NORTH CAROLINA REPORTS

VOLUME 384

SUPREME COURT OF NORTH CAROLINA

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THE SUPREME COURT
OF
NORTH CAROLINA

Chief Justice

PAUL MARTIN NEWBY

Associate Justices

MICHAEL R. MORGAN
ANITA EARLS
PHIL BERGER JR.
TAMARA PATTERSON BARRINGER
RICHARD D. DIETZ[1]
CURTIS H. ("TREY") ALLEN III[2]

Former Chief Justices

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JAMES G. EXUM JR.
BURLEY B. MITCHELL, JR.
HENRY E. FRYE
SARAH PARKER
MARK D. MARTIN
CHERI BEASLEY

Former Justices

ROBERT R. BROWNING
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FRANKLIN E. FREEMAN JR.
G. K. BUTTERFIELD JR.
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GEORGE L. WAINWRIGHT JR.
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ROBERT H. EDMUNDS JR.
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ROBIN E. HUDSON
SAMUEL J. ERVIN IV

Clerk
GRANT E. BUCKNER

Librarian
THOMAS P. DAVIS

Marshal
WILLIAM BOWMAN

[1] Sworn in 1 January 2023. [2] Sworn in 1 January 2023.

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ANDREW HEATH[3]
RYAN S. BOYCE[4]

Assistant Director

DAVID F. HOKE[5]
RAGAN R. OAKLEY[6]

OFFICE OF APPELLATE DIVISION REPORTER

ALYSSA M. CHEN
JENNIFER C. PETERSON
NICCOLLE C. HERNANDEZ

[3] Resigned 3 April 2023. [4] Appointed 4 April 2023. [5] Retired 31 December 2022.
[6] Appointed 13 January 2023.

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

DISTRICT	JUDGES	ADDRESS
	First Division	
1	Jerry R. Tillett	Manteo
	R. Andrew Womble	Manteo
2	Wayland Sermons	Washington
3A	Marvin K. Blount III	Greenville
	Jeffery B. Foster	Greenville
6A	Brenda Branch	Halifax
6B	Cy A. Grant Sr.	Ahoskie
7A	Timothy W. Wilson	Rocky Mount
7BC	Lamont Wiggins	Rocky Mount
	William D. Wolfe	Wilson
9	John Dunlow	Oxford
	Cindy Sturges	Louisburg
14	Michael O'Foghludha	Durham
	Josephine Kerr Davis	Durham
	Brian K. Wilks	Durham
	Shamieka L. Rhinehart	Durham
	Second Division	
3B	Joshua W. Wiley	New Bern
	Clinton D. Rowe	New Bern
4	Henry L. Stevens	Wallace
	Robert C. Roupe	Jacksonville
5	Phyllis M. Gorham[1]	Wilmington
	R. Kent Harrell[2]	Burgaw
	Frank Jones	Wilmington
8A	Imelda J. Pate	Kinston
8B	William W. Bland	Goldsboro
13A	C. Ashley Gore[3]	Whiteville
13B	Jason C. Disbrow	Southport
16B	James Gregory Bell	Lumberton
	Tiffany P. Powers	Lumberton
	Third Division	
10	Paul C. Ridgeway	Raleigh
	G. Bryan Collins Jr.	Raleigh
	A. Graham Shirley	Raleigh
	Rebecca W. Holt	Raleigh
	Vinston M. Rozier	Raleigh
	Keith O. Gregory	Raleigh
11A	C. Winston Gilchrist	Lillington

DISTRICT	JUDGES	ADDRESS
11B	Thomas H. Lock	Smithfield
	Paul A. Holcombe	Smithfield
12	James F. Ammons Jr.	Fayetteville
	Claire Hill	Fayetteville
	Gale M. Adams	Fayetteville
	George R. Hicks	Fayetteville
15A	D. Thomas Lambeth	Burlington
	Andy Hanford	Graham
16A	Stephan R. Futrell	Rockingham
	Dawn Layton	Rockingham
19B	James P. Hill	Asheboro
	W. Taylor Browne	Asheboro
19D	James M. Webb[4]	Southern Pines
	Michael A. Stone[5]	Laurinburg
20A	Kevin M. Bridges	Oakboro
	Patrick Nadolski	Mount Gilead
20B	Jonathan Perry	Monroe
	Matthew B. Smith	Monroe
	Fourth Division	
15B	R. Allen Baddour	Chapel Hill
	Alyson A. Grine	Chapel Hill
17A	Stanley L. Allen	Sandy Ridge
	John M. Morris	Reidsville
17B	Angela B. Puckett	Westfield
18	R. Stuart Albright	Greensboro
	William Wood	Greensboro
	Lora C. Cubbage	Greensboro
	Stephanie L. Reese	High Point
	Tonia A. Cutchin	Greensboro
19A	Martin B. McGee	Concord
19C	Michael S. Adkins	Salisbury
21	L. Todd Burke	Winston-Salem
	David L. Hall	Winston-Salem
	Eric C. Morgan	Kernersville
	Richard S. Gottlieb	Winston-Salem
	Aaron Berlin[6]	Winston-Salem
22A	Joseph Crosswhite	Statesville
	William Long	Statesville
22B	Lori Hamilton	Mocksville
	Robert A. Broadie	Lexington
23	Michael Duncan	Wilkesboro
	Fifth Division	
24	Gary Gavenus	Burnsville
	R. Gregory Horne	Boone
25A	Robert C. Ervin	Morganton
	Daniel A. Kuehnert	Morganton
25B	Nathaniel J. Poovey	Newton
	Gregory R. Hayes	Hickory
26	Carla Archie	Charlotte

DISTRICT	JUDGES	ADDRESS
	Karen Eady-Williams	Charlotte
	Louis A. Trosch	Charlotte
	George Bell	Charlotte
	Reggie McKnight	Charlotte
	Matthew J. Osman	Charlotte
	Donald R. Cureton	Charlotte
	David H. Strickland	Charlotte
27A	David Phillips	Gastonia
	Justin N. Davis	Gastonia
27B	W. Todd Pomeroy	Lincolnton
	Sally Kirby-Turner	Shelby
28	Alan Z. Thornburg	Asheville
29A	J. Thomas Davis	Forest City
29B	Peter B. Knight	Hendersonville
30A	William H. Coward	Highlands
30B	Bradley B. Letts	Hazelwood

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Louis A. Bledsoe III	Charlotte
Adam M. Conrad	Charlotte
Craig Croom	Raleigh
Julianna T. Earp	Greensboro
Mark A. Davis	Raleigh
Quintin McGee[7]	Leland
Michael L. Robinson	Winston-Salem
Steven R. Warren	Asheville
Edwin Graves Wilson Jr.	Hillsborough

EMERGENCY JUDGES

Benjamin G. Alford	New Bern
Sharon T. Barrett	Asheville
Michael E. Beale	Rockingham
Lisa C. Bell[8]	Columbus
W. Robert Bell	Charlotte
Christopher W. Bragg	Monroe
Susan E. Bray	Greensboro
Forrest Donald Bridges[9]	Shelby
Allen Cobb	Wilmington
John O. Craig III	High Point
Julia Lynn Gullett	Statesville
Nathan Hunt Gwyn[10]	Monroe
James E. Hardin Jr.	Hillsborough
Henry W. Hight Jr.	Henderson
Alma Hinton	Roanoke Rapids
Jack Hooks[11]	Whiteville
Jeffrey P. Hunt	Brevard
Robert F. Johnson	Burlington
Timothy S. Kincaid	Newton

JUDGES	ADDRESS
Eric L. Levinson[12]	Charlotte
Hugh Lewis	Charlotte
Vance Bradford Long	Asheboro
A. Moses Massey	Mount Airy
Jerry Cash Martin	Pilot Mountain
James W. Morgan	Shelby
Calvin Murphy	Charlotte
J. Richard Parker	Manteo
William R. Pittman	Raleigh
Mark Powell	Hendersonville
Eula Reid[13]	Elizabeth City
Ronald E. Spivey	Winston-Salem
Joseph E. Turner[14]	Greensboro
Tanya T. Wallace	Rockingham

RETIRED/RECALLED JUDGES

W. Douglas Albright	Greensboro
Anthony M. Brannon	Durham
Stafford G. Bullock	Raleigh
Jesse B. Caldwell III	Gastonia
J. Carlton Cole	Hertford
H. William Constangy	Charlotte
C. Preston Cornelius	Mooresville
Lindsay R. Davis	Greensboro
Richard L. Doughton	Sparta
B. Craig Ellis	Laurinburg
Larry G. Ford	Salisbury
James L. Gale	Greensboro
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Beecher R. Gray	Durham
Zoro J. Guice Jr.	Hendersonville
Thomas D. Haigwood	Greenville
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Howard E. Manning Jr.	Raleigh
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John W. Smith	Raleigh
James C. Spencer	Burlington
Quentin T. Sumner	Rocky Mount
Mary Ann Tally	Fayetteville
Anna Mills Wagoner	Salisbury
Ralph A. Walker Jr.	Raleigh
William Z. Wood Jr.	Lewisville

[1]Retired 31 December 2023. [2]Became Senior Resident Judge 1 January 2024. [3]Sworn in and became Senior Resident Judge 16 July 2023.
[4]Retired 31 October 2023. [5]Became Senior Resident Judge 1 November 2023. [6]Sworn in 1 January 2023. [7]Sworn in 16 October 2023.
[8]Sworn in 7 July 2023. [9]Sworn in 24 July 2023. [10]Sworn in 3 August 2023. [11]Resigned 25 November 2023. [12]Resigned 1 July 2023.
[13]Sworn in 14 August 2023. [14]Resigned 31 May 2022. [15]Died 31 October 2023.

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	Edgar L. Barnes (Chief)	Manteo
	Amber Malarney[1]	Wanchese
	Robert P. Trivette	Kitty Hawk
	Meader W. Harriss III	Edenton
	Jeff Moreland	Elizabeth City
2	Regina Rogers Parker (Chief)	Williamston
	Christopher B. McLendon[2]	Williamston
	Darrell B. Cayton Jr.	Washington
	Keith B. Mason	Washington
3A	G. Galen Braddy (Chief)	Grimesland
	Brian DeSoto	Greenville
	Lee F. Teague	Greenville
	Wendy S. Hazelton	Greenville
	Daniel H. Entzminger	Greenville
	Mario Perez	Greenville
3B	L. Walter Mills (Chief)	New Bern
	W. David McFadyen III	New Bern
	Paul J. Delamar	Bayboro
	Andrew Wigmore	Beaufort
	Debra L. Massie	New Bern
	James A. Pully	New Bern
4	James L. Moore (Chief)	Jacksonville
	William B. Sutton	Clinton
	Michael C. Surles	Jacksonville
	Christopher J. Welch	Jacksonville
	Mario M. White	Clinton
	William Shanahan	Jacksonville
	Robert H. Gilmore	Clinton
	James Walter Bateman III	Jacksonville
	Morgan H. Swinson	Jacksonville
5	J. H. Corpening II (Chief)	Wilmington
	James H. Faison III	Wilmington
	Sandra A. Ray	Wilmington
	Richard Russell Davis	Wilmington
	Melinda Haynie Crouch	Wrightsville Beach
	Jeffrey Evan Noecker	Wilmington
	Chad Hogston	Wilmington
	Robin W. Robinson	Wilmington
	Lindsey L. McKee	Wilmington
6	W. Turner Stephenson III (Chief)	Roanoke Rapids
	Teresa R. Freeman	Roanoke Rapids
	Vershenia Johnson[3]	Windsor
	W. Rob Lewis II	Halifax
7	William Charles Farris (Chief)	Wilson
	Pell C. Cooper	Rocky Mount
	Anthony W. Brown	Spring Hope
	Wayne S. Boyette	Tarboro
	Elizabeth Freshwater Smith	Wilson
	Joseph E. Brown III	Wilson
	William R. Solomon	Rocky Mount

DISTRICT	JUDGES	ADDRESS
8	Elizabeth A. Heath (Chief)	Kinston
	Curtis Stackhouse	Goldsboro
	Annette W. Turik	Kinston
	Jonathon Sargeant	Kinston
	Justin L. Minshew	Goldsboro
	Christopher A. Rogerson	Goldsboro
9	John W. Davis (Chief)	Louisburg
	Amanda Stevenson	Oxford
	Adam S. Keith	Louisburg
	Caroline S. Burnette	Henderson
	John H. Stultz III	Roxboro
	Benjamin S. Hunter	Louisburg
	Sarah K. Burnette	Oxford
10	Ned Wilson Mangum (Chief)	Raleigh
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	Christine M. Walczyk	Raleigh
	Eric Craig Chasse	Raleigh
	Anna Elena Worley	Raleigh
	Margaret Eagles	Raleigh
	Louis B. Meyer III	Raleigh
	Vartan A. Davidian	Raleigh
	Sam S. Hamadani	Raleigh
	Ashleigh Parker[4]	Raleigh
	J. Brian Ratledge	Raleigh
	David K. Baker Sr.	Raleigh
	Mark L. Stevens	Raleigh
	Julie L. Bell	Knightdale
	James R. Black	Raleigh
	Rashad Hunter	Raleigh
	Damion McCullers	Raleigh
	Jennifer Bedford	Raleigh
	Rhonda G. Young	Raleigh
	Cynthia Baddour Kenney	Raleigh
11	Jerry F. Wood (Chief)	Selma
	Jimmy L. Love Jr.	Sanford
	Resson O. Faircloth II	Erwin
	Mary H. Wells	Smithfield
	Joy A. Jones	Smithfield
	Jason H. Coats	Smithfield
	Terry F. Rose	Smithfield
	Craig James	Smithfield
	Travis N. Wheeler	Smithfield
	Jason P. Kimble	Lillington
	Michael Onufer	Smithfield
12	Toni S. King (Chief)	Fayetteville
	David H. Hasty	Fayetteville
	Lou Oliveria	Fayetteville
	Cheri Siler-Mack	Fayetteville
	Stephen C. Stokes	Fayetteville
	Tiffany M. Whitfield	Fayetteville
	Caitlin Evans	Fayetteville
	Frances M. Britt[5]	Fayetteville
	Cull Jordan III	Fayetteville

DISTRICT	JUDGES	ADDRESS
	Adam J.S. Phillips[6]	Fayetteville
	Rosalyn Hood[7]	Fayetteville
13	Scott Ussery (Chief)	Elizabethtown
	Pauline Hankins	Tabor City
	C. Ashley Gore	Whiteville
	J. Calvin Chandler	Shallotte
	Willie M. Callihan Jr.	Whiteville
	Bryan Wilson	Bolivia
	Sarah McPherson	Bolivia
	T. Heath Nance[8]	Whiteville
14	Clayton Jones (Chief)	Durham
	Doretta Walker	Durham
	Amanda L. Maris	Durham
	Dave Hall	Durham
	Dorothy H. Mitchell	Durham
	Kevin Jones	Durham
	Kendra A. Montgomery-Blinn[9]	Durham
15A	Bradley Reid Allen Sr. (Chief)	Burlington
	Kathryn W. Overby	Burlington
	Larry D. Brown	Graham
	Rick Champion	Burlington
15B	Samantha Cabe (Chief)	Chapel Hill
	Sherri T. Murrell	Chapel Hill
	Hathaway S. Pendergrass	Chapel Hill
	Christopher T. Roper	Siler City
	Joal H. Broun	Hillsborough
16A	Amanda L. Wilson (Chief)	Rockingham
	Christopher W. Rhue	Laurinburg
	Sophie G. Crawford	Wadesboro
	Chevonne R. Wallace	Rockingham
16B	Angelica C. McIntyre (Chief)	Lumberton
	William J. Moore	Maxton
	Dale G. Deese[10]	Maxton
	Brooke L. Clark[11]	Lumberton
	Gregory Bullard	Lumberton
	Diane Surgeon	Lumberton
	Leah B. Lanier	Lumberton
17A	James A. Grogan (Chief)	Reidsville
	Chris Freeman	Wentworth
	Christine F. Strader	Reidsville
	Erica S. Brandon	Wentworth
17B	William F. Southern III (Chief)	King
	Marion M. Boone	Dobson
	Thomas B. Langan	King
	Gretchen H. Kirkman	Dobson
18	Theresa H. Vincent (Chief)	Summerfield
	Kimberly Michelle Fletcher	Greensboro
	Angela C. Foster	Greensboro
	Angela B. Fox	Greensboro
	Tabatha Holliday	Greensboro
	William B. Davis	Greensboro
	Larry L. Archie	Greensboro
	Brian K. Tomlin	Greensboro

DISTRICT	JUDGES	ADDRESS
	Marc R. Tyrey	High Point
	Kevin D. Smith	Greensboro
	Ashley L. Watlington-Simms	Greensboro
	Caroline Tomlinson-Pemberton	Greensboro
	Walter W. Baker III[12]	Greensboro
	Joel N. Oakley[13]	Greensboro
19A	Christy E. Wilhelm (Chief)	Concord
	Brent Cloninger	Mount Pleasant
	Nathaniel E. Knust	Concord
	Steve Grossman	Concord
	Michael G. Knox	Concord
	Sarah E. Street	Concord
19B	Scott C. Etheridge (Chief)	Asheboro
	Robert M. Wilkins	Asheboro
	Sarah N. Lanier	Asheboro
	Barron Thompson	Asheboro
	Darren C. Allen	Asheboro
19C	Beth Spencer Dixon (Chief)	Salisbury
	Roy Marshall Bickett Jr.	Salisbury
	James Randolph	Salisbury
	Cynthia Dry	Salisbury
	Chris Sease	Salisbury
19D	Donald W. Creed Jr. (Chief)	Asheboro
	Regina M. Joe	Raeford
	Warren McSweeney	Carthage
	Steve Bibey	Carthage
	Beth Tanner	Carthage
20A	John R. Nance (Chief)	Albemarle
	Thai Vang	Montgomery
	Phillip Cornett	Norwood
20B	Erin S. Hucks (Chief)	Monroe
	William F. Helms III	Matthews
	Joseph J. Williams	Monroe
	Stephen V. Higdon	Monroe
	Anna Goodwin[14]	Monroe
21	Victoria Lane Roemer (Chief)	Winston-Salem
	Lawrence J. Fine	Clemmons
	Camille D. Banks-Payne	Winston-Salem
	David Sipprell	Winston-Salem
	Theodore Kazakos	Winston-Salem
	Carrie F. Vickery	Winston-Salem
	George M. Cleland	Winston-Salem
	Whit Davis	Winston-Salem
	Valene K. McMasters	Winston-Salem
	Frederick B. Adams II	Winston-Salem
	Kristen Kelly Broyles	Winston-Salem
22A	L. Dale Graham (Chief)	Taylorsville
	Edward L. Hendrick IV	Taylorsville
	Christine Underwood	Olin
	Carole A. Hicks	Statesville
	Bryan A. Corbett	Statesville
	Thomas R. Young	Statesville

DISTRICT	JUDGES	ADDRESS
22B	Carlton Terry (Chief)	Advance
	Mary Covington	Thomasville
	Carlos Jané	Lexington
	Jon Wade Myers	Lexington
	Jon W. Welborn	Lexington
	David S. Doherty	Lexington
23	Robert Crumpton (Chief)	Wilkesboro
	William Finley Brooks	Wilkesboro
	Donna L. Shumate	Sparta
	Laura B. Luffman	Wilkesboro
24	Theodore Wright McEntire (Chief)	Spruce Pine
	Hal Gene Harrison	Spruce Pine
	Rebecca E. Eggers-Gryder	Boone
	Matthew J. Rupp	Boone
25	Sherrie Wilson Elliott (Chief)	Newton
	Amy Sigmon Walker	Newton
	Robert A. Mullinax Jr.	Newton
	Mark L. Killian	Hickory
	Clifton H. Smith	Hickory
	David W. Aycock	Hickory
	Wesley W. Barkley	Newton
	Richard S. Holloway	Lenoir
	Andrea C. Plyler	Hudson
	Scott D. Conrad	Newton
26	Elizabeth Thornton Trosch (Chief)	Charlotte
	Christy Townley Mann	Charlotte
	Paige B. McThenia	Charlotte
	Jena P. Culler	Charlotte
	Tyyawdi M. Hands	Charlotte
	Gary Henderson	Charlotte
	Aretha V. Blake	Charlotte
	Tracy H. Hewett[15]	Charlotte
	Faith Fickling-Alvarez[16]	Charlotte
	Roy H. Wiggins	Charlotte
	Karen D. McCallum	Charlotte
	Jonathon R. Marvel	Charlotte
	C. Renee Little	Charlotte
	Shante' Burke-Hayer[17]	Charlotte
	Cecilia Oseguera[18]	Charlotte
	Rhonda Patterson[19]	Charlotte
	Alyssa Levine	Charlotte
	Samantha Mobley	Charlotte
	Jennifer Fleet	Charlotte
	Matt Newton	Charlotte
	Roderick Davis	Charlotte
	Keith Smith[20]	Charlotte
27A	John K. Greenlee (Chief)	Gastonia
	Angela G. Hoyle	Belmont
	Michael K. Lands[21]	Gastonia
	Pennie M. Thrower	Gastonia
	Craig R. Collins	Gastonia
	Donald Rice	Cramerton
	Edgar F. Bogle	Gastonia

