition, defendant directs our attention to Rule 21 of the General Rules of Practice for the Superior and District Courts, which requires that a trial court provide counsel with an opportunity to lodge objections at the jury instruction conference and at the conclusion of the trial court's jury instructions and prior to the beginning of the jury's deliberations, N.C. Gen. R. Prac. Super. & Dist. Ct. 21 ¶¶ 1–2, and authorizes the trial court to recall the jury and correct any of the instructions that it had previously delivered, *id.* ¶ 3. Defendant asserts that, since his trial counsel had requested the delivery of a self-defense instruction "before the trial court charged the jury" and "before the trial court provided the required second opportunity for 'additional instructions or for corrections or any objections to the instructions given' " at the conclusion of its instructions to the jury, defendant had properly preserved his challenge to the trial court's failure to instruct the jury concerning the issue of self-defense for purposes of appellate review.

¶ 24 In addition, defendant asserts that the majority at the Court of Appeals had erred by concluding that he had invited the trial court's allegedly erroneous refusal to instruct the jury concerning the law of self-defense, arguing that the Court of Appeals had "incorrectly relied on this Court's decision in *State v. White* . . . as support for [its] conclusion."

In defendant's view, our decision in *White* is not controlling with respect to this issue given that, in this case, defendant actually requested the delivery of a self-defense instruction, "whereas in *White*, the trial court instructed the jury based on the instruction defense counsel requested and the proposed language they agreed to." *Hooper*, ¶ 39.

¶ 25 On the other hand, the State contends that defendant failed to comply with N.C.G.S. § 15A-905(c)(1), which requires that a defendant:

> [g]ive notice to the State of the intent to offer at trial a defense of . . . self-defense. Notice of defense as described in this subdivision is inadmissible against the defendant. Notice of defense must be given within 20 working days after the date the case is set for trial pursuant to G.S. 7A-49.4, or such other later time as set by the court.

N.C.G.S. § 15A-905(c)(1) (2021). According to the State, defendant's failure to give notice of his intention to assert a claim of self-defense "did not preserve the issue of a self-defense instruction and, in fact, invited error." In addition, the State contends that the Court of Appeals correctly concluded that defendant's failure to object to the trial court's failure to deliver a self-defense instruction during the jury instruction conference or at the conclusion of the instructions that the trial court actually delivered to the jury constituted invited error, with "a defendant who [has] invite[d an] error ha[ving] waived his right to all appellate review concerning the invited error, including plain error review," quoting *Barber*, 147 N.C. App. at 74, and citing *State v. Roseboro*, 344 N.C. 364, 373 (1996). The State further contends that, even if defendant had not invited the trial court's alleged error, "it is still unpreserved and . . . only plain error review would be available," citing *Lawrence*, 365 N.C. at 512, with plain error review not having been available to defendant in this case "because [he] did not specifically and distinctly contend plain error in the trial court's decision."

¶ 26 A careful review of the record satisfies us that the defendant properly preserved his challenge to the trial court's failure to deliver a self-defense instruction for purposes of appellate review. As has already been noted, the literal language of N.C. R. App. P. 10(a)(2) states that "[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." The record in this case clearly reflects that defendant requested the trial court to instruct the jury concerning the issue of whether he was entitled to be acquitted

on the grounds of self-defense prior to the point in time at which the trial court instructed the jury. In addition, this Court clearly held almost four decades ago in *Wall v. Stout*, 310 N.C. 184 (1984), that the purpose sought to be achieved by N.C. R. App. P. 10(a)(2)[1] "is met when a request to alter an instruction has been submitted and the trial judge has considered and refused the request," with the trial court's "refusal at the charge conference to instruct in accordance with [a party's] proposals represent[ing] the judge's final decision" and with "further objections [being] not only useless but wasteful of the court's time."[2] *Id.* at 189; *see also State v. Smith*, 311 N.C. 287, 290 (1984) (stating that the defendant was not required "to repeat his objection to the jury instructions, after the fact, in order to properly preserve his exception for appellate review"); *Rowe*, 231 N.C. App. at 469–70 (holding that, given that the defendant had "specifically requested the trial court to include a jury instruction on simple assault and argued that point before the court, he had properly preserved the instructional issue in question for purposes of appellate review). As a result, given that defendant requested the trial court to instruct the jury concerning the issue of self-defense "before the jury retire[d] to consider its verdict," N.C. R. App. P. 10(a)(2), and given that the trial court expressly denied defendant's request for the delivery of the requested self-defense instruction,[3] defendant's challenge to the

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1. *Wall* refers to this rule as N.C. R. App. P. 10(b)(2) throughout its text. *See generally Wall*, 310 N.C. 184. However, as a result of an amendment that became effective 1 October 2009, the provisions of former N.C. R. App. P. 19(b)(2) were transferred to N.C. R. App. P. 10(a)(2). As a result, decisions construing former N.C. R. App. P. 10(b)(2) are equally applicable to current N.C. R. App. P. 10(a)(2).

2. As was the case in *Wall*, nothing in the record before us in this case provides any basis for a conclusion that defendant's trial counsel had a change of heart concerning the appropriateness of the requested self-defense instruction. Instead, the trial court in this case heard and rejected defendant's request for an additional instruction, making what happened in this case indistinguishable from the series of events that this Court held in *Wall* to be sufficient to preserve the rejection of a party's request for instructions for purposes of appellate review.

3. The fact that defendant requested the delivery of a self-defense instruction makes this case fundamentally different from *White*, in which the trial court agreed to give a peremptory instruction with respect to non-statutory mitigating circumstances at defendant's capital sentencing hearing, defendant agreed to the language that the trial court proposed and "neither suggested nor provided any other language either orally or in writing," "the trial court instructed the jury exactly as it had indicated" that it would, and defendant "did not object" after the conclusion of the trial court's instructions. *White*, 349 N.C. at 569. In other words, the trial court in *White* had no basis for believing that defendant objected to the manner in which it had instructed the jury concerning non-statutory mitigating circumstances while the trial court in this case was presented with and rejected a request for the delivery of a self-defense instruction.

trial court's allegedly erroneous refusal to deliver a self-defense instruction to the jury was properly preserved for purposes of appellate review even though defendant did not raise the self-defense issue at the jury instruction conference, expressed initial agreement with the trial court's proposed instructions, and did not lodge any sort of objection to the instructions that the trial court actually gave at the conclusion of the trial court's final charge to the jury.[4]

¶ 27 The fact that defendant failed to provide notice of his intent to rely upon self-defense in advance of trial as required by N.C.G.S. § 15A-905(c)(1) does not call for a different result with respect to this issue. Subsection § 15A-905(c)(1) appears in the statutory provision setting out a criminal defendant's obligation to make disclosure to the State during the discovery process. A party's failure to comply with his, her, or its discovery-related obligations is addressed in N.C.G.S. § 15A-910, which sets out a number of sanctions that can be imposed in the event that a party fails to provide discovery in accordance with applicable law, including the entry of "other appropriate orders." N.C.G.S. § 15A-910(a)(4) (2021). However, before "finding any sanctions appropriate, the court shall consider both the materiality of the subject matter and the totality of the circumstances surrounding an alleged failure to comply with [the applicable discovery-related statutes] or an order issued pursuant to" those statutes, N.C.G.S. § 15A-910(b), and, in the event that it deems the imposition of sanctions appropriate, "it must make specific findings justifying the imposed sanction," N.C.G.S. § 15A-910(d). Assuming, without in any way deciding, that a trial court is authorized to refrain from instructing the jury concerning an affirmative defense of which the defendant was required to provide notice pursuant to N.C.G.S. § 15A-905(c)(1) as a discovery sanction on the basis that such a determination constitutes an "other appropriate order" authorized by N.C.G.S. § 15A-910(a)(4), the record contains no indication that the trial court considered the totality of the surrounding circumstances in reaching that decision as required by N.C.G.S. § 15A-910(b) or made the required "findings justifying

4. Our determination that defendant properly preserved his challenge to the trial court's refusal to instruct the jury concerning the law of self-defense suffices to dispose of the State's argument that defendant invited the trial court's alleged error. As N.C.G.S. § 15A-1443(c) provides, "[a] defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." N.C.G.S. § 15A-1443(c) (2021). As a result, a finding of invited error must hinge upon a party's affirmative request for a specific action upon the part of the trial court rather than a mere failure to lodge an objection to an action that the trial court actually took.

the imposed sanction," N.C.G.S. § 15A-910(d).[5] Instead, the trial court appears to have rejected defendant's request for the delivery of the requested self-defense instruction based upon a determination that the record evidence, when taken in the light most favorable to defendant, would not have permitted a jury to acquit defendant on the grounds of self-defense. As a result, given that the trial court's decision to reject defendant's request for a self-defense instruction does not appear to have resulted from the imposition of a discovery sanction and given that the trial court did not take the procedural steps necessary to justify the imposition of such a sanction upon defendant in this case, we hold that defendant is not precluded from advancing his challenge to the trial court's refusal to instruct the jury concerning the law of self-defense based upon defendant's noncompliance with N.C.G.S. § 15A-905(c)(1) and will proceed to address the merits of the trial court's decision to refrain from delivering the requested self-defense instruction.

C. Sufficiency of the Evidence to Support a Self-Defense Instruction

¶ 28 **[2]** In seeking to persuade us that the record developed before the trial court in this case supports the delivery of the requested self-defense instruction, defendant asserts that the record contains conflicting evidence concerning the nature of the events that occurred in the hotel room on the night of the alleged assault. Among other things, defendant notes that Ms. Donnell testified that Ms. Thomas had told her that "a shot was fired, a scuffle happened, and then a fire, . . . and then he looked down at his leg." In addition, defendant points out that Ms. Machoca testified that Ms. Thomas had acquired a gun prior to her visit to defendant's hotel room and that the jury had acquitted defendant of being a felon in possession of a firearm. Defendant asserts that, even though "there may be contradictory evidence from the State or discrepancies in the defendant's evidence, . . . the trial court must charge the jury on self-defense where there is evidence that the defendant acted in self-defense," citing

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5. The trial court's ruling upon defendant's request for instructions consisted of nothing more than a notation that no notice had been given, that "we don't know what was in the [d]efendant's mind because he exercised his constitutional right not to testify," that defendant's failure to testify precluded any knowledge of "what he was thinking or what he believed," and that "there's been no other evidence that . . . anything was done in self-defense." Although the trial court did ask a number of questions during the colloquy that it conducted with counsel for the State and defendant, none of these questions was mentioned in the trial court's statement of the basis for its decision, which clearly focuses upon the merits of defendant's request for a self-defense instruction and does not reflect the weighing process that is contemplated by N.C.G.S. § 15A-910(b) and (d).

State v. Coley, 375 N.C. 156, 163 (2020), with it being "within the purview of the jury to resolve any conflicts in the evidence presented at trial and to render verdicts upon being properly instructed by the trial court," *Coley*, 375 N.C. at 163.

¶ 29 The State, on the other hand, appears to contend that the record precluded the delivery of a self-defense instruction in this case given that the undisputed evidence tended to show that defendant was the initial aggressor or that this fact precluded a finding of prejudicial error. In the State's view, the record provides ample "reason for the victim to need to defend herself against [d]efendant," including the existence of evidence tending to show that defendant made unwelcome visits to the home of Ms. Thomas' mother "almost every day" that were accompanied by "repeated verbal threats," evidence tending to show that defendant's mother had to serve as an intermediary between defendant and Ms. Thomas, and evidence tending to show that Ms. Thomas felt it necessary to bring Mr. Reaves to the funeral of defendant's great aunt funeral to assist in her interactions with defendant. Aside from the presence of evidence "indicative of an abusive relationship with [d]efendant," the State notes that the record contains evidence concerning defendant's history of inflicting physical abuse upon his romantic partners. In other words, the State contends that defendant failed to "present[ ] competent and sufficient evidence to warrant the self-defense instruction," quoting *Coley*, 375 N.C. at 162, and that the delivery of a self-defense instruction would not have changed the ultimate outcome at defendant's trial given the strength of the State's evidence and the fact that the wound that defendant sustained was not inflicted with a firearm like the one that Ms. Thomas obtained prior to 4 March 2017. As a result, since the evidence against defendant was both "overwhelming and uncontroverted," *Hooper*, ¶ 21 (quoting *Chavez*, ¶ 13), the State contends that any error that the trial court might have committed in refusing defendant's request for the delivery of a self-defense instruction could not have prejudiced defendant's chances for a more favorable outcome at trial.

¶ 30 According to N.C.G.S. § 14-51.3(a),

> [a] person is justified in using force, except deadly 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). As the relevant statutory language indicates, a defendant is not entitled to rely upon self-defense unless he or she (1)

reasonably believes (2) that his or her use of force (3) is necessary (4) to defend himself or herself against the imminent use (5) of unlawful force by another. As this Court has previously stated, "[t]he reasonableness of a [defendant's] belief is to be determined by the jury from the facts and circumstances as they appeared to him at the time" he used force against his adversary. *State v. Gladden*, 279 N.C. 566, 572 (1971).

¶ 31 A careful review of the record persuades us that the record contains no evidence tending to show that defendant assaulted Ms. Thomas for the purpose of defending himself from the use of unlawful force on the part of Ms. Thomas. Accepting, as we are required to do, the truthfulness of Ms. Donnell's recitation of the statements that Ms. Thomas made to her and the truthfulness of Officer Joyce's recitation of the statements that defendant made to him, the record contains nothing more than an assertion that an initial (and possibly a second) gunshot occurred before defendant assaulted Ms. Thomas.[6] In order for defendant to have been entitled to have used force against Ms. Thomas in self-defense, the record would have had to have contained evidence that the force that defendant used against Ms. Thomas stemmed from an attempt to protect himself against an unlawful use of force on the part of Ms. Thomas. However, even if the first gunshot occurred before defendant assaulted Ms. Thomas, the record contains no indication that defendant assaulted for the purpose of defending himself from any unlawfully assaultive conduct on the part of Ms. Thomas.

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6. A careful study of the record reveals no evidence that any of the gunshots described in the testimony of the various witnesses resulted from any sort of unprovoked intentional act of the type that would be necessary to support a valid claim of self-defense. For example, defendant told Officer Joyce that, after Ms. Thomas pulled out the firearm, he advanced upon her in order to take the gun away, at which point she shot him during the ensuing struggle. As a result, in this version of the relevant events, Ms. Thomas did nothing more than display a firearm before defendant attacked her, with there being no evidence that Ms. Thomas pulled out the gun before the argument between the two of them began or any evidence that Ms. Thomas made any menacing gesture or uttered any threats before defendant's assault began. Similarly, Ms. Donnell testified that Ms. Thomas stated that she had pointed the gun at defendant, that she asked defendant if she was going to kill her, that a shot had been fired, and that another shot was fired during the scuffle. Aside from the fact that nothing in Ms. Donnell's description of Ms. Thomas' statements indicates that either gunshot had been fired intentionally, Ms. Donnell's testimony reflects that, at the time that Ms. Thomas pointed the gun at defendant, she asked defendant if he was going to kill her, a set of circumstances that is inconsistent with the sort of attack upon the defendant or one of defendant's relatives or friends that occurred in cases like *State v. Greenfield*, 375 N.C. 434, 442 (2020); *State v. Lee*, 370 N.C. 671, 672 (2018); and *State v. Moore*, 363 N.C. 793, 797–98 (2010). As a result, we do not believe that the evidence, even when taken in the light most favorable to defendant, supports an inference that defendant only attacked Ms. Thomas after she intentionally fired a weapon at him.

¶ 32 Although Ms. Donnell described Ms. Thomas as having stated that she and defendant were standing in front of one another; that Ms. Thomas "had [the gun] pointed at" defendant and asked defendant if he was going to kill her; that defendant had requested that Ms. Thomas give him the gun; that each of them repeated the statements that they had just made; and that "a fire, . . . a bullet happened again, and [defendant] looked down at his leg," causing her to realize that she had "shot him in the leg" and although Officer Joyce testified that defendant claimed to have attempted to take a gun away from Ms. Thomas, none of this evidence tended to show that defendant assaulted Ms. Thomas for the purpose of protecting himself from any unlawful use of force on the part of Ms. Thomas. Put another way, the record does not contain any evidence tending to show that Ms. Thomas threatened defendant or that Ms. Thomas pointed a gun toward defendant in the absence of any provocation on his part prior to his assault upon her. On the contrary, the statements that Ms. Donnell attributed to Ms. Thomas reflect a fear on the part of Ms. Thomas that defendant would kill her. In the absence of any affirmative evidence tending to show that defendant assaulted Ms. Thomas based upon a perceived need to defend himself against unlawful attack, the trial court was not required to instruct the jury concerning the issue of self-defense. As a result, the trial court did not err by refusing to instruct the jury that it was entitled to acquit defendant of assault on the grounds of self-defense.

III. Conclusion

¶ 33 Thus, for the reasons set forth above, we hold that defendant properly preserved his challenge to the trial court's refusal to instruct the jury concerning the law of self-defense for purposes of appellate review and that the trial court did not err by refusing to deliver defendant's requested self-defense instruction. As a result, the Court of Appeals' decision is modified and affirmed.

MODIFIED AND AFFIRMED.

Chief Justice NEWBY concurring in part and dissenting in part.

¶ 34 On the merits, this case asks whether the trial court erred when it denied defendant's request for a jury instruction on self-defense. Were this issue preserved, I agree with the majority that the trial court did not err. Because defendant failed to preserve this issue for appellate review, however, this Court should not reach the merits. Further, defendant failed to provide timely notice to the State of his intent to offer a defense of self-defense as required by N.C.G.S. § 15A-905(c). The trial

court, therefore, appropriately exercised its discretion under N.C.G.S. § 15A-910(a) in denying defendant's requested instruction. Accordingly, I respectfully concur in part and dissent in part.

¶ 35 "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, stating distinctly that to which objection is made and the grounds of the objection . . . ." N.C. R. App. P. 10(a)(2). A trial court must give the parties or their attorneys an opportunity to object to the jury instructions (1) at the charge conference, and (2) "[a]t the conclusion of the charge and before the jury begins its deliberations." Gen. R. Prac. Super. & Dist. Cts. 21. This Court has held that "[w]here a defendant tells the trial court that he has no objection to an instruction," both at the charge conference and after the trial court charges the jury, "he will not be heard to complain on appeal." *State v. White*, 349 N.C. 535, 570, 508 S.E.2d 253, 275 (1998).

¶ 36 Relying on the decision in *Wall v. Stout*, the majority contends that the objection requirement in Rule 10(a)(2) is achieved whenever "a request to alter an instruction has been submitted and the trial judge has considered and refused the request." *Wall v. Stout*, 310 N.C. 184, 189, 311 S.E.2d 571, 574 (1984). This conclusion, however, ignores the possibility that a party's other conduct, including the timing of any request, could render a mere request inadequate to preserve an objection.

¶ 37 In *Wall*, the trial court held a charge conference after the conclusion of all evidence and described the pattern jury instructions it intended to use. *Id.* at 188, 311 S.E.2d at 574. At that time, the plaintiffs' counsel objected and asked the trial court to remove various portions of the proposed instructions. *Id.* The trial court overruled the request and instructed the jury as described at the charge conference. *Id.* The plaintiffs' counsel made no additional objections to the instructions after the trial court's jury charge concluded. *Id.* After the jury returned a verdict for defendant, the plaintiffs appealed seeking a new trial based on the jury instructions used by the trial court. *See id.* at 190, 311 S.E.2d at 575. Before turning to the merits of the plaintiffs' argument, this Court considered whether the plaintiffs properly preserved this issue for appellate review. *See id.* at 187–89, 311 S.E.2d at 574–75.

¶ 38 This Court noted that "[i]n *most* instances" the purpose of Rule 10(a)(2) is "met when a request to alter an instruction has been submitted and the trial judge has considered and refused the request" because it will usually be "obvious that further objection at the close of instructions would be unavailing." *Id.* at 189, 311 S.E.2d at 574 (emphasis added). This reasoning held true in *Wall* because

> [o]n the basis of the record . . . it appear[ed] plain that the trial judge's refusal at the charge conference to instruct in accordance with plaintiffs' proposals represented the judge's final decision and further objections would have been not only useless but wasteful of the court's time. As such, we hold that plaintiffs' failure to object following the giving of the jury instructions does not foreclose review by this Court of plaintiffs' exceptions . . . .

Id. at 189, 311 S.E.2d at 575. The plaintiffs in *Wall* objected to the trial court's proposed instructions at the first opportunity required by Rule 21 of the General Rules of Practice—the charge conference—and thereafter did nothing to indicate they had changed their position. Thus, this Court concluded, based on those facts, that no further action was required to preserve plaintiffs' objection. *Id.*

¶ 39 Here, unlike in *Wall*, defendant's conduct rendered his singular request for a self-defense instruction insufficient to preserve the issue for appellate review. First, at the Rule 21 charge conference, defendant affirmatively agreed to the trial court's proposed jury charge that did not include a self-defense instruction. The following morning just before the trial court instructed the jury, defendant orally requested that the trial court add a self-defense instruction to the jury charge. At that point, the trial judge asked both defendant and the State for argument on whether it should grant defendant's request and explained its reasoning for denying the request. Defendant did not note an objection to the trial court's denial, and the trial court proceeded to charge the jury without the requested self-defense instruction. Finally, once the jury charge was complete, defendant told the trial court that he had no "requests for additional instructions or for corrections or . . . objections to the instructions given to the jury."

¶ 40 Based on this sequence of events, it was not "obvious" at the conclusion of the jury charge whether defendant objected or assented to the trial court's instructions. *Wall*, 310 N.C. at 189, 311 S.E.2d at 574. It is entirely possible that the reason defendant did not object to the trial court's denial of his request and subsequently agreed with the trial court's jury instructions is because defendant changed his mind upon hearing the trial court's reasoning for denying his request and agreed that a self-defense instruction was improper. Accordingly, *Wall* is distinguishable and should not control the outcome of this case. Instead, this case is controlled by *White* where we said that "defense counsel . . . did not object when given the opportunity either at the charge conference

or after the charge had been given," so any issue regarding a requested instruction is not preserved. *See White*, 349 N.C. at 570, 508 S.E.2d at 275. Thus, defendant's request for a self-defense instruction was, without more, insufficient to preserve the issue for appellate review.[1]

¶ 41 Additionally, the majority concludes that the trial court could not have denied defendant's requested instruction under the notice requirement of N.C.G.S. § 15A-905(c) because it failed to first consider the "totality of the circumstances," as required by N.C.G.S. § 15A-910(b). The record does not support this conclusion.

¶ 42 During discovery, a criminal defendant must "[g]ive notice to the State of the intent to offer at trial a defense of . . . self-defense." N.C.G.S. § 15A-905(c)(1) (2021). If a defendant fails to satisfy this or other discovery requirements, the trial court may: "(1) [o]rder the party to permit the discovery or inspection, or (2) [g]rant a continuance or recess, or (3) [p]rohibit the party from introducing evidence not disclosed, or (3a) [d]eclare a mistrial, or (3b) [d]ismiss the charge, with or without prejudice, or (4) [e]nter other appropriate orders." N.C.G.S. § 15A-910(a) (2021). Before ordering any remedy under subsection (a), the trial court must "consider both the materiality of the subject matter and the totality of the circumstances surrounding [the] alleged failure to comply with" the notice requirement and "make specific findings justifying the imposed sanction." N.C.G.S. § 15A-910(b), (d) (2021).

¶ 43 However, "[t]he choice of which sanction to apply, if any, rests in the sound discretion of the trial court." *State v. Gladden*, 315 N.C. 398, 412, 340 S.E.2d 673, 682 (1986); *see also State v. Dukes*, 305 N.C. 387, 390, 289 S.E.2d 561, 563 (1982) ("This statute . . . is permissive and not mandatory, and the remedy for failure to provide discovery rests within the trial court's discretion."). Accordingly, the trial court's selected remedy under N.C.G.S. § 15A-910(a) "is not reviewable absent a showing of an abuse of that discretion." *Gladden*, 315 N.C. at 412, 340 S.E.2d at 682. We reverse a trial court's decision for abuse of discretion "only upon a showing that its ruling [is] so arbitrary that it could not have been the result of a reasoned decision." *Id.* (citing *State v. Hayes*, 314 N.C. 460, 471, 334 S.E.2d 741, 747 (1985)).

¶ 44 Both parties agree that defendant failed to provide the required notice of his intent to offer a defense of self-defense. As such, the trial

1. Because defendant failed to preserve his objection to the trial court's jury instructions under Rule 10(a)(2) of the Rules of Appellate Procedure, it is unnecessary to address whether defendant's conduct constituted invited error.

court acted within its statutory discretion to enter any "appropriate order" under N.C.G.S. § 15A-910(a) when it denied defendant's request for a self-defense instruction. Further, the trial court complied with the requirements of N.C.G.S. § 15A-910(b) and (d) before denying defendant's request. Once defendant requested a self-defense instruction, the trial court asked defendant and the State for argument on whether it should grant the request and then provided its basis for denying the request on the record.

¶ 45 Specifically, the trial court considered the fact that no notice was given to the State as required by N.C.G.S. § 15A-905(c), the State objected to the inclusion of the instruction, defendant agreed to the proposed instructions the previous day, the evidence at trial did not support the inclusion of a self-defense instruction, and the jury could not properly assess what defendant believed at the time of the incident because defendant chose not to testify. *See* N.C.P.I.–Crim. 308.40 (2020) (providing that a standard self-defense instruction includes consideration of what the defendant believed at the time he or she acted with force). The trial court recorded these findings orally on the record.

¶ 46 These actions satisfy the analysis required by N.C.G.S. § 15A-910(b) and (d). Since the trial court weighed various factors related to the parties' conduct and the evidence at trial, it did not abuse its discretion under N.C.G.S. § 15A-910(a) in denying defendant's request for a self-defense instruction.

¶ 47 Nonetheless, were the Court to reach the question of whether the trial court erred in refusing to give a self-defense instruction, I agree with the majority that the trial court did not err. Accordingly, I concur in part and dissent in part.

Justices BERGER and BARRINGER join in this concurring in part and dissenting in part opinion.

Justice EARLS concurring in part and dissenting in part.

¶ 48 "This Court has consistently held that 'where competent evidence of self-defense is presented at trial, the defendant is entitled to an instruction on this defense, as it is a substantial and essential feature of the case, and the trial judge must give the instruction even absent any specific request by the defendant.' " *State v. Coley*, 375 N.C. 156, 159 (2020) (quoting *State v. Morgan*, 315 N.C. 626, 643 (1986)). "In determining whether a defendant has presented competent evidence sufficient to support a self-defense instruction, we take the evidence as true and

consider it in the light most favorable to the defendant." *Coley*, 375 N.C. at 159. Applying this well-established standard to the facts of this case, it was error for the trial court to fail to instruct the jury on self-defense. To hold otherwise, the majority advances an astounding proposition: Even if, as Mr. Hooper's evidence suggests, Ashley Thomas had grabbed a gun, pointed it at him, fired it, and he then tried to wrestle the gun away from her, there is nevertheless no evidence "tending to show that defendant assaulted Ms. Thomas based upon a perceived need to defend himself against unlawful attack." The notion that the jury could not reasonably infer that Mr. Hooper feared for his life after being shot in his hotel room, a place he had a legal right to be, goes against common sense and well-established precedent. Therefore, I concur with the majority that this issue was preserved for review on appeal, but I dissent from the conclusion that Mr. Hooper's evidence in this case did not justify the submission of a self-defense instruction to the jury. The jury was free to believe the State's witnesses over Mr. Hooper's, but they needed to know the law of self-defense to properly assess his guilt.

A. Defendant's Evidence

¶ 49 Though Mr. Hooper did not testify at his trial, his statement regarding the incident, made just hours afterwards, was in evidence. He told law enforcement that Ms. Thomas, the alleged victim, entered his hotel room with their son on 4 March 2017. Ms. Thomas and Mr. Hooper had a conversation that turned into an argument, at which point Ms. Thomas pulled out a gun that she had received from a friend. Mr. Hooper explained that he approached her to take the gun away from her, she fired a shot, a struggle ensued, and she shot the gun a second time, this time hitting Mr. Hooper in the leg.

¶ 50 Mr. Hooper's mother, Felicia Donnell, corroborated this version of events. She testified that Ms. Thomas called her after the incident took place to inform Ms. Donnell that she shot Ms. Donnell's son. According to Ms. Donnell, Ms. Thomas explained that she pointed a gun at Mr. Hooper and fired a shot after Mr. Hooper demanded that she give him the weapon. This shot did not hit Mr. Hooper. Ms. Thomas told Ms. Donnell that a scuffle then ensued during which she fired a second shot. Ms. Thomas said that this second shot hit Mr. Hooper's leg. Ms. Donnell testified that her understanding was that there was no physical altercation between Ms. Thomas and Mr. Hooper until after the first shot was fired. She further testified that the assault took place during the interval between shots, when Mr. Hooper choked and punched Ms. Thomas.

¶ 51 Another one of Mr. Hooper's witnesses and the mother of one of his sons—Marcelina Machoca—testified that she communicated with

Ms. Thomas before the incident took place. Ms. Machoca explained that Ms. Thomas was upset that Mr. Hooper had spent time with Ms. Machoca because Mr. Hooper and Ms. Thomas were having conversations about getting back together. According to Ms. Machoca, during this conversation, Ms. Thomas told her that Ms. Thomas had a gun and would "have no problem" using it against Mr. Hooper.

B. Requirement of Self-Defense Instruction

¶ 52 In the light most favorable to Mr. Hooper, this evidence shows that, before the incident occurred, Ms. Thomas acquired a gun that she felt prepared to use on Mr. Hooper. On the day of the incident, Ms. Thomas pointed a gun at him, which she then fired. Mr. Hooper attempted to disarm her to protect himself, but she ultimately shot him in the leg. This evidence, supported by two witnesses, as well as by Mr. Hooper's own statement about what happened, which he made to a police officer while he was in the hospital receiving treatment for his injury, is sufficient to warrant a jury instruction on self-defense.

¶ 53 The majority recognizes that Mr. Hooper introduced this evidence but nonetheless concludes that there is "no evidence" that Mr. Hooper assaulted Ms. Thomas in self-defense. The majority explains that "even if the first gunshot occurred before defendant assaulted Ms. Thomas, the record contains no indication that defendant assaulted for the purpose of defending himself from any unlawfully assaultive conduct on the part of Ms. Thomas." This is a remarkably untenable conclusion. In fact, and very much to the contrary, Mr. Hooper's evidence tended to show that his disgruntled ex-girlfriend arrived at his hotel room, at which point an argument ensued. The evidence suggests that, during this argument, Ms. Thomas pointed a gun at him and fired before he used any force against her. A predictable response to such conduct is to use physical force as a means of self-protection. This response was made even more obviously necessary by the fact that Ms. Thomas then fired the gun a second time, hitting Mr. Hooper in his leg.

¶ 54 Thus, taking Mr. Hooper's version of events in the light most favorable to him, a reasonable jury could conclude that, after Ms. Thomas pointed the gun at him and fired once, (1) Mr. Hooper reasonably believed his conduct was necessary to defend himself (2) from Ms. Thomas's imminent use of unlawful force.[1] *See* N.C.G.S. § 14-51.3(a)

1. The majority repeatedly interprets the evidence in the light most favorable to the State, which is, of course, improper. For example, the majority's "careful study of the record" suggests that Mr. Hooper was not trying to defend himself when he tried to take

(2021). The majority's conclusion that "none of this evidence tended to show that defendant assaulted Ms. Thomas for the purpose of protecting himself from any unlawful use of force" defies logic, common sense, and countless cases that have examined whether a person who is being shot at or faces the imminent possibility of being shot has the right to defend themselves. *See, e.g.*, *State v. Greenfield*, 375 N.C. 434, 436–37, 442 (2020) (holding that the evidence was sufficient to entitle defendant to a self-defense jury instruction where defendant's evidence was that he did not point his gun at anyone until the surviving victim emerged from the bedroom pointing a gun at him); *State v. Lee*, 370 N.C. 671, 672, 676–77 (2018) (holding that a self-defense instruction was warranted where defendant asserted that he fired the fatal shot only after the victim turned the gun on him and defendant introduced evidence supporting his version of events); *State v. Moore*, 363 N.C. 793, 794, 798 (2010) (holding that defendant was entitled to a jury instruction on self-defense, despite conflict between defendant's evidence and the State's evidence, where victim of shooting was unarmed but evidence presented at trial, when viewed in the light most favorable to defendant, suggested the victim could have had a gun); *see also State v. Irabor*, 262 N.C. App. 490, 494–95 (2018) (holding that defendant was entitled to a jury instruction on self-defense, despite the State's contention that the evidence was conflicting, where victim of shooting did not have a gun but evidence presented at trial, when viewed in the light most favorable to defendant, suggested the victim could have been armed); *State v. Johnson*, 184 N.C. 637, 645 (1922) (holding that the defendant was entitled to a jury instruction on self-defense where there was evidence that defendant did not stab the victim with a knife until the victim assaulted him).

¶ 55 The majority cites Mr. Hooper's "history of inflicting physical abuse upon his romantic partners" as part of the State's evidence that a self-defense instruction was unwarranted under the circumstances. But the evidence introduced at trial indicates that this "history" is much more limited than the majority suggests. First, Ms. Machoca testified on cross-examination that several years earlier, Mr. Hooper "pulled out a gun on" her brother on one occasion and assaulted her on another. Ms. Machoca was careful to emphasize that the incidents took place years ago, and she provided no other context or details about what happened. Additionally, Ms. Donnell testified on cross-examination that Ms. Thomas and Mr. Hooper's "relationship is like nitro and glycerin."

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the gun away from Ms. Thomas but instead was unlawfully assaulting her. That inference implicitly favors the State when the Court should be making an inference in favor of Mr. Hooper.

However evocative the characterization, and regardless of how extensive or limited this history is, such evidence is irrelevant to the question of whether Mr. Hooper's evidence merits a self-defense instruction. This point highlights a larger, key principle in determining whether a self-defense instruction is proper: The State's evidence, however convincing, cannot negate evidence presented by a defendant for the purpose of determining whether a jury should be instructed on self-defense. *See*, *e.g.*, *State v. Greenfield*, 375 N.C. at 440 (quoting *State v. Mash*, 323 N.C. 39, 348 (1988)) (" 'To resolve whether a defendant is entitled to a requested instruction, we review de novo whether each element of the defense is supported by the evidence, when taken in the light most favorable to defendant.' ").

¶ 56 The State could have offered hours upon hours of testimony demonstrating that Mr. Hooper was the aggressor and was therefore not justified in assaulting Ms. Thomas. Indeed, the State may have offered significant evidence to rebut every element of the self-defense instruction. The question for the trial court, however, was whether Mr. Hooper offered sufficient competent evidence of each element of self-defense such that a reasonable jury could, if they believed that evidence, conclude that he acted in self-defense in assaulting Ms. Thomas. *See*, *e.g.*, *Moore*, 363 N.C. at 796 ("[I]f the defendant's evidence, taken as true, is sufficient to support an instruction for self-defense, it must be given even though the State's evidence is contradictory."); *State v. Webster*, 324 N.C. 385, 391 (1989) ("In determining whether there was any evidence of self-defense presented, the evidence must be interpreted in the light most favorable to defendant." (citing *State v. Gappins*, 320 N.C. 64, 71 (1987))). If believed, Mr. Hooper's evidence here was sufficient to show that, unarmed, he acted in self-defense when he assaulted Ms. Thomas after Ms. Thomas pointed and shot a gun at him.

¶ 57 Surely, if the roles were reversed and Ms. Thomas were on trial for assault, there would be no hesitation to give the jury an instruction on self-defense. In other words, would this Court hold that there is no evidence that Ms. Thomas was trying to defend herself if 1) Ms. Thomas had been shot in the leg while Mr. Hooper sustained a bite mark, a swollen jaw, red marks on his neck, and broken fingernails, and 2) a witness for Ms. Thomas testified that, very shortly after the incident, Mr. Hooper told Ms. Thomas's mother that he fired the gun once and only then did Ms. Thomas try to choke him before he fired a second time? The answer to this question, I believe, is a resounding no. Recognizing this likely discrepancy in result, it is important to remember that both men and

woman may be victims of intimate partner violence.[2] Assuming that Ms. Thomas must have been the victim of an assault in this incident without properly crediting Mr. Hooper's version of events is both counter to the law of self-defense and runs the risk of ignoring this important reality.

¶ 58 Perhaps it is true that on 4 March 2017 Ms. Thomas was the victim of an unprovoked assault by Mr. Hooper in his hotel room in front of their young son. But Mr. Hooper produced evidence showing the opposite to be true, namely that he was the victim and that Ms. Thomas, the aggressor, was angry about his behavior with another woman and entered his room looking for a fight. It is neither this Court's nor the trial court's duty to determine whose evidence was more convincing. Rather, the guiding principle courts must follow is that "although there may be contradictory evidence from the State or discrepancies in the defendant's evidence, . . . the trial court must charge the jury on self-defense where there is evidence that the defendant acted in self-defense." *Coley*, 375 N.C. at 163. In light of the evidence produced by both parties, it was the jury's duty to determine in whose favor it weighed after having been properly instructed on the law of self-defense in North Carolina.

¶ 59 Having concluded that a jury instruction on self-defense was warranted, I would also hold that it was prejudicial error for the trial court to fail to give that instruction, as there is a reasonable possibility that had the instruction been given, a different result would have been reached at trial. *See* N.C.G.S. § 15A-1443(a) (2021); *State v. Bass*, 371 N.C. 535, 542 (2018) (announcing that when self-defense instruction omitted relevant language, "[d]efendant is entitled to a trial with complete and accurate jury instructions"). I would therefore reverse the decision of the Court of Appeals, vacate the trial court's judgment, and remand this case to the trial court for a new trial.

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2. There is debate among scholars over the relative extent to which women and men are victims of domestic violence. *Compare* Amanda J. Schmesser, *Real Men May Not Cry, but They are Victims of Domestic Violence: Bias in the Application of Domestic Violence Laws*, 58 Syracuse L. Rev. 171, 186–89 (2007) (reviewing studies indicating gender symmetry, that is, just as many men as women are victims of domestic violence), *with* Michael S. Kimmel, *'Gender Symmetry' in Domestic Violence: A Substantive and Methodological Research Review*, 8 Violence Against Women 1332 (2002) (reviewing research including over 100 studies showing gender symmetry and cautioning that different conclusions are warranted when more nuanced factors are considered such as severity of injury). There is no need to resolve this debate for the purposes of the point being made here; all agree that intimate partner violence must be taken seriously and that all victims, regardless of gender, deserve equal access to laws that serve to protect and defend them.

STATE v. DIAZ-TOMAS

[382 N.C. 640, 2022-NCSC-115]

STATE OF NORTH CAROLINA
v.
ROGELIO ALBINO DIAZ-TOMAS

No. 54A19-3

Filed 4 November 2022

Courts—superior court—denial of petition for certiorari—motion to reinstate charges—discretion of district attorney

Where the State dismissed (with leave) charges against defendant for driving while impaired and driving without a license after defendant failed to appear in court and the district court denied defendant's motion to reinstate the charges, the superior court properly denied defendant's petition for writ of certiorari to review the district court's decision. Because the district attorney had the exclusive and discretionary power to place the criminal charges in dismissed-with-leave status pursuant to N.C.G.S. § 15A-932, defendant was not entitled to—and the district court lacked authority to order—the reinstatement and calendaring of his charges.

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. 97 (2020), affirming an order denying defendant's petition for writ of certiorari entered on 24 July 2019 by Judge Paul C. Ridgeway in Superior Court, Wake County. On 15 December 2020, the Supreme Court allowed defendant's petition for discretionary review as to additional issues. Heard in the Supreme Court on 6 January 2022.

Joshua H. Stein, Attorney General, by Joseph L. Hyde, Assistant Attorney General, for the State-appellee.

Anton M. Lebedev for defendant-appellant.

MORGAN, Justice.

¶ 1 Defendant appeals from a divided opinion of the Court of Appeals, 271 N.C. App. 97 (2020), in which the Court of Appeals affirmed an order of the Superior Court, Wake County, denying defendant's petition for writ of certiorari. Defendant's petition for writ of certiorari requested that the superior court review an order of the District Court, Wake County, in which that court denied defendant's Motion to Reinstate

Charges. Defendant's Motion to Reinstate Charges asked that the District Court reinstate, and place on the trial court's calendar, several criminal charges with which defendant had been charged which had been "dismissed with leave" by the district attorney's office pursuant to N.C.G.S. § 15A-932(a)(2) due to defendant's failure to appear before the trial court as ordered. The Court of Appeals determined that only the Superior Court's order denying defendant's certiorari petition, and not the District Court's order denying defendant's Motion to Reinstate Charges, was properly before the appellate court due to the limited nature of the Court of Appeals' discretionary allowance of defendant's certiorari petition before the lower appellate court. *State v. Diaz-Tomas*, 271 N.C. App. 97, 102 (2020). A dissenting opinion was filed in the matter in which the dissenting judge at the Court of Appeals considered the Superior Court to have erred in denying defendant's petition for writ of certiorari to review the order of the District Court. *Id.* at 103 (Zachary, J., concurring in part and dissenting in part). Defendant timely filed notice of appeal to this Court based upon the dissenting opinion. Therefore, an issue presented for our determination here is whether the Superior Court properly denied defendant's petition for writ of certiorari. This Court additionally allowed defendant's conditional petition for writ of certiorari to review the decision of the Court of Appeals, as well as defendant's conditional petition for writ of certiorari to review the order denying his aforementioned Motion to Reinstate Charges. In sum, this Court is positioned to contemplate and resolve defendant's contentions regarding his ability to compel the reinstatement of his dismissed criminal charges and to compel the placement of these matters on a trial court's criminal case calendar for disposition. We hold that a criminal defendant does not possess the right to compel the district attorney, who has the authority to place the defendant's unresolved criminal charges in a dismissed-with-leave status, to reinstate the dismissed charges and to place the charges on a trial court's criminal case calendar for resolution. We also hold that a trial court lacks the authority to order that criminal charges which have been dismissed with leave by the duly empowered district attorney be reinstated and placed on a trial court's criminal case calendar against the will of the district attorney. This Court therefore affirms the decision of the Court of Appeals which affirms the Superior Court's denial of defendant's petition for writ of certiorari.

¶ 2 Defendant also filed a petition for discretionary review which this Court allowed in part and denied in part by way of a special order entered on 15 December 2020, in which we opted to consider additional issues presented by defendant as to whether this Court and the Court of Appeals erred in declining to issue writs of mandamus to the District

Attorney of Wake County and the District Court, Wake County, in order to effect defendant's desired outcome which he originally sought in the trial court and which he pursued through his initial Motion to Reinstate Charges. We take this opportunity to reaffirm the clear and well-settled principle of law which establishes that the extraordinary and discretionary writ of mandamus shall issue only when the subject of the writ invokes a legal duty to act or to forebear from acting. This recognition, coupled with our determination that the remaining issues contained in defendant's petition for discretionary review are either academic in nature or are rendered moot by this Court's allowance of defendant's multiple petitions for writ of certiorari, obliges us to view defendant's petition for discretionary review as improvidently allowed.

I. Factual and Procedural Background

¶ 3 Defendant received a citation from an officer with the Raleigh Police Department charging him with the offenses of driving while impaired and driving without an operator's license on 4 April 2015. Defendant failed to appear for defendant's scheduled court date in the District Court, Wake County, on 24 February 2016, and on the following day, the trial court issued an order for defendant's arrest. While defendant's whereabouts were still unknown, the State dismissed defendant's charges with leave under the statutory authority and procedure of N.C.G.S. § 15A-932(a)(2) on 11 July 2016. While it appears that defendant did not possess a valid driver's license issued by the North Carolina Division of Motor Vehicles at the time of his 4 April 2015 charges, defendant's ability to apply for and to receive a valid North Carolina driver's license was indefinitely foreclosed as the result of his failure to appear for his 24 February 2016 court date and the State's dismissal of his charges with leave. On 24 July 2018, defendant was arrested in Davidson County and served with the order for arrest which had resulted from his previous failure to appear in court in Wake County. Defendant was given a new Wake County court date of 9 November 2018; however, defendant again failed to appear as scheduled in the District Court, Wake County, and a second order for defendant's arrest was issued on 13 November 2018. Defendant was arrested on 12 December 2018 pursuant to the second order for arrest, and was given another court date in the District Court, Wake County, of 18 January 2019. However, defendant's court date was "advanced," or moved to an earlier date, and was set for the 14 December 2018 administrative session of the District Court, Wake County.

¶ 4 Defendant appeared for the 14 December 2018 administrative session of the District Court, Wake County, but the assistant district attorney declined to reinstate—in other words, to bring out of dismissed-with-leave

status—defendant's two unresolved charges. Defendant therefore filed a Motion to Reinstate Charges in District Court on 28 January 2019. In his motion, defendant made several arguments addressing the claimed "duty," "inherent authority," and "mandate" of the District Court either to reinstate or to permanently dismiss defendant's outstanding charges. The motion was accompanied by two affidavits executed by licensed attorneys practicing in Wake County who both represented that it was the regular practice of the Wake County District Attorney's Office to decline to reinstate charges which had been placed in dismissed-with-leave status due to a defendant's failure to appear, unless the defendant agrees to plead guilty to the dismissed charges while simultaneously waiving the defendant's right to appeal these convictions to the Superior Court for a trial de novo. On 7 June 2019, defendant filed a document in the District Court, Wake County, captioned "Request for Prompt Adjudication of Defendant's Motion to Reinstate Charges" in which defendant asked the tribunal "to promptly adjudicate his previously filed Motion to Reinstate Charges" in light of the District Attorney's position. The chief district court judge responded to the filing, in a letter to defense counsel and the prosecutor dated 10 June 2019, that defendant's motion presented only questions of law, that an evidentiary hearing would not be required, and that the chief district court judge would consider any supportive filings by the parties "in arriving at a ruling in this matter."

¶ 5 The District Court, Wake County, entered an order on 15 July 2019 denying defendant's Motion to Reinstate Charges.[1] The District Court determined that "the State exercised its discretion and acted within its statutory authority pursuant to N.C.G.S. § 15A-932 by entering a dismissal with leave . . . after [d]efendant failed to appear for his regularly scheduled court date." The District Court explained that the statutory language provided that in the event that a defendant is presented to the forum after failing to appear, "the prosecutor *may* reinstate the proceedings by filing written notice with the clerk," quoting the exact language of subsection (d) of N.C.G.S. § 15A-932 and adding emphasis to the permissive term "may." *See* N.C.G.S. § 15A-932(d) (2021). Because the presence of the word "may" in N.C.G.S. § 15A-932(d) "clearly indicates . . . that discretion to reinstate charges previously dismissed with leave lies solely with the prosecutor," the District Court reasoned that the district attorney's office had "exercised its discretion and acted

1. During the interim period between the filing of defendant's motion and the District Court's ruling in the matter, defendant filed a Petition for Writ of Mandamus with this Court on 11 February 2019, which was promptly denied by this Court by an order dated 26 February 2019.

within its statutory authority . . . by declining to reinstate the charges in this matter." The District Court further opined that this Court's directives in *State v. Camacho*, 329 N.C. 589 (1991), prohibited the trial court from invading the province of the "independently elected constitutional officer"—namely, the District Attorney and this official's subordinates—by having "criminal charges reinstated upon demand." The District Court concluded

> [t]hat for the court to reinstate the charges and mandate that the District Attorney prosecute the [d]efendant, as requested by [d]efendant in his motion, . . . an unauthorized and impermissible interference with the District Attorney's performance of constitutional and statutory duties, which only the District Attorney or her lawful designees may perform, [would occur].

¶ 6 On 22 July 2019, defendant filed a petition for writ of certiorari in the Superior Court, Wake County, seeking a full review of the District Court's order which denied his motion. The Superior Court denied defendant's petition in an order dated 24 July 2019, explaining that a writ of certiorari was a discretionary writ "to be issued only for good or sufficient cause shown," quoting *Womble v. Moncure Mill & Gin Co.*, 194 N.C. 577, 579 (1927), and finding that defendant had failed to present such good or sufficient cause to warrant certiorari review. The Superior Court further found that defendant was "not entitled to the relief requested." Defendant next petitioned the Court of Appeals for writ of certiorari, requesting that the lower appellate court review both the District Court's order denying his Motion to Reinstate Charges as well as the Superior Court's order denying his petition for writ of certiorari. The Court of Appeals allowed defendant's petition on 15 August 2019 for the limited purpose of reviewing the Superior Court's denial of defendant's petition for writ of certiorari.

¶ 7 The Court of Appeals issued a divided, published opinion on 21 April 2020, affirming the Superior Court's denial of defendant's certiorari petition. *Diaz-Tomas*, 271 N.C. App. at 102. In light of the longstanding case law from this Court institutionalizing the principle that "[c]ertiorari is a discretionary writ, to be issued only for good or sufficient cause shown" which defendant candidly recognized in his appellate presentation, the Court of Appeals majority employed an abuse of discretion standard in assessing the correctness of the Superior Court's denial of defendant's petition. *Id.* at 100–01 (emphasis omitted) (quoting *Womble*, 194 N.C. at 579). The lower appellate court determined that defendant failed to meet his "burden of showing that the decision of the Superior Court in

denying his petition for certiorari was 'manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *Id.* at 101 (quoting *State v. Hennis*, 323 N.C. 279, 285 (1988)). Although defendant asserted that he was entitled to the writ because he had presented "appropriate circumstances" and "compelling" reasons for certiorari to be granted by the Superior Court, the Court of Appeals majority concluded that "[i]t is not enough that [defendant] disagree with it, or argue — incorrectly — that the trial court was obligated to grant his petition" in order to show an abuse of discretion. *Id.* at 101. Instead, "[d]efendant has to show that the Superior Court's decision was unsupported by reason or otherwise entirely arbitrary." *Id.* at 101. After all, a writ of certiorari "is not one to which the moving party is entitled as a matter of right." *Id.* at 100 (quoting *Womble*, 194 N.C. at 579).

¶ 8 The dissenting opinion disagreed with the view of the Court of Appeals majority that defendant had failed to show an abuse of discretion in the Superior Court's denial of defendant's petition for writ of certiorari. *Id.* at 106 (Zachary, J., concurring in part and dissenting in part). The dissent ventured that the Superior Court had provided no particular reason for the denial of defendant's petition other than the bare observations that defendant had failed to show "sufficient cause," for the allowance of the writ and that defendant otherwise possessed "no other avenue to seek redress" for "alleg[ed] statutory and constitutional violations akin to those at issue in *Klopfer* [*v. North Carolina*, 386 U.S. 213 (1967)] and *Simeon* [*v. Hardin*, 339 N.C. 358 (1994)]." *Id.* at 108–11 (Zachary, J., concurring in part and dissenting in part). Because article I, section 18 of the North Carolina Constitution guarantees "access to the court to apply for redress of injury," the Court of Appeals dissent opined that the Superior Court should have allowed defendant's petition for writ of certiorari in order to accord defendant his sole remaining route to review an apparent "no bargain": either to accept the outcome that his unresolved criminal charges would remain in dismissed-with-leave status without defendant's ability to regain his driver's license or to plead guilty as charged while simultaneously waiving his right to appeal for a trial de novo. *Id.* at 110 (Zachary, J., concurring in part and dissenting in part) (quoting *Simeon*, 339 N.C. at 378).

II. Analysis

A. Discretion of the District Attorney Under N.C.G.S. § 15A-932

¶ 9 In order to resolve this case, we first consider the issue of whether a district attorney may be compelled to reinstate charges under the statutory procedure described in N.C.G.S. § 15A-932. In *Camacho*, this Court observed that

> [t]he several District Attorneys of the State are independent constitutional officers, elected in their districts by the qualified voters thereof, and their special duties are prescribed by the Constitution of North Carolina and by statutes. Our Constitution expressly provides that: "The District Attorney shall be responsible for the prosecution on behalf of the State of all criminal actions in the Superior Courts of his district." The clear mandate of that provision is that the responsibility and authority to prosecute all criminal actions in the superior courts is vested solely in the several District Attorneys of the State.

Camacho, 329 N.C. at 593 (extraneity omitted) (quoting N.C. Const. art. IV, § 18). Prosecution of criminal offenses is the "sole and exclusive responsibility" of the duly elected district attorneys of the state. *In re Spivey*, 345 N.C. 404, 409 (1997). The General Assembly possesses the authority to frame the duties of a district attorney as the legislative body has established in N.C.G.S. § 7A-61, and one such duty includes the obligation to "prosecute in a timely manner in the name of the State all criminal actions." N.C.G.S. § 7A-61 (2021). The General Assembly's dictate that criminal prosecutions must be executed in a "timely manner" serves to reiterate the North Carolina Constitution's grant of exclusive authority to the state's district attorneys regarding the prompt handling, scheduling, and disposition of criminal charges which are brought against alleged violators of the law. In the present case, the elected District Attorney initially satisfied the mandates of the office's duties in handling defendant's criminal charges by timely scheduling defendant's matters for disposition in the name of the State by placing them on a court calendar pursuant to the prosecutor's constitutional responsibility and authority to do so in the official's sole and exclusive power.

¶ 10 Section 15A-932 establishes the procedure by which the General Assembly has enabled the state's district attorneys to enter a criminal case's "[d]ismissal with leave . . . when a defendant . . . [f]ails to appear . . . and cannot readily be found." N.C.G.S. § 15A-932(a) (2021). This statute empowers a district attorney or the officeholder's designee to place a pending criminal charge in dismissed-with-leave status either "orally in open court or by filing the dismissal in writing with the clerk," which has the effect of removing "the case from the docket of the court." N.C.G.S. § 15A-932(b)–(c). Although the case is removed from the docket of the trial court, and thus is not calendared before the trial court on a routine basis as an active criminal charge would be, nonetheless "all process

outstanding retains its validity, and all necessary actions to apprehend the defendant, investigate the case, or otherwise further its prosecution may be taken, including the issuance of nontestimonial identification orders, search warrants, new process, initiation of extradition proceedings, and the like." N.C.G.S. § 15A-932(b).

¶ 11 Of additional relevance to defendant's current appeal, the General Assembly has directed the Division of Motor Vehicles to revoke a defendant's driving privileges upon receiving "notice from a court that the person was charged with a motor vehicle offense and . . . failed to appear." N.C.G.S. § 20-24.1(a) (2021). The statute goes on to provide that:

> (b) A license revoked under this section remains revoked until the person whose license has been revoked:
>
> > (1) disposes of the charge in the trial division in which he failed to appear when the case was last called for trial or hearing[.]

N.C.G.S. § 20-24.1(b). In order to "dispose[ ] of the charge in the trial division," N.C.G.S. § 20-24.1(b), the charge must be reinstated in order to be placed back on the trial court docket, because when a district attorney places a charge in dismissed-with-leave status, it "results in removal of the case from the docket of the court," N.C.G.S. § 15A-932(b). Otherwise, the case record will reflect that the defendant's driving privileges remain in an indefinite state of suspension. Section 15A-932 provides a singular process by which a charge may be reinstated: "Upon apprehension of the defendant, or in the discretion of the prosecutor when he believes apprehension is imminent, the prosecutor *may* reinstitute the proceedings by filing written notice with the clerk" of court. N.C.G.S. § 15A-932(d) (emphasis added).

¶ 12 "Ordinarily when the word 'may' is used in a statute, it will be construed as permissive and not mandatory." *In re Hardy*, 294 N.C. 90, 97 (1978). Settled principles of statutory construction constrain this Court to hold that the use of the word "may" in N.C.G.S. § 15A-932(d) grants exclusive and discretionary power to the state's district attorneys to reinstate criminal charges once those charges have been dismissed with leave following a defendant's failure to appear in court to respond to them. In conjunction with our determination, it is worthy of note that the General Assembly created a single statutory exception in N.C.G.S. § 15A-932(d1) to the requirement that a district attorney exercise the official's discretion to "reinstitute the proceedings" in order to dispose of the charges which have been dismissed with leave, while

simultaneously empowering a defendant to activate dormant charges, without the involvement of a district attorney, which have been placed in dismissed-with-leave status. Subsection 15A-932(d1) states, in pertinent part:

> If the proceeding was dismissed pursuant to subdivision (2) of subsection (a) of this section [for failing to appear at a criminal proceeding at which his attendance is required, and the prosecutor believes the defendant cannot be readily found] . . . and the defendant later tenders to the court that waiver and payment in full of all applicable fines, costs, and fees, the clerk shall accept said waiver and payment without need for a written reinstatement from the prosecutor. Upon disposition of the case pursuant to this subsection, the clerk shall recall any outstanding criminal process in the case . . . .

N.C.G.S. § 15A-932(d1). Contrary to defendant's argument that he was entitled to the automatic reactivation of defendant's criminal charges by the District Attorney upon defendant's chosen time to be available to the trial court to respond to defendant's charges which had been dismissed with leave after defendant's multiple failures to appear in court to respond to said charges when they were calendared on the trial court docket, the General Assembly has expressly designated in N.C.G.S. § 15A-932(d) and (d1) the narrow, specified ways in which criminal charges which have been placed in dismissed-with-leave status can be resolved.

¶ 13 In light of the cited constitutional, statutory, and appellate case law authorities which are all in clear and unequivocal tandem with one another, a district attorney cannot be compelled to reinstate the charges, due to the official's recognized exclusive and discretionary power to reinstate criminal charges once those charges have been dismissed with leave following a defendant's failure to appear in court to respond to the charges when calendared on a trial court docket.

B. Authority of the Trial Court to Reinstate Charges

¶ 14 In his Motion to Reinstate Charges in District Court, defendant asked the trial tribunal to reinstate his criminal charges that were dismissed with leave by the State, to set a court date for his criminal matters, and to grant defendant any other and further relief that the District Court deemed to be just and proper given the circumstances.