DISTRICT	JUDGES	ADDRESS
	William A. Anthony III[22]	Gastonia
27B	Jeanette R. Reeves (Chief)	Shelby
	K. Dean Black	Denver
	Justin K. Brackett	Shelby
	Micah J. Sanderson	Denver
	Brad Champion	Lincolnton
	Jamie Hodges	Lincolnton
28	J. Calvin Hill (Chief)	Asheville
	Patricia Kaufmann Young	Asheville
	Julie M. Kepple	Asheville
	Andrea Dray	Asheville
	Ward D. Scott	Asheville
	Edwin D. Clontz	Candler
	Susan Marie Dotson-Smith	Asheville
29A	Robert K. Martelle (Chief)	Rutherfordton
	Ellen Shelley	Marion
	Michelle McEntire	Marion
	Corey J. MacKinnon	Marion
29B	Kimberly Gasperson-Justice (Chief)	Hendersonville
	Emily Cowan[23]	Hendersonville
	Gene B. Johnson	Hendersonville
	D. Abe Hudson	Hendersonville
	James Marshall	Hendersonville
	Lora T. Baker[24]	Tryon
30	Roy T. Wijewickrama (Chief)	Waynesville
	Monica Hayes Leslie	Waynesville
	Donna Forga	Clyde
	Tessa S. Sellers	Murphy
	Kaleb Wingate	Waynesville

EMERGENCY JUDGES

Richard Abernathy	Gastonia
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Rebecca W. Blackmore	Wilmington
Joseph A. Blick	Greenville
Monica M. Bousman	Garner
Jacqueline L. Brewer	Apex
Thomas M. Brittain Jr.	Etowah
Charles E. Brown[25]	Salisbury
Deborah P. Brown	Mooresville
Joseph M. Buckner	Chapel Hill
Susan R. Burch	Greensboro
William M. Cameron	Richlands
Lori G. Christian	Raleigh
William F. Fairley	Southport
Nancy E. Gordon	Durham
Paul A. Hardison	Jacksonville
James T. Hill	Durham
Richlyn D. Holt[26]	Waynesville
Shelly S. Holt	Wilmington

JUDGES	ADDRESS
Jeanie Houston	Yadkinville
F. Warren Hughes	Burnsville
Laurie L. Hutchins	Winston-Salem
Ericka Y. James	Goldsboro
Carol A. Jones	Kenansville
A. Elizabeth Keever	Fayetteville
Michael K. Lands[27]	Gastonia
David A. Leech	Greenville
Harold Paul McCoy Jr.	Halifax
Lawrence McSwain	Greensboro
Wayne L. Michael	Lexington
Regan A. Miller	Charlotte
Charles M. Neaves	Elkin
Thomas R.J. Newbern	Aulander
Ali B. Paksoy	Shelby
Addie H. Rawls	Clayton
Dennis J. Redwing	Gastonia
Sarah C. Seaton	Jacksonville
Joseph E. Setzer Jr.	Franklinton
Caron Stewart	Erwin
Robert J. Stiehl III	Fayetteville
Jerry Waddell	Bryson City
Fredrick B. Wilkins Jr.	Reidsville
Larry J. Wilson	Shelby

RETIRED/RECALLED JUDGES

J. Henry Banks	Henderson
George A. Bedsworth	Winston-Salem
Robert M. Brady	Lenoir
David B. Brantley	Goldsboro
Ronald L. Chapman	Charlotte
H. Thomas Church	Statesville
Albert A. Corbett Jr.	Smithfield
Linda Falls	Durham
Daniel Fredrick Finch	Oxford
Louis F. Foy Jr.	Pollocksville
James R. Fullwood	Raleigh
Mark E. Galloway	Roxboro
Charles P. Gaylor III	Goldsboro
Lloyd M. Gentry	Pelham
Samuel G. Grimes	Washington
Joyce A. Hamilton	Raleigh
John H. Horne Jr.	Laurinburg
Jerry A. Jolly	Tabor City
William C. Lawton	Raleigh
Jacquelyn L. Lee	Four Oaks
William L. Long	Chapel Hill
James E. Martin	Greenville
Fritz Y. Mercer Jr.	Summerfield
Gordon A. Miller	Winston-Salem

JUDGES	ADDRESS
William M. Neely	Asheboro
Nancy C. Phillips	Elizabethtown
Anne B. Salisbury	Cary
Jan H. Samet	Greensboro
J. Larry Senter	Raleigh
Margaret L. Sharpe	Greensboro
Leonard W. Thagard[28]	Clinton
Charles M. Vincent	Greenville
Richard K. Walker	Hayesville
Owen H. Willis	Dunn

[1]Formerly Amber Davis. [2]Retired 31 October 2023. [3]Formerly Vershenia B. Moody. [4]Formerly Ashleigh P. Dunston. [5]Formerly Frances M. McDuffie. [6]Resigned 31 December 2022. [7]Sworn in 1 January 2023. [8]Sworn in 1 October 2023. [9]Sworn in 1 September 2023. [10]Listed erroneously in previous volumes as Dale G. Desse. Resigned 21 December 2018. [11]Retired 1 September 2023. [12]Sworn in 1 January 2023. [13]Sworn in 10 July 2023. [14]Sworn in 1 June 2023. [15]Resigned 31 December 2022. [16]Formerly Faith Fickling. [17]Erroneously labeled in Vol. 383 as having resigned 31 December 2022. [18]Erroneously labeled in Vol. 383 as having resigned 31 December 2022. [19]Erroneously labeled in Vol. 383 as having resigned 31 December 2022. [20]Sworn in 31 July 2023. [21]Retired 31 December 2022. [22]Sworn in 1 January 2023. [23]Retired 30 June 2023. [24]Sworn in 1 December 2023. [25]Sworn in 8 May 2023. [26]Retired 31 October 2023. [27]Sworn in 16 June 2023. [28]Retired 8 August 2023.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General
JOSH STEIN

Chief of Staff
SETH DEARMIN

Deputy Chief of Staff
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General Counsel
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Senior Counsel
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Senior Policy Counsel
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Deputy General Counsels

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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

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

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

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

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

From N.C. Court of Appeals
P21-525

From Wake
21CVS015426
21CVS500085

v.

REPRESENTATIVE DESTIN HALL, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE HOUSE STANDING COMMITTEE ON REDISTRICTING; SENATOR WARREN DANIEL, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; SENATOR RALPH E. HISE, JR., IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; SENATOR PAUL NEWTON, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; REPRESENTATIVE TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; SENATOR PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; DAMON CIRCOSTA, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; STELLA ANDERSON, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; JEFF CARMON III, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; STACY EGGERS IV, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; TOMMY TUCKER, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; AND KAREN BRINSON BELL, IN HER OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS

No. 413PA21

ORDER

This matter comes before the Court pursuant to a petition for rehearing filed by legislative-defendants and a corresponding motion to dismiss petition for rehearing filed by plaintiff-intervenor Common Cause.

The Rules of Appellate Procedure provide that a petition for rehearing "shall state with particularity the points of fact or law that, in the opinion of the petitioner, the court has overlooked or misapprehended . . . ." N.C. R. App. P. 31(a). Further, the Rules provide that "[a] determination to grant or deny [the petition] will be made solely upon the written petition; no written response will be received from the opposing party . . . ." N.C. R. App. P. 31(c).

Plaintiff-intervenor's filing responds substantively to legislative-defendants' petition for rehearing. Such a filing is expressly not permitted

by the Rules of Appellate Procedure and plainly violates Rule 31(c) and Rule 37(a). Accordingly, we dismiss as frivolous plaintiff-intervenor's motion to dismiss, and the filing is hereby stricken because it grossly violates appellate rules.

In exercising our duty and authority to address alleged errors of law, this Court has granted rehearing of cases under both Rule 31 and its historical predecessor, former Rule 44. In *Nowell v. Neal*, this Court provided guidance on when a litigant has satisfied the criteria for rehearing under Rule 31. 249 N.C. 516, 521, 107 S.E.2d 107, 111 (1959). In addressing rehearing under a predecessor version of Rule 31 with nearly identical operative language, the Court observed that a recently issued opinion appropriately is reheard if the petitioner makes a satisfactory showing that the opinion may be erroneous: "No petition to rehear was filed. That is the appropriate method of obtaining redress from errors committed by this Court." *Id.*

This Court has consistently allowed a petition for rehearing when the petitioner has made the showing required by *Nowell*. *See*, *e.g.*, *Bailey v. Meadows Co.*, 154 N.C. 71, 69 S.E. 746 (1910) (modifying prior opinion upon grant of rehearing); *Clary v. Alexander Cty. Bd. of Educ.*, 286 N.C. 525, 212 S.E.2d 160 (1975) (withdrawing prior opinion upon grant of rehearing); *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977) (same); *Lowe v. Tarble*, 313 N.C. 460, 329 S.E.2d 648 (1985) (affirming prior opinion upon grant of rehearing); *Alford v. Shaw*, 320 N.C. 465, 358 S.E.2d 323 (1987) (withdrawing prior opinion upon grant of rehearing); *Wilson v. State Farm Mut. Auto. Ins. Co.*, 329 N.C. 262, 404 S.E.2d 852 (1991) (withdrawing in part and affirming in part prior opinion upon grant of rehearing); *Swanson v. State*, 330 N.C. 390, 410 S.E.2d 490 (1991) (affirming prior opinion upon grant of rehearing), *vacated and remanded*, 509 U.S. 916 (1993); and *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 517 S.E.2d 874 (1999) (superseding prior opinion upon grant of rehearing).

Upon consideration of legislative-defendants' petition and the arguments therein, this Court allows the petition for rehearing. The parties are hereby directed as follows:

(1) Legislative-defendants shall file supplemental briefs with this Court on or before 17 February 2023.

(2) All plaintiffs and shall file supplemental briefs with this Court on or before 3 March 2023.

(3) In addition to the issues raised in the petition for rehearing, the parties shall also brief the following issues:

(a) Whether congressional and legislative maps utilized for the 2022 election, which were drawn at the direction of this Court, are effective for future elections;

(b) What impact, if any, the following provisions of the North Carolina Constitution have on our analysis: Article II, Section 3(4) and Article II, Section (5)(4); and

(c) What remedies, if any, may be appropriate.

This matter shall be placed on the 14 March 2023 calendar for rehearing.

By order of the Court in Conference, this the 3rd day of February 2023.

/s/ Allen, J.
For the Court

Justices Morgan and Earls dissent as set out in the attached statement.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 3rd day of February 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

Justice EARLS dissenting.

The majority's order fails to acknowledge the radical break with 205 years of history that the decision to rehear this case represents. It has long been the practice of this Court to respect precedent and the principle that once the Court has ruled, that ruling will not be disturbed merely because of a change in the Court's composition. Indeed, data from the Supreme Court's electronic filing system indicate that, since

January 1993, a total of 214 petitions for rehearing have been filed, but rehearing has been allowed in only two cases.[1]

It has been the understood practice of this Court that rehearing is not allowed solely because a Justice may have had a change of heart after the opinion in the case has been issued or because an opinion was controversial. Moreover, this Court has respected the idea that "even if judges have ideological preferences and methodological differences . . . partisan loyalties [should] fade away after investiture to reveal a judiciary of men and women bound together by collegiality norms and the rule of law." Neal Devins & Allison Orr Larsen, *Weaponizing En Banc*, 96 N.Y.U. L. Rev. 1373, 1375 (2021). For these reasons, rehearing under our rules is meant to be limited to the rare occasions when the Court was initially unaware of material evidence already in the record or makes an obvious and indisputable error.

To be clear, whether one considers the entire 205 years that this Court has been in existence or the most recent thirty years, there has been no shortage of politically controversial cases, and it is not unusual for the partisan balance of the court to shift. Respect for the institution and the integrity of its processes kept opportunities for rehearing narrow in scope and exceedingly rare. Today, that tradition is abandoned.

Nothing has changed since we rendered our opinion in this case on 16 December 2022: The legal issues are the same; the evidence is the same; and the controlling law is the same. The only thing that has changed is the political composition of the Court. Now, approximately one month since this shift, the Court has taken an extraordinary action: It is allowing rehearing without justification.

More troubling still, today this Court grants not one but two petitions for rehearing. *See Holmes v. Moore*, 2022-NCSC-122 (Feb. 3, 2023) (order on motion for rehearing) [hereinafter *Holmes* Order]. This means that in a single day, the majority has granted more petitions for rehearing than it has over the past twenty years. There is nothing constitutionally conservative about the Court's decisions to allow rehearing in these cases.

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1. The Court most recently granted rehearing in *Jones v. City of Durham*, 361 N.C. 144 (2006). There, the Court granted rehearing for the limited purpose of reconsidering specific evidence in a negligence action that involved a single plaintiff, rather than to consider abolishing a constitutional right that belongs to millions of voters. There was no dissent to the per curiam final opinion of the Court, indicating the absence of any partisan divide over the issue. The other case in which the Court permitted rehearing was *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805 (1999). That case similarly did not involve a fundamental issue central to the structure of our democracy and had no impact whatsoever on elections.

Going down this path is a radical departure from the way this Court has operated, and these orders represent a rejection of the guardrails that have historically protected the legitimacy of the Court. Not only does today's display of raw partisanship call into question the impartiality of the courts, but it erodes the notion that the judicial branch has the institutional capacity to be a principled check on legislation that violates constitutional and human rights.

Despite its brevity, the Court's order is riddled with inaccuracies. It misleadingly states, for example, that this Court's previous decision in *Nowell v. Neal*, 249 N.C. 516 (1959), "provide[s] guidance on when a litigant has satisfied the criteria for rehearing." *Harper v. Hall*, No. 13P19, at 3 (Feb. 3, 2023) (order on motion for rehearing) [hereinafter Order] (emphasis added). Notably, the granting or denial of a petition for rehearing was not at issue in *Nowell*—none of the parties there requested rehearing nor did the Court consider granting as much. Rather than defining the showing a petitioner must make before a petition for rehearing is properly granted, *Nowell* simply pointed out the unremarkable fact that such a petition is "the appropriate method of obtaining redress from errors committed by this Court." *Nowell*, 249 N.C. at 521.

The Court's order then makes the bold claim that "[t]his Court has *consistently* allowed a petition for rehearing when the petitioner has made the showing required by *Nowell*."[2] Order at 3. The Court cites eight cases in support of its assertion, none of which were decided in this millennium and none of which mention *Nowell* or its fictitious standard.

The first of those cases, *Bailey v. Meadows Co.*, 154 N.C. 71 (1910), was decided in 1910—forty-nine years before *Nowell* defined the "showing" that *Bailey* supposedly applied. Moreover, *Bailey* was decided 113 years ago, highlighting the scarcity of cases from which the majority can draw in attempting to downplay the radical action it has taken today. Finally, the *Bailey* Court granted reconsideration for the narrow purpose of reviewing evidence that it failed to consider initially. By contrast, today's order does not constrain review to limited evidentiary questions but instead grants in full a motion that seeks to reverse the *entirety of two separate decisions* of this Court. *See Harper v. Hall*, 380 N.C. 317, *cert. granted sub nom.*, *Moore v. Harper*, 142 S. Ct. 2901 (2022); *Harper v. Hall*, 383 N.C. 89, 2022 N.C. LEXIS 1100 (Dec. 16, 2022).

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2. To repeat, *Nowell* did not define any "showing" that must be made, and the only "guidance" it provides is its recognition that Rule 31—what was then Rule 44—is the means by which a party asks one of this State's appellate courts to review one of its own decisions. 249 N.C. at 521.

The other cases the majority cites are similarly unavailing. For example, the Court permitted rehearing in *Clary v. Alexander County Board of Education*, 286 N.C. 525 (1975), after the plaintiffs brought to light evidence to which the parties had stipulated and agreed "would be considered as having been introduced in evidence without the necessity of putting [it] in 'one by one.' " *Id.* at 529. Despite the stipulation, the evidence was overlooked. *Id.* But these facts were "prerequisite to recovery by plaintiff[s]. In the absence thereof," the defendant's motions for directed verdicts were granted. *Id.* Reconsideration was therefore necessary to consider the stipulated evidence. *Id.* In *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 181 (1977), the Court granted rehearing and withdrew its first opinion because it did not apply the controlling legal statute. The defendant in *Wilson v. State Farm Mutual Automobile Ins. Co.*, 329 N.C. 262 (1991) (per curiam), "petitioned for a rehearing 'for the purpose of correcting a very specific and limited error of fact and law, rather than for the purpose of affecting the Court's ultimate conclusion.' " *Id.* at 263. And in *Alford v. Shaw*, 320 N.C. 465 (1987), the Court granted rehearing because it originally misunderstood the pertinent legal issue.

Rather than supporting the majority's position, these cases demonstrate that rehearing in this Court is used cautiously; it is rarely permitted, and when allowed, it is limited in scope. Legislative Defendants' motion, by contrast, seeks to upend the constitutional guarantee that voters in the State will enjoy "substantially equal voting power," regardless of their political affiliations. *See Harper*, 380 N.C. at 376. Such a change would fundamentally alter the political rights of every voter in North Carolina.

The consequences of this Court's orders are grave. The judiciary's "authority . . . depends in large measure on the public's willingness to respect and follow its decisions." *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 446 (2015). The public's trust in this Court, in turn, depends on the fragile confidence that our jurisprudence will not change with the tide of each election. Yet it took this Court just one month to send a smoke signal to the public that our decisions are fleeting, and our precedent is only as enduring as the terms of the justices who sit on the bench. The majority has cloaked its power grab with a thin veil of mischaracterized legal authorities. I write to make clear that the emperor has no clothes. Because this Court's decision today is an affront to the jurisprudence of this State and to the citizens it has sworn an oath to serve "impartially," "without favoritism to anyone or to the State," I dissent. *See* N.C.G.S. § 11-11 (2022).

Justice MORGAN joins in this dissenting opinion.

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

From N.C. Court of Appeals
P21-511

From Wake
95CVS1158

No. 425A21-1

ORDER

This matter is before the Court on the State Controller's motion to dissolve or lift a stay of the writ of prohibition previously issued by this Court, and legislative-intervenors' motion for leave to brief additional issues, motion to confirm reinstatement of the writ of prohibition, and conditional petition for writ of certiorari.

On 4 November 2022, this Court issued its opinion in No. 425A21-2, *Hoke County Board of Education, et al. v. State of North Carolina, et al.*, 382 N.C. 386, 879 S.E.2d 193 (2022). Prior to the issuance of that opinion, the State moved to consolidate that case, No. 425A21-2, with this case, No. 425A21-1. The State's motion to consolidate was resolved by this Court's 4 November 2022 order, which stated in relevant part:

> 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.

Upon review of the Controller's motion to lift the stay and the arguments set forth therein, this Court concludes that the motion constitutes a "filing[ ] in 425A21-1 pertaining to issues not already addressed in the opinion" filed 4 November 2022. Specifically, the Controller argues that there are many issues presented in this case that were left unaddressed in the Court's earlier opinion in No. 425A21-2. The Controller further argues that "it would be fundamentally unfair for a court to subject him, his staff, and the recipient agency staff to criminal and civil liability before the basic elements of procedural due process were met including notice, an opportunity to respond, counsel, and the right to an appeal including a hearing on these issues."

Because the Controller's motion is a further filing in 425A21-1 pertaining to issues not already addressed by this Court, and because the Controller has made a sufficient showing of substantial and irreparable harm should the stay remain in effect, we lift the stay, thereby reinstating the writ of prohibition, until this Court has an opportunity to address the remaining issues in this case.

In addition, this Court notes that legislative-intervenors properly intervened as of right in the related case, No. 425A21-2. However, they did not move to intervene in the case at hand, No. 425A21-1, and this Court's 4 November 2022 order does not relieve them of this procedural requirement. Therefore, we dismiss legislative-intervenors' filings for failure to intervene.

By order of the Court in Conference, this the 3rd day of March 2023.

/s/ Allen, J.
For the Court

Justice Morgan and Justice Earls dissent as set out in the attached statement.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 3rd day of March 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

Justice EARLS dissenting.

I agree that the Legislative-Intervenors' motions and petition for a writ of certiorari should be dismissed. However, I dissent from this Court's extraordinary, unprincipled, and unprecedented action allowing the Controller's motion in this matter. Today's order abandons the concepts of respect for precedent, law of the case, stare decisis, and the rule of law all in the name of preventing the State from complying with its constitutional duty to provide a sound basic education to the children of this state.

Though this motion is styled as a motion to "dissolve or lift stays entered . . . by the Court of Appeals," in substance it is an attempt to make an end run around the Rules of Appellate Procedure regarding rehearing and merely seeks rehearing on issues this Court has already decided. In fact, the Controller's position represents a stunning reversal from prior arguments to this Court, as the Controller previously argued that the issues related to the Controller's collateral attack on the trial court's order necessarily would be addressed in *Leandro IV*. Controller's Resp. Br. at 3, n.1, *Hoke Cnty. Bd. Of Educ. v. State*, 382 N.C. 386 (2022) (No. 425A21-2) (stating that "the resolution of the second case [425A21-2] will resolve the issues arising from the first case [425A21-1]") [hereinafter Controller's Resp. Br.]. And indeed, as detailed below, those issues were addressed in the Court's opinion in *Leandro VI*. Yet the Controller now asserts that many issues were left unaddressed in the Court's opinion and repeats the illogical argument already rejected by this Court that, by complying with the ruling of the North Carolina Supreme Court, the Controller could be subject to criminal and civil liabilities.[1] The new Court majority adopts this tortured misrepresentation of the proceedings to date without so much as a mention of any of the arguments made by the other parties to the case.

1. This was previously argued by the Controller and rejected by this Court by our Order directing him to comply with the trial court's transfer directive. *See* Controller's Resp. Br. at 12-13.