¶ 15 The trial courts of this state enjoy broad authority to control the conduct of trial and the decorum of the courtroom within statutory and constitutional boundaries. *See Shute v. Fisher*, 270 N.C. 247, 253 (1967) ("It 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 discretion in the interest of efficiency, practicality and justice."); *State v. Rankin*, 312 N.C. 592, 598 (1985) ("[A] trial judge has the duty to supervise and control the course and conduct of a trial, and [ ] in order to discharge that duty he is invested with broad discretionary powers."); *accord M.E. v. T.J.*, 380 N.C. 539, 2022-NCSC-23, ¶ 42. However, this Court has not ever held that, despite a trial court's wide and entrenched authority to govern proceedings before it as the trial court manages various and sundry matters, a trial court may invade the purview of the exclusive and discretionary power of a district attorney which was granted to the official through the provisions of the North Carolina Constitution and the statutory laws enacted by the General Assembly, absent a determination that the prosecutorial discretion was "being applied in an unconstitutional manner." *Simeon*, 339 N.C. at 378. As we have explained,

> it must be remembered that the elected District Attorneys of North Carolina are constitutional officers of the State whose duties and responsibilities are in large part constitutionally and statutorily mandated. The courts of this State, including this Court, must, at the very least, make every possible effort to avoid unnecessarily interfering with the District Attorneys in their performance of such duties. Therefore, any order tending to infringe upon the constitutional powers and duties of an elected District Attorney must be drawn as narrowly as possible.

Camacho, 329 N.C. at 595.

¶ 16 In the instant case, the district attorney's office exercised its exclusive authority and discretion regarding its constitutional responsibility to prosecute criminal actions when, on 14 December 2018, it declined to reinstate defendant's charges when defendant belatedly presented himself in court after his second failure to appear in court on the alleged offenses. Since defendant's requests of the District Court in his motion to reinstate his "dismissed with leave" criminal charges would have the effect, if granted by the District Court, of infringing upon the

constitutional powers and duties of a district attorney as disapproved by *Camacho*, we hold that the trial tribunal did not err in denying defendant's Motion to Reinstate Charges in District Court. The District Court's allowance of defendant's motion also would have contravened our admonition to the courts of this state, as we announced in *Camacho*, to "draw[ ] as narrowly as possible" any curtailment of a district attorney's constitutional powers and duties. *Id.*

¶ 17 Defendant argues that N.C.G.S. § 20-24.1(b1) affords him "an absolute statutory right to have the matter reinstated for a prompt trial or hearing." Despite this bald assertion, N.C.G.S. § 20-24.1(b1) contains no mention of the reinstatement of criminal charges. Subsection 20-24.1(b1) states in its entirety: "A defendant must be afforded an opportunity for a trial or a hearing within a reasonable time of the defendant's appearance. Upon motion of a defendant, the court must order that a hearing or a trial be heard within a reasonable time." N.C.G.S. § 20-24.1(b1). Defendant conveniently construes the term "appearance" to leniently apply to the eventual presentation of himself—whenever that may be—at a calendared session of the trial court after defendant has failed to appear for court when his criminal charges were originally scheduled for resolution within a reasonable time. After failing to appear for court on two scheduled opportunities to resolve his criminal charges when the District Attorney placed defendant's charges on a trial court docket for resolution within a reasonable time, defendant's insistence pursuant to his construction of N.C.G.S. § 20-24.1(b1) upon the reinstatement of his charges by the District Attorney or by the District Court "for a trial or a hearing within a reasonable time of the defendant's appearance" rings hollow when defendant did not come to court to respond to the criminal charges until nearly three years had passed since his original court date. Firstly, as previously stated, the allowance of defendant's demand that his "dismissed with leave" charges be activated would offend the delegated exclusive and discretionary power of the District Attorney to reinstate defendant's criminal charges after the charges were dismissed with leave due to defendant's failure to appear in court to answer to the charges. And secondly, if this Court were to interpret N.C.G.S. § 20-24.1(b1) as defendant contends, then we would ignore the identical caution which we articulated in *Camacho* for the state courts with regard to the philosophy to "make every possible effort to avoid unnecessarily interfering with the District Attorneys in their performance of [constitutionally and statutorily mandated] duties," such that "any order tending to infringe upon the constitutional powers and duties of an elected District Attorney must be drawn as narrowly as possible." *See Camacho*, 329 N.C. at 595. Accordingly, defendant's argument that

N.C.G.S. § 20-24.1(b1) gives him "an absolute statutory right to have the matter reinstated for a prompt trial or hearing" is without merit.

C. Discretion of the Superior Court to Deny Certiorari Petitions

¶ 18 A criminal defendant may seek certiorari review "when provided for by [the Criminal Procedure Act], by other rules of law, or by rule of the appellate division." N.C.G.S. § 15A-1444(g) (2021). "The authority of a superior court to grant the writ of certiorari in appropriate cases is, we believe, analogous to the Court of Appeals' power to issue a writ of certiorari," in the context of the Superior Court's review of a lower tribunal's action. *State v. Hamrick*, 110 N.C. App. 60, 65, *appeal dismissed, disc. review denied*, 334 N.C. 436 (1993). A writ of certiorari is "an *extraordinary* remedial writ to correct errors of law," *Button v. Level Four Orthotics & Prosthetics, Inc.*, 380 N.C. 459, 2022-NCSC-19, ¶ 19 (emphasis added) (quoting *State v. Simmington*, 235 N.C. 612, 613 (1952)), and its issuance is only appropriate when a defendant has shown merit in his arguments concerning the action to be reviewed or that "error was probably committed below," *State v. Ricks*, 378 N.C. 737, 2021-NCSC-116, ¶ 6 (quoting *State v. Grundler*, 251 N.C. 177, 189 (1959)). A writ of certiorari "is not one to which the moving party is entitled as a matter of right." *State v. Walker*, 245 N.C. 658, 659 (1957), *cert. denied*, 356 U.S. 946 (1958); *see Surratt v. State*, 276 N.C. 725, 726 (1970) (per curiam) (holding that the Court of Appeals was errorless in denying certiorari review of a trial court's denial of a habeas corpus petition because such judgment was "reviewable only by way of *certiorari* if the court *in its discretion* chooses to grant such writ" (second emphasis added)). The only exception to the entirely discretionary nature of certiorari review is the circumstance of a criminal defendant's loss of the right to appeal "due to some error or act of the court or its officers, and not to any fault or neglect of the [defendant]." *State v. Moore*, 210 N.C. 686, 691 (1936).

¶ 19 As we have determined, the District Attorney could not be compelled either by demand of defendant or by order of the District Court to reinstate defendant's charges which had been placed in the status of "dismissed with leave" after defendant had failed to appear in court as scheduled in order to respond to the criminal allegations against defendant. As we have further concluded, the District Court properly denied defendant's Motion to Reinstate Charges in District Court. Consequently, defendant failed to demonstrate that there was merit in his arguments or that error was probably committed by the District Court so as to qualify for the Superior Court's issuance of the extraordinary remedial writ in order for the Superior Court to correct, through certiorari review, any

errors committed by the District Court. The Superior Court expressly and correctly based its decision to deny defendant's petition for writ of certiorari on its accurate determination that "[d]efendant has failed to provide 'sufficient cause' to support the granting of his [p]etition" and that "[d]efendant is not entitled to the relief requested." Therefore, the Superior Court properly acted within its discretion in denying defendant's petition for writ of certiorari.

D. Denial of the Petitions for a Writ of Mandamus

¶ 20 Along with defendant's efforts to obtain the reinstatement of his criminal charges before the District and Superior Courts of Wake County, coupled with defendant's desire to obtain appellate review of both courts' respective denials of those efforts before the Court of Appeals, defendant filed multiple, duplicative petitions for a writ of mandamus before the Court of Appeals and this Court. "A writ of mandamus is an extraordinary court order to 'a board, corporation, inferior court, officer or person commanding the performance of a specified official duty imposed by law.' " *In re T.H.T.*, 362 N.C. 446, 453 (2008) (quoting *Sutton v. Figgatt*, 280 N.C. 89, 93 (1971)). In order to obtain the *extraordinary* relief provided by a writ of mandamus, the petitioner must demonstrate: (1) that the petitioner possesses a clear and established legal right to the act to be commanded; (2) that the party who is potentially subject to the writ has a clear and undebatable legal duty to perform the act requested in the petition; (3) that the act requested in the petition is ministerial in nature and does not involve exercising the discretion of the party who is potentially subject to the writ[2]; and (4) that the party who is potentially subject to the writ has, after the expiration of the appropriate time for the performance of the act requested in the petition, failed to perform the act requested. *Id.* at 453–54. In any event, a writ of "mandamus may not be used as a substitute for an appeal." *Snow v. N.C. Bd. of Architecture*, 273 N.C. 559, 570 (1968). The examination which we have already employed in assessing defendant's multiple theories and arguments regarding his claimed right to the reinstatement of his criminal charges after they were placed in the status of "dismissed with leave" due to defendant's failure to appear in court when scheduled similarly applies regarding defendant's petition for the extraordinary writ of mandamus. Defendant fails to satisfy any of the elements for the appellate courts' issuance of a writ of mandamus because he does not have a right to compel the activation of his

2. "Nevertheless, a court may issue a writ of mandamus to a public official compelling the official to make a discretionary decision, as long as the court does not require a particular result." *In re T.H.T.*, 362 N.C. 446, 454 (2008).

charges which have been dismissed with leave or to require the exercise of discretionary authority to fit his demand for prosecutorial action regarding his charges. Defendant's petitions for a writ of mandamus are properly denied.

E. *Klopfer*, *Simeon* Distinguished

¶ 21 In the case of *Klopfer v. North Carolina* (*Klopfer II*), 386 U.S. 213 (1967), the Supreme Court of the United States granted a writ of certiorari to review the decision of this Court in *State v. Klopfer* (*Klopfer I*), 266 N.C. 349 (1966). In *Klopfer I*, this Court affirmed a trial court's order which tacitly allowed a prosecutor to utilize a procedural rule which bore some similarity to the dismissal-with-leave procedure employed in the case at bar. The procedure in *Klopfer*, known as a "*nolle prosequi* with leave," allowed prosecutors to effectively pause their prosecution of a crime by releasing a defendant from the accused's responsibility to appear for any further court dates while simultaneously maintaining the legitimacy of an indictment filed against the defendant. *Klopfer II*, 368 U.S. at 214. "Its effect is to put the defendant without day, that is, he is discharged and permitted to go whithersoever he will, without entering into a recognizance to appear at any other time." *Id.* (quoting *Wilkinson v. Wilkinson*, 159 N.C. 265, 266–67 (1912)). Over defendant Klopfer's objection, the State moved the trial court for permission to take a *nolle prosequi* with leave after a first attempt to prosecute defendant for a trespassing charge which had resulted in a hung jury. *Id.* at 217–18. The trial court granted the State's motion. *Id.* at 218. Defendant Klopfer appealed the trial court's grant of the State's motion to enter a *nolle prosequi* to this Court, asserting that the effect of the *nolle prosequi* procedure of pausing the prosecution of his alleged crime, without disposing of the charge itself, violated his Sixth Amendment right to a speedy trial as it was applied to the individual states through the Fourteenth Amendment. *Id.* This Court affirmed the trial court's order granting the State's *nolle prosequi* motion and held that the State had "followed the customary procedure" to obtain the trial court's permission to enter a *nolle prosequi* in the defendant's case. *Klopfer I*, 266 N.C. at 351. This Court reasoned that

> [w]ithout question a defendant has the right to a speedy trial, if there is to be a trial. However, we do not understand the defendant has the right to compel the State to prosecute him if the State's prosecutor, in his discretion and with the court's approval, elects to take a *nolle prosequi*. In this case one jury seems to have been unable to agree. The solicitor may have

> concluded that another go at it would not be worth the time and expense of another effort.

Id. at 350.

¶ 22 The Supreme Court of the United States reversed the decision of this Court and remanded the case to the North Carolina courts for proceedings not inconsistent with its opinion. *Klopfer II*, 386 U.S. at 226. The high court opined:

> The North Carolina Supreme Court's conclusion—that the right to a speedy trial does not afford affirmative protection against an unjustified postponement of trial for an accused discharged from custody—has been explicitly rejected by every other state court which has considered the question. That conclusion has also been implicitly rejected by the numerous courts which have held that a *nolle prossed* indictment may not be reinstated at a subsequent term.
>
> We, too, believe that the position taken by the court below was erroneous. The petitioner is not relieved of the limitations placed upon his liberty by this prosecution merely because its suspension permits him to go "whithersoever he will." The pendency of the indictment may subject him to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes. By indefinitely prolonging this oppression, as well as the "anxiety and concern accompanying public accusation," the criminal procedure condoned in this case by the Supreme Court of North Carolina clearly denies the petitioner the right to a speedy trial which we hold is guaranteed to him by the Sixth Amendment of the Constitution of the United States.

Id. at 219–22 (footnotes omitted).

¶ 23 The dissenting opinion of the Court of Appeals in this case adopted the view that the Superior Court erred in denying defendant's petition for writ of certiorari, citing the outcome of *Klopfer II* in the Supreme Court of the United States and the outcome of *Simeon*[3] in this Court as

3. Upon plaintiff Simeon's allegations in his amended civil complaint that "the district attorney delayed calendaring [Simeon's] case for trial for the tactical purposes of keeping him in jail, delaying a trial at which he was likely to be acquitted, and pressuring

representative of the legal issues for which defendant should have been afforded further review regarding his inability to obtain a trial or hearing to resolve his criminal charges which the District Attorney maintained in dismissed-with-leave status. *Diaz-Tomas*, 271 N.C. App. at 110 (Zachary, J., concurring in part and dissenting in part). However, both cases are readily distinguishable from the current case in the salient respect that in *Klopfer II* and in *Simeon*, the District Attorney was recognized to be in a position, based on the facts presented in those respective cases, to tactically utilize the official's prosecutorial discretion to prevent a defendant who continually sought to resolve his active criminal charges through the defendant's consistent availability to the trial court from doing so; alternatively, in the present case, the District Attorney placed defendant's criminal charges on a trial court docket for prosecution in a timely manner on multiple occasions while defendant continually sought to evade the resolution of his active criminal charges through his consistent unavailability to the trial court by failing to appear as scheduled for court until nearly three years after defendant's criminal charges were placed in dismissed-with-leave status. These important differences between the instant case and the cases of *Klopfer II* and *Simeon*, which the Court of Appeals dissent cites as persuasive here, render the dissenting view as misguided based upon its reliance on inapplicable cases.

III. Conclusion

¶ 24 Based upon our analysis of the factual and procedural background of this case, this Court modifies the decision of the Court of Appeals to the extent that we affirm the outcome reached by the lower appellate court without prejudice to defendant to pursue any other legal remedy which has not been determined by this Court's opinion. Discretionary review of issues which were not addressed in our review of the Court of Appeals majority opinion or in our discussion of the Court of Appeals dissenting opinion is dismissed as improvidently allowed.

AFFIRMED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

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

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him into entering a guilty plea," and that "the district attorney purposely delays calendaring cases for trial for the purpose of exacting pretrial punishments and pressuring other criminal defendants into pleading guilty," this Court determined that the allegations were "sufficient to state a claim that the statutes which grant the district attorney calendaring authority are being applied in an unconstitutional manner," and therefore "we reverse[d] the order of the trial court which granted defendant district attorney's motion to dismiss and remand[ed] th[e] case to that court." *Simeon v. Hardin*, 339 N.C. 358, 378, 379 (1994).

STATE v. BRADSHER

[382 N.C. 656, 2022-NCSC-116]

STATE OF NORTH CAROLINA
v.
WALLACE BRADSHER

No. 13PA21

Filed 4 November 2022

Obstruction of Justice—felony—by intentionally providing false and fabricated statements—sufficiency of evidence—circumstantial

The State introduced sufficient evidence to convict defendant-supervisor of felony obstruction of justice based on the intentional provision of false statements to a State Bureau of Investigation agent where defendant falsely stated that his employee performed certain types of work, and where the agent testified—and circumstantial evidence allowed the reasonable inference—that defendant's false statements caused the agent to change the steps and process of his investigation.

Justice EARLS dissenting.

Justice MORGAN 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, 275 N.C. App. 715 (2020), vacating in part and finding no error in part in judgments entered on 19 June 2018 and 30 July 2018 by Judge Paul C. Ridgeway in Superior Court, Wake County, and remanding for resentencing. Heard in the Supreme Court on 29 August 2022.

Joshua H. Stein, *Attorney General*, *by James W. Doggett*, *Deputy Solicitor General*, *for the State-appellant.*

Glenn Gerding, *Appellate Defender*, *and Michele A. Goldman*, *Assistant Appellate Defender*, *for defendant-appellee.*

BARRINGER, Justice.

¶ 1 In this matter, we consider whether the Court of Appeals erred by vacating defendant's conviction of felony obstruction of justice. Upon careful review, we conclude that the Court of Appeals erred. Therefore, we reverse the Court of Appeals' decision.

I. Procedural Background

¶ 2 By superseding indictment, a grand jury indicted defendant Wallace Bradsher for conspiracy to commit obtaining property by false pretenses, obtaining property by false pretenses, aiding and abetting obtaining property by false pretenses, three counts of felony obstruction of justice, and willful failure to discharge the duties of office. After a nearly three-week-long trial, a jury returned a guilty verdict on obtaining property by false pretenses, aiding and abetting obtaining property by false pretenses, one count of misdemeanor obstruction of justice, one count of felony obstruction of justice, and willful failure to discharge duties of office. The jury acquitted defendant of the remaining charges. The trial court arrested judgment on the charge of obtaining property by false pretenses and entered judgment on the remaining convictions. After being sentenced, defendant appealed.

¶ 3 On appeal to the Court of Appeals, defendant presented multiple arguments, but the sole issue before this Court is whether there was sufficient evidence to convict defendant of felony obstruction of justice based on his false statements to the State Bureau of Investigation (SBI). Thus, the appeal before this Court only concerns Count V of the superseding indictment. Count V alleged that defendant "commit[ted] the infamous offense of obstruction of justice by knowingly and intentionally providing false and fabricated statements to David Whitley, agent of the [SBI] . . . designed to mislead the agent thereby impeding, delaying and obstructing the investigation, and legal and public justice."

¶ 4 As to this issue, the Court of Appeals concluded that when taking the evidence in the light most favorable to the State, the evidence presented at trial supported a determination that defendant's statement that Cindy Blitzer worked on special projects was false. *State v. Bradsher*, 275 N.C. App. 715, 724 (2020). However, the Court of Appeals concluded that defendant's statement that Cindy Blitzer worked on conflict cases was not false given that a particular time period was not specified. *Id.* The Court of Appeals viewed this as an omission, not a false or fabricated statement. *Id.* Then, the Court of Appeals concluded that "the State did not provide substantial evidence of obstruction to support the conviction for felony obstruction of justice." *Id.* at 725.

¶ 5 The State petitioned this Court for discretionary review pursuant to N.C.G.S. § 7A-31, arguing that the Court of Appeals erred by vacating the felony obstruction of justice conviction for insufficient evidence. This Court allowed the State's petition for discretionary review.

II. Standard of Review

¶ 6 "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." *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

¶ 7 "At common law it is an offense to do any act which prevents, obstructs, impedes or hinders public or legal justice." *In re Kivett*, 309 N.C. 635, 670 (1983) (quoting 67 C.J.S. *Obstructing Justice* § 2 (1978)). When this common law offense is done with deceit and intent to defraud, it is a felony. N.C.G.S. § 14-3(b) (2021); *State v. Ditenhafer*, 373 N.C. 116, 128 (2019).

¶ 8 On appeal to this Court, the State argues that the Court of Appeals erred in the same manner as the Court of Appeals erred in *Ditenhafer*, 373 N.C. 116 (2019). According to the State, by reversing the Court of Appeals' holding concerning the sufficiency of the evidence for a felony obstruction of justice conviction in *Ditenhafer*, this Court "showed that courts should not construe indictments narrowly to escape their obligation to review evidence in the light most favorable [to] the State." The State asserts that the Court of Appeals assumed the State was pursuing a conviction on a non-pleaded theory about omissions, rather than viewing the evidence in the light most favorable to the State to assess whether defendant made false statements. The State also emphasizes that the meaning of testimony bears on the evidence's weight, not sufficiency, as reiterated in *State v. Tucker*, 380 N.C. 234, 2022-NCSC-15, ¶ 22. The State further notes that an answer's falsehood may depend on the statement's context.

¶ 9 Defendant contends that the State relied on an omission by defendant, rather than a false or fabricated statement, for the felony obstruction of justice conviction. According to defendant, there was no evidence that Agent Whitley asked defendant if Cindy Blitzer was currently working on conflict cases. Defendant also argues that Agent Whitley never testified that any false or fabricated statement made by defendant on 6 September 2016 obstructed, impeded, or hindered his investigation.

¶ 10 From our review of the transcript and exhibits admitted at trial, we conclude that when viewing the evidence in the light most favorable to the State and giving the State the benefit of all reasonable inferences, a reasonable inference of defendant's guilt for felony obstruction of justice can be drawn from the circumstances. *See Barnes*, 334 N.C. at 75.

¶ 11 The State's evidence at trial showed the following: In mid-January 2015, defendant, the elected district attorney for Caswell County and Person County (District 9A), commenced employment of Cindy Blitzer. Also at that time, Craig Blitzer, the elected district attorney for Rockingham County (District 17A), commenced employment of Pam Bradsher. Pam Bradsher was defendant's wife; Cindy Blitzer was Craig

Blitzer's wife. However, defendant and Craig Blitzer wanted to employ their own wives.

¶ 12 Initially, Cindy Blitzer, employed by defendant, worked from the Caswell County District Attorney's Office (District 9A) on Caswell County District Court matters with John Stultz, who was an assistant district attorney in that district. Pam Bradsher, employed by Craig Blitzer, initially worked from the Rockingham County District Attorney's Office (District 17A). Yet, by March or April 2015, Pam Bradsher worked from the Person County District Attorney's Office (District 9A) on Person County matters. Around the same time, defendant authorized Cindy Blitzer to work from either the Rockingham County District Attorney's Office (District 17A) or from her home.

¶ 13 After this transition, Stultz assigned Cindy Blitzer to work on a case from Rockingham County that the district attorney's office in District 9A was handling (the Shockley case). Given this context, the Shockley case was classified as a conflict case. Cindy Blitzer reviewed and organized the file. She also worked on two or three other matters for Stultz "but nothing significant."

¶ 14 In May 2015, the State Ethics Commission informed defendant and Craig Blitzer that the prohibition against employing relatives under the State Government Ethics Act, N.C.G.S. § 138A-40, could not be waived. As a result, they could not hire their own wives as desired. Roughly three months later in August 2015, Pam Bradsher resigned from her employment with District 17A.

¶ 15 In light of Pam Bradsher's resignation, defendant asked Craig Blitzer to hire Tyler Henderson as a District 17A employee to work in District 9A and exclusively on District 9A matters. Henderson had previously been working for defendant in District 9A. Craig Blitzer agreed and hired Henderson. Henderson commenced work as a District 17A employee on 18 August 2015, the day after Pam Bradsher's last day of work as a District 17A employee. Craig Blitzer did not supervise Henderson's work, and Henderson worked from the Person County District Attorney's Office on Person County matters.

¶ 16 Cindy Blitzer meanwhile remained employed by District 9A. At that time, Cindy Blitzer was working the hours that she claimed "[f]or the most part."

¶ 17 Also in August 2015, Stultz informed defendant that he did not feel comfortable trying the Shockley case in the proposed time frame, and defendant responded that he would take over the case and try the case.

Defendant further stated that he would take over any responsibility for the supervision of Cindy Blitzer as it relates to the Shockley case and otherwise. After this conversation, Stultz never assigned any task to Cindy Blitzer.

¶ 18 An assistant district attorney informed the SBI in 2015 that Cindy Blitzer was not working the hours she claimed, and the SBI started investigating. For unexplained reasons, the investigation ended.

¶ 19 As of early March 2016, Cindy Blitzer was only working on the Shockley case. She had no other files or work. Defendant and Henderson went to the Rockingham County District Attorney's Office in March 2016 to retrieve the Shockley case file from Cindy Blitzer. During that visit, Craig Blitzer told defendant about the SBI investigation. In response, defendant told Craig Blitzer to vary Cindy Blitzer's time by entering vacation and sick time.

¶ 20 After defendant and Henderson took the Shockley case file, Cindy Blitzer had no work to do. She called defendant to obtain work, but she never received a response from defendant. She also asked her husband to speak with defendant about her lack of work. Despite not working, she continued to put in her time as if she was working and received payment for that time.

¶ 21 In April 2016, Cindy Blitzer started a full-time nursing program at a university while still employed by District 9A. Craig Blitzer also informed defendant in April 2016 that Cindy Blitzer had no work to do since March 2016 when the Shockley case file was taken from her. Defendant responded to Craig Blitzer by telling him that Cindy Blitzer should concentrate on school and continue to input her time as if she was working. After this conversation, Cindy Blitzer never received any work.

¶ 22 Cindy Blitzer testified that:

> Q. . . . [A]fter March when the Shockley case is taken away from you . . . [d]oes the defendant, Wallace Bradsher, reach out to you and ask you, "Hey, Cindy, where are you? Hey, Cindy, what's you working on? Hey, Cindy, why aren't you in the office? Hey, Cindy, can you come and help me with something or help someone in the office with anything?"
>
> A. No.

Q. Does he ever at any point reach out to you or does anyone from his office ever reach out to you and request that you do any work whatsoever for the Person or Caswell County District Attorney's Office[s]?

A. No.

Q. Do they ever reach out to you after April the 1st — after they take the Shockley file in March and say, "Hey, I've got this special project I want you to help us out with"?

A. No.

Q. Before that date, had they ever asked you to help out with a special project?

A. No.

Q. Did he ever ask you or did anyone at his staff ever ask you to use your nursing expertise in any way to assist with a mental health court?

A. No.

Q. Have you ever heard of a mental health court?

A. I am aware of what a mental health court is, but I was never asked to help with one, no.

Q. Okay. Were you ever asked to help out with any driving while impaired court as far as a special project?

A. No, sir.

Q. Bottom line, after that file gets taken from you, do you have any work to do for the defendant?

A. No, sir.

¶ 23 In April 2016, the assistant district attorney who had contacted the SBI in 2015 contacted the SBI again, informing the SBI that Cindy Blitzer was attending school during work hours. The SBI started a new investigation.

¶ 24 In July 2016, the SBI assigned Agent Whitley to the special investigations unit that was investigating whether Cindy Blitzer was "actually

working the hours that she was being paid as an investigator in [District 9A]." As Agent Whitley explained, "[t]he investigation was to concentrate on either showing that Cindy Blitzer did work the hours she was being paid for or she didn't work the hours she was being paid for."

¶ 25 Agent Whitley contacted the Administrative Office of the Courts (AOC) to learn whether Cindy Blitzer was putting in hours worked or whether she had taken leave. AOC personnel informed Agent Whitley that Cindy Blitzer "was still entering her time . . . [generally for] eight hours a day, five days a week." AOC personnel also informed Agent Whitley that her hours had not been approved in the system.

¶ 26 Next, on or about 10 August 2016, Agent Whitley telephoned defendant to introduce himself, schedule an appointment, and inform him of the investigation and the nature of the investigation. When defendant returned Agent Whitley's call, Agent Whitley informed defendant of the call's purpose. Agent Whitley told defendant that the SBI "had received a complaint . . . that a member of [defendant's] staff, Cindy Blitzer, was not showing up to work [and] was being paid for hours that she was not working." Agent Whitley explained that he "would like to come [to defendant's office] and talk with him about it" and "conduct interviews with some of his staff." As a result of the call, Agent Whitley and defendant scheduled an appointment to meet on 6 September 2016 at the Person County District Attorney's Office.

¶ 27 On 15 August 2016, defendant called Stultz after hours and asked him to come to the Person County District Attorney's Office. At the office, defendant informed Stultz that he had received a phone call from an SBI agent and that there was a problem with Cindy Blitzer's hours. Stultz asked defendant who was releasing her logged time, and defendant answered, "You are." Stultz disagreed, reminding defendant that earlier that year defendant had said he would assign that duty to someone else. Stultz further stated his speculation that the problem may be that Cindy Blitzer's hours were not being released. After calling defendant's administrative assistant to ask who was supposed to be releasing Cindy Blitzer's time and hearing from her that this task was still assigned to him, Stultz told defendant that he could release the time if that was what defendant requested him to do. While logging into his computer, Stultz asked defendant whether Cindy Blitzer still worked for District 17A and had been working her hours. Defendant answered both questions in the affirmative. Based on his prior conversation with defendant in August 2015, Stultz understood that defendant had been supervising Cindy Blitzer since that conversation. Thus, Stultz released the time as directed by defendant.

¶ 28 Prior to his appointment with defendant, Agent Whitley spoke with two District 17A employees who had some information that they wanted to provide.

¶ 29 Agent Whitley's goal for his visit to the Person County District Attorney's Office on 6 September 2016 was to interview people with whom Cindy Blitzer worked. He had mentally considered the process for his investigation. However, since it was early in the investigation, he had not developed a lead sheet detailing the intended investigative path. At that stage in the investigation, he did not have a preconceived notion of how the investigation would proceed. It could have gone many ways; "[i]t just depend[ed] on the information that [he] receive[d]."

¶ 30 On 6 September 2016, after arriving at the Person County District Attorney's Office, Agent Whitley interviewed defendant. Agent Whitley testified concerning his conversation with defendant about Cindy Blitzer's work as follows:

> Q. . . . [D]id you ask him what type of work Cindy Blitzer was supposed to be doing for him?
>
> A. I did.
>
> Q. Was he able to tell you anything?
>
> A. He told me that she worked on conflict cases. I believe he did reference the Shockley case when we met. He said that she also worked on special projects for him.
>
> Q. When you say "for him," what do you mean by that?
>
> A. Projects at his direction.
>
> Q. Okay. That he had assigned to her?
>
> A. Yes, sir.
>
> Q. Did he provide you with a list of special projects that he had assigned to her?
>
> A. No, he didn't at that time. We did agree that he would compile a list of projects and forward that to me at a later date.
>
> Q. Okay. Well, let me go ahead and ask you: Did you ever get that list of projects that he worked on with her?