However, as the record reflects all too well, the only issues not already addressed in *Leandro IV* relate to whether Plaintiffs were denied a meaningful opportunity to be heard when the Court of Appeals majority shortened the time for Plaintiffs to respond to the Controller's filing in that court and used what the dissent identifies as a "shadow docket" to grant relief. Order on Writ of Prohibition at 2 (P21-511) (2022). These procedural issues were not expressly addressed in *Leandro IV* but were made irrelevant by this Court's ruling. Contrary to the Controller's new argument, the Court made clear in its Consolidation Order that it was addressing the merits of both the trial court's November 2021 and April 2022 Orders and the 30 November 2021 Writ of Prohibition issued by the Court of Appeals. 4 November 2022 Order of the North Carolina Supreme Court in *Hoke Cnty. Bd. of Educ. v. State*, Nos. 425A21-1 and 425A21-2 [hereinafter 4 November 2022 Order]. If the Controller believed in good faith that the Court failed to properly or adequately consider an issue in the case, he had but one option; that is, to petition for rehearing pursuant to N.C. R. App. P. 31(a).

Although the Controller has failed to seek rehearing under Rule 31 of the North Carolina Rules of Appellate Procedure, this motion asks the Court to do exactly that: to decide again, and in a contrary manner, issues that were already decided in *Leandro IV*. This is not allowed under our appellate rules. *See*, *e.g.*, *Nowell v. Neal*, 249 N.C. 516, 521(1959) (stating "the appropriate method of obtaining redress from errors committed by this Court" is a petition for rehearing).

To be clear, Rule 31 is the only mechanism by which a party can ask this Court to rehear or address issues they allege the Court has not properly or adequately considered. N.C. R. App. P. 31. Rule 31 petitions have a firm deadline, which cannot be extended. *See* N.C. R. App. P. 27(c) (The "Court may not extend the time for . . . filing . . . a petition for rehearing"). The deadline to seek rehearing in this case, as in all other cases, expired "fifteen days after the mandate of the court [was] issued." *See* N.C. R. App. 31(a). The Controller's motion effectively raises rehearing despite being time barred from doing so. *See* N.C. R. App. 31(a). The North Carolina Rules of Appellate Procedure do not allow for such gamesmanship. The Controller cannot legitimately request a "do over" with a newly constituted Court in order to obtain a different result. And even more importantly, this Court cannot legitimately allow such a procedure.

First and foremost, the Controller misconstrues this Court's 4 November 2022 Order. In that Order, this Court "stay[ed] the Writ of Prohibition pending any further filings in 425A21-1 pertaining to issues

not already addressed in this opinion filed on this day in 425A21-2." 4 November 2022 Order. The Controller asserts "the stay was issued because the Writ of Prohibition *may* interfere with the rights of the parties in the superior court proceedings." The Controller also notes the Order is ambiguous because it "anticipates the Controller may need to make additional filings to protect his rights as well."

However, this Court explicitly stated its reasons for staying the Writ of Prohibition at least three times in *Leandro IV*, 382 N.C. 129 (2022). The Court explained that the case was remanded for further proceedings and instructed the trial court to "recalculat[e] the amount of funds to be transferred in light of the State's 2022 Budget" and subsequently "order those State officials to transfer those funds to the specified State agencies." *Leandro IV*, 382 N.C. at 391. Accordingly, "[t]o enable the trial court to do so" this Court "stay[ed] the 30 November 2021 Writ of Prohibition issued by the Court of Appeals." *Id.* To be sure, this Court then reiterated this reasoning two additional times. *Leandro IV*, 382 N.C. at 429, 476.

Even more fundamentally, the central question resolved by this Court in *Leandro IV* was whether the judiciary has the inherent authority to compel compliance with state constitutional guarantees when the responsible branches of government fail to act. *See*, *e.g.*, *Leandro IV*, 382 N.C. at 429. The Order granting the Writ of Prohibition addressed the exact same question. It is impossible to reconcile our decision in *Leandro IV*, that yes, the judiciary has that authority, *Id.*, with the Court's decision today to reinstate the Writ of Prohibition.

The Controller asks this Court to rehear issues about the Court's personal jurisdiction over him. This issue, along with any due process concerns the Controller raises in his motion, were addressed by the Court in *Leandro IV*. There, this Court rejected those concerns by noting that "[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." *Leandro IV*, 382 N.C. at 466. Indeed, these issues were also a source of disagreement between the majority and dissent. *See id.* ("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."); *see also id.* at 529-30 (Berger, J., dissenting).

The Controller also asks this Court to rehear issues that were addressed by the Remedial Order affirmed in *Leandro IV*. These questions pertain to how the transfer of funds complies with the State Budget

Act. But in *Leandro IV* this Court stated that "the Controller . . . [was] directed to treat the . . . 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. *Leandro IV*, 382 N.C. at 423 (quoting Remedial Order). N.C.G.S. 143C-6-4(b)(2)(a) of the State Budget Act allows a "State agency," with "approval of the Director of the Budget" to "spend more than was apportioned in the certified budget by adjusting the authorized budget" where "[r]equired by a court . . . order." Thus, this Court's reference to that section addresses the administrative issues the Controller raises.

Additionally, while the Controller asks this Court to lift or dissolve the stay of the Writ of Prohibition, granting the motion will lead to an absurd result. First, lifting the stay is premature given our Court's reason for staying the Writ of Prohibition, which was to "enable the trial court to comply with" the order "reinstat[ing] the trial court's order directing certain state officials to transfer the funds required to implement years two and three of the CRP." *Leandro IV*, 382 N.C. at 466. Thus, the stay must remain until the transfer directive is reinstated. That has not happened.

Next, lifting the stay will result in two contradictory appellate court orders—the Court of Appeals' Writ of Prohibition and this Court's *Leandro IV* Opinion and Order—being in effect simultaneously. While this Court's opinion requires further proceedings, mandates entry of the remedial order, and confirms the trial court has jurisdiction, the Writ of Prohibition divests the trial court of jurisdiction, prevents further trial court proceedings, and prohibits entry of the trial court's remedial order. But because an earlier Court of Appeals decision must yield to on point precedent from this Court, lifting or dissolving the stay cannot have the effect the movant wants. *See State v. Leaks*, 240 N.C. App. 573 (2015) ("[t]his Court is bound to follow the precedent of our Supreme Court [.]") (citing *State v. Scott*, 180 N.C. App. 462, 465 (2006). The trial court must follow this Court's *Leandro IV* opinion, despite the requested relief being granted.

To the extent the Controller purports to identify issues that could arise in subsequent proceedings, these issues have already been decided, or, if they have not, are not ripe for decision. For example, the Controller's motion raises a number of questions unrelated to the trial court's transfer directive. Instead, these questions relate to the particulars of disbursing the funds moving forward. Furthermore, this Court is asked to determine whether the trial court's order is contrary to the General Statutes and whether state and local agency officials who transfer funds can be

liable civilly or criminally under N.C.G.S. § 14C-10.1. These questions are addressed by the Remedial Order, which was affirmed by *Leandro IV*. 382 N.C. at 423, 2022-NCSC-108, ¶ 77. To the extent that any of the presented questions might require judicial intervention in the future, proper procedure requires they first be presented to a superior court judge as this Court does not receive testimony or facts, *Nale v. Ethan Allen*, 199 N.C. App. 511, 521 (2009) ("It is not the role of the appellate courts to make findings of fact."); *Cutter v. Wilkerson*, 544 U.S. 709, 718 n.7 (2005) ("we are a court of review, not of first review"), or issue advisory opinions. *Wise v. Harrington Grove Cmty. Ass'n, Inc.*, 357 N.C. 396, 408 (2003) ("It is no part of the function of the courts to issue advisory opinions."); *see also*, *Leandro IV*, 382 N.C. at 510 (Berger, J., dissenting) ("[i]t 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.").

Finally, the majority accepts the outlandish proposition that, although all of these issues were fully briefed,[2] the Controller argued before this Court at oral argument, and the Court issued its ruling in *Leandro IV* resolving all of the issues in the appeal, somehow the basic elements of procedural due process have not been afforded to the Controller and therefore the Court of Appeals' Writ of Prohibition effectively overruling *Leandro IV* must go into effect. Rather, allowing this motion strikes another nail in the coffin for the rule of law. Our legal system is based on the premise that this Court's orders and opinions will be treated as final and binding interpretations of North Carolina law and its constitution. The "law of the case" has long been a tenant of our jurisprudence. *See, e.g.*, *In re J.A.M.*, 375 N.C. 325, 332 (2020) ("Our decision in *J.A.M. II* constitutes 'the law of the case' and is binding as to the issues decided therein . . . Accordingly, we overrule respondent's arguments insofar as they concern the trial court's prior adjudication of neglect.") (citing *Shores v. Rabon*, 253 N.C. 428, 429 (1960) (per curiam)); *Hayes v. City of Wilmington*, 243 N.C. 525 (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, provided the same facts

2. For example, issues regarding the Court's personal jurisdiction over the Controller, the General Assembly, and procedural due process requirements were previously briefed by the Controller. Controller Resp. Br. at 12-16, 18-22. In that same filing, the Controller represented that "[u]nlike the other parties, [Controller] requests the Court to simply affirm the 28 April Order and dismiss the remainder of the appeals including any further appellate review of the Writ of Prohibition." Controller's Resp. Br. at 3. The fact that this Court denied that request does not give the Controller the right to come back to this Court asking us to reverse that decision.

and the same questions . . . are involved in the second appeal"). Without principled explanation or justification, the majority abandons this rule.

"Today, education is perhaps the most important function of the state and local governments . . . It is the very foundation of good citizenship. *Leandro IV*, 382 N.C. at 476 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)). 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." *Id.* (quoting *Hoke County Bd. of Educ. v. State*, 358 N.C. 605, 649 (2004) ("Leandro II")). Unfortunately, we have waited much too long to see whether the State will abide by its constitutional mandate to provide our children, including at-risk children struggling in under-resourced schools, with a basic, sound education. Thus far, at least twenty-eight classes of students "have already passed through our state's school system without benefit of relief." *Leandro IV*, 382 N.C. at 475. Not only is it true that justice delayed is justice denied, but denying adequate educational opportunities "entails enormous losses, both in dollars and in human potential, to the State and its citizens." *Id.* If our Court cannot or will not enforce state constitutional rights, those rights do not exist, the constitution is not worth the paper it is written on, and our oath as judicial officers to uphold the constitution is a meaningless charade. For the reasons stated herein, I dissent.

Justice MORGAN joins in this dissenting opinion.

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

From N.C. Court of Appeals
22-16

From Wake
18CVS15292

No. 342PA19-2

ORDER

This matter comes before the Court on a petition for rehearing filed by the Legislative Defendants.

A petition for rehearing is governed by Rule 31 of the Rules of Appellate Procedure. Under Rule 31, a petition for rehearing "shall state with particularity the points of fact or law that, in the opinion of the petitioner, the court has overlooked or misapprehended" and must be accompanied by certifications from two qualifying, disinterested attorneys stating "that they consider the decision in error on points specifically and concisely identified." N.C. R. App. P. 31(a).

In exercising our duty and authority to address alleged errors of law, this Court has granted rehearing of cases under both Rule 31 and its historical predecessor, former Rule 44. In *Nowell v. Neal*, this Court provided guidance on when a litigant has satisfied the criteria for rehearing. 249 N.C. 516, 521, 107 S.E.2d 107, 111 (1959). Under a predecessor version of Rule 31 with nearly identical operative language, the Court observed that a recently issued opinion appropriately is reheard if the petitioner makes a satisfactory showing that the opinion may be erroneous: "No petition to rehear was filed. That is the appropriate method of obtaining redress from errors committed by this Court." *Id.*

This Court has consistently allowed a petition for rehearing when the petitioner has made the showing required by *Nowell*. *See*, *e.g.*, *Bailey v. Meadows Co.*, 154 N.C. 71, 69 S.E. 746 (1910) (modifying prior opinion upon grant of rehearing); *Clary v. Alexander Cty. Bd. of Educ.*, 286 N.C. 525, 212 S.E.2d 160 (1975) (withdrawing prior opinion upon grant of rehearing); *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977) (same); *Lowe v. Tarble*, 313 N.C. 460, 329 S.E.2d 648 (1985) (affirming prior opinion upon grant of rehearing); *Alford v. Shaw*, 320 N.C. 465, 358 S.E.2d 323 (1987) (withdrawing prior opinion upon grant of rehearing); *Wilson v. State Farm Mut. Auto. Ins. Co.*, 329 N.C. 262, 404 S.E.2d 852 (1991) (withdrawing in part and affirming in part prior opinion upon grant of rehearing); *Swanson v. State*, 330 N.C. 390, 410 S.E.2d 490 (1991) (affirming prior opinion upon grant of rehearing), *vacated and remanded*, 509 U.S. 916 (1993); and *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 517 S.E.2d 874 (1999) (superseding prior opinion upon grant of rehearing).

We conclude that the petition for rehearing in this matter satisfies the criteria in Rule 31 and allow the petition. The parties are directed as follows:

1. Appellants shall file supplemental briefing with this Court on or before 17 February 2023.

2. Appellees shall file supplemental briefing with this Court on or before 3 March 2023.

3. In their supplemental briefing, the parties shall address the following issues: (1) the issues raised in the petition for rehearing and (2) whether the operation of the challenged statute is impacted by the pending legal challenge to N.C. Const. Art. VI, Sec. 3(2), addressed by this Court in *N.C. State Conf. NAACP v. Moore*, 382 N.C. 129 (2022). The parties also may address any other issues raised in the original petition for discretionary review prior to determination by the Court of Appeals.

This matter will be placed on the 14 March 2023 calendar for rehearing.

By order of the Court in Conference, this the 3rd day of February 2023.

/s/ Allen, J.
For the Court

Justices Morgan and Earls dissent as set out in the attached statement.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 3rd day of February 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

Justice MORGAN dissenting.

I respectfully dissent from this Court's allowance of the Petition for Rehearing. There is no aspect of the case at issue which is presented by petitioners in their Petition for Rehearing which meets the historically and purposely high standards to qualify for this Court's exceedingly rare extension of the opportunity for a party which has already been fully heard by this Court through written submissions and oral arguments—followed by a studious and thorough analysis of the matters at issue which culminates in this Court's issuance of its binding opinion—to be afforded yet another opportunity to be heard by this Court upon the party's original unsuccessful efforts. The allowance of this extraordinary remedy to petitioners in this case, under the existent circumstances, may serve to foment concerns that North Carolina's highest state court is engaged in the determination of challenging and legitimate legal disputes with a perceived desire to reach outcomes which are inconsistent with this Court's well-established principles of adherence to legal precedent, stare decisis, and the rule of law.

Rule 31 of the North Carolina Rules of Appellate Procedure governs the subject of "Petition for Rehearing." Rule 31(a) states, in pertinent part: "The petition shall state with particularity the points of fact or law that, in the opinion of the petitioner, the court has overlooked or misapprehended and shall contain such argument in support of the petition as petitioner desires to present." In my view, in light of the exhaustive coverage and discussion of the subject matter of the case as addressed by this Court in its written opinion, there is no factual or legal component of this case which was overlooked; in my view, while the matters in controversy in this case were exacting, there is no factual or legal component of this case which was misapprehended by this Court. In sum, there is nothing demonstrably remarkable or sensational about petitioners' arguments in this case under North Carolina Appellate Rule

31 which warrants the colossal distinction to join the scant few cases for rehearing which span the twenty-one decades of this Court's resolution of this state's most significant cases, when the mammoth majority of such cases were duly considered to fail to satisfy the Court's elevated standards for a petition for rehearing to be granted.

As support for this observation, I note that petitioners have cited only four occasions in which this Court has found it to be appropriate to allow a case to be reheard: (1) *Bailey v. Meadows Co.*, 152 N.C. 603, 603, 68 S.E. 11, 12, *modified on reh'g*, 154 N.C. 71, 71, 69 S.E. 746, 747 (1910), a case addressing employer liability for employee injury; (2) *Clary v. Alexander Cnty. Bd. of Educ.*, 285 N.C. 188, 195, 203 S.E.2d 820, 825 (1974), *op. withdrawn sub nom. Clary v. Alexander Cnty. Bd. of Educ.*, 286 N.C. 525, 533, 212 S.E.2d 160, 165 (1975), a personal injury case; (3) *Branch Banking & Tr. Co. v. Gill*, 286 N.C. 342, 352, 211 S.E.2d 327, 335 (1975), *on reconsideration*, 293 N.C. 164, 190, 237 S.E.2d 21, 37 (1977), a case based on contract law; and (4) *Alford v. Shaw*, 318 N.C. 289, 349 S.E.2d 41 (1986), *on reh'g*, 320 N.C. 465, 358 S.E.2d 323 (1987), a case arising out of corporate law. It is readily ascertainable from the subject areas of the law which spawned these cases that there were no characteristics about any of them which contained or otherwise harbored any considerations which rendered this Court's allowance of petitions for rehearing in those cases to be peculiar or questionable, whereas such astonishment looms for me in the present case where petitioners merely reassert the same contentions which they unsuccessfully argued, albeit now rehashing these positions before a Supreme Court of North Carolina which has a different judicial composition than that which existed when the case was originally decided by this Court.

In *Weisel v. Cobb*, this Court opined:

> As the highest principles of public policy favor a finality of litigation, rehearings are granted by us only in exceptional cases, and then every presumption is in favor of the judgment already rendered. . . . A partial change in the personnel of the Court affords no reason for a departure from the rule, but rather emphasizes the necessity of its application[.]

122 N.C. 67, 69-70 (1898).

I respectfully dissent.

Justice EARLS joins in this dissent.

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

From N.C. Court of Appeals
22-261

From Wake
21CVS7438

No. 109PA22

ORDER

On 12 April 2022, plaintiffs and the State intervenor petitioned this Court for discretionary review prior to a determination by the Court of Appeals. On 5 July 2022, this Court entered an order allowing that petition.

This Court now rescinds the 5 July 2022 order improvidently granting discretionary review prior to a determination by the Court of Appeals and remands this case to the Court of Appeals for hearing at the earliest convenience of that court. To expedite consideration, we direct the Court of Appeals to accept the parties' briefs previously filed in this Court as the basis for review in the Court of Appeals.

By order of the Court in Conference, this the 1st day of March 2023.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 3rd day of March 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

STATE v. BELL

[384 N.C. 21 (2023)]

STATE OF NORTH CAROLINA v. BRYAN CHRISTOPHER BELL	From Onslow 01CRS2990 01CRS2991 01CRS2989

No. 86A02-2

ORDER

The State filed a motion to hold the briefing schedule in abeyance and to remand this matter to Superior Court for an evidentiary hearing. This Court allowed the State's motion to hold the briefing schedule in abeyance on 11 February 2022 and remanded this case to the trial court for an evidentiary hearing by order of this Court dated 17 February 2022.

The trial court having conducted an evidentiary hearing and transmitted its order to this Court on 25 January 2023, it is therefore ordered that the 11 February 2022 order holding the briefing schedule in abeyance is hereby rescinded, and the appellant shall file its brief within sixty days of the entry of this order. The appellee shall thereafter have sixty days within which to file its response. The appellant shall thereafter file a reply brief, if any, within thirty days.

By order of the Court in Conference, this the 1st day of March 2023.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 3rd day of March 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

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. 202PA21

ORDER

This Court, on its own motion, will dispose of this case on the record and briefs without oral argument pursuant to Rule 30(f)(1) of the Rules of Appellate Procedure. Accordingly, defendant's motion to continue oral argument is dismissed as moot.

By order of the Court in Conference, this the 7th day of February 2023.

/s/ Allen, J.
For the Court

Justices Morgan and Earls dissent from this order.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 7th day of February 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

Justice MORGAN dissenting.

I disagree with the Court majority's decision, on its own motion, to dispose of this case on the record and briefs as its chosen approach in which to dispose of defendant's motion to continue due to the illness of defendant's counsel; therefore, I respectfully dissent. Rule 30(f)(1) of the North Carolina Rules of Appellate Procedure states, in pertinent part, that "[a]t any time that the Supreme Court concludes that oral argument in any case pending before it will not be of assistance to the Court, it may dispose of the case on the record and briefs." Under the

circumstances governing this Court's actions pursuant to Rule 30(f)(1) and in light of the issues presented in this case, I dissent from the actions of the majority of the Court to conveniently relegate this case to a determination on the record and briefs without the benefit of oral argument. Furthermore, the opposing party described its position regarding the motion as declining to register a "strong objection" to the request. Finally, the Court's actions result in the inability of defendant to utilize his opportunity to present his oral argument to the Court merely because his counsel has suffered the misfortune of contracting an illness. Because this Court has compelled defendant to sacrifice his opportunity to present his oral argument to the Court as a direct result of his counsel's sudden and unexpected illness, I dissent.

Justice EARLS joins in this dissent.

FRANKIE DELANO WASHINGTON AND FRANKIE DELANO WASHINGTON, JR.	From N.C. Court of Appeals 18-1069
v.	From N.C. Court of Appeals 13-224 13-224-2
TRACEY CLINE, ANTHONY SMITH, WILLIAM BELL, JOHN PETER, ANDRE T. CALDWELL, MOSES IRVING, ANTHONY MARSH, EDWARD SARVIS, BEVERLY COUNCIL, STEVEN CHALMERS, PATRICK BAKER, THE CITY OF DURHAM, NC, AND THE STATE OF NORTH CAROLINA	From Durham 11CVS5051

No. 148PA14-2

ORDER

The parties have filed a notice of death of a party and a joint supplemental notice of death of a party. This Court, on its own motion, removes this case from its calendar currently set for Thursday, 2 February 2023. This matter will be re-calendared after a personal representative is appointed for plaintiff and substituted as a party in this case. Counsel is directed to initiate and complete the process for appointing and substituting a personal representative for plaintiff as soon as practicable and to submit an update to the Court on the status of this process on or before Friday, 10 March 2023.

By order of the Court in Conference, this the 30th day of January 2023.

/s/Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 30th day of January 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

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

3 MARCH 2023

1P23	State v. Chris Shawn Williams	Def's Pro Se Motion to Dismiss (Jurisdiction Challenge)	Dismissed
2P23	State v. Damonte Maeson Larsen	Def's Pro Se Motion to Dismiss All Charges	Dismissed
3P23	State v. Joseph Edwards Teague, III	1. Def's Motion for Temporary Stay (COA21-10) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/04/2023** 2. 3.
4P23	State v. Bucky Scott Smith	1. Def's Pro Se Motion for Extension of Time to File Notice of Appeal (COA22-247) 2. Def's Pro Se Motion for Extension of Time to File PDR 3. Def's Pro Se Motion to Proceed *In Forma Pauperis* 4. Def's Pro Se Notice of Appeal Based Upon a Constitutional Question 5. Def's Pro Se PDR Under N.C.G.S. § 7A-31 6. State's Motion to Dismiss Appeal 7. Def's Pro Se Motion to Appoint Counsel	1. Dismissed as moot 2. Dismissed as moot 3. Allowed 4. --- 5. Denied 6. Allowed 7. Dismissed as moot **Dietz, J., recused**
7P23	State v. Dennis D. Ramsey	Def's Pro Se Motion for PDR (COAP22-226)	Dismissed
8P23	State v. Chad Terrell Kendrick	Def's Pro Se Petition for Writ of Habeas Corpus and Mandamus	Denied **01/06/2023**
9P23	State v. Travis James Tudor	Def's Pro Se Petition for Writ of Certiorari	Dismissed
11A22	State v. Jaqualyn Robinson	1. Def's Notice of Appeal Based Upon a Dissent (COA21-144) 2. Def's Conditional Petition for Writ of Certiorari to Review Order of the COA 3. State's Motion to Dismiss Appeal 4. Def's Motion to Amend Petition for Writ of Certiorari	1. --- 2. Denied 3. Allowed 4. Allowed
13PA22	Wing v. Goldman Sachs Trust Company, et al.,	Parties' Motion for Continuance of Oral Argument (COA21-133)	Allowed **02/17/2023**

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

3 MARCH 2023

15P22	State v. Keith Aaron Bucklew	1. Def's Motion for Temporary Stay (COA20-556) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/12/2022** Dissolved 2. Denied 3. Denied **Dietz, J., recused**
16A23	State v. Ernest Paul Jones	1. State's Motion for Temporary Stay (COA22-518) 2. State's Petition for Writ of Supersedeas	1. Allowed **01/11/2023** 2. Allowed **02/02/2023**
17P23	State v. Robyn Lynn Noffsinger	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA21-566) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
19P23	State v. Audwin Pierre Lindsay, Jr.	Def's Pro Se Petition for Writ of Habeas Corpus (COAP17-233)	Denied **01/18/2023**
24P22	State v. Marcus Antwon Parks	1. Def's PDR Under N.C.G.S. § 7A-31 (COA20-832) 2. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
26P23	State v. Jermelle Levar Smith	Def's PDR Under N.C.G.S. § 7A-31 (COA22-257)	Denied
32P23	In the Matter of the Adoption of B.M.T., a minor	1. Petitioners' PDR Under N.C.G.S. § 7A-31 (COA22-377) 2. Petitioners' Motion for Temporary Stay 3. Petitioners' Petition for Writ of Supersedeas	1. 2. Allowed **02/14/2023** 3.
35P23	State v. Jose M. Estrada Perdomo	Def's Pro Se Motion for Emergency Mandamus and Prohibition	Denied **01/26/2023**
36A22	Cedarbrook Residential Center, Inc., et al. v. N.C. Department of Health & Human Services	Plts' Petition for Rehearing (COA21-194)	Denied **02/13/2023** **Dietz, J., recused**
38P23	Jean-Laurent v. James	Petitioner's Pro Se Petition for Writ of Habeas Corpus (COAP22-545)	Denied **01/30/2023** **Dietz, J., recused**

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39P23	State v. Bobby Leshawn Byrd	Def's PDR Under N.C.G.S. § 7A-31 (COA22-527)	Denied **Dietz, J., recused**
41P17-10	Arthur O. Armstrong v. Armstrong Estate, 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	1. Dismissed 2. Dismissed
42P23	State v. Larry Timothy Abrams	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-347)	Denied
43P18-3	Jonathan H. Bynum v. State of North Carolina	1. Plt's Pro Se Motion for Wiretapping 2. Plt's Pro Se Motion for Discrimination 3. Plt's Pro Se Motion to Proceed as a Veteran	1. Dismissed 2. Dismissed 3. Dismissed
45P23	Smith v. Wisniewski	1. Plt's Pro Se Motion for Temporary Stay 2. Plt's Pro Se Petition for Writ of Supersedeas 3. Plt's Pro Se Notice of Appeal Based Upon a Constitutional Question 4. Plt's Pro Se PDR Under N.C.G.S. § 7A-31	1. Allowed **02/02/2023** 2. 3. 4.
46P23	State v. David Raeford Tripp, Jr.	1. Def's Motion for Temporary Stay (COA21-688) 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 **02/02/2023** 2. 3. 4. 5.
47P23	State v. Malcolm Leon Tripp	Def's Pro Se Motion for Relief from Excessive Bail	Dismissed
53P23	Cox v. Sadovnikov	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas	1. Allowed **02/06/2023** 2. **Dietz, J., recused**
56P23-1	Cumberland County v. Hall	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **02/14/2023**

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56P23-2	Cumberland County v. Hall	1. Def's Pro Se Petition for Writ of Habeas Corpus 2. Def's Pro Se Motion for Demand for Dismissal	1. Denied **02/23/2023** 2. Dismissed **02/23/2023**
57P22	Joseph Fleming and Rebecca Garland, on behalf of themselves and all others similarly situated v. Cedar Management Group, LLC	1. Plts' PDR Under N.C.G.S. § 7A-31 2. Def's Conditional PDR Under N.C.G.S. § 7A-31 (COA21-213)	1. Denied 2. Dismissed as moot
57P23	R.I. North, LLC v. Monette Baldwin a/k/a Nell Monette Baldwin	1. Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COAP23-95) 2. Def's Pro Se Motion for Temporary Injunction 3. Def's Pro Se Motion for a Bond of $1.00 be Assessed 4. Def's Pro Se Notice of Appeal 5. Def's Pro Se PDR Prior to a Decision of the COA 6. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA 7. Def's Pro Se Motion to Suspend the Rules for Expedited Review	1. Denied **02/17/2023** 2. Denied **02/17/2023** 3. Dismissed as moot **02/17/2023** 4. Dismissed *ex mero motu* **02/17/2023** 5. Denied **02/17/2023** 6. Denied **02/17/2023** 7. Denied **02/17/2023** **Morgan, J., recused**
58P23	Hwang v. Cairns, et al.	Plt's Motion for Extension of Time to File PDR (COA22-31)	Denied **02/20/2023**
63P23	Azevedo v. Onslow County DSS	Petitioner's Motion for Temporary Stay (COA22-376)	Allowed **02/27/2023**
64A22	Howard, et al., v. IOMAXIS, LLC, et al.	1. Def's (IOMAXIS, LLC) Motion for Closed Oral Arguments 2. Def's (IOMAXIS) Motion to Seal Document	1. Denied **01/20/2023** 2. Allowed **01/31/2023**
72P12-3	State v. Michael Scott Sistler	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Johnston County 2. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot

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73P22	State v. Harden Junior Viers	Def's PDR Under N.C.G.S. § 7A-31 (COA20-806)	Denied
86A02-2	State v. Bryan Christopher Bell	State's Motion to Hold Appeal in Abeyance and Remand for Evidentiary Hearing	Special Order
91P14-8	State v. Salim Abdu Gould	1. Def's Pro Se Motion for Notice of Appeals as of Right Sub. Const. Ques. (COA18-425) 2. Def's Pro Se Petition for Writ of Habeas Corpus	1. Dismissed *ex mero motu* **12/15/2022** 2. Denied **12/15/2022** **Dietz, J., recused**
91P14-9	State v. Salim Abdu Gould	1. Def's Pro Se Motion for Notice of Appeal as of Right Sub. Const. Ques. (COA18-425) 2. Def's Pro Se Petition for Writ of Habeas Corpus 3. Def's Pro Se Motion for Temporary Stay 4. Def's Pro Se Motion for Notice of Transfer	1. Dismissed *ex mero motu* **01/10/2023** 2. Denied **01/10/2023** 3. Dismissed **01/10/2023** 4. Dismissed **01/10/2023** **Dietz, J., recused**
91P22	State v. Joseph Orland Murdock	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA20-547) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
102P13-5	State v. Charles Anthony Ball	1. Def's Pro Se Petition for Writ of Mandamus 2. Def's Pro Se Motion to Compel 3. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Warren County 4. Def's Pro Se Motion to Proceed *In Forma Pauperis* 5. Def's Pro Se Motion for Petition for Rehearing	1. Dismissed 2. Dismissed 3. Denied **02/14/2023** 4. Allowed 5. Denied
105P18-2	Nathaniel R. Webb v. North Carolina State Highway Patrol	Plt's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA21-570)	Dismissed *ex mero motu* **Dietz, J., recused**

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109PA22	McKinney, et al. v. Goins, et al.	1. Plts and Intervenor's PDR Prior to a Determination by the COA (COA22-261) 2. Student Victims of Sexual Abuse's Motion for Leave to File Amicus Brief	1. Special Order 2. Allowed **02/09/2023**
113A22	Estate of Graham v. Lambert, et al.	North Carolina Association of Defense Attorneys' Motion for Extension of Time to File Amicus Brief	Allowed **02/24/2023**
121P04-2	State v. Mitchell Danyell Banks	Def's Pro Se Motion for New Sentencing Hearing	Dismissed
121P22	Christine Beronio v. Jon P. Henry	Def's Pro Se Motion and Notice of Hearing for Modification of Child Support Order	Dismissed
126P22	State v. Zaire Ali Muhammad	1. Def's Pro Se Motion for Court Date for a Lawyer 2. Def's Pro Se Motion for Arraignment Date	1. Dismissed 2. Dismissed
129P22	State v. William Scott Davis, Jr.	1. Def's Pro Se Motion for PDR 2. Def's Pro Se Motion for Indigent Copy of N.C. Supreme Court Rules 3. Def's Pro Se Motion for Indigent Copy of N.C. Court of Appeals Rules 4. Def's Pro Se Motion to Compel Clerks to Produce All Transcripts and Records 5. Def's Pro Se Motion to Compel Judge to Perfect Record on Appeal 6. Def's Pro Se Motion for Indigent Copies of Sample Documents 7. Def's Pro Se Motion for PDR 8. Def's Pro Se Petition for Writ of Mandamus 9. Def's Pro Se Motion to Appoint Counsel and Guardian ad Litem 10. Def's Pro Se Petition for Writ of Mandamus 11. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed 5. Dismissed 6. Dismissed 7. Dismissed 8. Dismissed 9. Dismissed as moot 10. Dismissed 11. Dismissed as moot
131P16-24	State v. Somchai Noonsab	Def's Pro Se Motion for Immediate Release and Monetary Sums Tax Free	Dismissed **02/13/2023**
147P22	State v. Sharon Whitford	Def's PDR Under N.C.G.S. § 7A-31 (COA20-725)	Denied **Dietz, J., recused**

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148PA14-2	Washington v. Cline	Notice	Special Order **01/30/2023**
155P22	State v. Travis Lamont Davenport	1. State's Motion for Temporary Stay (COA20-628) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **05/20/2022** 2. Allowed 3. Allowed 4. Denied **Dietz, J., recused**
157P22	State v. Tevin Demetrius Vann	1. State's Motion for Temporary Stay (COA20-907) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/20/2022** 2. Allowed 3. Allowed
163P22	Warren Paul Kean v. Amy Delene Kean	1. Def's PDR Under N.C.G.S. § 7A-31 (COA21-102) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31 3. Def's Motion for Temporary Stay 4. Def's Petition for Writ of Supersedeas	1. Denied 2. Dismissed as moot 3. Allowed **06/07/2022** Dissolved 4. Denied
164P22	State v. Todd Emerson Collins, Jr.	1. Def's Pro Se Motion for Temporary Stay (COA21-404) 2. Def's Pro Se Petition for Writ of Supersedeas 3. Def's Pro Se PDR Under N.C.G.S. § 7A-31	1. Denied **05/26/2022** 2. Denied 3. Denied **Dietz, J., recused**
165P16-2	State v. Simaron Demetrius Hill	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Randolph County	Dismissed **Berger, J., recused**
174P21	State v. Phillip Brandon Daw	1. State's Motion for Temporary Stay (COA20-680) 2. State's Petition for Writ of Supersedeas 3. Def's Conditional PDR Under N.C.G.S. § 7A-31 4. State's PDR Under N.C.G.S. § 7A-31 5. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **05/25/2021** 2. Allowed 3. Denied 4. Allowed 5. Denied

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176P22	Farron Jerome Upchurch v. Harp Builders, Inc. and Valentine Joseph Cleary	Defs' PDR Under N.C.G.S. § 7A-31 (COA21-472)	Allowed **Dietz, J., recused**
178P22	State v. James Matthew Kitchen	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA21-297) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
182P22	State v. William Enoch Thomas	1. Def's PDR Under N.C.G.S. § 7A-31 (COA21-396) 2. Def's Motion for Petition for Review Pursuant to Rule 2 3. Def's Motion to File Amended Petition 4. Def's Amended PDR Under N.C.G.S. § 7A-31 5. Def's Amended Motion for Petition for Review Pursuant to Rule 2	1. Dismissed as moot 2. Dismissed as moot 3. Allowed 4. Denied 5. Denied **Dietz, J., recused**
187A22	State v. Jahzion Wilson	1. Def's Notice of Appeal Based Upon a Dissent (COA20-108) 2. Def's PDR as to Additional Issues	1. --- 2. Denied
197PA20-2	State v. Jeremy Johnson	State's Emergency Motion to Continue Argument	Allowed **02/06/2023** **Berger, J., recused** **Dietz, J., recused**
200PA21	In the Matter of J.M. & N.M.	1. Petitioner and Guardian ad Litem's Motion to Amend Record on Appeal (COA20-667) 2. Respondent-Mother's Motion to Continue Oral Argument 3. Respondent-Mother's Motion for Extension of Time to File Brief	1. Denied **12/13/2022** 2. Denied **01/04/2023** 3. Denied **01/04/2023**
202PA21	State v. Scott Warren Flow	Def's Motion to Continue Oral Argument (COA20-534)	Special Order **02/07/2023**
202P22	State v. Kenneth Louis Walker	1. Def's PDR Under N.C.G.S. § 7A-31 (COA21-535) 2. Def's Petition for Writ of Certiorari to Review Decision of the COA	1. Dismissed 2. Allowed

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206P22	Roy Johnson v. James Nieland, DC and Family Chiropractic, PC	Plt's PDR Under N.C.G.S. § 7A-31	Denied
210P22	Kevin Scott Violette and Violette Family Farm, LLC a North Carolina Limited Liability Company v. The Town of Cornelius, a North Carolina body politic and corporate, Bluestream Partners, LLC, a North Carolina Limited Liability Company, Jacob a/k/a Jake J. Palillo, and Wayne Herron	Plts' PDR Under N.C.G.S. § 7A-31 (COA21-648)	Denied **Dietz, J., recused**
215P22	State v. Quashaun Niajel Slade	1. Def's PDR Under N.C.G.S. § 7A-31 (COA21-209) 2. Def's Motion to Deem PDR Timely Filed 3. Def's Petition in the Alternative for Writ of Certiorari to Review Decision of the COA	1. Denied 2. Allowed 3. Dismissed as moot
229P22	State v. Ernest Mario Roach	Def's PDR Under N.C.G.S. § 7A-31 (COA21-517)	Denied
231P22	Tutterow v. Hall	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA21-326) 2. Plt's Motion to Deem PDR Timely Filed 3. Plt's Petition for Writ of Certiorari to Review Decision of the COA	1. Dismissed 2. Denied 3. Denied **Dietz, J., recused**
233P22	State v. Wallace Earl Anderson	1. Def's PDR Under N.C.G.S. § 7A-31 (COA21-664 2. State's Conditional PDR Under N.C.G.S. § 7A-31)	1. Denied 2. Dismissed as moot **Dietz, J., recused**

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237P04-3	State v. James Edward Bell, Jr.	1. Def's Pro Se Motion for Notice of Appeal (COAP21-327) 2. Def's Pro Se Motion for PDR 3. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA	1. Dismissed 2. Dismissed 3. Dismissed
243P21	State v. Thomas McCaskill	Def's Pro Se Motion to Make Court Follow the Law	Dismissed
244P21-4	Meyers v. Jacobs, et al.	1. Petitioner's Pro Se Petition for Writ of Habeas Corpus 2. Petitioner's Pro Se Motion for Consolidated Objections and Notice of Appeal	1. Denied **02/09/2023** 2. Denied **02/09/2023**
244P22	Brenda Warley v. AutoMoney, Inc.	1. Def's PDR Under N.C.G.S. § 7A-31 (COA21-249) 2. Def's Motion to Amend PDR 3. Def's Motion to Withdraw PDR	1. Dismissed as moot 2. Dismissed as moot 3. Allowed
250P08-6	State v. Gregory Robinson, Jr.	1. Def's Pro Se Motion for Notice of Appeal 2. Def's Pro Se Motion for PDR	1. Dismissed 2. Dismissed
252P22	Rupa Vickers Russe and Ara L. Vickers v. William Anthony Youngblood, individually and William Anthony Youngblood in his official capacity as a Sheriff for the Henderson County Sheriff Department and County of Henderson	1. Plt's (Rupa Vickers Russe) Pro Se Notice of Appeal Based Upon a Constitutional Question (COA21-799) 2. Plt's (Rupa Vickers Russe) Pro Se PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
253P08-2	State v. William McDougald	1. Def's PDR Under N.C.G.S. § 7A-31 (COA21-286) 2. Def's Motion to Amend PDR	1. Denied 2. Allowed **09/20/2022**
255P22	Eastpointe Human Services v. N.C. Department of Health and Human Services, et al.	1. Plt's Motion for Temporary Stay (COA21-264) 2. Plt's Petition for Writ of Supersedeas 3. Plt's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/10/2022** Dissolved 2. Denied 3. Denied

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266P22	Grooms Property Management, Inc., et al. v. Muirfield Condominium Association, et al.	Def/Third-Party Plt's (Muirfield Condominium Association) PDR Under N.C.G.S. § 7A-31 (COA22-49)	Denied
272A14	State v. Jonathan Douglas Richardson	Def's Motion to Reschedule Oral Argument to Next Available Sitting	Denied **01/04/2023**
275P22	In the Matter of T.S.	Respondent's PDR Under N.C.G.S. § 7A-31 (COA21-710)	Denied
279P22	Wesley Walker v. Wake County Sheriff's Department; Gerald M. Baker, in his official capacity as Wake County Sheriff; Eric Curry (individually); Western Surety Company; WTVD, Inc.; WTVD Television, LLC; Shane Deitert	Plt's PDR Under N.C.G.S. § 7A-31 (COA21-661)	Allowed
280P22	Kody Kinsley, in his official capacity as Secretary of the North Carolina Department of Health and Human Services v. Ace Speedway Racing, LTD., After 5 Events, LLC, 1804-1814 Green Street Associates Limited Partnership, Jason Turner, and Robert Turner	Plt's PDR Under N.C.G.S. § 7A-31 (COA21-428)	Allowed
281A22	N.C. Farm Bureau Mutual Insurance Company, Inc. v. Matthew Bryan Hebert	1. Plt's Notice of Appeal Based Upon a Dissent (COA22-82) 2. Plt's PDR as to Additional Issues	1. --- 2. Allowed **Dietz, J., recused**
281P06-11	Joseph E. Teague, Jr., P.E., C.M. v. NC Department of Transportation, J.E. Boyette, Secretary	1. Plt's Pro Se Motion to Hear Exonerating Evidence (COA05-522) 2. Plt's Pro Se Motion for Petition for Rehearing	1. Dismissed 2. Dismissed

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293P22-2	State v. Harry Lee Hunter, Jr.	1. Def's Pro Se Motion to Remove Judge from Case 2. Def's Pro Se Motion for Court-Appointed Attorney	1. Dismissed 2. Dismissed as moot
295P22	Gaston County Board of Education, Plaintiff v. Shelco, LLC, S&ME, Inc., Boomerang Design, P.A. (f/k/a MBAJ Architecture, Inc.), and Campco Engineering, Inc., Defendants/ Crossclaim and Third-Party Plaintiff v. Hoopaugh Grading Company, LLC; Hart Wall and Paver Systems, Inc.; Worldwide Engineering, Inc.; and Lincoln Harris, LLC, Third-Party Defendants	1. Def's (Campco Engineering, Inc.) PDR Under N.C.G.S. § 7A-31 (COA21-618) 2. Def's (S&ME, Inc.) PDR Under N.C.G.S. § 7A-31 3. Carolinas AGC, Inc.'s Motion for Leave to File Amicus Brief in Support of Petitions for Discretionary Review	1. Denied 2. Denied 3. Dismissed as moot
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.	Plt's Petition for Rehearing	Dismissed **01/05/2023** **Dietz, J., recused**
307P21	State v. Theodore Williams, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA20-713)	Denied
311P21	State v. Garrett Jordan Vann	Def's PDR Under N.C.G.S. § 7A-31 (COA20-182)	Denied
313P22	Clarence Richards, Employee v. Harris Teeter, Inc., Employer, Self-Insured (Sedgwick Claims Management Services, Third-Party Administrator)	Defs' PDR Under N.C.G.S. § 7A-31 (COA21-804)	Denied