A. No, sir.

Q. Did he tell you if there were any other things that she was supposed to be working on?

A. He did say that she was to help out in Caswell County and also she worked — her day-to-day work would be done in Rockingham County, and she was to do any other projects or work that Mr. Stultz wanted her to do from Caswell County and then any other projects or work that the Rockingham County office wanted her to do.

Q. All right. Did he say to you that he ever talked to her about the number of hours that she was supposed to work?

A. He did say that he had spoken with her and she knew to put in 40 hours of work each week.

Q. Did you ask him if he had ever provided her with any equipment or anything like that through his office?

A. Yes, I did. He said that she was provided with a desk at one time, but that desk was allocated to someone else at a certain point and she no longer had it. He said that she did not have a computer through his office. I believe I asked about cell phones, that type thing. I think he said that she did have a phone there at the office, but no cell phone was issued to her.

. . . .

A. He told me at one point in the interview that she was a liaison to the Rockingham office for conflict cases.

. . . .

A. He said that she was — also does special projects at his direction.

Q. Again, at his direction?

A. Yes, sir.

Q. And did you ask for a list of those special projects?

A. That was part of the list that we talked about towards the end of the interview, that I was expecting to meet with him again at some point to conduct another interview and receive this list of any projects or any work she could have done to give her credit for that.

Q. And is that the list that you never got?

A. Yes, sir.

. . . .

Q. Did you ask the defendant for a list of people who would have had direct contact working with Cindy Blitzer?

A. Yes, sir.

Q. Was he able to provide you with that list?

A. He did.

Q. And when he provided you with that list, whose names were on it?

A. He told me that he believed the employees that could possibly have [contact with her or] worked with her would have been . . . Stultz [and five other individuals, including defendant's administrative assistant].

Q. Did you talk to those folks?

A. Yes, sir. They were all interviewed.

. . . .

Q. All right. During the course of this interview with the defendant, did you tell him that you were looking into whether or not Cindy was actually doing any work?

A. That is exactly what I told him.

Q. When you said that to him, did the defendant ever have any doubt or express to you that he didn't know if she was working or not?

A. No, he did not say that. He led me to believe that she was working.

> Q. And, in fact, told you he was going to give you a list of the things that she was working on?
>
> A. Yes, sir.
>
> . . . .
>
> Q. As a result of that information that you received from the defendant, did you have to go look into things that he had told you that ended up not being true?
>
> A. That is correct.
>
> Q. What types of things did you have to go look into?
>
> A. Well, that expanded the list of people that had to be interviewed because we, basically, had to interview the bulk of the employees from each county. . . . There were quite a few things we had to do.
>
> Q. Okay.
>
> A. The lead sheet would have looked a lot different had the information from [defendant] been different.

¶ 31 During this interview, Agent Whitley also sought defendant's permission to talk to his employees to collect information on whether Cindy Blitzer "was actually working for the money or not."

¶ 32 After his trip to the Person County District Attorney's Office and interview with defendant,[1] Agent Whitley "realized [that he] was going to have to meet with [defendant] again" and that "[i]t was going to take a while to complete this process." As a direct result of his interview with defendant,Agent Whitley had to track down other leads and had to interview the employees identified by defendant.

¶ 33 While at the Person County District Attorney's Office, Agent Whitley interviewed three District 9A employees, two of which had been named by defendant. A few days later, Agent Whitley interviewed Stultz, who

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1. Agent Whitley also prepared his investigation notes from his interview of defendant, which included a note that defendant "stated that Cindy Blitzer *is* a liaison to the Rockingham [County District Attorney's] Office for conflict cases," and defendant "stated that Cindy Blitzer also *does* special projects at his direction." (Emphases added.)

had been named by defendant. He also interviewed most if not all District 17A employees and interviewed nine more times the assistant district attorney who had initially contacted the SBI to inform the SBI that Cindy Blitzer was not working the hours she claimed. In the interviews, each of the employees identified by defendant as possibly having contact with or working with Cindy Blitzer indicated that he or she "had very minimal contact with Cindy [Blitzer]."

¶ 34 In addition to conducting interviews, the SBI submitted a public records request to the Rockingham County Sheriff's Office to obtain documents reflecting keycard activity by Cindy Blitzer. Such information was requested from other counties as well. The documents obtained from Rockingham County reflected that Cindy Blitzer's keycard was used on three days over the course of three months in the spring and summer of 2016.

¶ 35 In October 2016, the Blitzers called defendant and informed him that Cindy Blitzer wanted to resign. Defendant refused Cindy Blitzer's resignation and told her to keep entering hours as if she was working. Defendant knew that Cindy Blitzer had no work to do. Nevertheless, he suggested that Cindy Blitzer had been working on "special projects" and that she should tell investigators that. This flabbergasted the Blitzers because Cindy Blitzer had never worked on or heard anything about special projects prior to that conversation. She had only worked on the Shockley case.

¶ 36 Defendant later changed course and had his administrative assistant fire Cindy Blitzer a few days later.

¶ 37 The SBI continued to investigate whether Cindy Blitzer had been working while employed by defendant. In early March 2017, the SBI obtained a search warrant for and seized the computer in the Rockingham County District Attorney's Office that had been identified as Cindy Blitzer's computer. Shortly thereafter, Craig Blitzer resigned from his position as district attorney of Rockingham County.

¶ 38 Until May 2017, the Blitzers declined to submit themselves to interviews with the SBI. Cindy Blitzer stated during her interview on 12 May 2017 that she worked every hour that she logged until the Shockley case file was taken from her in March 2016 but did not work thereafter. Given her statement, the SBI decided not to forensically examine the computer that it had seized. The SBI also issued subpoenas to telephone carriers for phone numbers affiliated with the Blitzers to obtain phone records of incoming and outgoing calls.

¶ 39 Subsequently, the State criminally charged Craig Blitzer, and he pleaded guilty to one count of failure to discharge duties on 17 July 2017. The Blitzers also paid back the State $48,000. In October 2017, a grand jury indicted defendant by superseding indictment for conspiracy to commit obtaining property by false pretenses, obtaining property by false pretenses, aiding and abetting obtaining property by false pretenses, three counts of felony obstruction of justice, and willful failure to discharge the duties of office.

¶ 40 Applying the standard of review for motions to dismiss for insufficiency of the evidence, we hold that the evidence taken in the light most favorable to the State was sufficient to support a determination that defendant knowingly and intentionally committed an act which obstructed, impeded, and hindered an investigation and public and legal justice. *See In re Kivett*, 309 N.C. at 670. "[A] reasonable inference of defendant's guilt may be drawn from the circumstances" presented as evidence before the jury. *Barnes*, 334 N.C. at 75.

¶ 41 The Court of Appeals concluded that when taking the evidence in the light most favorable to the State, the evidence presented at trial supported a determination that defendant's statement that Cindy Blitzer worked on special projects was false.[2] *Bradsher*, 275 N.C. App. at 724. However, unlike the Court of Appeals, we additionally hold that a reasonable jury could conclude that defendant's statement to Agent Whitley that Cindy Blitzer worked on conflict cases was false. Granted, Agent Whitley did not testify that he asked defendant if Cindy Blitzer was "currently" working on conflict cases. Yet, as set forth previously in more detail, there was ample evidence from which a reasonable jury could conclude that he asked defendant that question or questions to that effect and defendant knowingly and intentionally answered falsely. For example, Agent Whitley explained to defendant that the investigation's purpose was to assess whether Cindy Blitzer "was being paid for hours that she was not working" and testified that defendant "told [him] that [Cindy Blitzer] worked on conflict cases . . . [and] also worked on special projects for him."

¶ 42 Second, a reasonable jury could conclude that defendant's false statements concerning Cindy Blitzer's work on conflict cases and special projects for defendant obstructed, impeded, and hindered the investigation and public and legal justice. While Agent Whitley had considered a mental process when he interviewed defendant, he testified that his

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2. Neither party petitioned for this Court's review of this holding by the Court of Appeals.

steps and process changed as a result of his interview of defendant, partly because of defendant's false statements. He testified that "[i]t was going to take a while to complete this process." In fact, after interviewing defendant, the SBI interviewed most District 9A and District 17A employees, obtained subpoenas for phone records, submitted public records requests for keycard access data for multiple counties, and reviewed the documents obtained. The SBI also obtained a search warrant for and seized the computer in the Rockingham County District Attorney's Office that had been identified as Cindy Blitzer's computer. Further, after defendant's interview with Agent Whitley, Cindy Blitzer remained employed by defendant and paid by the State until her dismissal by defendant in October 2016. Craig Blitzer also remained as district attorney for Rockingham County until his resignation in March 2017 and did not plead guilty until July 2017.

¶ 43 While the dissent agrees that there is substantial evidence that defendant knowingly and intentionally made false statements with intent to deceive, the dissent contends the foregoing evidence previously summarized fails to satisfy the second element—of obstructing, impeding, or hindering public and legal justice. Yet, by focusing on whether there was "actual" obstruction of justice, the dissent substitutes its factual determination for that of the jury. To convince the dissent, direct, specific evidence is required. Further, to convince the dissent, the false statements must cause more than what would have occurred if defendant had not been interviewed or invoked his right to remain silent.

¶ 44 But this Court is not the fact-finder. We only consider whether there is "more than a scintilla of evidence" supporting the disputed element. *Powell*, 299 N.C. at 99. Is the evidence "existing and real, not just seeming or imaginary[?]" *Id.* Also, direct evidence is not required to survive a motion to dismiss for insufficiency of the evidence. *See e.g.*, *State v. Stone*, 323 N.C. 447, 452 (1988) ("Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence.").

¶ 45 Nor is it proper for this Court to contemplate what evidence "the State should have presented." *State v. Miller*, 363 N.C. 96, 100–01 (2009). The "proper application of the standard of review focuses our analysis on the evidence that the State did present in these highly fact-specific cases." *Id.* at 100. Thus, this Court has and must assess the circumstantial evidence to determine "whether a reasonable inference of defendant's guilt may be drawn from the circumstances." *Barnes*, 334 N.C. at 75.

¶ 46 We conclude there is. There is more than a scintilla of evidence. There is sufficient evidence for the claim to go to "*the jury* to decide whether the facts, taken singly or in combination, satisfy it beyond a reasonable doubt that the defendant is *actually* guilty." *Barnes*, 334 N.C. at 75–76 (cleaned up) (emphasis added).

IV. Conclusion

¶ 47 Defendant could have declined to answer Agent Whitley's questions pursuant to his Fifth Amendment right to remain silent, but in deciding to answer, he could not knowingly and willfully answer with a falsehood. *Bryson v. United States*, 396 U.S. 64, 72 (1969). In this matter, a reasonable jury could conclude that defendant knowingly and intentionally committed an act, here making false statements to Agent Whitley, that obstructed, impeded, and hindered the investigation and public and legal justice. *See In re Kivett*, 309 N.C. at 670. Because we conclude that there is sufficient evidence to support the jury's verdict finding defendant guilty of felony obstruction of justice, we reverse the Court of Appeals' decision and reinstate the felony obstruction of justice conviction.

REVERSED.

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

Justice EARLS dissenting.

¶ 48 Not every lie or misstatement to law enforcement constitutes an *obstruction of justice*. Holding as much would render one of the three elements of common law felonious obstruction of justice meaningless: the requirement that justice is, in fact, obstructed. *See State v. Ditenhafer* (*Ditenhafer I*), 373 N.C. 116, 128 (2019) (recognizing that the elements of common law felonious obstruction of justice are that: (1) the defendant unlawfully and willfully; (2) *obstructed justice*; (3) with deceit and intent to defraud).

¶ 49 And though on a motion to dismiss for insufficiency of the evidence, we must consider the evidence in the light most favorable to the State and allow it "every reasonable inference to be drawn therefrom," *State v. Ditenhafer* (*Ditenhafer II*), 376 N.C. 846, 2021-NCSC-19, ¶ 28 (quoting *State v. Powell*, 299 N.C. 95, 99 (1980)), the State must still introduce substantial evidence of each element of the crime, meaning "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion[,]" *Ditenhafer II*, ¶ 28 (quoting *State v. Stone*,

323 N.C. 447, 451 (1988)). I do not agree with the majority that the State has met its burden here, specifically with respect to the requirement that it must introduce evidence that justice was actually obstructed.

¶ 50 As this Court has recognized, an obstruction of justice is "any act which prevents, obstructs, impedes or hinders public or legal justice." *Ditenhafer I*, 373 N.C. at 128 (quoting *In re Kivett*, 309 N.C. 635, 670 (1983)). In interpreting statutes that have codified similar versions of the common law crime of obstruction, courts in other jurisdictions have emphasized that an obstruction only exists if there was a material impediment to the administration of justice.[1]

¶ 51 Mr. Bradsher was convicted of felony obstruction of justice on the basis of two statements he made to Agent Whitley during a 6 September 2016 interview that, taken in the light most favorable to the State, were false. I agree with the majority that a reasonable jury could conclude that Mr. Bradsher's statements during this interview that Cindy Blitzer worked on special projects and that she worked on conflict cases were false at the time they were made and were willfully made with the intent to deceive. The additional, essential question is whether those statements actually obstructed justice. *See*, *e.g.*, *State v. Acklin*, No. COA21-385, 2022 WL 29887, *2 (N.C. Ct. App. Jan. 4, 2022) (unpublished) (vacating judgments where indictment "failed to allege an essential element of common law felony obstruction of justice: that [d]efendant obstructed, prevented, impeded, or hindered justice"); *State v. Anderson*, No. COA15-269, 2015 WL 7288200, *6 (N.C. Ct. App. Nov. 17, 2015) (unpublished) ("[T]o convict a defendant of the common law offense of obstruction of justice, the State must prove that she 'had committed an act

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1. *See*, *e.g.*, *People v. Casler*, 2020 IL 125117, ¶¶ 41, 53 (reading a material impediment requirement into the state's obstruction statute and holding that the defendant's provision of a false name to law enforcement was not a material impediment); *State v. Wilson*, 101 Ohio Misc. 2d 43, 46 (Mun. 1999) (holding that the defendant's lie to law enforcement that a fourth individual was not in a car that was pulled over by police was not an obstruction under the state's "obstruction of official business" statute and explaining that a "false statement, even if made with the intent to hamper or impede, does not violate state law unless the officer is actually hampered in some substantial way").

Though these cases interpret statutes codifying the crime of obstruction rather than the common law crime, they provide helpful guidance. Similar to this Court's definition of obstruction of justice, for example, the statute at issue in *Wilson* prohibits activity that "hampers" or "impedes" public officials from carrying out their duties. Relying on the dictionary definitions of these terms, the court held that conduct, even if intended to hamper or impede, must actually result in the intended effect in some substantial way, as quoted above. *See Wilson*, 101 Ohio Misc. 2d at 46.

that prevented, obstructed, impeded, or hindered public or legal justice.' " (quoting *State v. Taylor*, 212 N.C. App. 238, 246, *disc. review denied*, 365 N.C. 342 (2011))).

¶ 52 In support of its position that Mr. Bradsher's false statements obstructed justice, the State presented the following evidence: (1) State Bureau of Investigation (SBI) investigator Agent Whitley's testimony that his lead sheet would have "looked a lot different had the information from Mr. Bradsher been different"[2]; (2) Agent Whitley's testimony that the information Mr. Bradsher provided "expanded the list of people that had to be interviewed because [he] . . . had to interview the bulk of the employees from each county"; and (3) Agent Whitley's testimony that he was going to have to interview Mr. Bradsher a second time and that "[i]t was going to take a while to complete th[e] process." The majority adds that Agent Whitley had "considered a mental process" that changed after his first interview with Mr. Bradsher, in part, based on defendant's false statements. The majority also points out that, as part of its investigation, the SBI obtained subpoenas for phone records, submitted public records requests for keycard access data, and reviewed the documents it obtained.

¶ 53 This evidence fails to demonstrate how Mr. Bradsher's false statements—specifically that Ms. Blitzer worked on special projects and conflict cases—impacted the course of the investigation in a way that hindered or obstructed it or led it down a path it would not have otherwise taken if the interview were never conducted in the first place. A closer look at Agent Whitley's testimony further illustrates this deficiency. Agent Whitley testified that he had considered a mental process prior to interviewing Mr. Bradsher, but he clarified that "[i]t was so early in the investigation" that he did not believe he had yet developed a lead sheet. He further testified that he did not go into the interview with Mr. Bradsher "with a preconceived notion" about how long the investigation would take. These statements underscore the fact that the evidence presents no baseline from which to evaluate how and to what extent Mr. Bradsher's false statements impeded the investigation.

¶ 54 The Court of Appeals' decision in *State v. Cousin* further highlights this flaw in the State's evidence. In *Cousin*, the defendant was charged

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2. This testimony is not useful evidence of obstruction. It is manifest that had Mr. Bradsher provided different information, investigators would have prepared different plans in response. As explained below, the relevant question does not hinge on how the investigation might have been different had Mr. Bradsher given different information but rather how it would have differed had Mr. Bradsher never given any information at all.

with obstruction of justice after providing law enforcement with eight written statements either identifying different individuals as the killer in a homicide case or placing different individuals at the scene. *See State v. Cousin*, 233 N.C. App. 523, 530–31 (2014). The Court of Appeals held that there was sufficient evidence of obstruction, including because the detective "testified as to the significant burden imposed on the investigation," such as interviewing each individual the defendant identified and analyzing whether any of them were present at the scene of the crime. *Id.* at 531. *Cousin* is an example of a case in which law enforcement was manipulated into pursuing a line of investigation that it would not have pursued in the absence of the defendant's false statements.

¶ 55 The State's evidence here is not sufficiently specific to show a similar departure from the course the investigation would necessarily have taken otherwise. The closest it comes is in the form of Agent Whitley's testimony that Mr. Bradsher's false statements "expanded the list" of individuals who had to be interviewed as part of the investigation. If the false statements themselves necessitated the additional interviews, and these interviews would not have occurred had Mr. Bradsher either never been interviewed or invoked his right to remain silent, the evidence may have been sufficient to submit the charge to the jury. But Agent Whitley's testimony does not suggest as much, and it is entirely unclear how, taken alone, Mr. Bradsher's statements that Ms. Blitzer had worked on special projects and conflict cases required investigators "to interview the bulk of the employees from each county,"[3] and further, that they would not have otherwise undertaken to conduct those interviews. The investigation here was to determine whether Ms. Blitzer was, in fact, working the hours for which she was being paid. All of the evidence about the steps taken during the investigation were steps that would be required to answer that question, with or without Mr. Bradsher's false statements that Ms. Blitzer worked on special projects and conflict cases.

¶ 56 Unlike *Cousin*, where the defendant's false statements implicating several individuals in a homicide required law enforcement to confirm the veracity of defendant's false charges, this case presents a situation where, taken in the light most favorable to the State, the defendant intentionally made misleading statements and investigators took additional steps to discover whether those statements were accurate.

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3. Agent Whitley also testified that Mr. Bradsher provided him with a list of individuals with whom Ms. Blitzer had worked directly. This list prompted Agent Whitley to follow up with those individuals. But, as he acknowledged, this list contained truthful information regarding employees who had come in direct contact with Ms. Blitzer. It therefore does not and cannot serve as the basis for an obstruction of justice charge.

But a falsehood that merely requires additional investigation is not the touchstone of the inquiry regarding whether an obstruction or impediment existed. Rather, the inquiry turns on whether the content of the false statement caused investigators to be misdirected or delayed in a tangible way, for example, by being led down a path they would not have otherwise taken *but for* the false information. *See also State v. Skinner*, No. COA14-04, 2014 WL 6901847, *4 (N.C. Ct. App. Dec. 2, 2014) (unpublished) (holding that evidence that defendants' threats delayed a witness from notifying law enforcement personnel about the crimes committed against her for approximately eighteen hours constituted substantial evidence that defendants committed an act that prevented, obstructed, impeded, or hindered public or legal justice, and, relying on Merriam-Webster's Collegiate Dictionary, defining "impede" as "to interfere with or slow the progress of," and defining "hinder" as "to make slow or difficult the progress of," "to hold back," or "to delay, impede, or prevent action"). Here, the State's evidence does not explain how Mr. Bradsher's statements forced investigators to pursue routes of inquiry that they would not have pursued had the statements never been made or otherwise delayed them in their efforts to determine whether Ms. Blitzer actually worked the hours for which she was paid. Mr. Bradsher's failure to confess the truth in his interview with Agent Whitley cannot, without more, be the sole basis of an obstruction of justice charge because he has the right to remain silent. Under common law, any lies he tells law enforcement are only criminal if they, in fact, obstruct justice. *See* Strong's N.C. Index 4th, Obstructing Justice § 1.

¶ 57 The majority asserts that this application of the State's burden would improperly place the Court in the role of a factfinder and require the Court to contemplate "what evidence the State should have presented." But requiring the State to present evidence of an essential element of the crime does not usurp the role of the jury—it simply requires of the State what it is legally obligated to do: present evidence that is "necessary to persuade a rational juror to accept a conclusion." *State v. Crockett*, 368 N.C. 717, 720 (2016). Further, requiring the State to introduce evidence of each element of a crime does not inappropriately dictate what evidence the State *should have* presented, but rather what evidence it *must* present for the charge to be properly submitted to the jury.

¶ 58 Here, requiring the State introduce evidence—whether direct or circumstantial—of how Mr. Bradsher's conduct obstructed the investigation was necessary to prove one of the three elements of felony common law obstruction of justice. The problem is that the State introduced neither direct nor circumstantial evidence of an actual obstruction.

Instead, it introduced testimony suggesting how the investigation might have been different had Mr. Bradsher told the truth from the outset. The majority, for example, points to the fact that Agent Whitley had to alter his preliminary plans for the investigation in response to Mr. Bradsher's statements, issue subpoenas for and seize Ms. Blitzer's work computer, and submit public records requests for keycard access data as evidence indicating obstruction. But these examples, like the rest of the evidence relied upon, illustrate activities that would have been required had Mr. Bradsher simply exercised his constitutional right to remain silent. Again, Mr. Bradsher's misstatements alone are not a crime, and the record is wholly devoid of evidence suggesting what role his specific falsehoods played in obstructing or impeding the investigation.

¶ 59 Finally, the majority seems to suggest that the State presented circumstantial evidence showing that Mr. Bradsher's falsehoods obstructed the investigation. Circumstantial evidence is "proof of a chain of facts and circumstances indicating the guilt or innocence of a defendant." *State v. Adcock*, 310 N.C. 1, 36 (1984). The evidence here fails to support any inferences whatsoever regarding how Mr. Bradsher's conduct obstructed justice. Mischaracterizing insufficient evidence as simply circumstantial reduces the State's well established burden of providing substantial evidence to nothing more than a burden in name only.

¶ 60 The State's evidence only details actions that investigators would have had to take anyway if Mr. Bradsher were never interviewed or had simply invoked his Fifth Amendment right to remain silent. Agent Whitley's testimony is not sufficiently specific to suggest otherwise. Tasks that would have been conducted regardless of whether misleading statements were made cannot amount to evidence of actual obstruction of justice. Thus, because the State did not introduce evidence that Mr. Bradsher's statements obstructed the investigation, I dissent from the Court's holding that there was substantial evidence of every element of common law felonious obstruction of justice, such that submitting the charge to the jury was proper. The State's evidence, at best, proved nothing more than that Mr. Bradsher lied during his interview with Agent Whitley. I would hold that the trial court erred in denying Mr. Bradsher's motion to dismiss for insufficient evidence as to the charge of felony obstruction of justice based on allegations of false statements he made to Agent Whitley because the State did not produce substantial evidence of actual obstruction.

Justice MORGAN joins in this dissenting opinion.

TAYLOR v. BANK OF AM., N.A.

[382 N.C. 677, 2022-NCSC-117]

CHESTER TAYLOR III, RONDA AND BRIAN WARLICK, LORI MENDEZ, LORI MARTINEZ, CRYSTAL PRICE, JEANETTE AND ANDREW ALESHIRE, MARQUITA PERRY, WHITNEY WHITESIDE, KIMBERLY STEPHAN, KEITH PEACOCK, ZELMON MCBRIDE
v.
BANK OF AMERICA, N.A.

No. 102A20-2

Filed 4 November 2022

Appeal and Error—order granting motion to dismiss—de novo review—no request by parties for findings—remand not appropriate

In a case involving allegations of fraud against a bank, where the trial court granted defendant's motion to dismiss for failure to state a claim, the Court of Appeals erred by remanding the case to the trial court for further findings of fact instead of reviewing de novo whether plaintiffs' complaint contained allegations sufficient to support their claims for relief. The trial court was not required to include any factual findings or conclusions of law in its order, and none were requested by either party.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, No. COA20-160-2, 2021 WL 4535323 (N.C. Ct. App. Oct. 5, 2021), reversing an order entered on 3 October 2019 by Judge Lisa C. Bell in Superior Court, Mecklenburg County, and remanding for the trial court to make findings of facts and conclusions of law. Heard in the Supreme Court on 19 September 2022.

Robinson Elliott & Smith, by William C. Robinson and Dorothy M. Gooding; Robert F. Orr; and Aylstock, Witkin, Kreis & Overholtz, PLLC, by Samantha Katen and Caitlyn Miller, for plaintiff-appellees.

McGuireWoods LLP, by Bradley R. Kutrow; and James W. McGarry and Keith Levenberg for defendant-appellant.

BARRINGER, Justice.

¶ 1 In this case, we must decide whether the Court of Appeals erred by remanding the case to the trial court for findings of fact and conclusions

of law on defendant's motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. As addressed in more detail herein, we conclude that the Court of Appeals erred because an order granting a Rule 12(b)(6) motion to dismiss is reviewed de novo and neither party requested findings of fact and conclusions of law.

I. Background

¶ 2 On 1 May 2018, plaintiffs commenced this action against Bank of America, N.A. (Bank of America), alleging fraud and other related claims arising out of Bank of America's Home Affordable Modification Program. Bank of America moved to dismiss the amended complaint for failure to state a claim pursuant to North Carolina Rule of Civil Procedure 12(b)(6). The trial court granted Bank of America's motion to dismiss pursuant to Rule 12(b)(6), concluding that plaintiffs' claims were "barred by the applicable statute[ ] of limitation[s]" and that "the claims of all [p]laintiffs who were parties to foreclosure proceedings [were] barred by the doctrines of *res judicata* and collateral estoppel." Plaintiffs appealed.

¶ 3 In its decision, a divided panel of the Court of Appeals acknowledged that appellate courts review orders granting a motion to dismiss pursuant to Rule 12(b)(6) de novo. *Taylor v. Bank of Am., N.A.*, No. COA20-160-2, 2021 WL 4535323, *2 (N.C. Ct. App. Oct. 5, 2021). Then, after observing that the trial court did not make findings of fact, the Court of Appeals concluded that it could not "determine the reason behind the grant" and could not "conduct a meaningful review of the trial court's conclusions of law." *Taylor*, 2021 WL 4535323, at *3. Based on these conclusions, the Court of Appeals reversed the trial court's order and remanded the case. *Id.* On remand, the Court of Appeals directed the trial court to make factual findings and conclusions of law. *Id.*

¶ 4 The dissent concluded that the trial court correctly dismissed plaintiffs' claims as time barred under the applicable statute of limitations. *Taylor*, 2021 WL 4535323, at *3–4 (Dillon, J., dissenting). Bank of America filed a notice of appeal based on the dissent pursuant to N.C.G.S. § 7A-30(2).

II. Analysis

¶ 5 On appeal to this Court, Bank of America argues that the Court of Appeals "erred by professing that it could not resolve this issue of law on the record" and concluding that it "needed 'findings of fact' " from the trial court to conduct a de novo review of a Rule 12(b)(6) ruling. Bank

of America claims that there is no need for a trial court to articulate its reasoning in an order on a Rule 12(b)(6) motion to dismiss because appellate courts analyze de novo whether a complaint's allegations state a claim upon which relief can be granted. Additionally, Bank of America contends that factual findings and conclusions of law are improper in the context before this Court. Bank of America raises that North Carolina Rule of Civil Procedure 52(a)(2) provides that "[f]indings of fact and conclusions of law are necessary on decisions of any motion or order . . . *only when* requested by a party and as provided by Rule 41(b)." N.C.G.S. § 1A-1, Rule 52(a)(2) (2021) (emphasis added). Bank of America asserts, and plaintiffs concede, that plaintiffs did not request findings of fact and conclusions of law.

¶ 6 Given that plaintiffs appealed to the Court of Appeals an order granting a Rule 12(b)(6) motion to dismiss and the record does not reflect that any party requested findings of fact and conclusions of law, we agree that the Court of Appeals erred. The standard of review for an order granting a Rule 12(b)(6) motion to dismiss is well established. Appellate courts review de novo an order granting a Rule 12(b)(6) motion to dismiss. *E.g.*, *Bridges v. Parrish*, 366 N.C. 539, 541 (2013).

¶ 7 "The word de novo means fresh or anew; for a second time . . . ." *In re Hayes*, 261 N.C. 616, 622 (1964) (cleaned up); *see also De Novo*, *Black's Law Dictionary* (11th ed. 2019) (defining "de novo" as "[a]new"). The appellate court, just like the trial court below, considers "whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Bridges*, 366 N.C. at 541 (quoting *Coley v. State*, 360 N.C. 493, 494 (2006)). In other words, under de novo review, the appellate court as the reviewing court considers the Rule 12(b)(6) motion to dismiss anew: It freely substitutes its own assessment of whether the allegations of the complaint are sufficient to state a claim for the trial court's assessment. *See id.*; *Lanvale Props., LLC v. Cnty. of Cabarrus*, 366 N.C. 142, 149 (2012); *Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd. of Adjustment*, 365 N.C. 152, 156 (2011). Thus, the review of an order granting a Rule 12(b)(6) motion to dismiss does not involve an assessment or review of the trial court's reasoning. Rather, the appellate court affirms or reverses the disposition of the trial court—the granting of the Rule 12(b)(6) motion to dismiss—based on the appellate court's review of whether the allegations of the complaint are sufficient to state a claim.

¶ 8 Assuming, without in any way deciding, that there could ever be a need for the making of findings and conclusions in an order granting or denying a motion to dismiss lodged pursuant to Rule 12(b)(6) of

the North Carolina Rules of Civil Procedure, neither plaintiffs nor Bank of America requested factual findings or conclusions of law in the trial court's order. Pursuant to Rule 52(a)(2) of the North Carolina Rules of Civil Procedure, a trial court is not required to make factual findings and conclusions of law to support its order unless requested by a party. N.C.G.S. § 1A-1, Rule 52(a)(2); *see also Toshiba Glob. Com. Sols., Inc. v. Smart & Final Stores LLC*, 381 N.C. 692, 2022-NCSC-81, ¶ 5. Therefore, the trial court was not required to include any factual findings or conclusions of law in its order granting Bank of America's Rule 12(b)(6) motion to dismiss. As a result, there is no legal basis or practical reason for the Court of Appeals to remand the case to the trial court to make factual findings and conclusions of law.

¶ 9 We conclude that the Court of Appeals erred by not conducting a de novo review of the sufficiency of the allegations in plaintiffs' complaint as required by the well-established standard of review. Therefore, we vacate the Court of Appeals' decision and remand this case to the Court of Appeals to fulfill its obligation to follow this Court's precedent and to address "whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Bridges*, 366 N.C. at 541 (quoting *Coley*, 360 N.C. at 494). Given the foregoing, we do not reach Bank of America's remaining arguments concerning the insufficiency of the allegations to state a claim.

III. Conclusion

¶ 10 The Court of Appeals erred by remanding the case to the trial court with instructions to make factual findings and conclusions of law. Thus, we vacate the Court of Appeals' decision and remand this case to the Court of Appeals to review this matter in a manner not inconsistent with this opinion.

VACATED AND REMANDED.

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

TOWNES v. PORTFOLIO RECOVERY ASSOCS., LLC

[382 N.C. 681, 2022-NCSC-118]

PIA TOWNES
v.
PORTFOLIO RECOVERY ASSOCIATES, LLC

No. 66PA21

Filed 4 November 2022

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 275 N.C. App. 939, 854 S.E.2d 146 (2020), affirming in part and reversing in part an order entered on 16 August 2019 by Judge Robert C. Ervin in Superior Court, Mecklenburg County, granting in part plaintiff's motion for summary judgment; vacating in part a final judgment entered on 7 October 2019; affirming an order entered on 7 October 2019 denying defendant's motion to dismiss; and remanding the case to the trial court. Heard in the Supreme Court on 30 August 2022.

North Carolina Justice Center, by Jason A. Pikler and Carlene McNulty; and J. Jerome Hartzell for plaintiff-appellee.

Jon Berkelhammer, Joseph D. Hammond, Michelle A. Liguori, and D. Scott Hazelgrove II for defendant-appellant.

Legal Aid of North Carolina, by Celia Pistolis and Kathryn A. Sabbeth; Center for Responsible Lending, by Nadine Chabrier; Charlotte Center for Legal Advocacy, Inc., by Karen Fisher Moskowitz; Financial Protection Law Center, by Maria D. McIntyre; Pisgah Legal Services, by Marjorie Maynard; and National Association of Consumer Advocates, by Adrian M. Lapas and Suzanne Begnoche, for amici curiae.

Richard P. Cook, PLLC, by Richard P. Cook, for North Carolina Consumer Bankruptcy Rights Coalition, amicus curiae.

Smith Debnam Narron Drake Saintsing & Myers, LLP, by Caren D. Enloe and Landon G. Van Winkle, for North Carolina Creditors Bar Association, amicus curiae.

Joshua H. Stein, Attorney General, by Daniel P. Mosteller, Deputy General Counsel, and M. Lynne Weaver, Special Deputy Attorney General, for the State of North Carolina, amicus curiae.

PER CURIAM.

¶ 1 Justice ERVIN took no part in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See Piro v. McKeever*, 369 N.C. 291, 794 S.E.2d 501 (2016) (per curiam) (affirming a Court of Appeals opinion without precedential value by an equally divided vote).

AFFIRMED.

COMMUNITY SUCCESS INITIATIVE; JUSTICE SERVED NC, INC; WASH AWAY UNEMPLOYMENT; NORTH CAROLINA STATE CONFERENCE OF THE NAACP; TIMOTHY LOCKLEAR; DRAKARUS JONES; SUSAN MARION; HENRY HARRISON; ASHLEY CAHOON; AND SHAKITA NORMAN

v.

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; 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; KENNETH RAYMOND, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; JEFF CARMON IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; AND DAVID C. BLACK, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS

From N.C. Court of Appeals
22-136; P21-340; P22-153

From Wake
19CVS15941

No. 331PA21

ORDER

The Legislative-Defendants' motion for extension of time is denied. The Court, on its own motion, extends the deadline for the filing of their principal reply brief to 9 September 2022. The Legislative-Defendants' reply brief to the amici briefs remains due on 19 September 2022.

By order of the Court in Conference, this the 2nd day of September, 2022.

/s/ Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 2nd day of September, 2022.

s/Grant E. Buckner
Grant E. Buckner
Clerk of the Supreme Court

CMTY. SUCCESS INITIATIVE v. MOORE

[382 N.C. 685 (2022)]

COMMUNITY SUCCESS INITIATIVE; JUSTICE SERVED NC, INC; WASH AWAY UNEMPLOYMENT; NORTH CAROLINA STATE CONFERENCE OF THE NAACP; TIMOTHY LOCKLEAR; DRAKARUS JONES; SUSAN MARION; HENRY HARRISON; ASHLEY CAHOON; AND SHAKITA NORMAN

v.

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; 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; KENNETH RAYMOND, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; JEFF CARMON IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; AND DAVID C. BLACK, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS

From N.C. Court of Appeals
22-136; P21-340; P22-153

From Wake
19CVS15941

No. 331PA21

ORDER

Plaintiffs' Motion to Set Oral Argument as Soon as Feasible filed 21 September 2022 is allowed to the extent that the Court will calendar the matter for hearing at the first regularly scheduled session of Court to be held in 2023.

By order of the Court in Conference, this the 6th day of October 2022.

/s/ Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 6th day of October 2022.

s/Grant E. Buckner
Grant E. Buckner
Clerk of the Supreme Court

HARPER v. HALL

[382 N.C. 687 (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; 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; DAMON CIRCOSTA, IN HIS OFFICIAL CAPACITY

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

v.

From N.C. Court of Appeals
P21-525

From Wake
21CVS015426 21CVS500085

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

In order to preserve the confidentiality and separation of information concerning the inner workings of a Justice's chambers, as recognized in the Motion filed by the Legislative Defendants, the Motion for Clarification is resolved as follows: Mr. Tim Longest is taking a leave of absence from his clerkship in the chambers of Justice Hudson, effective 1 October 2022, and has and will have no participation of any kind in

the consideration of any case yet to be decided by the Court, including all aspects of this case, until further notice, but at least until after the election of November 2022. Accordingly, the Motion for Clarification is DISMISSED as Moot.

This the 2nd day of October 2022.

/s/ Hudson, J.
Associate Justice

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 2nd day of October 2022.

s/Grant E. Buckner
Grant E. Buckner
Clerk of the Supreme Court

HOLMES v. MOORE

[382 N.C. 690 (2022)]

JABARI HOLMES, FRED CULP, DANIEL E. SMITH, BRENDON JADEN PEAY, AND PAUL KEARNEY, SR.

v.

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

From N.C. Court of Appeals
19-762; 22-16

From Wake
18CVS15292

No. 342PA19-2

ORDER

On 14 January 2022, plaintiffs filed a Petition for Discretionary Review Prior to Determination by the Court of Appeals. This Court issued an order allowing the petition on 3 March 2022. On 11 July 2022, plaintiffs filed a Motion for Expedited Hearing and Consideration and legislative defendants filed a response.

In light of the great public interest in the subject matter of this case, the importance of the issues to the constitutional jurisprudence of this State, and the need to reach a final resolution on the merits at the earliest possible opportunity, plaintiffs' Motion for Expedited Hearing and Consideration is allowed as follows: This case shall be scheduled for oral argument as soon as practicable, on a date to be determined during arguments scheduled the week of 3 October 2022, or by special setting no later than 18 October 2022.

By order of the Court in Conference, this the 9th day of September 2022.

/s/ Hudson, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 9th day of September 2022.

s/Grant E. Buckner
Grant E. Buckner
Clerk of the Supreme Court

HOKE COUNTY BOARD OF EDUCATION, ET AL., PLAINTIFFS

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, PLAINTIFF-INTERVENOR

and

RAFAEL PENN, ET AL., PLAINTIFF-INTERVENORS

v.

STATE OF NORTH CAROLINA AND THE STATE BOARD OF EDUCATION, DEFENDANTS

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, REALIGNED DEFENDANT

and

PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT *PRO TEMPORE* OF THE NORTH CAROLINA SENATE, AND TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, INTERVENOR-DEFENDANTS

From N.C. Court of Appeals
22-86

From Wake
95CVS1158

No. 425A21-2

ORDER

Pursuant to an administrative order entered by this Court on December 23, 2021, and having reviewed and considered precedent established by this Court, N.C.G.S. § 1-72.2, N.C.G.S. § 120-32.6, the North Carolina Code of Judicial Conduct, and the arguments of the parties, plaintiffs' motion and suggestion of recusal is denied.

This the 19th day of August, 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 19th day of August 2022.

s/Grant E. Buckner
Grant E. Buckner
Clerk of the Supreme Court

HOKE COUNTY BOARD OF EDUCATION; ET AL., PLAINTIFFS

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, PLAINTIFF-INTERVENOR

and

RAFAEL PENN, ET AL., PLAINTIFF-INTERVENORS

v.

STATE OF NORTH CAROLINA AND THE STATE BOARD OF EDUCATION, DEFENDANTS

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, REALIGNED DEFENDANT

and

PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE, AND TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, INTERVENOR-DEFENDANTS

From N.C. Court of Appeals
22-86

From Wake
95CVS1158

No. 425A21-2

ORDER

Pursuant to an administrative order entered by this Court on 23 December 2021,[1] and having considered the North Carolina Code of Judicial Conduct, the arguments of the parties, and this Court's precedents—and further having reviewed the procedural history of this case and relevant filings including those referenced by the parties and others—I conclude that grounds do not exist for me to disqualify myself from hearing and deciding the issues presented in *Hoke County Board*

1. Available at: https://www.nccourts.gov/assets/news- uploads/Order%20re%20Recusal%20Motions%20Clocked%20In_0.pdf?VersionId=tF6Vi.8fL KF_2Cd7vX74DItZ0woUshB3

of Education, et al. v. State of North Carolina, et al. (No. 425A21-2). Accordingly, the Motion and Suggestion of Recusal filed by Legislative Intervenor-Defendants on 14 July 2022 is denied.

The North Carolina Code of Judicial Conduct provides that "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 instances where "the judge served as a lawyer in the matter in controversy." N.C. Code of Jud. Conduct, Canon 3(C)(1)(b). In their motion, Legislative Intervenor-Defendants argue that Canon 3 requires me to recuse myself from this case for two reasons: (1) because I signed an Intervening Complaint on behalf of a group of Plaintiff-Intervenors in 2005 as an attorney at the University of North Carolina School of Law Center for Civil Rights, and (2) because I signed an amicus brief on behalf of the Southern Coalition for Social Justice when an earlier iteration of this case was before the Supreme Court of North Carolina in 2013. However, Legislative Intervenor-Defendants' motion omits important factual and legal context that is relevant to the application of Canon 3(C)(1)(b) under these circumstances. In short, I have not served as a lawyer in the matter in controversy currently pending before this Court.

With respect to the Intervening Complaint filed in 2005, it is correct that I was one of several attorneys who signed a motion to intervene on behalf of "plaintiff-intervenors Rafael Penn, *et al.*, who were public school students in the Charlotte-Mecklenburg School District and their parents as next friends, together with the Charlotte Branch of the NAACP." Order re: Motion to Intervene, at 4, Hoke County Bd. of Educ., et al., v. State of North Carolina et al., No. 95 CVS 1158, Wake Co. Superior Ct., (Aug. 19, 2005).[2] The court did "grant the motion to intervene under Rule 24(b) and allow permissive intervention . . . **limited**, however, to consideration of the facts and law arising under movants' third claim of relief . . . which addresses 'the failure of the [Charlotte Mecklenburg School] district to provide sufficient human, fiscal, and educational resources to its central city and high poverty schools.' " *Id.* (emphasis added). However, the court chose to "sever the CMS claims so as to permit separate trial of the CMS claims from the pending matters that are on-going in the remedial phase of this case." *Id.* at 5. Accordingly, the court ordered that the surviving CMS claim "will be pursued separately from the other claims pending in this action . . . and pre-trial discovery and trial, if necessary, will go forward separately on the intervening

2. Because the trial court's 2005 Order re: Motion to Intervene is not otherwise available in electronic format, I attach hereto a copy of that Order obtained from the files maintained by the Clerk of Court of Wake County.

claim." *Id.* at 10. Although the court stated that it "reserves the authority . . . to consolidate . . . portions of this intervention with other claims presently pending in this action," *id.*, there is no record of consolidation while I was representing plaintiff-intervenors, nor do I have any recollection of ever appearing in court on their behalf. Thus, the matter in which I did appear seventeen years ago as one of several attorneys representing intervenors was severed from the underlying case and is not at issue in this appeal.

My representation of plaintiff-intervenors who were adverse to the defendants in this case is not the same as representing the plaintiffs "as [a] lawyer in the matter in controversy" as defined in Canon 3(C)(1)(b). *See State v. Mitchell*, 723 S.E.2d 584 (N.C. Ct. App. 2012) (unpublished) ("Canon 3(C)(1)(b) does not address the purported conflict defendant identifies, which involves [a judge's] prior representation of a party adverse to defendant in a matter unrelated to the present criminal case."). Significantly, the facts and claims at issue in the Intervening Complaint—which largely concerned student assignment policies in CMS—are entirely unrelated to the questions presently before this Court.

With respect to the Amicus Brief filed in 2013, representing an amicus is not the same as representing a party to a "matter in controversy." *Cf. City of Las Vegas Downtown Redev. Agency v. Hecht*, 940 P.2d 127, 130 (Nev. 1997) ("[W]e have stated previously that representing an amicus curiae is not the equivalent of representing a 'litigant' in an appeal. As such, it is clear that representing an amicus curiae is not the equivalent of 'acting as a lawyer in the proceeding' " (quoting Canon 3E(1)(d)of the Nevada Code of Judicial Conduct)); *see also Washington Mut. Fin. Grp., LLC v. Blackmon*, 925 So.2d 780, 788 n.2 (Miss. 2004) ("The motion does not charge that [the attorney] represents a party in this case. Rather, the firm filed an amicus curiae brief on behalf of a nonparty."). As the Ninth Circuit has explained, "[a]n amicus curiae is not a party to litigation. [T]he classic role of amicus curiae [is] assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." *Miller-Wohl Co. v. Comm'r of Lab. & Indus. State of Mont.*, 694 F.2d 203, 204 (9th Cir. 1982). It is unsurprising that, during my decades-long career as a civil rights lawyer in North Carolina, I "assist[ed] in a case of general public interest" on behalf of the organization I led at that time, involving issues of paramount importance to the civil rights community. *See Miller-Wohl Co. v. Comm'r of Lab.*, 694 F.2d at 204.

Intervenor-Defendants correctly note that I recused myself in another pending case, *Bouvier, et al. v. Porter, et al.*, No. 403P21-1, based

on my participation as a lawyer in that matter. But the circumstances in *Bouvier* were substantially different than the circumstances at issue here. In *Bouvier*, I represented the plaintiffs and appeared as counsel on the complaint and amended complaint that formed the basis for the appeal that has come to our Court. Thus, I determined in my judgment that recusal was warranted pursuant to Canon 3(C)(1)(b) because I had "served as [a] lawyer in the matter in controversy." *See* Order, *Bouvier, et al. v. Porter, et al.*, No. 403P21-1 (Jan. 18, 2022). By contrast, in this case, I represented an attempted plaintiff-intervenor in a separate proceeding that "forms part of the historical background of [a] dispute" that has been ongoing for decades, *Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist. No. 1*, 839 F.2d 1296, 1301–02 (8th Cir. 1988), and I filed an amicus brief on behalf of the civil rights organization I was leading a decade ago. Just as a jurist's prior career as a prosecutor is not understood to undermine their capacity to preside impartially in cases involving the State or defendants prosecuted by their office, *see State v. Pemberton*, 221 N.C. App. 671, 674 (2012) (unpublished), it would be a disservice to the judiciary and to the people of North Carolina to conclude that my prior career as a civil rights attorney precludes me from acting impartially in cases involving civil rights matters. *See United States v. Ala.*, 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 Motors of N. Am., Inc.*, 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).

Indeed, in other jurisdictions, this issue most often arises in criminal cases and the general rule followed in those cases should be equally applicable here. Whether serving as a prosecutor, in other government service, in private practice, or as a public interest attorney, an attorney is not automatically recused as a judge from cases her office handled. *See, e.g.*, *Laird v. Tatum*, 409 U.S. 824, 830 (1972) (Rehnquist, J., mem.) (the Justice's previous employment at the Department of Justice when the case was pending was not, by itself, grounds for discretionary disqualification); *Matson v. Bd. of Educ.*, 631 F.3d 57, 78 (2d Cir. 2011) (Straub, J., dissenting in part, concurring in part) ("A judge's prior governmental service, even with the same entity appearing before the judge as a party, does not automatically require recusal. Rather,

prior governmental service disqualifies a judge from presiding over a matter only if the judge directly participated in the matter in some capacity … ."); *United States v. Di Pasquale*, 864 F.2d 271, 279 (3d Cir. 1988) ("[A]bsent a *specific* showing that [a] judge was previously involved with a case while in the U.S. Attorney's office that he or she is later assigned to preside over as a judge," recusal is not mandated. (emphasis in original)); *Beckum v. State*, 917 So.2d 808, 816 (Miss. App. 2005) (holding that proof that the judge "once worked as a member of a district attorney's office that prosecuted Beckum [does not alone] overcome the presumption of impartiality").

Based on the ABA *Codes of Judicial Conduct*, Brandeis Professor Leslie W. Abramson suggested the following criteria to evaluate the need for recusal in these circumstances:

> When an allegation is made that a judge is presiding over the case of a prior client (or the case of a person who was the former client's adversary at the time of the representation) as to require disqualification or discipline, some of the factors to be evaluated include: (1) the relationship between the two proceedings; (2) the amount of time between the past proceeding and the instant case; (3) whether the past proceeding is relevant to the current case; (4) the number of cases in which the judge represented the former client; and (5) the compensation received by the judge for the prior representation.

Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned*", 14 Geo. J. Legal Ethics 55, 83. By this standard, recusal is not required here. The proceedings are not substantially related, roughly ten years or more has elapsed since the prior representation, the past proceeding is not relevant to the current issues, there is only one case in which the prior parties were represented by me, and I did not receive any direct compensation for the pro bono representation.

I agree with the Pennsylvania Supreme Court Justice who explained that "[i]t is, indeed, imperative that my every action must be tailored to protect this august Court from the appearance of impropriety; that I must not allow my conduct to undermine public confidence in the judiciary." *League of Women Voters of Pa. v. Commonwealth*, 645 Pa. 341, 361-62 (2018) (cleaned up). At the same time, I do not believe the circumstances here warrant recusal.

Finally, Intervenor-Defendants' suggestion that my choosing to preside over this case raises Due Process Clause concerns is without merit. Again, the circumstances present here are starkly different than the circumstances at issue in the case Intervenor-Defendants' rely upon, *Williams v. Pennsylvania*, 579 U.S. 1 (2016). In *Williams*, the Supreme Court held that it violated the Due Process Clause for the Chief Justice of the Pennsylvania Supreme Court to rule on a defendant's emergency application for a stay of execution when the Chief Justice, while previously serving as a District Attorney, had personally authorized prosecutors to seek the death penalty in the defendant's case. *Id.* at 4. The Court explained that recusal was warranted "when a judge earlier had *significant*, *personal* involvement as a prosecutor in a *critical decision* regarding the defendant's case." *Id.* at 8 (emphasis added). My involvement in the decades-long litigation that forms part of the background to this case is neither "significant" nor "personal," and I was not involved in the making of any "critical decision[s]" on behalf of the parties that shaped the course of the litigation.

Accordingly, because I am confident that I can rule on the issues presented in this case impartially, and because relevant ethical rules and precedents do not require my disqualification under these circumstances, Legislative Intervenor-Defendants' Motion and Suggestion of Recusal is denied.

This the 19th day of August 2022.

/s/ Earls, J.
Associate Justice

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 19th day of August 2022.

s/Grant E. Buckner
Grant E. Buckner
Clerk of the Supreme Court

NORTH CAROLINA: IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
WAKE COUNTY: 95 CVS 1158

HOKE COUNTY BOARD
OF EDUCATION, et al.,
Plaintiffs,

And

ASHEVILLE CITY BOARD OF EDUCATION, et al.,
Plaintiff-Intervenors,

Vs.

STATE OF NORTH CAROLINA;
STATE BOARD OF EDUCATION,
Defendants.

ORDER RE: MOTION TO INTERVENE BY CMS STUDENTS & CHARLOTTE BRANCH OF THE NAACP, RULE 24, NORTH CAROLINA RULES OF CIVIL PROCEDURE

THIS MATTER is before the Court with regard to the proposed plaintiff-intervenors, Rafael Penn, *et al.*, motion to intervene. The motion to intervene was filed on February 9, 2005. CMS filed a memorandum in opposition to the motion to intervene. The Court postponed hearing on the motion in order to concentrate its resources on the "high school problem" in North Carolina high schools, including the Charlotte Mecklenburg Schools ("CMS"), during hearings that the Court had previously scheduled for the week of March 7, 2005. CMS put on evidence concerning so-called improvements that were in place to improve the CMS high school performance for 2004-2005.

The Court discussed CMS' so-called improvement plans and reported its findings in a **Report From the Court: The High School Problem** filed May 24, 2005. CMS' high school performance was also discussed at length in that report and due to the continued dreadful academic performance in 10 out of 17 CMS High Schools, concluded that there was no excuse for those high schools to be so "academically in the ditch year after year." At the time that the Court filed

the report, the 2004-2005 ABC testing data for the EOC tests for CMS high schools were not available.

On July 8, 2005, the Court reviewed CMS' 2004-2005 high school performance composites and other ABC disaggregated data published by CMS on its website. Based on the published data, it appeared that the poor academic performance in the majority of CMS high schools continued to run rampant in spite of CMS' claims that it had in place a number of "plans" to aid high school student performance.

The ABC performance composite scores for CMS high schools for the past four years follow. It doesn't take a rocket scientist to conclude that the dreadful academic performance in the majority of CMS high schools continued unabated in 2004-2005.

CMS HIGH SCHOOLS - COMPOSITE SCORES - 2002,2003,2004 & 2005

	2002	2003	2004	2005
BUTLER	64.1%	70.9%	72.7%	75.5%
MYERS PARK	69.9%	72.0%	73.4%	81.2%
N. MECKL.	65.5%	69.5%	70.3%	71.9%
PROVIDENCE	78.4%	82.7%	83.5%	86.0%
S. MECKL.	66.6%	70.6%	71.9%	72.0%
WADDELL	39.2%	41.5%	39.4%	47.6%
E. MECKL.	64.2%	61.2%	61.2%	58.1%
GARINGER	36.2%	38.6%	43.7%	42.1%
HARDING U.	63.8%	60.2%	58.4%	56.5%
HOPEWELL	65.8%	67.6%	66.0%	64.6%
INDEPENDENCE	59.2%	56.2%	49.3%	56.2%
NW ARTS	60.1%	57.0%	58.6%	63.0%
OLYMPIC	49.8%	55.9%	53.5%	53.6%

OBERRY	**xx**	**50.4%**	**41.4%**	**46.6%**
VANCE	**57.0%**	**49.3%**	**48.0%**	**54.0%**
W.CHARLOTTE	**30.6%**	**24.8%**	**30.1%**	**35.7%**
W. MECKL.	**47.8%**	**43.9%**	**47.5%**	**46.7%**

It should be noted that EOC tests in U.S.History and ELPS were not administered in 2004 and 2005.

On July 11, 2005, the Court scheduled a special civil session to begin August 9, 2005, to hear a report from CMS about what "specific substantive, effective and academically proven corrective measures CMS will have in place in its bottom 10 high schools as of the start of the 2005-2006 school year to ensure those schools are Leandro compliant in terms of qualified, competent principals, qualified, competent teachers and resources so that the constitutionally required educational opportunity is provided in those schools to each and every child."

The Court also noticed a hearing on the CMS students' motion to intervene for August 9, 2005. On August 1, 2005, the proposed plaintiff-intervenors filed a first amended complaint adding additional plaintiff-intervenor parties and a new legal claim ("the CMS claims").

On August 5, 2005, the Court received a written report from CMS on its plans to improve high school performance.

At the hearing on August 9, 2005, the Court received a report from CMS about its proposed plans to "improve" CMS high school performance for 2004-2005. Markedly absent from either the written or verbal report was any goal for higher academic achievement. There was no set goal for academic improvement such as a 15% increase in the composite score for each troubled CMS high school for 2005-2006.

The motion to intervene was heard on August 9, 2005. Counsel for CMS and the proposed plaintiff-intervenors made arguments as well as any other counsel who wished to have a say on the matter. Counsel for the plaintiffs suggested that in the event the Court granted the motion, that the CMS claims be severed (bi-furcated) so as to not affect the on going remedial phase of this case. The Court took the

motion to intervene under advisement. The Court has now had time to review the written memoranda in support of and against the motion, the comments and arguments of counsel and the matter is ripe for disposition.

The proposed plaintiff-intervenors Rafael Penn, *et al.*, who are public school students in the Charlotte-Mecklenburg School District and their parents as next friends, together with the Charlotte Branch of the NAACP have moved to intervene in this action to enforce the constitutional rights of these and other school children in CMS to the equal opportunity to obtain a sound basic education under ***Leandro v. State*, 346 N.C. 336 (1997) and *Hoke County Board of Education v. State*, 358 N.C. 605 (2004).**

Rule 24, North Carolina Rules of Civil Procedure provides for intervention, upon timely application, as a matter of right under Rule 24(a) and for permissive intervention under Rule 24(b).

The motion to intervene before the Court alternatively relies on Rule 24(a) and Rule 24(b). The proposed plaintiff-intervenors argue principally for their right to intervene under Rule 24 (a). The Urban District Plaintiff-Intervenors, including the Charlotte-Mecklenburg Board of Education, strongly oppose the motion.

The Court will by-pass the issues raised under Rule 24 (a). Instead, for the reasons set forth below, the Court will, in the exercise of its discretion, grant the motion to intervene under Rule 24 (b)and allow permissive intervention. The intervention will be **limited**, however, to consideration of the facts and law arising under movants' third claim for relief, asserted in their First Amended Intervening Complaint, filed on August 1, 2005, which addresses "the failure of the CMS district to provide sufficient human, fiscal, and educational resources to its central city and high poverty schools." **The Court will not hear evidence or argument on the plaintiff-intervenors' first claim for relief, which contends that the CMS student assignment system violates their right to a sound basic education under *Leandro*.**

Moreover, in the exercise of its discretion and to avoid any inconvenience to other parties to this action, including the original "low wealth" district plaintiffs who are not directly affected by the intervenors' claims, the

Court, pursuant to the authority granted by Rule 42 (b), will sever the CMS claims so as to permit separate trial of the CMS claims from the pending matters that are on-going in the remedial phase of this case.

Severance (bi-furcation) will permit separate pre-trial proceedings and a separate trial of the CMS claims, if necessary, so as to avoid prejudice and delay in the broader action.

Notwithstanding the foregoing, the Court reserves the authority, under Rule 42 (a), to consolidate any legal arguments and/or evidentiary hearings on the CMS claims with other hearings or motions in the broader action where appropriate, or in the alternative, to sever the CMS claims under Rule 21.

Permissive Intervention under Rule 24(b) is within the Court's discretion.

Rule 24 (b) authorizes the Court to permit intervention to anyone who "[u]pon timely application" makes a "claim or defense" which has "a question of law or fact in common" with the action already underway. The Court finds that all of those conditions are met, and that intervention here will further the full and fair adjudication of this action.