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314P22	State v. Yon Hwar See	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA22-9) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
316P22	Joseph Lannan and Landry Kuehn, on behalf of themselves and others similarly situated v. Board of Governors of the University of North Carolina, known and distinguished by the name of the University of North Carolina, a body politic and corporate	1. Def's Motion for Temporary Stay (COA21-554) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31 4. North Carolina Association of Defense Attorneys' Conditional Motion for Leave to File Amicus Brief	1. Allowed **10/21/2022** 2. Allowed 3. Allowed 4. Allowed
318P22	State v. Charles Singleton	1. State's Motion for Temporary Stay (COA22-114) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/25/2022** 2. Allowed 3. Allowed
319P22	State v. Laquan Leon Williams	1. Def's PDR Under N.C.G.S. § 7A-31 (COA21-647) 2. Def's Motion to Deem PDR Timely Filed 3. Def's Petition in the Alternative for Writ of Certiorari to Review Decision of the COA	1. Denied 2. Allowed 3. Dismissed as moot
322P22	HD Hospitality, LLC v. Live Oak Banking Company	Plt's PDR Under N.C.G.S. § 7A-31 (COA21-795)	Denied
324P22	State v. Ronald Preston Harper	Def's PDR Under N.C.G.S. § 7A-31 (COA21-752)	Denied
327P02-13	State v. Guy Tobias LeGrande	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **01/20/2023**
328P22	Scott Waters v. William Pumphrey	1. Def's Motion for Temporary Stay (COA20-816) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/07/2022** Dissolved 2. Denied 3. Denied

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329A09-4	State v. Martinez Orlando Black	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Mecklenburg County (COA08-1180) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel 4. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA 5. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA	1. Dismissed 2. Allowed 3. Dismissed as moot 4. Dismissed 5. Dismissed **Dietz, J., recused**
330P22	State v. Michael Anthony Leslie	Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP22-263)	Dismissed **Dietz, J., recused**
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. Dismissed as moot 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**
335P22	State v. Wesley Clayton Rhom, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA22-68)	Denied
336P22-2	William D. Woolens v. Charlene D. Cliborne	Plt's Pro Se Motion for Supreme Court Case	Dismissed
342PA19-3	Holmes, et al. v. Moore, et al.	Defs' Petition for Rehearing	Special Order **02/03/2023**

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343A22	Sylvia Corry v. The North Carolina Division of Health and Human Services, Division of Child Development and Early Education	1. Plt's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA22-47) 2. Def's Motion to Dismiss Appeal 3. Plt's Pro Se Motion for Extension of Time to File Brief	1. --- 2. Allowed 3. Dismissed as moot **Dietz, J., recused**
344P22	State v. Raymond L. Dumas	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Guilford County 2. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
345P22	State v. Jonathan Omar Kelly	Def's PDR Under N.C.G.S. § 7A-31 (COA22-70)	Denied
347P22	State v. Denaud Manscel Egana	Def's Pro Se Motion for Notice of Appeal (COAP22-514)	Dismissed
349P22	State v. Nathan Gabriel McBryde	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31 4. Def's Motion for Leave to File Amended Record on Appeal	1. Allowed **12/06/2022** Dissolved 2. Denied 3. Denied 4. Dismissed as moot
352P22	Robert Alan Lillie v. William C. Farris, Chief Judge of Wilson County District Court	1. Petitioner's Pro Se Petition for Writ of Mandamus 2. Petitioner's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
353P22	State v. Marvin Bruce Phillips	Def's Pro Se Motion for Review	Dismissed
354P22	State v. Arlington Efrin Ashley	1. Def's Pro Se Motion for Petition for Writ of Error *Coram Nobis* 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
355P22	State v. Eric Douglas Moore	Def's PDR Under N.C.G.S. § 7A-31 (COA22-220)	Denied
357P15-2	State v. James David Nanney	Def's Pro Se Motion to Dismiss and Pardon Habitual Felon Sentence and to Reimburse	Dismissed

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359P22	In the Matter of I.B.M. & P.J.S.	Respondent-Father's PDR Under N.C.G.S. § 7A-31 (COA22-327)	Denied **12/29/2022** **Dietz, J., recused**
361P22	State v. Trentair Bingham	1. Def's Pro Se Motion for Appeal (COAP22-612) 2. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA	1. Dismissed 2. Dismissed
363P22	State v. Jamaal Gittens	1. Def's Pro Se Motion for Petition for Mandamus Certiorari 2. Def's Pro Se Motion to Dismiss Case	1. Dismissed 2. Dismissed **Dietz, J., recused**
367P22	Jonathan Huff v. State Trooper Derrick Banks, Clerk of Superior Court, Dare County Courthouse	1. Plt's Pro Se Motion to Intervene with an Injunction 2. Plt's Pro Se Motion to Intervene with an Injunction	1. Dismissed 2. Dismissed
368A22	U.S. Bank Trust, as Trustee for LSF10 Master Participation Trust v. Raleigh G. Rogers, Dreama Louise Rogers, and Jonathan J. Rogers	Def's (Raleigh G. Rogers) Pro Se Notice of Appeal Based Upon a Constitutional Question (COA22-889)	Dismissed *ex mero motu* **Dietz, J., recused**
369P22	State v. Buckman and Brady	1. Def's (Mikel E. Brady, II) Petition for Writ of Supersedeas 2. Def's (Mikel E. Brady, II) Petition for Writ of Certiorari to Review Order of Superior Court, Dare County 3. Def's (Mikel E. Brady, II) Petition in the Alternative for Writ of Mandamus 4. Def's (Mikel E. Brady, II) Motion for Temporary Stay	1. Denied **12/16/2022** 2. Denied **12/16/2022** 3. Denied **12/16/2022** 4. Denied **12/16/2022**
371P22	State v. Kwain Hawkins	Def's PDR Under N.C.G.S. § 7A-31 (COA22-97)	Denied
372P22	In the Matter of D.D.H.	Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA22-67)	Denied **Dietz, J., recused**
373P22	State v. Delbert Almonzo Kurtz	Def's PDR Under N.C.G.S. § 7A-31 (COA22-233)	Denied

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374P22	Town of Boone and Marshall Ashcraft, in his individual capacity as a resident and taxpayer of the Town of Boone, Plaintiffs v. Watauga County, Town of Seven Devils, and Town of Blowing Rock, Defendants and Town of Beech Mountain, Intervenor	Plts' PDR Under N.C.G.S. § 7A-31 (COA21-586)	Denied **Dietz, J., recused**
375P22	State v. Nathan Pike	1. Def's Pro Se Motion to Appoint Counsel 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
377P22	State v. Marty Douglas Rogers	1. State's Motion for Temporary Stay 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/22/2022** 2. 3. **Dietz, J., recused**
378P22	Palacios v. White, et al.	Petitioner's Motion to Unseal Docket for Moving Counsel (COA22-295)	Allowed **02/03/2023**
381P22-1	In re Matthew Safrit	1. Petitioner's Pro Se Motion for PDR (COAP22-495) 2. Petitioner's Pro Se Motion to Proceed *In Forma Pauperis*	1. Denied **12/28/2022** 2. Allowed **12/28/2022** **Dietz, J., recused**
381P22-2	In re Matthew Safrit	1. Petitioner's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP22-495) 2. Petitioner's Pro Se Motion to Proceed *In Forma Pauperis*	1. Denied **01/24/2023** 2. Allowed **01/24/2023** **Dietz, J., recused**

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383P20-3	State v. Derek Lynn Hendricks	1. Def's Pro Se Motion for Appeal 2. Def's Pro Se Motion to Assign New Appellate Counsel 3. Def's Pro Se Motion for Reconsideration 4. Def's Pro Se Motion to Expedite Preliminary Injunction and Intervention	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed
387P21	State v. Jennifer Lynn Pierce	1. Def's PDR Under N.C.G.S. § 7A-31 (COA20-494) 2. Def's Motion to Withdraw as Counsel and Appoint Office of Appellate Defender	1. Denied 2. Allowed **06/27/2022**
397A18-2	State v. Bobby Dewayne Helms	Def's PDR Under N.C.G.S. § 7A-31 (COA20-295)	Denied
399P15-2	State v. Devon Armond Gayles	Def's Pro Se Petition for Writ of Mandamus (COA13-1005)	Dismissed
402A21	State v. Montez Gibbs	1. State's Motion for Temporary Stay (COA20-591) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent 4. Def's Motion to Strike Portions of the State's Brief 5. Def's Motion to Stay Briefing Until Resolution of the Motion 6. State's Petition for Writ of Certiorari to Review Decision of the COA	1. Allowed **11/19/2021** 2. Allowed **03/09/2022** 3. --- 4. Denied 5. Dismissed as moot 6. Allowed
413PA21-2	Harper, et al. v. Hall, et al.	1. Legislative-Defs' Petition for Rehearing 2. Plt-Intervenor's (Common Cause) Motion to Dismiss Frivolous Petition 3. Legislative-Defs' Motion to Admit Richard Raile Pro Hac Vice	1. Special Order **02/03/2023** 2. Special Order **02/03/2023** 3. Allowed **02/15/2023**

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425A21-1	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 State Board of Education, Defendants and Charlotte-Mecklenburg Board of Education, Realigned Defendant	1. Plts' Notice of Appeal Based Upon a Dissent (COAP21-511)	1. ---
		2. Plts' Notice of Appeal Based Upon a Constitutional Question	2. Special Order **3/18/2022**
		3. Plts' PDR Under N.C.G.S. § 7A-31	3. Special Order **3/18/2022**
		4. Plts' Petition in the Alternative for Writ of Certiorari to Review Order of the COA	4. Special Order **3/18/2022**
		5. Plt-Intervenors' (Rafael Penn, et al.) Motion to Admit David Hinojosa Pro Hac Vice	5. Dismissed as moot **2/23/2023**
		6. Plt-Intervenors' (Rafael Penn, et al.) Notice of Appeal Based Upon a Dissent	6. ---
		7. Plt-Intervenors' (Rafael Penn, et al.) Notice of Appeal Based Upon a Constitutional Question	7. Special Order **3/18/2022**
		8. Plt-Intervenors' (Rafael Penn, et al.) PDR Under N.C.G.S. § 7A-31	8. Special Order **3/18/2022**
		9. Plt-Intervenors' (Rafael Penn, et al.) Petition for Writ of Certiorari to Review Order of the COA	9. Special Order **3/18/2022**
		10. Controller's Motion to Dismiss Appeals	10. Special Order **3/18/2022**
		11. Controller's Conditional Petition for Writ of Supersedeas	11. Special Order **3/18/2022**
		12. Legislative-Intervenors' Motion to Dismiss Appeals	12. Special Order **3/18/2022**
		13. Controller's Motion to Dissolve or Lift Stays	13. Special Order
		14. Legislative-Intervenors' Motion for Leave to Brief Additional Issues	14. Special Order
		15. Legislative-Intervenors' Motion to Confirm Reinstatement of Writ of Prohibition	15. Special Order
		16. Legislative-Intervenors' Conditional Petition for Writ of Certiorari	16. Special Order
		17. Plt-Intervenors' (Rafael Penn, et al.) Motion to Admit David Hinojosa Pro Hac Vice	17. Allowed **2/23/2023**

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		18. Plt-Intervenors' (Rafael Penn, et al.) Motion to Admit Michael Robotti Pro Hac Vice	18. Allowed **2/23/2023**
501P10-2	In the Matter of J.D.	1. Respondent-Father's Pro Se Petition for Writ of Certiorari to Review Decision of District Court, Wake County (COA10-422) 2. Respondent-Father's Pro Se Motion to Appoint Counsel	1. Denied **01/20/2023** 2. Dismissed as moot **01/20/2023**
505PA20	State of North Carolina v. Rayquan Jamal Borum	1. Def's Motion to Dispose of the Case on the Record and Briefs 2. Def's Motion in the Alternative to Withdraw and Appoint the Appellate Defender	1. Allowed **01/18/2023** 2. Dismissed as moot **01/18/2023**
518P98-3	State v. Christopher Mosby	1. Def's Pro Se Motion for Notice of Appeal (COAP21-361) 2. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA	1. Dismissed 2. Dismissed
526P20	State v. Quonshe Marquise Brimmer	Def's PDR Under N.C.G.S. § 7A-31 (COA19-1103)	Denied **Dietz, J., recused**

IN RE A.J.L.H.

[384 N.C. 45 (2023)]

IN THE MATTER OF A.J.L.H., C.A.L.W., M.J.L.H.

No. 35PA21

Filed 6 April 2023

1. Child Abuse, Dependency, and Neglect—adjudication—hearsay analysis—remaining evidentiary findings

In its review of the trial court's adjudication and disposition order in a child abuse case, the Court of Appeals erred in holding that some of the trial court's findings relied on inadmissible hearsay statements from the abused child (which were almost entirely duplicative of other evidence) and that the order must be vacated and remanded because the abuse adjudication heavily relied upon the inadmissible hearsay statements. In the first place, the out-of-court statements at issue were admissible for the purpose of explaining why social services began to investigate respondent-parents (rather than for the truth of the matter asserted), and the Court of Appeals should have presumed the trial court's ruling on respondents' objection to be correct where the trial court did not expressly state the reason it was admitting the evidence. Second, when the Court of Appeals concluded that the statements were erroneously admitted, that court should have simply disregarded the statements and examined whether the remaining findings supported the trial court's determination.

2. Child Abuse, Dependency, and Neglect—adjudication—abuse and neglect—grossly inappropriate discipline—parents unrepentant

The trial court did not err by adjudicating a nine-year-old child as abused under N.C.G.S. § 7B-101(1) where, according to the trial court's findings, which were supported by clear, cogent, and convincing evidence (in a large part from respondents' own admissions), respondents mother and stepfather used "cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior" by whipping the child with a belt severely enough to inflict visible physical injuries, forcing her to stand in a corner for many hours at a time, and making her sleep on the floor without any covers—all for days at a time, possibly for as long as two months. The trial court also did not err by adjudicating the same child as neglected under N.C.G.S. § 7B-101(15) based on the home environment being "injurious to the juvenile's welfare"

where respondents saw nothing wrong with their discipline of the child, even after months of working with social services.

3. Child Abuse, Dependency, and Neglect—adjudication—neglect—siblings of abused child—parents' unwillingness to remedy the injurious environment

Where the trial court properly adjudicated respondents' nine-year-old daughter as abused and neglected based on respondents' cruel and grossly inappropriate discipline of her, the trial court did not err by also adjudicating respondents' two younger children (then three years old and six months old) as neglected based on respondents' refusal to acknowledge that the discipline of the nine-year-old was inappropriate and their inability to make a commitment that they would not repeat the discipline, creating a substantial risk that the two younger children would be harmed if they stayed in the home.

4. Child Abuse, Dependency, and Neglect—appellate review—role of appellate court—various procedural postures

In a child abuse case, where the Court of Appeals vacated and remanded the adjudication order with respect to all children involved, that court should not have addressed the disposition phase, and its instruction that the trial court must "order generous and increasing visitation between Margaret and her mother" was improper. On remand from the Supreme Court's decision holding that the trial court's adjudications were not erroneous (reversing the Court of Appeals' decision), the Court of Appeals was reminded to apply the abuse of discretion standard to the disposition order. If the trial court's order meets the high bar for abuse of discretion, the remedy is to vacate the disposition order and remand—without expressing an opinion as to the ultimate result of the best interests determination on remand, which is a decision that belongs to the trial court.

Justice MORGAN concurring in part and dissenting in part.

Justice EARLS joins in this concurring in part and dissenting in part 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. 11 (2020), vacating and remanding an order entered on 13 December 2019 by Judge Tonia A.

Cutchin in District Court, Guilford County. Heard in the Supreme Court on 31 January 2023.

Mercedes O. Chut for petitioner-appellant Guilford County Department of Health and Human Services.

Matthew D. Wunsche, GAL Appellate Counsel, for appellant Guardian ad Litem.

Benjamin J. Kull for respondent-appellee father.

Leslie Rawls for respondent-appellee mother.

DIETZ, Justice.

In 2019, the trial court adjudicated nine-year-old Margaret as an abused and neglected juvenile and adjudicated Margaret's two younger siblings as neglected juveniles.

Respondents, who are Margaret's mother and stepfather, admitted that they whipped Margaret with a belt, leaving marks and bruises on her back and neck; forced Margaret to stand in the corner for many hours at a time; and made Margaret sleep on the bare floor. Respondents told social workers that they took these actions to address Margaret's misbehavior, but also admitted that they imposed this discipline—including the whippings with a belt—day after day for weeks or perhaps even months. Respondents also insisted to social workers that their actions were appropriate and that they would continue to discipline Margaret in this manner until her behavior improved.

On appeal, the Court of Appeals reversed the trial court's adjudications, holding that the trial court improperly admitted some hearsay evidence. The court held that the trial court's reasoning was so "heavily reliant and intertwined with" the hearsay evidence that the proper remedy was to vacate the trial court's order and remand for a new hearing with respect to Margaret. *In re A.J.L.H.*, 275 N.C. App. 11, 23 (2020). The Court of Appeals also ordered the trial court to dismiss the petitions directed at Margaret's younger siblings. *Id.* at 24. Finally, the Court of Appeals instructed the trial court that, if it once again adjudicated Margaret as abused or neglected, the trial court must "order generous and increasing visitation between Margaret and her mother." *Id.* at 25.

We allowed discretionary review to reaffirm the proper role of an appellate court in reviewing a trial court's adjudication and disposition in a juvenile proceeding. As explained below, if the reviewing court determines that there are findings unsupported by the record, the reviewing court simply disregards those findings and examines whether the remaining findings support the trial court's determination. The reviewing court should not speculate about how "heavily" the trial court might have relied on one finding as opposed to another. Likewise, the best interests determination during the disposition phase is a matter left to the sound discretion of the trial court. In the rare instances when a reviewing court finds an abuse of that discretion, the proper remedy is to vacate and remand for the trial court to exercise its discretion. The reviewing court should not substitute its own discretion for that of the trial court.

Applying these principles here, we hold that the trial court's order contains sufficient findings, supported by clear, cogent, and convincing evidence, to support the court's adjudications of Margaret and her two siblings. We therefore reverse the decision of the Court of Appeals and remand for that court to properly address respondents' arguments concerning the disposition order.

Facts and Procedural History

Respondent-mother is the mother of Margaret, Chris, and Anna.[1] Respondent-father lives with respondent-mother and the children but is the biological father only of the youngest child, Anna. The fathers of Margaret and Chris are not parties to this appeal.

In May 2019, the Guilford County Department of Health and Human Services received a report of inappropriate discipline of Margaret. According to the report, Margaret "became extremely upset" following an incident at school and told school personnel that "she would be getting a whipping from her step-father just like she had done the previous day." The report noted that there were three marks on Margaret's back "where the skin was broken and appeared to be from a belt mark" as well as red marks on Margaret's arms. The report further indicated that respondent-mother arrived at the school and stated that Margaret "was going to be punished again when she went home" and that Margaret "was afraid to go home."

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1. We use pseudonyms to protect the identities of the juveniles and for ease of reading.

The next day, DHHS received a second report that Margaret had a new injury on the upper part of her back or neck "that appeared to be like a silver dollar." Margaret explained that she "was hit" but would not give any details. Margaret was shaking and hiding under a desk, and she explained that she did not want to go home because "they" were "going to hurt me."

In response to this report, a social worker, Lisa Joyce, went to Margaret's school that day to speak with her. Joyce found Margaret under a desk in the school counselor's office. Margaret appeared nervous and told Joyce that she was afraid to go home. Margaret told Joyce that respondent-father hit her with a belt buckle, causing the marks on her back, and that respondents punished her by making her sleep on the floor without covers and stand in the corner for hours at a time. Joyce observed marks on Margaret's lower back and at the base of her neck, consistent with the two reports.

After speaking to Margaret, Joyce met with respondent-mother to discuss the allegations. Respondent-mother stated that Margaret "has been lying a lot lately" and that she knew about the marks on Margaret's back. She explained that the marks were "from the disciplinary action that she had asked [respondent-father] to perform" but that the marks were "accidental" due to Margaret moving around and causing respondent-father to hit her back instead of her buttocks area.

Respondent-mother also told Joyce "that she does take the bed privileges away for lying, that she does make [Margaret] stand in the corner from about 3:30 PM to around 6:00 PM," and that after stopping for dinner, "the child goes back to standing in the corner until it's bedtime." When asked about the frequency of punishment, respondent-mother stated "that recently it had been occurring about every day" due to Margaret's behavior. When Joyce expressed the view that the discipline seemed "extreme to be using on the child," respondent-mother responded that she did not feel like what she was doing was wrong and she "felt like that this was appropriate."

Joyce also spoke with respondent-father. He reported to Joyce that he had physically disciplined Margaret in the days leading up to the DHHS reports and that he did so to "discourage the child from lying." Respondent-father also confirmed that Margaret "is made to stand in the corner for two to three hours at a time" and "made to sleep on the floor" as additional forms of discipline. When asked how often these disciplinary actions were happening, respondent-father stated that "it had been occurring a lot" in the past two months. Joyce asked

whether respondent-father thought the practices were appropriate, and he responded that "he didn't see anything wrong with the disciplinary practices that they were using."

DHHS entered into a safety plan with respondents, under which Margaret was placed with her maternal grandmother. Chris and Anna remained in the home with respondents. Respondent-mother was charged with misdemeanor child abuse, and respondent-father was charged with assault on a child under the age of twelve in connection with their discipline of Margaret.