CMS has argued that the motion to intervene is untimely. In **Hamilton v. Freeman, 147 N.C. App. 195, 201 (2001),** the North Carolina Court of Appeals considered in detail the standards that apply under Rule 24(a) and (b). Addressing the issue of "timeliness," the Court of Appeals stated:

> **In considering whether a motion to intervene is timely, the trial court considers "(1) the status of the case, (2) the possibility of unfairness or prejudice to the existing parties, (3) the reason for the delay in moving for intervention, (4) the resulting prejudice to the applicant if the motion is denied, and (5) any unusual circumstances." *Procter v. City of Raleigh Bd. of Adjust.*, q33 N.C. App. 181, 183, 514 S.E.2d 745, 746 (1999). Whether a motion to intervene is timely is a matter within the sound discretion of the trial court and will be overturned only upon a showing of abuse of**

discretion. *See State Employees' Credit Union, Inc. v. Gentry*, 75 N.C. App. 260, 264, 330 S.E. 2d 645, 648 (1985) A motion to intervene is rarely denied as untimely prior to the entry of judgment, and may be considered timely even after judgment is rendered if "extraordinary and unusual circumstances" exist. *Id.; see also Procter*, 133 N.C. App. At 184, 514 S.E. 2d at 747 (concluding that proposed intervenors' motion was timely after entry of judgment).

***Hamilton v. Freeman*, 147 NC. App. at 201.**

The motion to intervene is timely.

Despite the protestations of CMS, this motion to intervene is timely. Here's why.

This case started in 1994, over eleven (11) years ago. However, the action to date has focused almost exclusively on the broader constitutional issues addressed by the North Carolina Supreme Court in **Leandro v. State, 346 N.C. 336 (1997)**, and on the many legal and factual issues that were necessary to determine whether the State and Hoke County, as a representative low-wealth school district, were providing Hoke County students with a sound basic education.

This Court's Judgment was entered in April, 2004, and appealed by the State of North Carolina. On July 30, 2004, the Supreme Court ruled on that appeal. ***Hoke County Board of Education v. State, 358 N.C. 605, 612 (2004)***

This case is now largely in the remedial phase but there are still academic performance issues relating to certain schools in North Carolina becoming ***Leandro*** compliant. For a school to become Leandro compliant and thereby be providing an equal opportunity for all of the school's children to obtain a sound basic education, the school must have in place three (3) fundamental assets: a competent principal, a competent teacher in each classroom capable of teaching the SCOS to the children in that classroom, and the resources to support the educational programs within the school.

Schools with ABC performance composites below 60% are schools that clearly are not providing the assets necessary to be ***Leandro compliant*** and thereby provide the constitutionally mandate educational opportunities to the children in that school.

Following the July 30, 2004 decision of the Supreme Court in this case, the Court reviewed the 2003-2004 ABC performance data statewide for all schools. The Court noticed that many North Carolina High Schools were not up to snuff and too many were below 60% composite. Of particular note were the CMS high schools.

Accordingly, the Court turned its attention to the performance of high schools in the CMS district in its November 10, 2004 fax only memo.

The Court held its initial hearing on conditions in CMS high schools on March 7, 2005. The motion to intervene was filed on February 9, 2005 and considering the history of this case, the motion to intervene is not untimely in any respect.

There is no valid claim of "delay" against the CMS children and parents in presently asserting their claims, since they had no immediate interest or other reason to intervene earlier while the Court was considering circumstances in distant Hoke County.

There will be, moreover, no prejudice to CMS in requiring CMS to meet the constitutional allegations now asserted in these CMS claims. Under ***Leandro***, all North Carolina children have the right to an opportunity sound basic education, and the State has the duty to provide that right. The right belongs to the children.

Aside from the hearings conducted by this Court and this Court's Report filed May 24, 2005, there has been no proceeding that has considered or focused on whether CMS (an urban district) is meeting or failing to meet its constitutional duties under ***Leandro***.

Accordingly, there will be no redundancy or duplication of cost or effort by now requiring the CMS district to answer the CMS claims asserted at this point. Moreoever, the legal standards for being ***Leandro compliant*** are clear and finally decided.

The Court's simultaneous decision to conduct to sever the CMS claims under Rule 42 (b), moreover, should protect the low-wealth plaintiffs and other urban intervenor districts from any prejudice to them. These parties will not need to expend extensive time or resources on the litigation of CMS-specific claims.

Finally, under the present posture of the CMS high schools academic performance, denial of the motion to intervene might seriously prejudice the CMS students' rights under the North Carolina Constitution.

These students are each guaranteed by ***Leandro*** the opportunity for a sound basic education. If their constitutional rights to the opportunity are presently being denied by CMS and the State which is ultimately responsible, they are entitled to petition the Court for relief.

The Court has informed the parties that it intends to consider and address that very issue: whether the "academic genocide" it reported to the Governor, the Leadership of the General Assembly, the Chair of the State Board of Education, and the Superintendent of Public Instruction in its Report From The Court: The High School Problem filed May 25, 2005 constitutes a constitutional violation by CMS.

No present party to the litigation represents, exclusively, the interests of CMS students and their parents. A full consideration of these issues requires such an adversary. The plaintiff-intervenors will play that necessary role. Without such a party, the rights of these students might well be adjudicated adversely to them without any opportunity for their views and/or evidence to be fully heard; that would constitute undue prejudice to the applicants.

CMS contends that the presence of these intervenors in the case is also unnecessary as CMS is quite capable of adequately protecting and looking out for their interests and is in fact doing so. The ABC scores of CMS's high schools tell a far different story and paints a far different picture. As far as those children in the bottom ten (10) high schools, the past 4 years academic performance shows an on going failure on the part of CMS to look out for their interests and does little to convince

this Court that CMS is adequately representing those children's interest at the present time. All things considered, denial of intervention here may well, as a practical matter, impede the intervenors' ability to protect their interests.

Beyond the question of timeliness, the Court's exercise of discretion rests on its judgment, informed by its six-year supervision of this complex case, that the motion to intervene will present numerous questions of law and fact that are common to the claims already asserted in this lawsuit. The "question[s] of law" likely to arise include many subsidiary issues about the application of **Leandro and Hoke County** to a large, metropolitan school district, and the respective responsibilities of the district and the State under such circumstances. Likely questions of fact include, among others, the wisdom of the wisdom and propriety of certain central school administration choices and practices, the challenges in recruiting and retaining competent certified teachers and principals in low-performing high schools, and the educational programs and policies that are necessary to improve student achievement among at risk and low-performing students.

Intervention here is also timely in that the Governor of the State of North Carolina has expressed concern over the poor performance of the 44 high schools in North Carolina that had 2004-2005 performance composites of less that 60%, ten of which are located in CMS.

To his credit, the Governor has directed that the State Board of Education and DPI create "turn around teams" to deal with these poorly performing high schools and has directed these teams to start in CMS. The intervention permitted here will not delay, obstruct or hinder the "turn around teams" in their vital work and their report on what may be necessary to effect real academic improvement in CMS's bottom ten high schools.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That the motion of plaintiff-intervenors Rafael Penn, *et al.*, to intervene in this action is granted in part and denied in part, in the sound exercise of the Court's discretion, pursuant to Rule 24 (b), N.C. Gen. Stat. §1A-1, Rule 24 (b).

2. That the plaintiff-intervenors may assert their Third Claim for Relief, set forth in their First Amended Intervening Complaint, filed on August 1, 2005, and any evidence or legal argument in support thereof. Their motion to intervene to assert the First and Second Claims for Relief is denied.

3. That their claim will be pursued separately from the other claims pending in this action, pursuant to Rule 42 (b), N.C. Gen. Stat. 1A-1, Rule 42 (b). The named defendants in intervention will respond under the Rules, and pre-trial discovery and trial, if necessary, will go forward separately on the intervening claim.

4. That the Court reserves the authority, pursuant to Rule 42 (a), to consolidate for discovery, argument, and/or evidentiary hearing certain portions of this intervention with other claims presently pending in this action, in the exercise of its discretion, where common questions of law or fact arise, or to avoid unnecessary cost or delay. The Court also reserves the authority pursuant to Rule 21, to sever the CMS claims if appropriate.

5. That the intervention permitted here is not to interfere with the remedial process and proceedings of this case in other school systems throughout the State of North Carolina nor with the work of the "turn around teams" which the Governor of North Carolina has directed be first focused on CMS high schools.

This the 19th day of August, 2005.

Howard E. Manning, Jr.
Superior Court Judge

HOKE COUNTY BOARD OF EDUCATION; ET AL., PLAINTIFFS

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, PLAINTIFF-INTERVENOR

and

RAFAEL PENN, ET AL., PLAINTIFF-INTERVENORS

v.

STATE OF NORTH CAROLINA AND THE STATE BOARD OF EDUCATION, DEFENDANTS

and

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, REALIGNED DEFENDANT

and

PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate, and TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives, Intervenor-Defendants

From N.C. Court of Appeals
22-86

From Wake
95CVS1158

Nos. 425A21-1 and 425A21-2

ORDER

On 15 December 2021, Plaintiffs filed a Notice of Appeal, Petition for Discretionary Review, and Petition for Writ of Certiorari seeking this Court's review of the Court of Appeals' 30 November 2021 Writ of Prohibition. These petitions and subsequent filings from Plaintiff-Intervenors, Legislative Defendants, and the State Controller in December 2021 and January 2022 were filed under case number 425A21, later designated as 425A21-1.

On 14 February 2022, Defendant State of North Carolina filed with this Court a Petition for Discretionary Review Prior to Determination by the Court of Appeals in this matter. In its petition, the State requested

that this Court "consolidate this appeal with Plaintiffs' appeal in case number 425A21, and suspend the appellate rules as necessary to facilitate a prompt decision on this filing and appeal." This petition and subsequent responses by Plaintiffs, Plaintiff-Intervenors, and Legislative Defendants were filed under case number 425A21-2.

On 21 March 2022, this Court addressed these petitions in two separate orders. In the first order, the Court addressed the various December 2021 and January 2022 petitions from Plaintiffs, Plaintiff-Intervenors, Legislative Defendants, and the State Controller. This order directed these petitions to be "held in abeyance, with no further action, including the filing of briefs, to be taken until further order of the Court."

In the second order, the Court addressed the State's 14 February 2022 petition and subsequent responses. This order allowed the State's and Plaintiffs' petitions, but remanded the case to the trial court "for a period of no more than thirty days for the purpose of allowing the trial court to determine what effect, if any, the enactment of the State Budget has upon the nature and extent of the relief that the trial court granted in its 11 November 2021 Order." This Order did not specifically address the State's request to consolidate the State's appeal numbered 425A21-2 with Plaintiffs' appeal numbered 425A21-1.

On 26 April 2022, the trial court issued its order on remand. In their subsequent briefing and oral arguments to this Court in 425A21-2, the parties addressed the merits of both the trial court's November 2021 and April 2022 Orders and the Court of Appeals' 30 November 2021 Writ of Prohibition.

Now, on our own motion, the Court hereby treats the Writ of Prohibition filed 30 November 2021 by the Court of Appeals in 425A21-1 as consolidated with 425A21-2 to the extent necessary for the Court to address the arguments pertaining to the Writ made by the parties here; further, we hereby stay the Writ of Prohibition pending any further filings in 425A21-1 pertaining to issues not already addressed in the opinion filed on this day in 425A21-2. The State's motion to consolidate is otherwise dismissed as moot.

By order of the Court in conference, this the 2nd day of November 2022.

/s/ Hudson, J.
Associate Justice

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 4th day of November 2022.

s/Grant E. Buckner
Grant E. Buckner
Clerk of the Supreme Court

Justice BERGER dissenting.

For the reasons stated in the dissenting opinion in 425A21-2, I dissent from this order which summarily disposes of 425A21-1 which was appealed of right.

Chief Justice NEWBY and Justice BARRINGER join in this dissent.

IN RE K.A.S.

[382 N.C. 713 (2022)]

IN THE MATTER OF
K.A.S.

From N.C. Court of Appeals
21-757

From Cleveland
18JT14

No. 259P22

ORDER

On its own motion, and pursuant to Rule 21(a)(2) of the North Carolina Rules of Appellate Procedure, the Court will treat Respondent-Father's Pro Se Petition for Discretionary Review filed herein on 15 August 2022 as a Petition for Writ of Certiorari and allow it for the limited purpose of remanding this matter to the Court of Appeals for reconsideration in light of this Court's opinion in *In re: G.B.*, 377 N.C. 106, 2021-NCSC-34. On remand, the Court of Appeals may review all grounds found by the trial court to justify the termination of respondent-father's parental rights in this matter.

Respondent-Father's Motion for Equitable Tolling of the Deadline for Petition for Discretionary Review filed 9 September 2022 is denied.

By order of the Court in Conference, this the 7th day of October, 2022.

/s/ Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 7th day of October 2022.

s/Grant E. Buckner
Grant E. Buckner
Clerk of the Supreme Court

IN RE T.M.

[382 N.C. 714 (2022)]

IN THE MATTER OF
T.M.

From N.C. Court of Appeals
21-676

From Stokes
19JA92 19JT92

No. 297P22

ORDER

Respondent-mother's Petition for Discretionary Review Under N.C.G.S. § 7A-31 is allowed for the limited purpose of remand to the Court of Appeals for reconsideration of respondent-mother's appeal without reliance upon N.C.G.S. § 7B-101(18a) (2021).

By order of the Court in Conference, this the 12th day of October 2022.

/s/ Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 12th day of October 2022.

s/Grant E. Buckner
Grant E. Buckner
Clerk of the Supreme Court

STATE v. GILLARD

[382 N.C. 715 (2022)]

STATE OF NORTH CAROLINA	From Wake 16CRS5702 16CRS223351
v.	
SEAGA EDWARD GILLARD	

No. 316A19

ORDER

Petitioner Brandon Hill's Petition to Intervene in this matter is denied without prejudice to his right to file a motion for leave to file an amicus curiae brief in this matter pursuant to Rule 28 of the Rules of Appellate Procedure.

By order of the Court in Conference, this the 12th day of September 2022.

/s/ Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 12th day of September 2022.

s/Grant E. Buckner
Grant E. Buckner
Clerk of the Supreme Court

STATE v. TUCKER

[382 N.C. 716 (2022)]

STATE OF NORTH CAROLINA v. RUSSELL WILLIAM TUCKER	From Forsyth 94CRS40465

No. 113A96-4

ORDER

Defendant's Motion to Calendar Case for Hearing and Consideration filed 27 September 2022 is allowed to the extent that the Court will calendar the matter for hearing at the first regularly scheduled session of Court to be held in 2023.

By order of the Court in Conference, this the 6th day of October 2022.

/s/ Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 6th day of October 2022.

s/Grant E. Buckner
Grant E. Buckner
Clerk of the Supreme Court

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

4 NOVEMBER 2022

1P22-2	State v. Quinton Lajuan Duncan	1. Def's Pro Se Motion for Timely Judicial Determination of Probable Cause for Pre-Trial Restraint 2. Def's Pro Se Petition for Writ of Habeas Corpus 3. Def's Pro Se Motion to Reconsider and Amend Previous Order	1. Dismissed 2. Denied **06/14/2022** 3. Denied **07/05/2022**
19A21	In the Matter of D.C.	Respondent-Parents' Motion to Unseal Certain Filings	Denied
20PA21	Radiator Specialty Company v. Arrowood Indemnity Company, et al.	Plt and Defs' Joint Motion to Extend Time Allotted for Oral Argument by Five Minutes	Allowed **08/26/2022** **Berger, J., recused**
24PA15-2	State v. Juan Carlos Benitez	Def's PDR Under N.C.G.S. § 7A-31 (COA20-766)	Denied
33P22	State v. Chan Tavares Thomas	Def's PDR Under N.C.G.S. § 7A-31 (COA20-402)	
34P22	State v. Mack Washington	Def's PDR Under N.C.G.S. § 7A-31 (COA20-448)	Allowed
41A22	State v. Mark Brichikov	Def's Motion to Continue Oral Argument	Allowed **09/20/2022**
41P17-9	Armstrong v. State of N.C., et al.	1. Plt's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Wilson County 2. Plt's Pro Se Motion for Relief 3. Plt's Pro Se Motion for Conspiracy Complaint	1. Dismissed 2. Dismissed 3. Dismissed
42P22	Klotz v. Klotz	1. Def's Petition for Writ of Certiorari to Review Order of COA (COA21-29) 2. Def's Petition for Writ of Certiorari to Review Order of District Court, Davidson County	1. Denied 2. Denied
44P22	John L. Davis v. Lake Junaluska Assembly, Inc.	Plt's Pro Se PDR Under N.C.G.S. § 7A-31 (COA21-333)	Denied

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

4 NOVEMBER 2022

52P22	Miller v. Eastern Band of Cherokee Indians, et al.	1. Plt's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA21-206)	1.---
		2. Plt's Pro Se PDR Under N.C.G.S. § 7A-31	2. Denied
		3. Defs' Motion to Dismiss Appeal	3. Allowed
		4. Plt's Pro Se Motion to Amend Notice of Appeal Based Upon a Constitutional Question	4. Allowed
		5. Plt's Pro Se Motion to Amend PDR	5. Allowed
54A19-3	State v. Rogelio Albino Diaz-Tomas	1. Def's Motion for Temporary Stay (COA19-777)	1. Allowed **04/21/2020**
		2. Def's Petition for Writ of Supersedeas	2. Allowed **06/03/2020**
		3. Def's Notice of Appeal Based Upon a Dissent	3. ---
		4. Def's PDR as to Additional Issues	4. Special Order **12/15/2020**
		5. Def's Petition for Writ of Certiorari to Review Order of COA	5. Allowed **12/15/2020**
		6. Def's Petition for Writ of Certiorari to Review Decision of District Court	6. Allowed **12/15/2020**
		7. Def's Petition for Writ of Mandamus	7. Denied
		8. Def's Motion to Expedite the Consideration of Def's Matters	8. Dismissed as moot **12/15/2020**
		9. Def's Motion to Proceed *In Forma Pauperis*	9. Allowed **12/15/2020**
		10. Def's Motion to Take Judicial Notice	10. Dismissed as moot **12/15/2020**
		11. Def's Motion for Leave to Amend Notice of Appeal	11. Allowed **12/15/2020**
		12. Def's Motion for Summary Reversal	12. Dismissed **12/15/2020**
		13. Def's Motion to Supplement Record on Appeal l	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 Certificates 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**
56P22	Theresa Lynn Revis v. Kristi J. Schleder, M.D. and Hot Springs Health Program	Defs' PDR Under N.C.G.S. § 7A-31 (COA21-360)	Denied
58P22	State v. Thomas Wayne Steele	Def's PDR Under N.C.G.S. § 7A-31 (COA20-894)	Denied
61P22	State v. Nathan Andrew Jones, II	Def's Pro Se Motion for Court to Vacate, Set Aside and/or Withhold Adjudication of Guilt	Dismissed
62PA21	Anderson Creek Partners, L.P., et al. v. County of Harnett	Plts' Petition for Rehearing	Denied **10/13/2022**
78P22-2	State v. Eric Antron Ingram	Def's Pro Se Motion for Notice of Appeal Based on Dissent	Dismissed
82P22	State v. Artemus V. Nicholson	Def's Pro Se Motion for Dismissal	Dismissed

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

4 NOVEMBER 2022

95A22	State v. Joanna Kaye Julius	1. Def's Notice of Appeal Based Upon a Dissent (COA20-548) 2. Def's PDR as to Additional Issues	1. --- 2. Dismissed as moot
97P22	Snow Enterprises, LLC, et al. v. Bankers Insurance Company, a Florida Corporation	Plts' PDR Under N.C.G.S. § 7A-31 (COA21-41)	Denied
100A22	Value Health Solutions, Inc., et al. v. Pharmaceutical Research Associates, Inc., et al.	Defs' Motion to Admit Mitchell Osterday Pro Hac Vice	Allowed
102P19-4	State v. Christopher Lee Neal	Petitioner's Pro Se Petition for Writ of Habeas Corpus	Denied **09/29/2022**
102A20-2	Taylor, et al. v. Bank of America, N.A.	Plts' Motion to Admit Caitlyn Miller Pro Hac Vice	Allowed **08/31/2022** **Berger, J., recused**
103P22	State v. Timothy Robert Gallion	Def's PDR Under N.C.G.S. § 7A-31 (COA21-375)	Denied
107P22	State v. Larry Bernard	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, New Hanover County 2. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
113A96-4	State v. Russell William Tucker	Def's Motion to Calendar Case for Hearing and Consideration	Special Order **10/06/2022**
113A22	Estate of Gregory Graham v. Ashton Lambert, individual and official capacity, Fayetteville Police Department, and City of Fayetteville	1. Plt's Notice of Appeal Based Upon a Dissent (COA21-15) 2. Defs' PDR Under N.C.G.S. § 7A-31 3. Plt and Defs' Joint Motion to Suspend Briefing Pending Disposition of PDR	1. --- 2. Allowed 3. Allowed **05/13/2022**

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

4 NOVEMBER 2022

125P22	State v. Jaime Suzanne Bowen	1. Def's Motion for Temporary Stay (COA21-43) 2. Def's Petition for Writ of Supersedeas 3. Def's Notice of Appeal Based Upon a Constitutional Question 4. Def's PDR Under N.C.G.S. § 7A-31 5. State's Motion to Dismiss Appeal	1. Allowed **04/22/2022** Dissolved 2. Denied 3. --- 4. Denied 5. Allowed
131P22	State v. Barry Demetrius Sarratt	Def's Pro Se Motion for PDR (COAP21-187)	Dismissed
138P22	Julie Klapp v. Randall Buck	Def's PDR Under N.C.G.S. § 7A-31 (COA21-494)	Denied
146P22	Deborah Sink Moss and Carla Shuford, on Behalf of Themselves and All Others Similarly Situated v. N.C. Department of State Treasurer, Retirement Systems Division	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA21-60) 2. Def's Conditional PDR	1. Denied 2. Dismissed as moot
152P22	Dr. James McKernan v. East Carolina University, et al.	1. Plt's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA21-572) 2. Plt's Pro Se PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
166P22	State v. Stamey Jason Darr	Def's PDR Under N.C.G.S. § 7A-31 (COA21-493)	Denied
173P22	Robin Kluttz-Ellison, Employee v. Noah's Playloft Preschool, Employer, and Erie Insurance Group, Carrier	1. Defs' Motion for Temporary Stay (COA21-356) 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed **06/08/2022** 2. Allowed 3. Allowed

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

4 NOVEMBER 2022

175P22	State v. David Anthony Manno	1. Def's Pro Se Motion for Notice of Appeal (COAP22-84) 2. Def's Pro Se Motion for PDR 3. Def's Pro Se Petition for Writ of Certiorari to Review Order of COA 4. Def's Pro Se Motion to Consider 5. Def's Pro Se Motion for Petition to Amend 6. Def's Pro Se Motion in the Alternative for PDR	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed 5. Dismissed 6. Dismissed
180P22	Birchard v. Blue Cross & Blue Shield of N.C., Inc., et al.	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA21-729) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
183P22	State v. Joseph Irving	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of COA 2. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed **Berger, J., recused**
193P22-3	State v. Khawan Tyrell Dixon	1. Def's Pro Se Motion to Dismiss for Lack of Speedy Trial 2. Def's Pro Se Motion for Discovery	1. Dismissed 2. Dismissed
195P22	Nehemiah v. Ameriglide, Inc.	Plt's PDR Under N.C.G.S. § 7A-31 (COA21-122)	Denied
197PA20-2	State v. Jeremy Johnson	Def's Motion for Expedited Hearing and Consideration	Denied **09/29/2022** **Berger, J., recused**
199P21-2	Hutchins v. CVS Pharmacy, Inc., et al.	Plts' Pro Se Notice of Appeal Based Upon a Constitutional Question (COA21-345)	Dismissed
199P22-2	Armstrong v. Kiser, et al.	Plt's Pro Se Motion for Petition for Review	Denied

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

4 NOVEMBER 2022

203P22	Wake County on Behalf of Kelly Williams v. Andrelle Wiley	1. Def's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA21-347) 2. Def's Pro Se PDR Under N.C.G.S. § 7A-31 3. Def's Pro Se Motion for Temporary Stay 4. Def's Pro Se Petition for Writ of Supersedeas 5. Def's Pro Se Motion to Request Judicial Notice	1. Dismissed *ex mero motu* 2. Denied 3. Denied **07/07/2022** 4. Denied 5. Denied
217A22	Lisa Biggs Fore v. The Western North Carolina Conference of the United Methodist Church (a/k/a Western North Carolina Conference); and the Children's Home, Incorporated (a/k/a the Children's Home, a/k/a the Crossnore School & Children's Home, a/k/a Crossnore Children's Home)	Defs' Motion to Admit Ashley P. Cuttino Pro Hac Vice (COA21-546)	Allowed **08/24/2022**
221P22	Stewart v. Goulston Techs., Inc.	1. Defs' Motion for Temporary Stay (COA21-642) 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed **07/26/2022** Dissolved 2. Denied 3. Denied
224P22	State v. Mykael Sebastain Cooper	Def's PDR Under N.C.G.S. § 7A-31 (COA21-598)	Denied
228A21	C Investments 2, LLC v. Auger et al.	Plt's Motion for Amicus Curiae to Participate in Oral Argument (COA19-976)	Denied **09/12/2022**
235P22	Sony Pictures Entm't, Inc. v. Henderson	1. Def's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA22-29) 2. Def's Pro Se PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied

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

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238P22	Abdullah-Malik v. Cooper, et al.	1. Petitioner's Pro Se Motion for Notice of Appeal 2. Petitioner's Pro Se Motion for Transcripts	1. Denied 2. Dismissed
239P22	In re Terrell McIlwain	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA21-434)	Denied
240PA21	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 **02/09/2022** 2. Denied **02/09/2022** 3. Allowed **09/01/2021** 4. Allowed **02/09/2022** 5. Denied 6. Denied **10/06/2021** 7. Denied **10/06/2021**
240A22	State v. Darren O'Brien Lancaster	State's Petition for Writ of Supersedeas (COA21-231)	Allowed **08/26/2022**
243P22-1	Creekside Crabtree Apartments, Inc. v. May	1. Defs' Pro Se Motion for Temporary Stay 2. Defs' Pro Se Petition for Writ of Supersedeas 3. Defs' Pro Se Motion for Notice of Appeal 4. Defs' Pro Se Motion for Petition from Decision of COA	1. Allowed **08/10/2022** Dissolved **08/31/2022** 2. Denied **08/31/2022** 3. Dismissed *ex mero motu* **08/31/2022** 4. Dismissed **08/31/2022**
243P22-2	Creekside Crabtree Apartments, Inc. v. May	Defs' Pro Se Motion for Temporary Stay	Denied **09/13/2022**
244P21-3	Meyers v. Chief Justice of the Supreme Court of North Carolina, et al.	1. Petitioner's Pro Se Petition for Writ of Mandamus 2. Petitioner's Motion to Proceed *In Forma Pauperis*	1. Denied 2. Allowed

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250P21-2	Department of Transportation v. Bloomsbury Estates, LLC, et al.	Def's (Bloomsbury Estates, LLC) PDR Under N.C.G.S. § 7A-31 (COA21-323)	Allowed
251P22	State v. Xavier Markeese Langley	1. Def's PDR Under N.C.G.S. § 7A-31 (COA21-395) 2. Def's Motion to Amend Certificate of Service	1. Denied 2. Allowed
253P22	State v. Linwood Bruce Cameron	Def's PDR Under N.C.G.S. § 7A-31 (COA21-442)	Denied
259P07-2	State v. Jesse Lee Braxton	Def's Pro Se Motion for Immediate Release from Prison (COA06-848)	Dismissed as moot **10/17/2022**
259P22	In re K.A.S.	1. Respondent-Father's Pro Se PDR Under N.C.G.S. § 7A-31 (COA21-757) 2. Respondent-Father's Motion for Equitable Tolling of the Deadline for PDR	1. Special Order **10/07/2022** 2. Special Order **10/07/2022**
261P22	Jones v. Morrissey	Plt's Pro Se Motion for Supreme Court Review	Dismissed
263P22	State v. David Anthony Harris	Def's Pro Se Motion to Dismiss Indictment	Dismissed
265P22-1	State v. Sherman Lane Smith	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **08/23/2022** **Berger, J., recused**
265P22-2	State v. Sherman Lane Smith	Def's Pro Se Motion for Double Jeopardy	Denied **09/01/2022** **Berger, J., recused**
269P22	State v. Gregory Brown	Def's Pro Se Motion for New Probable Cause Hearing	Dismissed
270P22	State v. Terreil Q. Powell	1. Def's Pro Se Motion to Exclude Evidence 2. Def's Pro Se Motion for Bond Reduction	1. Dismissed 2. Dismissed
271P22	State v. Nathaniel Barrett	Def's Pro Se Motion to Get Before Judge	Dismissed