Between May and August 2019, DHHS social workers made home visits to check on Chris and Anna. They found no issues of concern. On 8 August 2019, DHHS held a meeting with respondents. The DHHS staff members explained their concerns about Margaret's discipline to respondents; however, respondents continued to defend their discipline of Margaret, with respondent-mother explaining that she was trying to "teach" Margaret that if Margaret continued misbehaving "she could end up in jail." Respondents did not commit to stop disciplining Margaret as they had in the past and did not acknowledge that these repeated, daily disciplinary measures—including whippings with a belt—were inappropriate for a nine-year-old child.

The following day, DHHS filed juvenile petitions alleging that Margaret was abused and neglected and that three-year-old Chris and three-month-old Anna were neglected. DHHS obtained custody of all three children.

After a hearing in which the trial court received evidence concerning the facts described above, the court entered an adjudication and disposition order on 13 December 2019. In the order, the trial court adjudicated Margaret an abused and neglected juvenile and adjudicated Chris and Anna as neglected juveniles. In its disposition order, the court placed Margaret with a relative and Chris and Anna in foster care. The court determined that it was not in the children's best interests for respondents to have any visitation with the children while they worked on their case plans with DHHS. The court also scheduled a review hearing for several months after the date of the order.

Respondents timely appealed. The Court of Appeals vacated and remanded the adjudication and disposition order in a written opinion. *In re A.J.L.H.*, 275 N.C. App. 11, 25 (2020). After holding that some of the trial court's findings relied on inadmissible hearsay statements from Margaret, the Court of Appeals vacated Margaret's adjudication. The court explained that it was "apparent the trial court's abuse adjudication

is heavily reliant and intertwined with its findings based on inadmissible evidence." *Id.* at 23.

The court remanded the matter "for a new hearing at which the trial court should make findings on properly admitted clear and convincing evidence and make new conclusions of whether" Margaret is an abused or neglected juvenile. *Id.* The Court of Appeals also held that the trial court's adjudications of Chris and Anna were "based solely on its conclusion Margaret was purportedly abused and neglected" and reversed the trial court's adjudication for those children. *Id.* at 24. Finally, although the court's decision to vacate the adjudication order meant there was no need to address the disposition order, the Court of Appeals held that, if the trial court again adjudicates Margaret as abused or neglected, the trial court must "order generous and increasing visitation between Margaret and her mother." *Id.* at 25.

DHHS timely filed a petition for discretionary review under N.C.G.S. § 7A-31 and the guardian ad litem joined the request for review. This Court allowed the petition.

Analysis

We allowed discretionary review on sixteen separate issues in this appeal. We begin by addressing a series of issues concerning the Court of Appeals' analysis of the findings of fact and underlying evidence in the record. We then turn to the Court of Appeals' analysis of the disposition order and its mandate to the trial court to award "generous and increasing" visitation with Margaret on remand.

I. Hearsay evidence

[1] We first address the Court of Appeals' hearsay analysis. The Court of Appeals rejected a number of findings by the trial court—all of which are located in Finding of Fact 14 in the trial court's order—on the ground that these findings relied on inadmissible hearsay. These findings address statements Margaret made to school personnel and to Lisa Joyce, the social worker who interviewed Margaret.

The relevant information in Margaret's out-of-court statements is almost entirely duplicative of other evidence admitted in the case—mainly because Joyce questioned respondents about Margaret's statements and respondents confirmed they were accurate. But the Court of Appeals nevertheless held that it was "apparent the trial court's abuse adjudication is heavily reliant and intertwined with its findings based on inadmissible evidence." *In re A.J.L.H.*, 275 N.C. App. 11, 23 (2020). Thus, the Court of Appeals vacated and remanded the trial court's adjudication

concerning Margaret "for a new hearing at which the trial court should make findings on properly admitted clear and convincing evidence." *Id.*

The Court of Appeals' analysis conflicts with this Court's precedent in several ways. First, "out-of-court statements offered for purposes other than to prove the truth of the matter asserted are not considered hearsay." *State v. Call*, 349 N.C. 382, 409 (1998). Among the many hearsay exceptions are "statements of one person to another to explain subsequent actions taken by the person to whom the statement was made." *Id.*

Here, when respondents objected to the testimony concerning Margaret's out-of-court statements, counsel for the guardian ad litem explained that "this is all part of the reporting process and the investigation process which is not considered offered for the truth of the matter asserted." In other words, counsel argued that this testimony established *why* DHHS began to investigate respondents and to ask them specific questions about Margaret's abuse. Margaret's statements are admissible for this purpose, which is not to prove the truth of Margaret's own out-of-court statements. *Id.*

To be sure, the trial court never *expressly* stated that it was admitting this evidence solely for this permissible purpose. But a trial court's "ruling on an evidentiary point will be presumed to be correct unless the complaining party can demonstrate that the particular ruling was in fact incorrect." *State v. Herring*, 322 N.C. 733, 749 (1988). Nothing in the record indicates that the trial court admitted this testimony to impermissibly prove the truth of the matter, as opposed to permissibly establishing the sequence of events that led Joyce to interview respondents. Thus, the Court of Appeals should not have presumed that the trial court's ruling was erroneous and should have instead treated these findings as non-substantive evidentiary findings.

In any event, the Court of Appeals also erred by declining to examine the remaining evidentiary findings. Instead, the Court of Appeals held that the trial court's "adjudication is heavily reliant and intertwined with its findings based on inadmissible evidence" and therefore vacated and remanded the case for a new hearing and new fact findings. *In re A.J.L.H.*, 275 N.C. App. at 23.

Again, this conflicts with our precedent. When reviewing findings of fact in a juvenile order, the reviewing court "simply disregards information contained in findings of fact that lack sufficient evidentiary support" and examines whether the remaining findings support the trial court's determination. *In re A.C.*, 378 N.C. 377, 394 (2021). The reviewing

court should not speculate about how "heavily" the trial court might have relied on one finding as opposed to another. The sole question for the reviewing court is whether the trial court's conclusions of law are supported by adequate findings and whether those findings, in turn, are supported by clear, cogent, and convincing evidence. *In re E.H.P.*, 372 N.C. 388, 392 (2019). We thus turn to examining the trial court's substantive evidentiary findings and whether they support the trial court's adjudications of abuse and neglect.

II. Findings of fact concerning Margaret

[2] We first address the trial court's adjudication of Margaret as an abused and neglected juvenile.

Under section 7B-101, an abused juvenile is defined as one whose parent or caretaker

> a. Inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means;
>
> b. Creates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means;
>
> c. Uses or allows to be used upon the juvenile cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior . . . .

N.C.G.S. § 7B-101(1) (2021).

DHHS alleged in the petition that Margaret was an abused juvenile under each of these three grounds. "There is a commonality present in these criteria. Each definition states that a juvenile is abused when a caretaker harms the juvenile in some way, allows the juvenile to be harmed, or allows a substantial risk of harm. The harm may be physical; emotional; or some combination thereof." *In re M.G.*, 363 N.C. 570, 573 (2009). At its core, "the nature of abuse, based upon its statutory definition, is the existence or serious risk of some nonaccidental harm inflicted or allowed by one's caretaker." *Id.* at 574.

Applying this standard to the evidentiary findings of the trial court, the court's adjudication of abuse is proper. First, the trial court found that Lisa Joyce, the DHHS social worker, investigated a child protective services report that Margaret "had three marks on her mid back where the skin was broken from what appeared to be a belt mark" and, later,

a "new injury" that was "a red bruise a little larger than a silver dollar on her lower neck between her shoulders." When Joyce examined Margaret at school, she saw "marks on her lower back and a mark near her neck area" as described by the reports.

Joyce then interviewed respondents about Margaret's injuries. The trial court recounted their statements in its findings. Both respondents confirmed that they caused the injuries to Margaret. Respondent-mother told Joyce that she "did physically discipline [Margaret] by whipping her" and that respondent-father "also physically disciplined her." Respondent-mother further explained that Margaret's injuries were "an accident because [Margaret] was moving around while [respondent-father] was trying to discipline her."

Respondent-mother also confirmed that, in addition to whipping Margaret with a belt, respondents disciplined Margaret by forcing her to stand in the corner for many hours at a time and to sleep on the floor. Respondent-mother explained that this discipline "did not normally occur every day, but had been occurring every day lately."

Respondent-father similarly told Joyce that he often "physically disciplined [Margaret] with a belt." He also confirmed that respondents often forced Margaret to "stand in the corner for 2-3 hours" and made her sleep on the floor. He told Joyce that this discipline had been "occurring a lot" for the last two months.

All of these findings are supported by clear, cogent, and convincing evidence in the record—largely from respondents' own admissions to Joyce as she investigated the reports of abuse. Moreover, these findings readily are sufficient to show that respondents used or allowed to be used on Margaret "cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior." N.C.G.S. § 7B-101(1)(c).

To be sure, when used sparingly, none of respondents' chosen forms of discipline—physically striking a child, forcing a child to stand for hours in a corner, or forcing a child to sleep on the floor—would *compel* a finding of abuse. But the trial court found that respondents did *not* use this discipline sparingly. They imposed all this discipline—whipping Margaret with a belt, making her stand in a corner for hours on end, and forcing her to sleep on the bare floor without covers—for days and days at a time, possibly as long as two months. That is abuse under our juvenile code. *Id.*

The trial court also adjudicated Margaret as a neglected juvenile. This, too, is a proper adjudication. Among other grounds, a juvenile may

be adjudicated as neglected when the juvenile "lives in an environment injurious to the juvenile's welfare." *Id.* § 7B-101(15) (2019) (amended 2021).

Here, the trial court found that both respondents told Joyce that they "did not see anything wrong" or "had no concerns" with this discipline of Margaret. Moreover, even several months after DHHS became involved, in response to DHHS workers' concerns about the discipline, respondents maintained that their disciplinary approach was appropriate and was necessary to "teach" Margaret that her misbehavior was wrong. These findings are supported by clear, cogent, and convincing evidence in the record and support the trial court's finding that respondents created "an environment injurious to the juvenile's welfare." *Id.*

III. Findings of fact concerning Chris and Anna

[3] We next address the trial court's adjudication of Chris and Anna as neglected juveniles. The neglect statute provides that in "determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile . . . has been subjected to abuse or neglect by an adult who regularly lives in the home." *Id.*

An adjudication of neglect cannot be "solely based upon previous Department of Social Services involvement relating to other children." *In re J.A.M.*, 372 N.C. 1, 9 (2019). Instead, the trial court must find "the presence of other factors to suggest that the neglect or abuse will be repeated." *Id.* at 9–10.

Here, the Court of Appeals reversed the trial court's adjudication of neglect because "[n]othing in the record indicates Chris or Anna had been harmed or were at risk of being harmed" and that, in the Court of Appeals' view, the trial court "concluded Chris and Anna were neglected based solely on its conclusion Margaret was purportedly abused and neglected." *In re A.J.L.H.*, 275 N.C. App. at 24.

This is not an accurate characterization of the trial court's findings and conclusions with respect to Chris and Anna. Although a trial court cannot rely solely on abuse of another child in the home as a basis for a neglect adjudication, we have emphasized that a trial court "need not wait for actual harm to occur to the child if there is a substantial risk of harm to the child in the home." *In re T.S., III*, 178 N.C. App. 110, 113 (2006), *aff'd per curiam*, 361 N.C. 231 (2007). This is particularly true for very young children, where the evaluation "must of necessity be predictive in nature, as the trial court must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case." *In re J.A.M.*, 372 N.C. at 9.

When determining the weight to be given to a finding of abuse of another child in the home, a critical factor is whether the respondent indicates a willingness to "remedy the injurious environment that existed" with respect to the older child. *In re A.W.*, 377 N.C. 238, 249 (2021). Facts that can demonstrate a parent's unwillingness to remedy the injurious environment include failing to acknowledge the older child's abuse or insisting that the parent did nothing wrong when the facts show the parent is responsible for the abuse. *See id.* at 248–49; *In re J.A.M.*, 372 N.C. at 10.

Here, the trial court adjudicated Margaret abused based on findings of cruel and grossly inappropriate discipline by respondents, as explained above. The trial court also found that respondents refused to acknowledge that this discipline was inappropriate and maintained that it was necessary to address Margaret's behavioral problems. Indeed, the trial court expressly found that, in discussions with social workers, respondent-father "never disclosed that he would not discipline [Chris and Anna] in the same manner that he had discipline[d] [Margaret]." This finding is supported by the social worker's testimony in the record.

Under our precedent, the trial court was not required to wait for Chris and Anna to reach the same age as Margaret before determining that they, too, face a substantial risk of harm from these cruel and inappropriate disciplinary measures. The key "other factor" in this case, beyond the abuse of Margaret, is respondents' inability to recognize that it *was* abuse, and their corresponding inability to commit to never repeating it. *In re J.A.M.*, 372 N.C. at 9. As in *In re J.A.M.* and *In re A.W.*, the trial court in this case found that respondents failed to acknowledge their role in the abuse determination of an older sibling and would not acknowledge that their conduct was wrong. *Id.* at 10. In light of these findings, the trial court properly determined by clear, cogent, and convincing evidence that there was a substantial risk that Chris and Anna likewise faced harm if they remained in the home and, as a result, properly adjudicated Chris and Anna as neglected juveniles. *Id.* at 9.

IV. Disposition order and visitation ruling

[4] Finally, we address the trial court's disposition order. Because the Court of Appeals vacated and remanded the adjudication order with respect to all three juveniles, there was no need for the Court of Appeals to address the disposition phase. But the Court of Appeals chose to address the disposition anyway. Specifically, the Court of Appeals instructed the trial court that, if the court again adjudicated Margaret as abused or neglected, the trial court must "order generous and increasing

visitation between Margaret and her mother." *In re A.J.L.H.*, 275 N.C. App. at 25.

This instruction to the trial court is improper and beyond the role of an appellate court. A trial court order "that removes custody of a juvenile from a parent, guardian, or custodian or that continues the juvenile's placement outside the home shall provide for visitation that is in the best interests of the juvenile consistent with the juvenile's health and safety, including no visitation." N.C.G.S. § 7B-905.1(a) (2021).

The assessment of the juvenile's best interests concerning visitation is left to the sound discretion of the trial court and "appellate courts review the trial court's assessment of a juvenile's best interests solely for an abuse of discretion." *In re K.N.L.P.*, 380 N.C. 756, 759 (2022). "Under this standard, we defer to the trial court's decision unless it is manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Id.* Moreover, even in the rare cases in which we determine that a trial court acted arbitrarily and unreasonably, the remedy is to vacate the disposition order but to "express no opinion as to the ultimate result of the best interests determination on remand, as that decision must be made by the trial court." *In re R.D.*, 376 N.C. 244, 264 (2020).

On remand, the Court of Appeals should apply this standard to the disposition order. The Court of Appeals should not substitute its own judgment for that of the trial court; if it determines that the trial court's order meets the high bar for abuse of discretion, the appropriate remedy is to explain how the trial court abused its discretion, vacate the disposition order, and remand for the trial court to enter a new order in the exercise of the trial court's discretion. *Id.*

Conclusion

The trial court properly adjudicated Margaret as an abused and neglected juvenile and properly adjudicated Chris and Anna as neglected juveniles. The Court of Appeals erred by vacating or reversing those adjudications. We reverse the decision of the Court of Appeals and remand for that court to address respondents' remaining arguments concerning the disposition order.[2]

REVERSED AND REMANDED.

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2. The Court of Appeals opinion also contains a section titled "Parental Rights" that discusses respondents' constitutionally protected rights to parent their children. This Court repeatedly has held that this constitutional issue cannot be addressed on appeal unless properly preserved by the parties. *E.g.*, *In re R.D.*, 376 N.C. at 253; *In re J.N.*, 381 N.C.

Justice MORGAN concurring in part and dissenting in part.

While I concur with the majority's reversal of the portion of the Court of Appeals decision which vacated and remanded the trial court's adjudication and disposition order establishing that Margaret was an abused and neglected juvenile plus mandating the trial court's potential determinations regarding visitation, in my view the lower appellate court was correct in opining that "[n]othing in the record indicates Chris or Anna had been harmed or were at risk of being harmed." *In re A.J.L.H.*, 275 N.C. App. 11, 24 (2020). Therefore, I respectfully dissent from the conclusion reached by the majority to uphold the trial court's adjudication of Chris and Anna as neglected juveniles.[1] Accordingly, I would affirm the Court of Appeals decision to the extent that it reversed the trial court's conclusion that Chris and Anna were neglected juveniles.

While in "determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile . . . lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home," N.C.G.S. § 7B-101(15) (2021), it is well established that "[a] court may not adjudicate a juvenile neglected *solely* based upon previous Department of Social Services involvement relating to other children. Rather, . . . the clear and convincing evidence in the record must show *current circumstances* that present a risk to the juvenile." *In re J.A.M.*, 372 N.C. 1, 9 (2019) (emphases added). The abuse or neglect of a juvenile, standing alone, cannot support an allegation of neglect for the juvenile's siblings; for allegations of the neglect of siblings of an abused and neglected juvenile to be substantiated, there must also appear " 'other factors' indicating a present risk to" a juvenile for him or her to be adjudicated as neglected. *Id.* at 10.

The majority in the present case cites and quotes *In re A.W.*, 377 N.C. 238, 248–49 (2021) for the proposition that "[w]hen determining the weight to be given to a finding of abuse of another child in the home, a critical factor is whether the respondent [parent] indicates a willingness to 'remedy the injurious environment that existed' with respect to the

131, 133 (2022). Here, respondents did not assert a constitutional challenge on this basis in the trial court and did not raise the issue in their appellate briefing at the Court of Appeals. Accordingly, on remand, the Court of Appeals should not address this constitutional issue.

1. A neglected juvenile is one "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; . . . or who lives in an environment injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15) (2019).

older child." In *In re A.W.*,[2] the child Anna was brought to the emergency room of a hospital at the age of two months with a severe traumatic brain injury and other significant injuries—none of which could be explained by her parents—and Anna died four days later as a result of blunt force injuries to her head. 377 N.C. at 239–40. Almost exactly one year later, A.W.—known as Abigail in this proceeding—was born to respondent-parents. The local Department of Social Services (DSS) obtained nonsecure custody of Abigail and filed a petition alleging that Abigail—much like the juveniles Chris and Anna in the present case with regard to their older sibling Margaret—

> was a neglected juvenile in that her sibling, Anna, died in the care of respondents as a result of suspected abuse and neglect. Respondents reported they were the only caregivers and gave no explanation for Anna's injuries. Respondent-father was incarcerated on charges related to Anna's death, and respondent-mother's involvement in Anna's death had not been ruled out. Because of the nature of Anna's injuries and death, Abigail was at substantial risk of abuse and neglect if she remained in respondents' care and supervision.

Id. at 241. DSS then filed a petition to terminate the mother's parental rights, alleging therein that "respondent-mother had neglected Abigail, and there was no indication that she was willing or able to correct the conditions that lead [sic] to Anna's death and the injurious environment that was present in her home, and respondent-mother was incapable of providing for the proper care and supervision of Abigail such that Abigail was a dependent juvenile." *Id.* (citing N.C.G.S. § 7B-1111(a)(1), (a)(6) (2019)). Ultimately, the trial court entered an order "concluding that grounds existed to terminate respondent-mother's parental rights in Abigail pursuant to N.C.G.S. § 7B-1111(a)(1) and (6) . . . [and] determined that it was in Abigail's best interests that respondent-mother's parental rights be terminated." *Id.* at 242.

On appeal, this Court considered the evidence adduced at trial and the trial court's subsequent findings of fact, particularly with regard to the mother's representation to law enforcement investigators of her proffered theory to the doctor who treated Anna's injuries that the

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2. Pseudonyms are used to protect the identities of children in juvenile cases and for ease of reading.

parents' large dog could have caused them, along with the mother's later deduction that the father "wasn't holding [Anna] right, and holding her with his one arm, and she slipped out of his arms." *Id.* at 246. We noted that "[i]n neglect cases *involving newborns*, 'the decision of the trial court must of necessity be predictive in nature, as the trial court must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case.' " *Id.* at 248 (emphasis added) (quoting *In re J.A.M.*, 372 N.C. at 9). This Court then specifically emphasized that

> although the trial court considered the fact that Abigail lived in the same home where Anna died as a result of an act of one or both respondents, this was not the sole basis for the trial court's conclusion that Abigail was a neglected juvenile. Rather, the trial court also found the presence of other factors demonstrating that Abigail presently faced a substantial risk in her living environment: respondent-mother continued to provide the implausible explanation that her dog caused Anna's head injury; respondent-mother failed to provide an explanation that accounted for Anna's other injuries; there were no means by which the court could determine what caused Anna's death and "thereby insure the safety of [Abigail]"; respondent-mother continued to be in a relationship with respondent-father; and respondents colluded to deceive the court about the status of their relationship. In conjunction with the fact that Anna died in the home at the hands of one or both respondents, the findings of respondent-mother's ongoing failure to recognize and accept the cause of Anna's injuries and resulting death, and her continued relationship with respondent-father, establish that respondent-mother was unable to ensure Abigail's safety and that Abigail was at a substantial risk of impairment. Respondent-mother did not remedy the injurious environment that existed for Anna, and the trial court properly concluded that Abigail was a neglected juvenile.

Id. at 248–49.

In my view, the Court of Appeals was correct in the instant case in determining that the trial court's adjudication of then-three-year-old Chris and six-month-old Anna as neglected was erroneous because that

decision was based *solely* upon the trial court's adjudication of their then-nine-year-old sibling Margaret, who lived in the same household, to be an abused and neglected juvenile. The lower appellate court correctly reached this determination, as I see it, based upon the forum's express and accurate determination, consistent with our directive in *In re J.A.M.*, that there were no other factors which existed in addition to Margaret's adjudication as abused and neglected which constituted a risk to the children Chris and Anna that emanated from current circumstances existing in the household at the time that Chris and Anna were adjudicated as neglected. Conversely, my distinguished colleagues in the majority unfortunately ignore the requirement for "the presence of other factors to suggest that the neglect or abuse will be repeated" which we established in *In re J.A.M.*, 372 N.C. at 9–10 (extraneity omitted), in their haste to cobble together various principles from our juvenile case opinions which are inapposite here, including the majority's regrettable conflation of "predictive" behavior with the majority's speculative projections and the majority's specter of "substantial risk of harm" as we identified for newborn juveniles in *In re A.W.*, as compared to the majority's convenient approach to siblings here who spanned ages ranging from post-toddler to preteen.

I respectfully concur in part and dissent in part.

Justice EARLS joins in this concurring in part and dissenting in part opinion.

IN RE G.C.

[384 N.C. 62 (2023)]

IN THE MATTER OF G.C.

No. 241A22

Filed 6 April 2023

Child Abuse, Dependency, and Neglect—neglect—injurious environment—death of sibling from suspected neglect—other siblings in DSS custody—ultimate findings

The trial court properly adjudicated a minor child as neglected based on its ultimate findings that the minor child lived in an environment injurious to her welfare and did not receive proper care or supervision pursuant to N.C.G.S. § 7B-101(15), including that the minor child lived with her mother, who had previously been convicted of misdemeanor child abuse; the minor child's older siblings had previously been adjudicated abused, neglected, and dependent; and the minor child's younger sibling had died from asphyxiation after the mother left him alone for three hours in his crib with blankets, even though the parents had previously been instructed on proper sleeping arrangements for infants. Therefore, the Court of Appeals erred by reversing the trial court's order for failure to make a specific written finding of a substantial risk of impairment. Further, the Supreme Court clarified that the term "ultimate fact" means "a finding supported by other evidentiary facts reached by natural reasoning," and overturned prior caselaw that did not adhere to this definition.

Justice EARLS dissenting.

Justice MORGAN joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 284 N.C. App. 313 (2022), vacating an order entered on 19 October 2021 by Judge Cheri Siler Mack in District Court, Cumberland County, and remanding for additional adjudicatory findings. Heard in the Supreme Court on 31 January 2023.

Patrick A. Kuchyt for petitioner-appellant Cumberland County Department of Social Services.

McGuireWoods LLP, by Anita M. Foss, for appellant Guardian ad Litem.

Sean P. Vitrano for respondent-appellee father.

BARRINGER, Justice.

In this matter, we consider whether the Court of Appeals erred by determining that the trial court's findings of fact did not support its conclusion adjudicating Glenda[1] a neglected juvenile. Appellate courts review de novo whether the findings of fact support a conclusion of law adjudicating a minor a neglected juvenile. *In re K.S.*, 380 N.C. 60, 64 (2022). Having reviewed the trial court's findings of fact and this Court's precedent, we conclude that the Court of Appeals erred and accordingly reverse the Court of Appeals' decision.

I. The Trial Court's Adjudication and Disposition Order

After an adjudication hearing in August 2021, the trial court found as follows: Glenda's mother has two older children who have been in the custody of Cumberland County Department of Social Services (DSS) since 2017. In May 2018, the older children were adjudicated abused, neglected, and dependent juveniles based on one child's bruises and severe malnourishment. Glenda's mother and that child's father had failed to feed the child. Given the circumstances that existed at the time of the adjudication hearing in those cases, the trial court in that matter relieved DSS of reunification efforts pursuant to N.C.G.S. § 7B-901(c)(1)(b) and (f). As to her two older children, Glenda's mother was also convicted of misdemeanor child abuse and placed on probation. The older children's father was convicted of felony child abuse.

In September 2018, Glenda's mother gave birth to Glenda. Glenda's birth certificate lists respondent as her father.[2] DSS provided case management services to Glenda's mother and respondent from December 2018 to August 2019. During that time, Glenda's mother and respondent abided by all safety plans, and Glenda's mother completed services as ordered by the trial court in the older children's cases.

In December 2019, Glenda's mother gave birth to another child, Gary, to whom respondent is the father. Glenda's mother, respondent, Gary, and Glenda lived together in the same residence. Respondent provided care and supervision for both children.

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

2. Respondent is not the father of the two older children.

On 12 March 2020, a few months after Gary's birth, Glenda's mother placed Gary in his Pack 'n Play and propped a bottle for him to feed. Around 4:15 p.m. Glenda's mother burped Gary, laid a folded large, fuzzy, thick blanket in the bottom of his Pack 'n Play, and placed Gary on his side on the blanket in his Pack 'n Play. Two other smaller blankets were also in the Pack 'n Play. Over three hours later, around 7:38 p.m., Glenda's mother checked on Gary and found him unresponsive. Glenda's mother picked up Gary and ran to the paternal grandmother's house for help. The paternal grandmother is a nurse, and she told Glenda's mother to call 911. Glenda's mother then called 911. After arriving at respondent and Glenda's mother's home, Emergency Medical Services pronounced Gary dead. Emergency Medical Services observed Gary "foaming from the nose and the mouth, indicative of asphyxiation." The police officers who arrived on the scene also noticed two used baby bottles and several blankets in the Pack 'n Play. Respondent was at work when these events occurred.

The medical examiner's autopsy report stated that "*sleeping in an environment with blankets while less than one year of age is a risk factor for an accidental asphyxial event. An asphyxial event cannot be ruled out based on the autopsy findings*." Both respondent and Glenda's mother had been instructed about proper sleeping arrangements for children.

After Gary's death, respondent and Glenda's mother agreed to allow Glenda to be temporarily placed with Glenda's paternal grandmother. Thereafter, DSS filed a petition alleging that Glenda was a neglected juvenile. Glenda was approximately one and a half years old. The trial court found that Glenda "lived in an environment injurious to [her] welfare; and that [she] does not receive proper care, supervision, or discipline from [her] parent, guardian, [or] custodian."

Based on the foregoing findings of fact, the trial court concluded as a matter of law that Glenda is a neglected juvenile within the meaning of N.C.G.S. § 7B-101(15).

Respondent appealed. Glenda's mother also appealed the adjudication and disposition order but later moved to dismiss her appeal. The Court of Appeals allowed Glenda's mother's motion to dismiss her appeal.

II. The Court of Appeals' Decision

The Court of Appeals majority vacated the trial court's adjudication and disposition order and remanded on the ground that "the trial court

made no finding or determination Glenda suffered any physical, mental, or emotional impairment or that Glenda was at a substantial risk of such impairment as a consequence of any failure to provide proper care, supervision, or discipline to support the adjudication of Glenda as a neglected juvenile." *In re G.C.*, 284 N.C. App. 313, 319 (2022) (citing *In re J.A.M.*, 372 N.C. 1, 9 (2019)). According to the majority, unlike this Court's decision in *In re J.A.M.*, the trial court "failed to find 'the presence of other factors' indicating a present risk *to Glenda* when it reached its conclusion that *Glenda* was neglected as a matter of law." *Id.* (quoting *In re J.A.M.*, 372 N.C. at 10).

The dissent disagreed with the majority's holding and reasoning. *Id.* at 320–21 (Griffin, J., dissenting). The dissent acknowledged that this Court's precedent in *In re J.A.M.* precluded an adjudication of neglect solely based on previous department of social services involvement with other children. *Id.* at 320. According to the dissent, "other factors" suggesting that neglect will be repeated are needed. *Id.* at 320 (quoting *In re J.A.M.*, 372 N.C. at 9). However, unlike the majority, the dissent concluded that there were other factors present because the trial court also relied on and made "specific findings relating to the circumstances of Gary's death, a child who DSS had no previous involvement with, under [m]other's supervision, in the home that Glenda also resided in." *Id.* at 320. According to the dissent, "the evidence is clear that Glenda is at a substantial risk of harm in [respondent and Glenda's mother's] home based upon the trial court's findings about [m]other's older children, showing a history of neglecting children, and the findings detailing the circumstances around Gary's death, evidencing current issues with supervision and care in [respondent and Glenda's mother's] home." *Id.* at 321.

III. Standard of Review

"An appellate court reviews a trial court's adjudication to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re K.S.*, 380 N.C. at 64 (cleaned up). "A trial court's finding of an ultimate fact is conclusive on appeal if the evidentiary facts reasonably support the trial court's ultimate finding [of fact]."[3] *State v. Fuller*, 376 N.C. 862, 864 (2021).

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3. In prior cases, this Court has misused the term "ultimate fact," saying that an "ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact," *In re N.D.A.*, 373 N.C. 71, 76 (2019) (quoting *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 491 (1937)), which is contrary to decades of this Court's well-established precedent. Writing for a unanimous Court in 1951, Justice S. J. Ervin Jr. explained:

"Where no [objection is made] to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *In re K.S.*, 380 N.C. at 64 (quoting *Koufman v. Koufman*, 330 N.C. 93, 97 (1991)).

Appellate courts review a trial court's conclusion of law concerning adjudication de novo. *Id.* In this context, de novo review requires the appellate court to "determin[e] whether or not, from its review, the findings of fact supported a conclusion of neglect." *Id.* at 65. In other words, the appellate court "freely substitutes" its conclusion for the trial court's conclusion concerning whether the findings of fact support or do not support that Glenda is a neglected juvenile. *See In re T.M.L.*, 377 N.C. 369, 375 (2021).

IV. Analysis

We begin our analysis with the definition of "neglected juvenile" as set forth by the legislature in N.C.G.S. § 7B-101(15). The relevant provisions for this matter are as follows:

> There are two kinds of facts: Ultimate facts, and evidentiary facts. Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts. . . .
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> . . . .
>
> . . . Ultimate facts are those found in that vaguely defined area lying between evidential facts on the one side and conclusions of law on the other. In consequence, the line of demarcation between ultimate facts and legal conclusions is not easily drawn. An ultimate fact is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts. Whether a statement is an ultimate fact or a conclusion of law depends upon whether it is reached by natural reasoning or by an application of fixed rules of law.
>
> When the statements of the judge are measured by this test, it is manifest that they constitute findings of ultimate facts, *i.e.*, the final facts on which the rights of the parties are to be legally determined.

Woodard v. Mordecai, 234 N.C. 463, 470, 472 (1951) (citations omitted). To avoid confusion in the future, we overturn our prior caselaw to the extent it misuses the term "ultimate fact" and clarify that, as Justice Ervin wrote in *Woodard* and consistent with well-established precedent, an ultimate finding is a finding supported by other evidentiary facts reached by natural reasoning.

> (15) Neglected juvenile.—Any juvenile less than 18 years of age . . . whose parent, guardian, custodian, or caretaker does any of the following:
>
> a. Does not provide proper care, supervision, or discipline.
>
> . . . .
>
> e. Creates or allows to be created a living environment that is injurious to the juvenile's welfare.
>
> . . . .
>
> In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

N.C.G.S. § 7B-101(15) (2021).

Here, the trial court specifically found that Glenda "lived in an environment injurious to [her] welfare; and that [she] does not receive proper care, supervision, or discipline from [her] parent, guardian, [or] custodian." These findings are properly characterized as ultimate findings and satisfy the statutory definition of neglected juvenile.

The ultimate findings of fact that Glenda does not receive proper care, supervision, or discipline from her parents is supported by the trial court's evidentiary findings of fact and reached by natural reasoning from the evidentiary findings of fact. Specifically, Glenda lived in the same residence as Glenda's mother, respondent, and Gary. Respondent provided care and supervision for Glenda as he had for her brother Gary until his death. Glenda's mother had previously been convicted of misdemeanor child abuse, and her older children had previously been adjudicated abused, neglected, and dependent juveniles for reasons that included Glenda's mother's failure to feed one of the older children.

On 12 March 2020, respondent was at work, and only Glenda's mother was with Gary. That day, Glenda's mother left Gary, who was three months old, in his Pack 'n Play on his side with blankets for over three hours without supervision even though "*sleeping in an environment with blankets while less than one year of age is a risk factor for an accidental asphyxial event.*" When Glenda's mother did finally check on Gary around 7:38 p.m., she found Gary unresponsive. She responded

by running to the home of a relative, who was a nurse and lived nearby. Glenda's mother called 911 after the relative instructed her to do so. Gary was pronounced dead by Emergency Medical Services upon arrival at the residence. Emergency Medical Services observed Gary "foaming from the nose and the mouth, indicative of asphyxiation," and the medical examiner could not rule out an asphyxial event given the autopsy findings. Both respondent and Glenda's mother had been instructed about proper sleeping arrangements for children.

Although there is no mention of Glenda, who was approximately one and a half years old at the time, or her whereabouts on 12 March 2020 in the trial court's findings of fact, the foregoing evidentiary findings support the ultimate finding that Glenda does not receive proper care, supervision, or discipline from her parents and the conclusion of law that Glenda is a neglected juvenile. Subsection (15) of N.C.G.S. § 7B-101 provides that:

> In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

N.C.G.S. § 7B-101(15). Here, both relevant situations are present. First, Glenda lived in the home where Gary died as a result of suspected neglect, asphyxia on account of blankets in his Pack 'n Play and a lack of supervision and care. Second, Glenda lived in the home where Gary was neglected. He was placed in an injurious environment, a Pack 'n Play with blankets, in the home he shared with Glenda's mother, respondent, and Glenda. Further, the aforementioned neglect was not based on ignorance since Glenda's mother and respondent had been instructed on proper sleeping arrangements for children.

These facts reflect "current circumstances that present a risk" to Glenda, *In re J.A.M.*, 372 N.C. at 9, not "[a] prior and closed case with other children and a different father," *In re J.A.M.*, 259 N.C. App. 810, 822 (2018) (Tyson, J., dissenting); *see In re J.A.M.*, 372 N.C. at 9 (agreeing with dissenting opinion at the Court of Appeals). Thus, similarly to this Court's decision in *In re J.A.M.*, the adjudication of neglect in this matter is not based solely on the prior adjudication that Glenda's mother's older children were abused, neglected, and dependent juveniles. *See In re J.A.M.*, 372 N.C. at 10 ("Here, the prior orders entered into the record were not the sole basis for the trial court's decision. Rather, the

trial court also properly found 'the presence of other factors' indicating a present risk to J.A.M. when it reached its conclusion that J.A.M. was neglected as a matter of law.").

This Court did not hold in *In re J.A.M.* that trial courts must make a written "finding or determination" that each juvenile "suffered . . . physical, mental, or emotional impairment" or "was at a substantial risk of such impairment as a consequence of any failure to provide proper care, supervision, or discipline" to support the adjudication of a juvenile as a neglected juvenile, *In re G.C.*, 284 N.C. App. at 319; *see In re J.A.M.*, 372 N.C. at 9. Rather, this Court previously adopted this assessment from the Court of Appeals in *In re Stumbo* to clarify that the legislature did not intend that every act of negligence on the part of parents satisfies the definition of a neglected juvenile as set forth in N.C.G.S. § 7B-101(15). *In re Stumbo*, 357 N.C. 279, 283 (2003); *cf. Troxel v. Granville*, 530 U.S. 57, 68–69 (2000) (O'Connor, J., plurality opinion) ("[S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."). This assessment remains useful and remains the law—there must "be some physical, mental, or emotional impairment of the juvenile *or a substantial risk of such impairment* as a consequence of the failure to provide 'proper care, supervision, or discipline.' " *In re J.A.M.*, 372 N.C. at 9 (quoting *In re Stumbo*, 357 N.C. at 283).

However, to be clear, there is no requirement of a specific written finding of a substantial risk of impairment. As raised by DSS, a substantial risk of impairment is not contained in the statutory definition of neglect. *See* N.C.G.S. § 7B-101(15).[4] Rather, the trial court must make written findings of fact sufficient to support its conclusion of law of neglect. And in this matter, the trial court's written findings of fact support its conclusion that Glenda is a neglected juvenile.[5]

Given the foregoing, we conclude that the Court of Appeals erred by misconstruing and misapplying this Court's precedent in *In re J.A.M.* as raised by the dissent in the Court of Appeals and argued by the guardian

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4. While "substantial risk of serious physical injury" is found in the definition of "[a]bused juveniles," the legislature did not use similar language in the definition of "[n]eglected juvenile," further indicating that the legislature did not intend to require a finding of fact of substantial risk of impairment. *See* N.C.G.S. § 7B-101(1), (15) (2021).

5. To the extent any Court of Appeals' decision requires a written finding of fact by the trial court of substantial risk of impairment, such decisions are overruled.

ad litem and DSS and by vacating the trial court's order and remanding this matter when the findings of fact support the conclusion that Glenda is a neglected juvenile.

V. Conclusion

The Court of Appeals erred by requiring findings of fact from the trial court to adjudicate a juvenile neglected that are not required by statute or this Court's precedent. The Court of Appeals also appears to have discounted the statutes and our precedent that recognize that neglect of another juvenile can be relevant as to whether a juvenile is a neglected juvenile. *See* N.C.G.S. § 7B-101(15); *see, e.g.*, *In re J.A.M.*, 372 N.C. at 10–11. In this matter, as in *In re J.A.M.*, the trial court's findings of fact addressed "present risk factors in addition to an evaluation of past adjudications involving other children," *In re J.A.M.*, 372 N.C. at 11, and the findings of fact supported the trial court's adjudication and conclusion of law that Glenda was a neglected juvenile. Accordingly, we reverse the Court of Appeals' decision.

REVERSED.

Justice EARLS dissenting.

This case involves the adjudication of Glenda[1] as neglected, based on what may have been the accidental death of her infant brother, Gary. The medical examiner who examined Gary's body was uncertain of Gary's cause of death. He noted that while he could not rule out "an accidental asphyxial event," his clinical findings showed that Gary's death "could be consistent with a diagnosis of sudden infant death syndrome" (SIDS). Ultimately, the medical examiner classified Gary's death as "undetermined." Despite these facts, the majority makes no mention of SIDS or the undetermined nature of Gary's death, concluding that Gary died from asphyxiation.

The law governing termination of parental rights has one central purpose: to keep children safe. *See* N.C.G.S. § 7B-1100 (2022). But in many cases in which a child dies from SIDS, the parents have not harmed the child. *See* Kent P. Hymel, MD, & the Committee on Child Abuse & Neglect, *Distinguishing Sudden Infant Death Syndrome From Child Abuse Fatalities*, 118 Pediatrics, 421, 422 (July 2006) (hereinafter *Distinguishing SIDS from Child Abuse*) (discussing the link

1. Glenda and Gary are pseudonyms used to protect the children's identities.

between SIDS and brain stem abnormalities). Rather, these parents have acted like any good parent: loving and caring for their child, and making sure their child has enough food to eat and a roof over his or her head.

American jurisprudence recognizes that parental "natural bonds of affection lead [them] to act in the best interests of their children." *Troxel v. Granville*, 530 U.S. 57, 68 (2000) (O' Connor, J., plurality opinion) (quoting *Parham v. J.R.*, 443 U.S. 584, 602 (1979). Consequently, "there is a presumption that a fit parent will act in the best interests of their children." *Id.* (citing *J.R.*, 442 U.S. at 602). Yet today the majority contravenes that presumption, potentially creating the possibility that whenever a parent loses a child to SIDS, the parent is also at risk for losing the other children in the home. This is contrary to our law and manifestly unjust. Accordingly, I dissent.

Glenda was born on 23 September 2018. When Glenda was approximately one and a half years old, DSS filed a petition on 13 March 2020 to adjudicate her as neglected. On 19 October 2021, the trial court adjudicated her as such under N.C.G.S. § 7B-101(15) because she "did not receive proper care, supervision, or discipline from [her] parent[s], guardian, custodian, or caretaker, and [she] lived in an environment injurious to [her] welfare."

Gary and Glenda's mother has two older children who were previously placed in DSS custody on 28 December 2017 following their adjudication as abused, neglected, and dependent.[2] After Glenda was born, mother and respondent-father received DSS case management support from December 2018 through August 2019. During the nine months DSS was involved in Glenda's life, the parents properly cared for Glenda and abided by all safety plans.

Gary was born on 16 December 2019. On 12 March 2020, respondent-father was at work, and mother was home caring for Gary. Although the cause of Gary's death remains unclear, the trial court found that mother fed Gary, burped him, and placed him on his side in a "Pack n Play" with several blankets. Approximately three hours later, mother returned to check on Gary and found him unresponsive. Mother picked the baby up and ran to the home of Gary's grandmother, who is a nurse, for help and called 911. Gary was later pronounced dead at the scene. The next day, DSS filed the petition seeking to have Glenda declared a neglected juvenile.

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2. Respondent father is not the father of those children.

In addition to the above findings of fact, the trial court found that the parents "have been instructed about proper sleeping arrangements for children"; that upon arriving at the scene, EMS saw Gary foaming from the nose and mouth, which is indicative of asphyxiation; that the Fayetteville Police Department incident report from that day indicated there were several blankets and bottles in the Pack n Play; and that the medical examiner's autopsy report noted that a child under one year of age sleeping with blankets is at risk for "an accidental asphyxial event." Based on the trial court's findings regarding Gary's death and mother's prior DSS involvement with her older children, the trial court determined that Glenda was a neglected juvenile pursuant to N.C.G.S. § 7B-101(15) because she lived in an environment injurious to her welfare and did not receive proper care, supervision, or discipline from her parent, guardian, or custodian. Following this adjudication, Glenda was ordered to stay in DSS custody.