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273P22	Black v. Black	1. Plt's Pro Se Motion for Notice of Intent to Appeal	1. Dismissed as moot
		2. Plt's Pro Se Motion for Notice of Objection and Preservation of Issues	2. Dismissed as moot
		3. Plt's Pro Se Motion for PDR	3. Denied **09/12/2022**
		4. Plt's Pro Se Motion to Appeal *In Forma Pauperis*	4. Allowed
		5. Plt's Pro Se Motion for Consolidation of Actions on Appeal	5. Dismissed as moot
		6. Plt's Pro Se Motion for Temporary Stay	6. Denied **09/12/2022**
		7. Plt's Pro Se Petition for Writ of Supersedeas	7. Dismissed as moot
		8. Plt's Pro Se Motion to Amend Petitions for Writ	8. Dismissed as moot
283P22	In re Chastain	1. Respondent's Motion for Temporary Stay (COAP22-393)	1. Denied **09/15/2022**
		2. Respondent's Petition for Writ of Supersedeas	2. Denied **09/15/2022**
284P22	State v. Brandon Xavier Hill	1. Def's Motion for Temporary Stay Pending Review of Recusal Decision	1. Denied **09/12/2022**
		2. Def's Petition for Writ of Supersedeas Pending Review of Recusal Decision	2. Denied **09/12/2022**
		3. Def's Petition for Writ of Mandamus	3. Denied **09/12/2022**
		4. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Wake County	4. Denied **09/12/2022**
		5. Def's Motion for Temporary Stay of Trial Proceedings Pending Resolution of *State v. Gillard* (316A19)	5. Denied **09/12/2022**
		6. Def's Petition for Writ of Supersedeas to Stay Trial Proceedings Pending Resolution of *State v. Gillard* (316A19)	6. Denied **09/12/2022**
285P22	State v. Charles Edward Bender	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **09/12/2022**
286P22	State v. Miller Eugene Ross	Def's Pro Se Motion for Notice of Appeal	Denied
288A21	In the Matter of J.C.J. & J.R.J.	Respondent-Mother's Petition for Rehearing	Denied **08/23/2022**

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288P22	State v. Jessica Brandy Hinnant	1. Def's Motion for Temporary Stay (COA22-69) 2. Def's Petition for Writ of Supersedeas 3. Def's Petition for Writ of Certiorari to Review Order of COA	1. Denied **09/26/2022** 2. 3.
289P22	Cureton v. N.C. Department of Public Safety, et al.	Petitioner's Petition for Writ of Habeas Corpus	Denied **09/22/2022**
293P22	State v. Harry Lee Hunter, Jr.	Def's Pro Se Motion to Appeal Right to Receive Additional Court-Appointed Counsel (COAP22-377)	Dismissed **09/28/2022**
297PA16-3	In the Matter of the Adoption of C.H.M., a Minor Child	Respondent-Father's Motion to Amend Record on Appeal	Denied
297P22	In the Matter of T.M.	1. Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA21-676) 2. Petitioner's Conditional PDR Under N.C.G.S. § 7A-31	1. Special Order **10/12/2022** 2. Denied **10/12/2022**
298P22	Lisa Biggs, Individually and as Administrator, Estate of Kelwin Biggs v. Daryl Brooks, Nathaniel Brooks, Sr., Kyle Ollis, Individually, and Boulevard Pre-Owned, Inc.	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA21-653) 2. Plt's Motion to Amend PDR 3. Plt's Amended PDR Under N.C.G.S. 7A-31 4. Def's (Boulevard Pre-Owned, Inc.) Motion for Sanctions 5. Def's (Boulevard Pre-Owned, Inc.) Motion in the Alternative to Strike 6. Plt's Motion for Temporary Stay	1. 2. Allowed **09/28/2022** 3. 4. 5. 6. Denied **10/27/2022**
303A21	In the Matter of J.D.O., J.D.O., and J.D.O.	Respondent-Mother's Petition for Rehearing	Denied **08/23/2022**
306P22	State v. Zabiane Laquris Williams	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA21-577)	Denied
307P22	State v. Jacorey M. Paige	1. Def's Pro Se Motion for Discovery 2. Def's Pro Se Motion to Dismiss	1. Dismissed 2. Dismissed
316A19	State v. Seaga Edward Gillard	Petitioner Brandon Hill's Petition to Intervene	Special Order **09/12/2022**

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316P22	Lannan, et al. v. Board of Governors of the University of N.C.	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas	1. Allowed **10/21/2022** 2.
318P22	State v. Charles Singleton	1. State's Motion for Temporary Stay (COA22-114) 2. State's Petition for Writ of Supersedeas	1. Allowed **10/25/2022** 2.
331PA21	Community Success Initiative, et al. v. Moore, et al.	1. Legislative-Defs' Motion for Extended Briefing Schedule (COA22-136) 2. Institute for Innovation in Prosecution at John Jay College's Motion to Admit Lloyd B. Chinn Pro Hac Vice 3. Institute for Innovation in Prosecution at John Jay College's Motion to Admit Joseph C. O'Keefe Pro Hac Vice 4. District of Columbia, et al.'s Motion to Admit Caroline S. Van Zile Pro Hac Vice 5. Legislative-Defs' Motion for Extension of Time to File Reply Brief 6. District of Columbia, et al.'s Motion to Amend Exhibit A to Motion for Admission of Counsel 7. Plts' Motion to Set Oral Argument	1. 2. Allowed **08/19/2022** 3. Allowed **08/19/2022** 4. Allowed **08/31/2022** 5. Special Order **09/02/2022** 6. Allowed **08/31/2022** 7. Special Order **10/06/2022**
342PA19-2	Holmes, et al. v. Moore, et al.	1. Plts' Motion to Dismiss Plt Brendon Jaden Peay (COA22-16) 2. Plts' Motion for Expedited Hearing and Consideration	1. 2. Special Order **09/09/2022**
363P21	State v. David Bryant Stilwell, II	1. Def's Pro Se Motion for Notice of Appeal 2. Def's Pro Se Motion for Appeal	1. Dismissed 2. Dismissed
376A21	Woodcock, et al. v. Cumberland County Hospital System, et al.	1. Defs' Motion for Sanctions 2. Defs' Motion for Leave to File Documents	1. 2. Allowed
383P21-2	State v. Christopher Gene Crawford	1. Def's Pro Se Motion for PDR (COA20-180) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Denied 2. Allowed **Ervin, J., recused**

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389P20-3	State v. Gordon Hendricks	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA21-180)	Dismissed
413PA21	Harper, et al. v. Hall, et al.	1. Plts' (N.C. League of Conservation Voters, et al.) Notice of Appeal Pursuant to Special Order Dated 8 December 2021 (COAP21-525)	1. ---
		2. Plts' (Harper, et al.) Notice of Appeal Pursuant to Special Order Dated 8 December 2021	2. ---
		3. Plaintiff-Intervenor's (Common Cause) Notice of Appeal Pursuant to Special Order Dated 8 December 2021	3. ---
		4. Legislative-Defs' Motion to Dismiss Appeal	4.
		5. Harper and North Carolina League of Conservation Voters Plts' Motion for Summary Affirmance	5.
		6. Plts' Motion for Extension of Time Allowed for Oral Argument	6. Denied **09/27/2022**
		7. Legislative-Defs' Motion for Clarification	7. Special Order **10/02/2022**
416P19-2	State v. Rodney McDonald Williams	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Vance County	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
418P21	Poythress v. Poythress	Plt's PDR Under N.C.G.S. § 7A-31 (COA20-137)	Denied
420P19-2	State v. Shelton Andrea Kimble	1. Def's Pro Petition for Writ of Certiorari to Review Order of Superior Court, Mecklenburg County	1. Dismissed
		2. Def's Pro Se Motion to Take Notice in the Mecklenburg ABA-Judicial Response of Entitlement	2. Dismissed
		3. Def's Pro Se Motion to Take Notice of Elements, Records	3. Dismissed **Berger, J., recused**
421P21-2	State v. John Anthony Rouse	Def's Pro Se Motion for Reconsideration	Dismissed

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425A21-1	Hoke County Board of Education, et al. v. State of North Carolina, et al.	1. Plts' Notice of Appeal Based Upon a Dissent (COAP21-511)	1. Special Order **03/18/2022**
		2. Plts' Notice of Appeal Based Upon a Constitutional Question	2. Special Order **03/18/2022**
		3. Plts' PDR Under N.C.G.S. § 7A-31	3. Special Order **03/18/2022**
		4. Plts' Petition in the Alternative for Writ of Certiorari to Review Order of the COA	4. Special Order **03/18/2022**
		5. Plt-Intervenors' (Rafael Penn, et al.) Motion to Admit David Hinojosa Pro Hac Vice	5. Allowed **03/18/2022**
		6. Plt-Intervenors' (Rafael Penn, et al.) Notice of Appeal Based Upon a Dissent	6. Special Order **03/18/2022**
		7. Plt-Intervenors' (Rafael Penn, et al.) Notice of Appeal Based Upon a Constitutional Question	7. Special Order **03/18/2022**
		8. Plt-Intervenors' (Rafael Penn, et al.) PDR Under N.C.G.S. § 7A-31	8. Special Order **03/18/2022**
		9. Plt-Intervenors' (Rafael Penn, et al.) Petition for Writ of Certiorari to Review Order of the COA	9. Special Order **03/18/2022**
		10. Controller's Motion to Dismiss Appeals	10. Special Order **03/18/2022**
		11. Controller's Conditional Petition for Writ of Supersedeas	11. Special Order **03/18/2022**
		12. Legislative-Intervenors' Motion to Dismiss Appeals	12. Special Order **03/18/2022**
		13. State's Notice of Upcoming Filing	13. Dismissed as moot **03/18/2022**
		14. Petitioner's Motion for Substitution of Party	14. Allowed **07/22/2022**

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425A21-2	Hoke County Board of Education, et al. v. State of North Carolina, et al.	1. Legislative-Defs' Conditional Petition for Writ of Certiorari to Review Order of Superior Court, Wake County (COA22-86)	1. Dismissed as moot
		2. Petitioner's Motion for Substitution of Party	2. Allowed **07/22/2022**
		3. Legislative Intervenor-Defs' Motion and Suggestion of Recusal	3. Special Order **08/19/2022**
		4. Plts' Motion and Suggestion of Recusal	4. Special Order **08/19/2022**
		5. Duke Children's Law Clinic, Education Law Center, the Center for Educational Equity, Southern Poverty Law Center, and Constitutional and Education Law Scholars' Motion to Admit David G. Sciarra Pro Hac Vice	5. Allowed **07/22/2022**
		6. North Carolina Business Leaders' Motion to Amend Amicus Brief	6. Allowed **08/05/2022**
		7. Parties' Joint Motion to Extend the Time Limits for Oral Argument	7. Allowed **08/08/2022**
		8. Legislative Intervenor-Defs' Motion to Dismiss Plt-Intervenors (Rafael Penn, et al.) as Parties	8. Dismissed as moot
		9. Legislative Intervenor-Defs' Motion to Dismiss Appeal of Plt-Intervenors (Rafael Penn, et al.)	9. Dismissed as moot
		10. Legislative Intervenor-Defs' Motion to Strike Brief of Plt-Intervenors (Rafael Penn, et al.)	10. Denied **08/30/2022**
		11. Ex Mero Motu Stay of Court of Appeals Writ of Prohibition	11. Special Order
435P21	State v. Robert Wilson Driver	Def's PDR Under N.C.G.S. § 7A-31 (COA20-851)	Denied
485PA19	State v. Cashaun K. Harvin	1. Def's Motion for Appropriate Relief	1. Dismissed as moot
		2. Def's Motion to Seal Motion for Appropriate Relief	2. Allowed **03/08/2021**
		3. State's Motion for Extension of Time to File Reply Brief and Response to Motion for Appropriate Relief	3. Allowed **03/10/2021**
		4. State's Motion for Summary Denial of Motion for Appropriate Relief	4.

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491P02-8	Dontez Simuel v. Superintendent Millis	Petitioner's Pro Se Petition for Writ of Habeas Corpus	Denied **08/18/2022** **Ervin, J., recused**
499P20-2	In re Noori	1. Respondent's Pro Se PDR Under N.C.G.S. § 7A-31 (COA20-728) 2. Respondent's Pro Se Motion for Amending Record 3. Lender's Conditional PDR Under N.C.G.S. § 7A-31 4. Respondent's Pro Se Motion to Dismiss Appellee's Responses 5. Respondent's Pro Se Motion to Impose Sanctions on Appellee's Attorney and Party 6. Lender's Motion for Sanctions	1. Denied 2. Dismissed as moot 3. Dismissed as moot 4. Dismissed 5. Denied 6. Denied
522P20-2	State v. Raymond Dakim Harris Joiner	1. Def's Pro Se Motion to Proceed *In Forma Pauperis* (COA19-1112) 2. Def's Pro Se Motion for Hearing for Default Judgment	1. Allowed 2. Dismissed
629P01-10	State v. John Edward Butler	1. Def's Pro Se Motion to Appeal Petition for Writ of Habeas Corpus and New Discovery Motion 2. Def's Pro Se Motion to Appeal Petition for Writ of Certiorari, Motion for Post-Conviction DNA Testing, All Other DNA Motions, and Motion AOC-G-108 Petition to Sue as Indigent 3. Def's Pro Se Petition for Writ of Mandamus 4. Def's Pro Se Petition for Writ of Mandamus 5. Def's Pro Se Motion to Appeal Certiorari	1. Denied 2. Dismissed 3. Denied 4. Denied 5. Dismissed

APPENDIXES

LEGAL SPECIALIZATION

RULEMAKING PROCEDURES

PROCEDURES FOR ADMINISTRATIVE COMMITTEE

RULES OF PROFESSIONAL CONDUCT

BOARD OF LAW EXAMINERS

CERTIFICATION OF PARALEGALS

RULES OF PROFESSIONAL CONDUCT

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES GOVERNING THE PLAN OF LEGAL SPECIALIZATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 8, 2021.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 1D, Section .2500, *Certification Standards for the Criminal Law Specialty*, be amended as shown on the following attachments:

ATTACHMENT A-1: 27 N.C.A.C. 1D, Section .2500, Rule .2501, *Establishment of Specialty Field*

ATTACHMENT A-2: 27 N.C.A.C. 1D, Section .2500, Rule .2502, *Definition of Specialty*

ATTACHMENT A-3: 27 N.C.A.C. 1D, Section .2500, Rule .2503, *Recognition as a Specialist in Criminal Law*

ATTACHMENT A-4: 27 N.C.A.C. 1D, Section .2500, Rule .2505, *Standards for Certification as a Specialist in State Criminal Law*

ATTACHMENT A-5: 27 N.C.A.C. 1D, Section .2500, Rule .2506, *Standards for Continued Certification as a State Criminal Law Specialist*

ATTACHMENT A-6: 27 N.C.A.C. 1D, Section .2500, Rule .2507, *Applicability of Other Requirements*

ATTACHMENT A-7: 27 N.C.A.C. 1D, Section .2500, Rule .2508, *Standards for Certification as a Specialist in Juvenile Delinquency Law*

ATTACHMENT A-8: [NEW SECTION] 27 N.C.A.C. 1D, Section .2500, Rule .2510, *Standards for Certification as a Specialist in Federal Criminal Law*

ATTACHMENT A-9: [NEW SECTION] 27 N.C.A.C. 1D, Section .2500, Rule .2511, *Standards for Continued Certification as a Federal Criminal Law Specialist*

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 8, 2021.

Given over my hand and the Seal of the North Carolina State Bar, this the 3rd day of February, 2022.

s/Alice Neece Mine
Alice Neece Mine, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 15th day of June, 2022.

s/Paul M. Newby
Paul M. Newby, Chief Justice

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

This the 15th day of June, 2022.

s/Berger, J.
For the Court

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .2500 - CERTIFICATION STANDARDS FOR THE CRIMINAL LAW SPECIALTY

27 NCAC 01D .2501 ESTABLISHMENT OF SPECIALTY FIELD

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates criminal law~~(encompassing both federal and state criminal law)~~, including the subspecialt~~y~~ies of state criminal law, ~~and~~ juvenile delinquency law, and federal criminal law, as a field of law for which certification of specialists under the North Carolina Plan of Legal Specialization (*see* Section .1700 of this Subchapter) is permitted.

History Note: *Authority G.S. 84-23;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court:
March 10, 2011; August 25, 2011; June 15, 2022.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .2500 - CERTIFICATION STANDARDS FOR THE CRIMINAL LAW SPECIALTY

27 NCAC 01D .2502 DEFINITION OF SPECIALTY

The specialty of criminal law is the practice of law dealing with the defense or prosecution of those charged with ~~misdemeanor and felony crimes~~criminal offenses in state ~~and~~ or federal ~~trial~~ courts. The subspecialt~~y~~ies in the field ~~is~~ are identified and defined as follows:

(a) State Criminal Law. The practice of criminal law in state trial and appellate courts. The standards for the subspecialty are set forth in Rules .2505-.2506.

(b) Juvenile Delinquency Law. The practice of law in state juvenile delinquency courts. The standards for the subspecialty are set forth in Rules .2508-.2509.

(c) Federal Criminal Law. The practice of criminal law in federal trial and appellate courts. The standards for the subspecialty are set forth in Rules .2510-.2511.

History Note: *Authority G.S. 84-23;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court:
March 10, 2011; August 25, 2011; June 15, 2022.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .2500 - CERTIFICATION STANDARDS FOR THE CRIMINAL LAW SPECIALTY

27 NCAC 01D .2503 RECOGNITION AS A SPECIALIST IN CRIMINAL LAW

A lawyer may qualify as a specialist by meeting the standards for ~~criminal law or~~ any of the subspecialties of state criminal law, ~~or~~ juvenile delinquency law, or federal criminal law. ~~If a lawyer qualifies as a specialist by meeting the standards for the criminal law specialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Criminal Law."~~ If a lawyer qualifies as a specialist by meeting the standards set for the subspecialty of state criminal law, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in State Criminal Law." If a lawyer qualifies as a specialist by meeting the standards for the subspecialty of juvenile delinquency law, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Criminal Law – Juvenile Delinquency." If a lawyer qualifies as a specialist by meeting the standards set for the subspecialty of federal criminal law, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Federal Criminal Law." Effective June 15, 2022, any lawyer previously certified as a specialist in the state/federal criminal law specialty may continue to represent that he or she is a "Board Certified Specialist in State/Federal Criminal Law" until the specialist's next recertification period, at which point he or she must satisfy the requirements for continued certification as a specialist in state criminal law, federal criminal law, or both.

History Note: *Authority G.S. 84-23;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court:
March 10, 2011; August 25, 2011; June 15, 2022.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .2500 - CERTIFICATION STANDARDS FOR THE CRIMINAL LAW SPECIALTY

27 NCAC 01D .2505 STANDARDS FOR CERTIFICATION AS A SPECIALIST IN STATE CRIMINAL LAW

Each applicant for certification as a specialist in state criminal law ~~or the subspecialty of state criminal law~~ shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification:

(a) Licensure and Practice - . . . .

(b) Substantial Involvement - An applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of state criminal law.

(1) Substantial involvement shall mean during the five years immediately preceding the application, the applicant devoted an average of at least 500 hours a year to the practice of state criminal law, ...

(2) "Practice equivalent" shall mean:

(A) . . . .

(B) Service as a ~~federal~~, state or tribal court judge for one year or more, ...

(3) For the ~~specialty of criminal law and the~~ subspecialty of state criminal law, the board shall require an applicant to show substantial involvement by providing information that demonstrates the applicant's significant criminal trial experience such as:

(A) . . . ;

. . .

(D) . . . .

(c) Continuing Legal Education - In the ~~specialty of criminal law and the~~ state criminal law subspecialty, an applicant must have earned no less than 40 hours of accredited continuing legal education credits in criminal law during the three years preceding the application, which ~~40 hours~~ must include the following:

(1) . . . ; and

(2) at least 6 hours in the area of ethics ~~and criminal law~~.

(d) Peer Review -

(1) Each applicant for certification as a specialist in ~~criminal law and~~ the subspecialty of state criminal law must make a satisfactory showing of qualification through peer review.

(2) . . . .

. . .

(4) Each applicant must provide for reference and independent inquiry the names and addresses of the following: (i) ten lawyers and/or judges . . . and (ii) . . . .

(5) ~~A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application~~A reference may not be related by blood or marriage to the applicant, may not be a partner or associate of the applicant, and may not work in the same government office as the applicant at the time of the application.

(e) Examination - The applicant must pass a written examination designed to test the applicant's knowledge and ability.

(1) Terms - The examination(~~s~~) shall be in written form and shall be given at such times as the board deems appropriate. The examination(~~s~~) shall be administered and graded uniformly by the specialty committee.

(2) Subject Matter - The examination shall cover the applicant's knowledge in the following topics in ~~criminal law, and/or in the subspecialty of~~ state criminal law, ~~as the applicant has elected~~:

(A) the North Carolina ~~and Federal~~ Rules of Evidence;

(B) state ~~and federal~~ criminal procedure and state ~~and federal~~ laws affecting criminal procedure;

. . .

(E) trial procedure and trial tactics; and

(F) criminal substantive law~~;~~.

(3) Required Examination Components - ~~:~~

~~(A) Criminal Law Specialty.~~

~~An applicant for certification in the specialty of criminal law must pass part I of the examination on general topics in criminal law and part II of the examination (federal and state criminal law).~~

~~(B) State Criminal Law Subspecialty.~~

An applicant for certification in the subspecialty of state criminal law must pass ~~part I of~~ the examination on general topics in criminal law and ~~part III of~~ the examination on state criminal law.

History Note: *Authority G.S. 84-23;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: February 5, 2004; October 6, 2004; August 23, 2007; March 8, 2013; October 2, 2014; March 16, 2017; June 15, 2022.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .2500 - CERTIFICATION STANDARDS FOR THE CRIMINAL LAW SPECIALTY

27 NCAC 01D .2506 STANDARDS FOR CONTINUED CERTIFICATION AS A SPECIALIST IN STATE CRIMINAL LAW

The period of certification is five years. A certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2506(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - The specialist must demonstrate that for the five years preceding reapplication he or she has had substantial involvement in the ~~specialty or~~ subspecialty as defined in Rule .2505(b).

(b) Continuing Legal Education - The specialist must have earned no less than 6~~5~~0 hours of accredited continuing legal education credits ~~in criminal law~~ as defined in Rule .2505(c)(1), with not less than 6 credits earned in any one year.

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers or judges, ... Each applicant also must provide the names and addresses of the following: (i) five lawyers and/or judges who practice in the field of criminal law and who are familiar with the applicant's practice, and (ii) . . . .

(d) . . . .

. . .

(f) . . . .

History Note: *Authority G.S. 84-23;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court:
February 5, 2004; October 6, 2004; March 27, 2019;
June 15, 2022.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .2500 - CERTIFICATION STANDARDS FOR THE CRIMINAL LAW SPECIALTY

27 NCAC 01D .2507 APPLICABILITY OF OTHER REQUIREMENTS

The specific standards set forth herein for certification of specialists in the criminal law ~~the~~ subspecialt~~y~~ies of state criminal law, ~~and the subspecialty of~~ juvenile delinquency law, and federal criminal law are subject to any general requirement, standard, or procedure adopted by the board applicable to all applicants for certification or continued certification.

History Note: *Authority G.S. 84-23;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court:
March 10, 2011; August 25, 2011; June 15, 2022.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .2500 - CERTIFICATION STANDARDS FOR THE CRIMINAL LAW SPECIALTY

27 NCAC 01D .2508 STANDARDS FOR CERTIFICATION AS A SPECIALIST IN JUVENILE DELINQUENCY LAW

Each applicant for certification as a specialist in juvenile delinquency law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification:

(a) Licensure and Practice - . . . .

. . .

(d) Peer Review –

(1) . . . .

. . .

(4) Each applicant must provide for reference and independent inquiry the names and addresses of ten lawyers and/or judges . . . .

(5) ~~A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application~~A reference may not be related by blood or marriage to the applicant, may not be a partner or associate of the applicant, and may not work in the same government office as the applicant at the time of the application.

(e) Examination - An applicant must pass a written examination designed to demonstrate sufficient knowledge, skills, and proficiency in the field of juvenile delinquency law to justify the representation of special competence to the legal profession and the public.

(1) . . . .

(2) Subject Matter – . . . :

(A) . . . ;

. . .

(F) . . . .

(3) Examination Components - An applicant for certification in the subspecialty of juvenile delinquency law must pass ~~part I of~~ the criminal law examination on general topics in criminal law and ~~part IV of~~ the examination on juvenile delinquency law.

History Note: *Authority G.S. 84-23;*
Approved by the Supreme Court August 25, 2011;
Amendments Approved by the Supreme Court
March 5, 2015; June 15, 2022.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .2500 - CERTIFICATION STANDARDS FOR THE CRIMINAL LAW SPECIALTY

[THIS ENTIRE SECTION IS NEW]

27 NCAC 01D .2510 STANDARDS FOR CERTIFICATION AS A SPECIALIST IN FEDERAL CRIMINAL LAW

Each applicant for certification as a specialist in the subspecialty of federal criminal law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification:

(a) Licensure and Practice - An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of the application. During the period of certification an applicant shall continue to be licensed and in good standing to practice law in North Carolina.

(b) Substantial Involvement - An applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of criminal law in the federal courts of the United States.

(1) Substantial involvement shall mean during the five years immediately preceding the application, the applicant devoted an average of at least 600 hours a year to the practice of criminal law, but not less than 400 hours in any one year. "Practice" shall mean substantive legal work, specifically including the handling of matters in federal district court criminal cases, the pre-charge representation of clients in matters being investigated by federal law enforcement agencies, in federal criminal appeals, or otherwise providing legal advice or representation regarding such matters, or a practice equivalent.

(2) "Practice equivalent" shall mean:

(A) Service as a law professor concentrating in the teaching of criminal law for one year or more, which may be substituted for one year of experience to meet the five-year requirement set forth in Rule .2510(b)(1) above;

(B) Service as an Article III or federal magistrate judge for one year or more, which may be substituted for one year of experience to meet the five-year requirement set forth in Rule .2510(b)(1) above;

(3) For the subspecialty of federal criminal law, the board shall require an applicant to show substantial involvement by providing information that demonstrates the applicant's significant federal criminal trial experience such as:

(A) representation during the applicant's entire legal career as principal counsel of record in federal criminal trials, whether concluded by jury verdict or not;

(B) court appearances in other substantive criminal proceedings in the U.S. District Courts of any jurisdiction;

(C) pre-charge representation in matters being investigated by federal law enforcement agencies; and

(D) representation as principal counsel of record in criminal appeals to any federal appellate court.

(c) Continuing Legal Education - In the federal criminal law subspecialty, an applicant must have earned no less than 40 hours of accredited continuing legal education credits in criminal law during the three years preceding the application, which must include the following:

(1) at least 34 hours in skills pertaining to federal criminal law, such as evidence, substantive criminal law, federal criminal procedure, criminal trial tactics, pre-trial or pre-charge advocacy, criminal appeals (including any annual update pertaining to the docket of a federal appellate or the U.S. Supreme Court); and

(2) at least 6 hours in the area of ethics.

(d) Peer Review -

(1) Each applicant for certification as a specialist in the subspecialty of federal criminal law must make a satisfactory showing of qualification through peer review.

(2) All references must be licensed and in good standing to practice in North Carolina and must be familiar with the competence and qualifications of the applicant in the specialty field. The applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualifications.

(3) Written peer reference forms will be sent by the board or the specialty committee to the references. Completed peer reference forms must be received from at least five of the

references. The board or the specialty committee may contact in person or by telephone any reference listed by an applicant.

(4) Each applicant must provide for reference and independent inquiry the names and addresses of the following: (i) ten lawyers and/or judges who practice in the field of criminal law and who are familiar with the applicant's practice, and (ii) opposing counsel and the judge in eight recent cases tried by the applicant to verdict or entry of order.

(5) A reference may not be related by blood or marriage to the applicant, may not be a partner or associate of the applicant, and may not work in the same government office as the applicant at the time of the application.

(e) Examination - The applicant must pass a written examination designed to test the applicant's knowledge and ability.

(1) Terms - The examination shall be in written form and shall be given at such times as the board deems appropriate. The examination shall be administered and graded uniformly by the specialty committee.

(2) Subject Matter - The examination shall cover the applicant's knowledge in the following topics in federal criminal law:

(A) the Federal Rules of Evidence;

(B) federal criminal procedure and federal laws/federal case law affecting criminal procedure;

(C) federal constitutional law;

(D) the United States Sentencing Guidelines, and the calculation and application thereof;

(E) trial procedure and trial tactics;

(F) pre-charge advocacy and tactics;

(G) substantive federal criminal law; and

(H) federal appellate procedure and tactics.

(3) Required Examination Components - An applicant for certification in the subspecialty of federal criminal law must pass the examination on general topics in criminal law and the examination on federal criminal law.

History Note: *Authority G.S. 84-23;*
Approved by the Supreme Court: June 15, 2022.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .2500 - CERTIFICATION STANDARDS FOR THE CRIMINAL LAW SPECIALTY

[THIS IS ENTIRE SECTION IS NEW]

27 NCAC 01D .2511 STANDARDS FOR CONTINUED CERTIFICATION AS A FEDERAL CRIMINAL LAW SPECIALIST

The period of certification is five years. A certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2511(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - The specialist must demonstrate that for the five years preceding reapplication he or she has had substantial involvement in the subspecialty as defined in Rule .2510(b).

(b) Continuing Legal Education - The specialist must have earned no less than 60 hours of accredited continuing legal education credits as described in .2510(c)(1), with not less than 6 credits earned in any one year.

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in this state and familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. Each applicant also must provide the names and addresses of the following: (i) five lawyers and/or judges who practice in the field of criminal law and who are familiar with the applicant's practice, and (ii) opposing counsel and the judge in four recent cases tried by the applicant to verdict or entry of order. All other requirements relative to peer review set forth in Rule .2510(d) of this subchapter apply to this standard.

(d) Time for Application - Application for continuing certification shall be made not more than 180 days nor less than 90 days prior to the expiration of the prior period of certification.

(e) Lapse of Certification - Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Rule .2510 of this subchapter, including the examination.

(f) Suspension or Revocation of Certification - If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Rule .2510 of this subchapter.

History Note: *Authority G.S. 84-23;*
Approved by the Supreme Court: June 15, 2022.

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES CONCERNING RULEMAKING PROCEDURES

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 22, 2022.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 01A, Section .1400, *Rulemaking Procedures*, be amended as shown in the following attachment:

ATTACHMENT 1: 27 N.C.A.C. 01A, Section .1400, Rule .1403, *Action by the Council and Review by the North Carolina Supreme Court*

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 22, 2022.

Given over my hand and the Seal of the North Carolina State Bar, this the 15th day of August, 2022.

s/Alice Neece Mine
Alice Neece Mine, Secretary

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

This the 2nd day of November, 2022.

s/Paul M. Newby
Paul M. Newby, Chief Justice

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

This the 2nd day of November, 2022.

s/Berger, J.
For the Court

TITLE 27 – THE NORTH CAROLINA STATE BAR

CHAPTER 1 – RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR

SUBCHAPTER 1A – ORGANIZATION OF THE NORTH CAROLINA STATE BAR

SECTION .0100 – FUNCTIONS

27 NCAC 01A .1403 ACTION BY THE COUNCIL AND REVIEW BY THE NORTH CAROLINA SUPREME COURT

(a) . . .

(1) . . . ;

. . .

(3) . . . .

(b) Any proposed rule or amendment to a rule adopted by the council shall be transmitted by the secretary to the North Carolina Supreme Court for its review on a schedule approved by the Court, but in no event later than ~~120~~ 183 days following the council's adoption of the proposed rule or amendment.

(c) . . . .

. . . .

History Note: *Authority G.S. 84-23;*
Approved by the Supreme Court August 23, 2007;
Amendments Approved by the Supreme Court:
September 20, 2018; November 2, 2022.

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES CONCERNING PROCEDURES FOR THE ADMINISTRATIVE COMMITTEE

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 22, 2022.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 01D, Section .0900, *Procedures for the Administrative Committee*, be amended as shown in the following attachment:

ATTACHMENT 2: 27 N.C.A.C. 01D, Section .0900, Rule .0901, *Transfer to Inactive Status*

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 22, 2022.

Given over my hand and the Seal of the North Carolina State Bar, this the 15th day of August, 2022.

s/Alice Neece Mine
Alice Neece Mine, Secretary

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

This the 2nd day of November, 2022.

s/Paul M. Newby
Paul M. Newby, Chief Justice

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

This the 2nd day of November, 2022.

s/Berger, J.
For the Court

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .0900 – PROCEDURES FOR THE ADMINISTRATIVE COMMITTEE

27 NCAC 01D .0901 TRANSFER TO INACTIVE STATUS

(a) Petition for Transfer to Inactive Status

. . .

(d) Transfer to Inactive Status by Secretary of the State Bar Notwithstanding paragraph (c) of this rule, an active member may petition for transfer to inactive status pursuant to paragraph (a) of this rule and may be transferred to inactive status by the secretary of the State Bar upon a finding that the active member has complied with or fulfilled the conditions for transfer to inactive status set forth in paragraph (b) of this rule. Transfer to inactive status by the secretary is discretionary. If the secretary declines to transfer a member to inactive status, the member's petition shall be submitted to the Administrative Committee at its next meeting and the procedure for review of the petition shall be as set forth in paragraph (c) of this rule.

History Note: *Authority G.S. 84-23;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court:
March 7, 1996; February 3, 2000; March 6, 2008;
March 6, 2014; November 2, 2022.

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES OF PROFESSIONAL CONDUCT

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 22, 2022.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct of the North Carolina State Bar as set forth in 27 N.C.A.C. 02, Section .0100, *Client-Lawyer Relationship*, be amended as shown in the following attachments:

ATTACHMENT 3-A: 27 N.C.A.C. 02, Section .0100, Rule 1.6, *Confidentiality of Information*

ATTACHMENT 3-B: 27 N.C.A.C. 02, Section .0100, Rule 1.9, *Duties to Former Clients*

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at regularly called meeting on April 22, 2022.

Given over my hand and the Seal of the North Carolina State Bar, this the 15th day of August, 2022.

s/Alice Neece Mine
Alice Neece Mine, Secretary

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

This the 2nd day of November, 2022.

s/Paul M. Newby
Paul M. Newby, Chief Justice

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

This the 2nd day of November, 2022.

s/Berger, J.
For the Court

CHAPTER 02 - RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR

SECTION .0100 - CLIENT-LAWYER RELATIONSHIP

27 NCAC 02 RULE 1.06 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) . . . :

(1) . . .

. . .

(8) . . . .

(c) . . . .

(d) . . . .

Comment

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client acquired during the lawyer's representation of the client. "Information acquired during the professional relationship with a client" does not encompass information acquired through legal research or other expansion of the lawyer's legal knowledge, even if acquired during the representation, as the client does not have any reasonable expectation of confidentiality of such information. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information acquired during a lawyer's prior representation of a former client, and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients and Rule 8.6 for a lawyer's duty to disclose information to rectify a wrongful conviction.

[2] . . . .

. . . .

History Note: *Authority G.S. 84-23;*
Approved by the Supreme Court July 24, 1997;
Amendments Approved by the Supreme Court:
March 1, 2003; October 2, 2014; March 16, 2017;
November 2, 2022.

CHAPTER 02 - RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR

SECTION .0100 - CLIENT-LAWYER RELATIONSHIP

27 NCAC 02 RULE 1.09 DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) . . . .

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information ~~has become generally known~~ is contained in the public record, was disclosed at a public hearing, or was otherwise publicly disseminated; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client. A lawyer may disclose information otherwise covered by Rule 1.6 that is contained in the public record, was disclosed at a public hearing, or was otherwise publicly disseminated unless the information would likely be embarrassing or detrimental to the client if disclosed.

Comment

[1] . . . .

. . .

[8] ~~Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client. Whether information is "generally known" depends in part upon how the information was obtained and in part upon~~

~~the former client's reasonable expectations. The mere fact that information is accessible through the public record or has become known to some other persons, does not necessarily deprive the information of its confidential nature. If the information is known or readily available to a relevant sector of the public, such as the parties involved in the matter, then the information is probably considered "generally known." See Restatement (Third) of The Law of Governing Lawyers, 111 cmt. d.~~ The Rules of Professional Conduct are rules of reason and should be applied with a commonsense approach. Rule 0.2, Scope, cmt. [1]. To reveal is to make public something that was secret or hidden. See Reveal, Merriam-Webster's Collegiate Dictionary (10th ed. 1998). A lawyer cannot reveal that which has already been revealed via public disclosure. Accordingly, the prohibition on a lawyer revealing information pursuant to Rule 1.9(c)(2) does not extend to information that has been made public because public information by its nature is no longer capable of being revealed.

[9] Whether information is likely to be embarrassing or detrimental to a client if disclosed must be determined by the lawyer prior to the disclosure under Rule 1.9(c)(2). A lawyer should elevate a client's desire for his or her lawyer to not publicly discuss his or her case over the lawyer's desire to publicly speak about the case after the representation has ended. When it is unclear whether a lawyer's disclosure pursuant to Rule 1.9(c)(2) would be embarrassing or detrimental to the client, a lawyer should consult with the client about the potential disclosure and the resulting impact thereof.

[~~9~~10] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). *See* Rule 1.0(f). With regard to the effectiveness of an advance waiver, *see* Comment [22] to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, *see* Rule 1.10.

History Note: *Authority G.S. 84-23;*
Approved by the Supreme Court July 24, 1997;
Amendments Approved by the Supreme Court:
October 7, 1999; February 27, 2003; November 2, 2022.

AMENDMENT TO THE BOARD OF LAW EXAMINERS' RULES:

RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW

The following amendments to the Board of Law Examiners' Rules Governing Admission to the Practice of Law in the State of North Carolina were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 22, 2022.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Board of Law Examiners' Rules Governing Admission to the Practice of Law as set forth in the Board of Law Examiners' Rules, Section .0500, *Requirements for Applicants*, be amended as shown in the following attachments:

ATTACHMENT 4-A: Rule .0501, *Requirements for General Applicants*

ATTACHMENT 4-B: Rule .0504, *Requirements for Transfer Applicants*

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Board of Law Examiners' Rules Governing Admission to the Practice of Law in the State of North Carolina were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 22, 2022.

Given over my hand and the Seal of the North Carolina State Bar, this the 15th day of August, 2022.

s/Alice Neece Mine
Alice Neece Mine, Secretary

After examining the foregoing amendments to the Board of Law Examiners' Rules Governing Admission to the Practice of Law as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 2nd day of November, 2022.

s/Paul M. Newby
Paul M. Newby, Chief Justice

On this date, the foregoing amendments to the Board of Law Examiners' Rules Governing Admission to the Practice of Law as adopted by the Council of the North Carolina State Bar were entered upon the minutes of the Supreme Court. The amendments shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 2nd day of November, 2022.

s/Berger, J.
For the Court

BOARD OF LAW EXAMINERS' RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW

SECTION .0500

RULE .0501 REQUIREMENTS FOR GENERAL APPLICANTS

As a prerequisite to being licensed by the Board to practice law in the State of North Carolina, a general applicant shall:

(1) . . . ;

. . .

~~(8) have successfully completed the State-Specific Component, consisting of the course in North Carolina law prescribed by the Board, within the twenty-four (24) month period next preceding the beginning day of the written bar examination which applicant passes as prescribed above, or within the twelve (12) month period thereafter; the time limits are tolled for a period not exceeding four (4) years for any applicant who is a service member as defined in the Service Members Civil Relief Act, 50 U.S.C. Appx. § 511, while engaged in active service as defined in 10 U.S.C. § 101, and who provides a letter or other communication from the service member's commanding officer stating that the service member's current military duty prevents the service member from completing the State-Specific Component within the twenty-four month period next preceding the beginning day of the written bar examination which applicant passes as prescribed above, or within the twelve month period thereafter.~~

History Note: *Amendments Approved by the Supreme Court November 2, 2022.*

BOARD OF LAW EXAMINERS' RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW

SECTION .0500

RULE .0504 REQUIREMENTS FOR TRANSFER APPLICANTS

As a prerequisite to being licensed by the Board to practice law in the State of North Carolina, a transfer applicant shall:

(1) . . . ;

. . .

(8) if the applicant is or has been a licensed attorney, be in good standing in each state, territory of the United Sates, or the District of Columbia, in which the applicant is or has been licensed to practice law and not under any charges of misconduct while the application is pending before the Board.

(a) For purposes of this rule, an applicant is "in good standing" in a jurisdiction if:

(i) the applicant is an active member of the bar of the jurisdiction and the jurisdiction issues a certificate attesting to the applicant's good standing therein; or

(ii) the applicant was formerly a member of the jurisdiction and the jurisdiction certifies the applicant was in good standing at the time that the applicant ceased to be a member; and

(b) if the jurisdiction in which the applicant is inactive or was formerly a member will not certify the applicant's good standing solely because of the non-payment of dues, the Board, in its discretion, may waive such certification from that jurisdiction~~; and~~.

~~(9) have successfully completed the State-Specific Component, consisting of the course in North Carolina law prescribed by the Board.~~

History Note: *Amendments Approved by the Supreme Court November 2, 2022.*

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES CONCERNING THE PLAN FOR CERTIFICATION OF PARALEGALS

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 22, 2022.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 01G, Section .0100, *The Plan for Certification of Paralegals*, be amended as shown in the following attachments:

ATTACHMENT 5-A: 27 N.C.A.C. 01G, Section .0100, Rule .0105, *Appointment of Members; When; Removal*

ATTACHMENT 5-B: 27 N.C.A.C. 01G, Section .0100, Rule .0108, *Succession*

ATTACHMENT 5-C: 27 N.C.A.C. 01G, Section .0100, Rule .0109, *Appointment of Chairperson*

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 22, 2022.

Given over my hand and the Seal of the North Carolina State Bar, this the 15th day of August, 2022.

s/Alice Neece Mine
Alice Neece Mine, Secretary

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

This the 2nd day of November, 2022.

s/Paul M. Newby
Paul M. Newby, Chief Justice

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

This the 2nd day of November, 2022.

s/Berger, J.
For the Court

SUBCHAPTER 01G – CERTIFICATION OF PARALEGALS

SECTION .0100 THE PLAN FOR CERTIFICATION OF PARALEGALS

27 NCAC 01G .0105 APPOINTMENT OF MEMBERS; WHEN; REMOVAL

(a) . . . .

(b) Procedure for Nomination of Candidates for Paralegal Members.

(1) Composition of Nominating Committee. At least 60 days prior to a meeting of the council at which one or more paralegal members of the board are subject to appointment for a full three-year term, the board shall appoint a nominating committee comprised of seven certified paralegals as ~~follows:~~ selected by the board. The nominating committee should consist of active certified paralegals, including but not limited to representatives from paralegal and legal assistant associations, organizations, or divisions of legal organizations, as well as independent paralegals (not employed by a law firm, government entity, or legal department).

~~(i) A representative selected by the North Carolina Paralegal Association;~~

~~(ii) A representative selected by the North Carolina Bar Association Paralegal Division;~~

~~(iii) A representative selected by the North Carolina Advocates for Justice Legal Assistants Division;~~

~~(iv) Three representatives from three local or regional paralegal organizations to be selected by the board; and~~

~~(v) An independent paralegal (not employed by a law firm, government entity, or legal department) to be selected by the board.~~

(2) Selection of Candidates. The nominating committee shall meet within 30 days of its appointment to select at least two but no more than five certified paralegals as candidates for each paralegal member vacancy on the board for inclusion on the ballot to be ~~mailed~~ sent to all active certified paralegals.

(3) Vote of Certified Paralegals. At least 30 days prior to the meeting of the council at which a paralegal member appointment to the board will be made, ~~a ballot shall be mailed or a notice of online voting shall be emailed or mailed to all active~~

~~certified paralegals at each certified paralegal's physical or email address of record on file with the North Carolina State Bar.~~ vote on the list of candidates provided by the nominating committee shall be conducted of all active certified paralegals in a manner approved by the board. Notice of the vote shall be sent to all active certified paralegals using contact information on file with the North Carolina State Bar, shall contain instructions on how to participate in the vote, and shall state how many paralegal member positions on the board are subject to appointment and the names of the candidates selected by the nominating committee for each such position. ~~The ballot or notice shall be accompanied by written instructions, and shall state how many paralegal member positions on the board are subject to appointment, the names of the candidates selected by the nominating committee for each such position, and when and where the ballot should be returned. If balloting will be online, the notice shall explain how to access the ballot on the State Bar's paralegal website and the method for voting online. Write-in candidates shall be permitted and the instructions shall so state. Each ballot sent by mail shall be sequentially numbered with a red identifying numeral in the upper right hand corner of the ballot. Online balloting shall be by secure log-in to the State Bar's paralegal website using the certified paralegal's identification number and personal password. Any certified paralegal who does not have an email address on file with the State Bar shall be mailed a ballot.~~ The board shall maintain appropriate records respecting how many ballots or notices are sent to prospective voters in each election as well as how many ballots are returned. ~~Only original ballots will be accepted by mail.~~ Votes cast or received after the deadline stated in the notice ~~Ballots received after the deadline stated on the ballot or the email notice~~ will not be counted. The names of the two candidates receiving the most votes for each open paralegal member position shall be the nominees submitted to the council.

. . .

History Note: *Authority G.S. 84-23;*
Approved by the Supreme Court October 6, 2004;
Amendments approved by the Supreme Court:
March 8, 2007; March 11, 2010; August 25, 2011;
March 6, 2014; November 2, 2022.

SUBCHAPTER 01G – CERTIFICATION OF PARALEGALS

SECTION .0100 THE PLAN FOR CERTIFICATION OF PARALEGALS

27 NCAC 01G .0108 SUCCESSION

Each member of the board shall be entitled to serve for one full three-year term and to succeed himself or herself for one additional three-year term. Each certified paralegal member shall be eligible for reappointment by the council at the end of his or her term without appointment of a nominating committee or vote of all active certified paralegals as would be otherwise required by Rule .0105 of this subchapter. Thereafter, no person may be reappointed without having been off of the board for at least three years.; provided, however, that any member who is designated chairperson at the time that the member's second three-year term expires may serve one additional year on the board in the capacity of chair.

History Note: *Authority G.S. 84-23;*
Approved by the Supreme Court October 6, 2004;
Amendments approved by the Supreme Court:
March 6, 2014; November 2, 2022.

SUBCHAPTER 01G – CERTIFICATION OF PARALEGALS

SECTION .0100 THE PLAN FOR CERTIFICATION OF PARALEGALS

27 NCAC 01G .0109 APPOINTMENT OF CHAIRPERSON

The council shall appoint the chairperson of the board from among the ~~lawyer~~ members of the board. The term of the chairperson shall be one year. The chairperson may be reappointed thereafter during his or her tenure on the board. The chairperson shall preside at all meetings of the board, shall prepare and present to the council the annual report of the board, and generally shall represent the board in its dealings with the public.

History Note: *Authority G.S. 84-23;*
Approved by the Supreme Court October 6, 2004;
Amendments approved by the Supreme Court November 2, 2022.

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES OF PROFESSIONAL CONDUCT

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 22, 2022.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct of the North Carolina State Bar as set forth in 27 N.C.A.C. 02, Section .0100, *Client-Lawyer Relationship*, be amended as shown in the following attachments:

ATTACHMENT 6: 27 N.C.A.C. 02, Section .0100, Rule 1.19, *Sexual Relations with Clients Prohibited*

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 22, 2022.

Given over my hand and the Seal of the North Carolina State Bar, this the 15th day of August, 2022.

s/Alice Neece Mine
Alice Neece Mine, Secretary

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

This the 2nd day of November, 2022.

s/Paul M. Newby
Paul M. Newby, Chief Justice

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

This the 2nd day of November, 2022.

s/Berger, J.
For the Court

CHAPTER 02 - RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR

27 NCAC 02 RULE 1.19 SEXUAL ~~RELATIONS~~ CONDUCT WITH CLIENTS PROHIBITED

(a) A lawyer shall not ~~have~~ engage in sexual ~~relations~~ activity with a ~~current~~ client ~~of the lawyer~~. For purposes of this Rule, "sexual activity" means:

(1) sexual intercourse; or

(2) any touching of a person or causing such person to touch the lawyer for the purpose of arousing or gratifying the sexual desire of either party.

(b) A lawyer shall not engage in sexual communications with a client. For purposes of this Rule, "sexual communications" means:

(1) requesting or actively participating in sexually explicit conversation; or

(2) requesting or transmitting messages, images, audio, video, or other content that contain nudity or sexually explicit material.

Communications that contain nudity or sexually explicit content but are relevant to the client's legal matter and are made in furtherance of the representation are not "sexual communications" for purposes of this Rule.

~~(b) Paragraph (a) shall not apply if a consensual sexual relationship existed between the lawyer and the client before the legal representation commenced.~~

(c) A lawyer shall not request, require, or demand sexual ~~relations~~ activity or sexual communications with a client incident to or as a condition of any professional representation.

(d) Scope.

(1) The prohibitions in this Rule apply to:

(A) current clients;

(B) an individual or a representative of an organization who is consulting with a lawyer about the possibility of forming a client-lawyer relationship, until the lawyer declines the representation; and

(C) representatives of a current client with whom the lawyer is authorized to communicate regarding the representation.

(2) Paragraph (a) shall not apply if a consensual sexual relationship existed between the lawyer and the person identified in (d)(1) before the legal representation or consultation commenced.

(3) Paragraph (b) shall not apply if the lawyer and the person identified in (d)(1) consensually engaged in sexual communications before the legal representation or consultation commenced.

(4)

~~For purposes of this rule, "sexual relations" means:~~

~~(1) Sexual intercourse; or~~

~~(2) Any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party.~~

~~(e)~~ For purposes of this rule, "lawyer'" means any lawyer who assists in the representation of the client but does not include other lawyers in a firm who provide no such assistance.

COMMENT

[1] Rule 1.7, the general rule on conflict of interest, has always prohibited a lawyer from representing a client when the lawyer's ability competently to represent the client may be impaired by the lawyer's other personal or professional commitments. Under the general rule on conflicts and the rule on prohibited transactions (Rule 1.8), relationships with clients, whether personal or financial, that affect a lawyer's ability to exercise his or her independent professional judgment on behalf of a client are closely scrutinized. The rules on conflict of interest have always prohibited the representation of a client if a sexual relationship with the client presents a significant danger to the lawyer's ability to represent the client adequately. The present rule clarifies that ~~a~~ sexual ~~relationship~~ conduct with a client is damaging to the client-lawyer relationship and creates an impermissible conflict of interest that cannot be ameliorated by the consent of the client.

. . .

[3] ~~A s~~Sexual ~~relationship~~ conduct between a lawyer and a client may involve unfair exploitation of the lawyer's fiduciary position. Because of the dependence that so often characterizes the attorney-client relationship, there is a significant possibility that ~~a~~ sexual ~~relationship~~conduct

with a client resulted from the exploitation of the lawyer's dominant position and influence. Moreover, if a lawyer permits the otherwise benign and even recommended client reliance and trust to become the catalyst for ~~a~~ sexual ~~relationship~~conduct with a client, the lawyer violates one of the most basic ethical obligations; i.e., not to use the trust of the client to the client's disadvantage. . . . .

Impairment of the Ability to Represent the Client Competently

[4] A lawyer must maintain his or her ability to represent a client dispassionately and without impairment to the exercise of independent professional judgment on behalf of the client. ~~The existence of a s~~ Sexual ~~relationship~~conduct between lawyer and client, under the circumstances proscribed by this rule, presents a significant danger that the lawyer's ability to represent the client competently may be adversely affected because of the lawyer's emotional involvement. This emotional involvement has the potential to undercut the objective detachment that is demanded for adequate representation. ~~A s~~Sexual ~~relationship~~ conduct also creates the risk that the lawyer will be subject to a conflict of interest. . . . .

No Prejudice to Client

[5] The prohibition on ~~upon representing a client with whom a~~ sexual ~~relationship~~ conduct with a client ~~develops~~ applies regardless of ~~the absence of a showing of~~ whether it prejudices ~~to~~ the client and regardless of whether the ~~relationship~~ conduct is consensual.

Prior Consensual Relationship

[6] Sexual ~~relationships~~ conduct that predates the client-lawyer relationship ~~are~~is not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are not present when the sexual ~~relationship~~conduct exists prior to the commencement of the client-lawyer relationship. . . . .

No Imputed Disqualification

[7] The other lawyers in a firm are not disqualified from representing a client with whom the lawyer has ~~become intimate~~engaged in sexual conduct. The potential impairment of the lawyer's ability to exercise independent professional judgment on behalf of the client with whom he or she is ~~having a~~ engaging in sexual ~~relationship~~conduct is specific to that lawyer's representation of the client and is unlikely to affect the ability of other members of the firm to competently and dispassionately represent the client.

History Note: *Authority G.S. 84-23;*
Approved by the Supreme Court July 24, 1997;
Amendments Approved by the Supreme Court:
February 27, 2003; November 2, 2022.

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR

Interlocutory orders—substantial right—challenge to trust amendments—order for distributions to defending beneficiaries—Where plaintiffs challenged certain amendments to their father's revocable trust removing them as beneficiaries and the trial court issued an interlocutory order directing the trustee to make distributions to the beneficiaries for the legal fees incurred in their defense of the trust amendments, the Court of Appeals properly exercised jurisdiction over plaintiffs' interlocutory appeal because the order impacted a substantial right—namely, their right to recover from the trustee pursuant to N.C.G.S. § 36C-6-604(b) for distributions to the defending beneficiaries in the event plaintiffs were successful in their challenge to the trust amendments. However, the portions of the Court of Appeals' opinion addressing one of the trial court's rulings not appealed by the parties was vacated. **Wing v. Goldman Sachs Tr. Co., N.A., 288.**

Mootness—statute amended during appeal—request for damages—constitutionality of fees—Where plaintiffs filed suit challenging a county ordinance that required residential property developers to pay one-time water and sewer "capacity use" fees for each lot they wished to develop as a precondition for the county's concurrence in the developer's applications for water and sewer permits, plaintiffs' request for declaratory relief was not rendered moot by the legislature's amendments to the relevant statutory provisions during the pendency of the appeal because plaintiffs' request for declaratory relief was inextricably intertwined with their claim for monetary relief. Further, the county's statutory authority to enact the fees at issue had no bearing on the constitutionality of those fees. **Anderson Creek Partners, L.P. v. Cnty. of Harnett, 1.**

Order granting motion to dismiss—de novo review—no request by parties for findings—remand not appropriate—In a case involving allegations of fraud against a bank, where the trial court granted defendant's motion to dismiss for failure to state a claim, the Court of Appeals erred by remanding the case to the trial court for further findings of fact instead of reviewing de novo whether plaintiffs' complaint contained allegations sufficient to support their claims for relief. The trial court was not required to include any factual findings or conclusions of law in its order, and none were requested by either party. **Taylor v. Bank of Am., N.A., 677.**

Preservation of issues—criminal case—denied request for jury instruction—self-defense—request constituted objection—In a prosecution for assault on a female and other related charges, defendant properly preserved for appellate review his challenge to the trial court's refusal to instruct the jury on self-defense where, although defendant expressly agreed to the trial court's planned instructions during the charge conference and again after the court finished instructing the jury, defendant's request for a self-defense instruction—which he made right before the court instructed the jury—constituted an "objection" for purposes of Appellate Rule 10(a)(2). Further, defendant's failure to file a pre-trial notice of his intent to assert self-defense as required under N.C.G.S. § 15A-905(c)(1) did not preclude him on appeal from challenging the trial court's refusal to instruct on self-defense, where the court's decision did not appear to be the imposition of a discovery sanction under section 15A-910(a)(4) and, even if that had been the court's intent, it failed to take the procedural steps necessary to justify such a sanction. **State v. Hooper, 612.**

Preservation of issues—probation revocation—right to confront witnesses—insufficient objection—Where defendant's objection at his probation revocation hearing to the introduction of a transcript of an officer's testimony (from

CONSTITUTIONAL LAW—Continued

authority to conduct business in this state—which signaled its consent to be treated like a domestic corporation of like character and to be sued in North Carolina. **Farmer v. Troy Univ., 366.**

North Carolina—education provisions—fundamental right to sound basic education—The Supreme Court reaffirmed the principle stated in *Leandro v. State*, 346 N.C. 336 (1997) and *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605 (2004), that the education provisions of the North Carolina Constitution (including Article I, Section 15 and Article IX, Section 2) expressly establish the right of every child in North Carolina to be given the opportunity to receive at least a sound basic education, a right that the State has an affirmative duty to protect and maintain. **Hoke Cnty. Bd. of Educ. v. State of N.C., 386.**

Public school funding—failure to provide—equitable remedy—inherent power of judiciary to grant—ordering the transfer of state funds—The North Carolina Constitution requires the General Assembly to adequately fund the public school system in order to fulfill the State's constitutional duty to provide to every child in North Carolina the opportunity to receive a sound basic education, and it gives the judiciary inherent power to uphold constitutional rights; thus, in the exceedingly rare and extraordinary circumstance where the General Assembly continually fails to meet its obligations to provide adequate funds to meet the constitutional minimum standard for public education, a court may, after exhibiting the appropriate deference and after established methods of seeking a remedy fail, order as an equitable remedy the transfer of adequate available state funds. **Hoke Cnty. Bd. of Educ. v. State of N.C., 386.**

Public school funding—right to sound basic education—ongoing violation—remedy—transfer of state funds—Where the state public education system was constitutionally deficient due to the State's continued failure to provide to all children the opportunity to receive a sound basic education—as set forth in *Leandro v. State*, 346 N.C. 336 (1997), and *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605 (2004)—the extraordinary circumstances of the State's ongoing constitutional violation and the failure of the legislative and executive branches to correct those educational deficiencies despite years of opportunity required the judiciary to exercise its inherent power to fashion an appropriate equitable remedy. The trial court did not err when it ordered the State to transfer funds to comply with portions of the State's Comprehensive Remedial Plan based on conclusions that the violation was statewide and that the trial court had shown proper deference to the other branches prior to taking this step. However, the trial court's subsequent order rescinding the transfer requirement—based on a mistaken conclusion, which required reversal, that it lacked authority to order the transfer—was vacated and the matter remanded to the trial court for the narrow purpose of recalculating the amount of funds to be transferred, subject to the 2022 state budget. **Hoke Cnty. Bd. of Educ. v. State of N.C., 386.**

Public school funding—role of General Assembly—appropriations power—subject to duty to provide sound basic education—The education provisions of the North Carolina Constitution (including Article I, Section 15 and Article IX, Section 2) require the General Assembly to wield its appropriations power in accordance with its contemporaneous duty to provide every child in every school district the opportunity to receive at least a sound basic education. **Hoke Cnty. Bd. of Educ. v. State of N.C., 386.**