Under our law, "[a] 'neglected juvenile' is defined in part as one 'who does not receive proper care, supervision, or discipline from the juvenile's parent . . . or who lives in an environment injurious to the juvenile's welfare.' " *In re Stumbo*, 357 N.C. 279, 283 (2003) (quoting N.C.G.S. § 7B-101(15) (2001)). In order to adjudicate a child neglected, "our courts have additionally required that there be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide proper care, supervision, or discipline. " *Id.* (cleaned up). Here the trial court did not make such a finding. Accordingly, under North Carolina law, Glenda cannot be adjudicated neglected. Thus, the Court of Appeals correctly concluded that the trial court did not make the necessary findings to support Glenda's adjudication as neglected. *In re G.C.*, 284 N.C. App. 313, 319 (2022).

The appellants in this case, petitioner DSS and the guardian ad litem, make two principal arguments. First, DSS argues that N.C.G.S. § 7B-101(15) does not require a showing of "substantial risk" to adjudicate a child neglected. Petitioner states this omission is in contrast to N.C.G.S. § 7B-101(1)(b) which does require "substantial risk" to adjudicate a child abused. While the majority agrees with this argument, this distinction ignores our precedent on this point, *In re Stumbo*, 357 N.C. 279, and the overarching principles the United States Supreme Court holds as central to a parent's fundamental right to custody, care, and control of their child. *See Troxel*, 530 U.S. at 68-69; *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *J.R.*, 442 U.S. at 602; *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

A parent's right to "establish a home and bring up children" was acknowledged by the United States Supreme Court as early as 1923. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Since then, the United States Supreme Court has affirmed that there is a "constitutional dimension to the right of parents to direct the upbringing of their children," *Troxel*, 530 U.S. at 65, and that parents have a "fundamental right to make decisions concerning the care, custody, and control of [their children.]," *id.* at 72; *accord Stanley*, 405 U.S. at 651; *Quilloin*, 434 U.S. at 255 (1978); *J.R.* 442 U.S. at 602; *Santosky*, 455 U.S. at 753.

Under this framework, "so long as a parent adequately cares for his or her children (*i.e.*, is [a] fit [parent]), there will normally be no reason for the State to inject itself into the private realm of the family." *Troxel*, 530 U.S. at 68. Thus, it follows that, when a parent's right to custody, control, and care of their children is at issue, the reviewing court must determine whether the parent has the best interests of the child in mind. *Id.* at 69. In doing so, the court must apply the traditional presumption that a fit parent will act in the best interest of his or her child. *Id.*

This Court's requirement that the State make the showing reflected in N.C.G.S. § 7B-101(15), and that there "be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide proper care, supervision, or discipline," *In re Stumbo*, 357 N.C. at 283 (2003) (cleaned up), contemplates the framework above and ensures that only children who are neglected are adjudicated as such, *see id.* Perhaps most importantly, in *In re Stumbo*, this Court cautioned that "not every act of negligence . . . constitutes 'neglect' under the law and results in a 'neglected juvenile.' " *Id.* For "[s]uch a holding would subject every misstep by a care giver to . . . the potential for petitions for removal of the child." *Id.* Rather than heed this advice, the majority's holding brushes it aside by effectively abolishing this Court's "impairment" or "substantial risk of impairment" requirement. *See id.*

While the majority acknowledges *In re Stumbo* and its teachings, and admits that decision "remains the law," the majority's analysis reduces *In re Stumbo*'s holding to "useful" but "no[t] required" to show neglect under N.C.G.S. § 7B-101(15). Specifically, the majority states that "there is no requirement of a specific written finding of substantial risk of impairment." This holding contravenes North Carolina law as stated in *In re Stumbo* and United States Supreme Court precedent requiring that a reviewing court be certain a parent is unfit before terminating parental rights, *see Troxel*, 530 U.S. at 68–69; *see also In re Safriet*, 112 N.C. App. 747, 752–53 (1993) (stating that a mandatory finding of

impairment or substantial risk of impairment properly limits the authority of the State to regulate the parent's constitutional right to rear their children only to when "it appears that parental decisions will jeopardize the health or safety of the child" (first citing *Meyer v. Nebraska*, 262 U.S. 390 (1923); and then quoting *Wisconsin v. Yoder*, 406 U.S. 205, 233–34 (1972))).

Next, DSS and the guardian ad litem argue that under *In re Safriet*, 112 N.C. App. at 753, if findings of fact, viewed in totality, would support a finding of impairment or substantial risk of impairment, then remanding a case to the trial court to make those findings of fact is not necessary. They argue that substantial risk of impairment is supported here by the adjudication of mother's older children as abused and neglected, and by the prior training and instruction the parents received on proper sleeping arrangements and caring for children; however, not only is *In re Safriet* not binding on this Court, but it is also not applicable because the record in this case does not support a finding of impairment or substantial risk of impairment.

In re Safriet does not stand for the proposition that a petitioner need not demonstrate impairment or substantial risk of impairment. Instead, while the Court of Appeals in that case acknowledged that the statute is silent as to whether this factor is required, that court also stated that the requirement "is consistent with the authority of the State to regulate the parent[s'] constitutional right to rear their children only when "it appears that parental decisions will jeopardize the health or safety of the child," *In re Safriet*, 112 N.C. App. at 752–53 (1993) (first citing *Meyer*, 262 U.S. at 390; and then quoting *Yoder*, 406 U.S. at 233–34 (1972)). Importantly, in reaching its conclusion that evidence in Ms. Safriet's case supported a finding of physical, mental, or emotional impairment of the child, the Court of Appeals reviewed evidence that is not present in this case. There Ms. Safriet's child was reported to have noticeably poor hygiene, such that "other children made fun of him." *Id.* at 753. Ms. Safriet also lacked a permanent residence, and the child's school and grandparents did not know how to contact her in case of an emergency. *Id.* In contrast, it is clear in this case that during the nine months DSS was involved in Glenda's life, the parents properly cared for Glenda and abided by all safety plans.

This Court has also previously found that a child cannot be adjudicated neglected based solely on previous DSS involvement with other children. *In re J.A.M.*, 372 N.C. 1, 9 (2019) (quoting *In re A.K.*, 360 N.C. 449, 456 (2006)). "Rather, in concluding that a juvenile 'lives in an environment injurious to the juvenile's welfare,' N.C.G.S. § 7B-101(15), the

clear and convincing evidence in the record must show current circumstances that present a risk to the juvenile." *In re J.A.M.*, 372 N.C. at 9. *In re J.A.M.* also reiterates that to adjudicate a child neglected "our courts have additionally required that there be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide proper care, supervision or discipline." *Id.* (cleaned up). Thus, while the circumstances surrounding mother's older children may be relevant these circumstances cannot on their own, without a showing of impairment or substantial risk of impairment to Glenda, support Glenda's removal from her parents' care and adjudication of neglect. *See id.* It is also important to note that this case is based on respondent father's appeal and not mother's. Thus, what is at stake are his parental rights.

The majority relies on *In re J.A.M.* to conclude that the facts in Glenda's case reflect "current circumstances that present a risk," and that thus she can be adjudicated neglected. Nonetheless, in reaching its conclusion that evidence in J.A.M.'s case supported that J.A.M. "presently faced substantial risk in her living environment," *id.* at 10, this Court reviewed evidence there that is not present in this case. In *In re J.A.M.*, the trial court found that respondent-mother

> (1) continued to fail to acknowledge her role in her rights being terminated to her six other children, (2) denied the need for any services for J.A.M.'s case, and (3) became involved with the father, who [had] engaged in domestic violence . . . even though domestic violence was one of the reasons her children were removed from her home . . .

Id. But these facts are not present in Glenda's case. Instead, here the trial court found that Glenda's mother had completed services ordered by the court in her older children's cases, and there is no evidence of domestic violence in her relationship with Glenda's father. Thus, the evidence in this case does not support Glenda's adjudication as a neglected juvenile.

Petitioner DSS and the guardian ad litem argue that Gary's death and the parents' prior knowledge about proper sleeping arrangements for an infant are sufficient to show impairment or substantial risk of impairment for Glenda. Similarly, the majority contends these facts are sufficient to show "current circumstances that present a risk." Yet neither assertion can be true given the undetermined nature of Gary's death.

Sudden Infant Death Syndrome "is the most common cause of death for children between 1 and 6 months of age." *Distinguishing SIDS from Child Abuse*, 421. This condition is defined as the "sudden death of an infant younger than 1 year that remains unexplained after thorough case investigation, including performance of a complete autopsy, examination of the death scene, and review of the clinical history." *Id.* Sudden Infant Death Syndrome is suspected in cases, such as Gary's, in which a healthy child under six months of age "apparently dies during sleep." *Id.* at 422. When a child is diagnosed with SIDS, this finding "reflects the clear admission by medical professionals that an infant's death remains unexplained." *Id.*

In many cases a parent is blamed for a SIDS death.[3] And while it is true that many SIDS risk factors are preventable,[4] research also suggests some causes of SIDS are outside the parent's control. For example, brain stem abnormalities involving the "delayed development of arousal, cardiorespiratory control, or cardiovascular control" may contribute to SIDS. *Id.* In this case Gary was born on 16 December 2019 and died on 12 March 2020, at just under three months old. The police officer who arrived on the scene made observations indicating that Gary was not malnourished, and had no signs of physical abuse, such as bruising or burn marks on his body. Gary's home was also reported to be "in order" and there were no signs of alcohol or drug abuse by the parents. An autopsy was performed on Gary's body, and no internal or external injuries were found. There was also no evidence of injury to Gary's scalp, including no sign of skull fractures. Radiography of Gary's body indicated no acute or chronic fractures.

According to the Medical Examiner who conducted Gary's autopsy, "[t]he lack of significant traumatic injuries, toxicologic findings, congenital abnormalities, infectious disease processes or other natural disease that would account for death" meant that Gary's death "could be consistent with a diagnosis of sudden infant death syndrome." While it is true the Medical Examiner could not rule out "an accidental asphyxial

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3. *See Distinguishing SIDS from Child Abuse*, p. 423 (explaining that "the appropriate medical response to every [SIDS] death must be compassionate, empathic, supportive and nonaccusatory", and that "[i]t is important for those in contact with parents during this time to remain nonaccusatory even while conducting a thorough death and/or incident-scene investigation").

4. For example, "SIDS has been linked epidemiologically in research studies to prone sleep position, sleeping on a soft surface, bed sharing, maternal smoking during or after pregnancy, overheating, [and] late or no prenatal care. " *Id.* at 422.

event," there is no evidence in the report to indicate Gary's death was intentional in nature. Ultimately, Gary's cause of death was classified as "undetermined."

Our precedent in *In re Stumbo*, teaches that "not every act of negligence . . . constitutes 'neglect' under the law and results in a 'neglected juvenile.' " 357 N.C. at 283. This is one such case. Losing a child to an unexplained or accidental death would be a painful experience for any parent. To have another child removed from the home on top of that would be devastating. Because the record does not show, and the trial court did not find that Glenda suffered impairment, or that she was at a substantial risk for such impairment, the Court of Appeals was correct to vacate Glenda's neglect adjudication. In my view, this Court should do the same. Thus, I dissent.

Justice MORGAN joins in this dissenting opinion.

MICHAEL MOLE'
v.
CITY OF DURHAM, NORTH CAROLINA, A MUNICIPALITY

No. 394PA21

Filed 6 April 2023

Appeal and Error—discretionary review improvidently allowed—no precedential value of lower appellate decision

The Supreme Court concluded that discretionary review had been improvidently allowed; therefore, the decision of the Court of Appeals was left undisturbed but without precedential value.

Justice DIETZ concurring.

Justice BERGER joins in this concurring opinion.

Justice MORGAN dissenting.

Justice EARLS joins in this dissenting opinion.

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, 279 N.C. App. 583, 866 S.E.2d 773 (2021), affirming the trial court's dismissal of plaintiff's Article I, Section 19 claims and reversing the trial court's dismissal of plaintiff's Article I, Section 1 claim. Heard in the Supreme Court on 9 February 2023.

J. Michael McGuinness and M. Travis Payne for plaintiff-appellant.

Kennon Craver, PLLC, by Henry W. Sappenfield and Michele L. Livingstone, for defendant-appellee.

Norris A. Adams, II, Caitlin H. Walton, and Larry H. James for the National Fraternal Order of Police and the State of North Carolina Fraternal Order of Police, amici curiae.

John W. Gresham for North Carolina Association of Educators and National Association of Police Organizations, amici curiae.

Patterson Harkavy, LLP, by Narendra K. Ghosh and Trisha Pande, for Professional Fire Fighters and Paramedics Association of North Carolina and North Carolina Advocates for Justice, amici curiae.

PER CURIAM.

Discretionary review improvidently allowed. The decision of the Court of Appeals is left undisturbed but stands without precedential value. *See Costner v. A.A. Ramsey & Sons Inc.*, 318 N.C. 687, 351 S.E.2d 299 (1987) (stating that a published opinion of the Court of Appeals was without precedential value where the Court was "divided three to two as to the result and thus there being no majority of the Court[.]").

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

Justice DIETZ concurring.

It might seem odd to write a separate opinion concurring in a boilerplate, two-sentence order from this Court. But my dissenting colleagues have managed to write a combined thirty-two pages in response to this order, so adding a few extra paragraphs feels quite reasonable by comparison. And I write separately solely because a reader trekking through these two lengthy dissents is owed some context about what is really going on here.

First, with respect to "unpublishing" a Court of Appeals opinion, this is nothing new. This Court has done so just shy of 100 times in the last fifty years, most recently this past November. *Townes v. Portfolio Recovery Assocs., LLC*, 382 N.C. 681, 682 (2022) (holding that "the decision of the Court of Appeals is left undisturbed and stands without precedential value").

Now, to be sure, many of these orders were because there was a recusal and this Court's remaining members were equally divided, which is not the case here. But the point is that "unpublishing" a Court of Appeals opinion is far from unprecedented. Indeed, this practice is so noteworthy that one legal scholar wrote an entire law review article about it, explaining that the effect of these rulings is to render the Court of Appeals opinions "of no more precedential value than the decision

of a trial court." John V. Orth, "*Without Precedential Value*"*—When the Justices of the Supreme Court of North Carolina Are Equally Divided*, 93 N.C. L. Rev. 1719, 1735 (2015).

And, more importantly, this practice is *not* limited solely to cases where the voting members of this Court were equally divided. We also have unpublished Court of Appeals opinions when the Court was not equally divided but, nevertheless, there was "no majority of the Court" voting for any given outcome. *Costner v. A.A. Ramsey & Sons Inc.*, 318 N.C. 687 (1987); *Nw. Bank v. Roseman*, 319 N.C. 394, 395 (1987).

Of course, by using the phrase "majority of the Court" in these cases, we meant a majority of the *full court*. When this Court is divided three to two with two recusals, as happened in *Costner* and *Roseman*, the Court always has the power to enter a precedential decision by the three justices in the voting majority. Indeed, we have done so in several recent cases. *E.g.*, *Connette for Gullatte v. Charlotte-Mecklenburg Hosp. Auth.*, 382 N.C. 57, 58 (2022) (overturning 100-year-old medical malpractice precedent by 3-2 vote with two recusals). But when there is no majority of the full court voting for a particular disposition, this Court has long had the *option*—one we used in *Costner* and *Roseman*—to take no action on the merits and to render the Court of Appeals decision non-precedential, so that the issue could continue to percolate in the lower courts. *Costner*, 318 N.C. at 687; *Roseman*, 319 N.C. at 395.

Cases like *Costner* and *Roseman*—where there was no majority vote for how to resolve the case—bring me to my second point. As anyone watching the oral argument in this case could observe, the justices' questions revealed several alternative ways to decide the case, none of which could be reconciled with the others.

When this happens in appellate cases, if there is no majority for any one approach in the voting conference, the result is often a series of plurality and minority opinions that are a complete mess to decipher. Moreover, those competing opinions can make the law less settled and make the surrounding confusion about the law even worse.

How do courts of last resort, exercising discretionary review, avoid creating these sorts of messy rulings with no majority holding? They can dismiss a case by announcing that their discretionary decision to review it was improvident. Again, this practice is hardly unprecedented. This Court has done so well over 100 times, including several times last year. *E.g.*, *State v. Boyd*, 381 N.C. 169 (2022). And again, scholars have acknowledged that a court's "jurisprudence would be better served" by this practice when "the justices are at loggerheads and see that an

opinion is going to go eight ways." H.W. Perry, Jr., *Deciding to Decide: Agenda Setting in the United States Supreme Court* 39, 111 (1991).

One final point: I am not fond of unpublishing a Court of Appeals decision. I served on the Court of Appeals twice as long as all the other members of this Court combined. The Court of Appeals' ability to create its own body of binding precedent is essential to our State's jurisprudence. Similarly, I am not fond of dismissing a case for review improvidently allowed. If we took a case based on the statutory criteria for review, that is a strong indication that the case deserves resolution on the merits.

Having said that, there is precedent for taking both of these steps. And there will be rare cases where it is appropriate for this Court to do so because doing otherwise would only make things worse. I concur in the Court's order because this is one of those rare cases.

Justice BERGER joins in this concurring opinion.

Justice MORGAN dissenting.

I respectfully dissent from both the majority's determination that discretionary review was improvidently allowed in the present case as well as this Court's unprecedented unpublication of the Court of Appeals opinion rendered in this case, *Mole' v. City of Durham*, 279 N.C. App. 583 (2021). In my view, the issues raised by the parties regarding the applicability of the Fruits of Labor Clause of Article I, Section 1 of the Constitution of North Carolina as previously interpreted by this Court in *Tully v. City of Wilmington*, 370 N.C. 527 (2018), as well as the viability of class-of-one equal protection claims for public employees under Article I, Section 19 of the Constitution of North Carolina, easily met this Court's requirements for discretionary review as described by the General Assembly. This Court's review of this challenging case which invokes two momentous state constitutional provisions would have provided crucial direction into uncharted constitutional terrain, while appropriately allowing North Carolina's highest court to determine a resolution of plaintiff's constitutionally significant claims. I therefore respectfully disclaim the majority's refusal to clarify the reach of *Tully* or the viability of class-of-one claims in the employment context, along with the majority's simultaneous decision to strip the Court of Appeals opinion here of its own precedential effect, thereby calculatedly eliminating any North Carolina appellate court examination of the pivotal constitutional principles illuminated by this case.

On 28 June 2016, the Durham Police Department dispatched officers to an apartment complex in Durham in order to serve an arrest warrant on Julius Smoot. Upon their arrival, the officers discovered that Smoot had barricaded himself in an upstairs bedroom and claimed to be armed with a firearm. Smoot represented that he would kill himself unless he was allowed to see his wife and son within ten minutes. As a result, the law enforcement officers contacted their supervising officers for the purpose of requesting that a hostage negotiator be sent to the scene.

Plaintiff, who had begun working for the Durham Police Department in May 2007 and held the rank of sergeant on 28 June 2016, was the only hostage negotiator on duty when the request for a hostage negotiator was made. Although plaintiff had received hostage negotiation training in May 2014, he had not ever participated in a barricaded subject or hostage situation until this event occurred. Upon arriving at the apartment approximately five minutes after the police department had received the request for negotiation assistance with Smoot, plaintiff began talking with Smoot in an effort primarily to keep Smoot alive and to extend Smoot's stated deadlines to meet Smoot's demands. In the course of his interactions with Smoot, plaintiff heard the sound of a gunshot come from the interior of Smoot's apartment, at which point Smoot assured plaintiff that the gunshot was accidental.

After the negotiations had proceeded for about two hours, during which time Smoot became "highly agitated," Smoot told plaintiff that Smoot had a "blunt"[1] and intended to smoke it. In light of plaintiff's concerns that the effects of marijuana consumption might exacerbate Smoot's precarious emotional state and could result in even more danger to himself and the law enforcement officers, plaintiff asked Smoot to refrain from smoking the marijuana cigarette and, in return, plaintiff would allow Smoot to smoke the "blunt" if Smoot would peacefully surrender himself and the firearm. After agreeing to plaintiff's proposal, Smoot handcuffed himself, left the gun in the bedroom of the apartment, and surrendered to plaintiff while still in the apartment. As Smoot waited in the living room of the apartment to meet with his son, Smoot asked for Smoot's lighter and pack of cigarettes, which plaintiff placed on the table in front of Smoot. Smoot then removed the marijuana cigarette from behind his ear, lit it with his lighter, and smoked about half of it prior to his son's arrival.

In the aftermath of these events, the Durham Police Department initiated an internal investigation into plaintiff's actions. On 24 October

1. A marijuana cigarette.

2016, plaintiff received written notice that a predisciplinary hearing would take place on the following day despite the fact that municipal policy provided that City of Durham employees were entitled to notice of at least three business days before such a hearing could be held. After the hearing was conducted on 25 October 2016, plaintiff's immediate supervisors recommended that plaintiff be demoted. However, defendant City of Durham terminated plaintiff's employment on 14 November 2016 for "conduct unbecoming" a municipal employee based upon the manner in which he secured Smoot's surrender.

On 13 November 2018, plaintiff filed a complaint against the City of Durham which alleged that the City had violated his constitutional rights to due process, equal protection, and the fruits of his labor. On 17 January 2019, the City filed an answer to plaintiff's complaint in which the City denied the material allegations of plaintiff's complaint and moved to dismiss the action for failure to state a claim upon which relief could be granted pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6). On 24 May 2019, the trial court entered an order granting the City's dismissal motion. Plaintiff appealed this outcome to the Court of Appeals.

In recognizing that plaintiff asserted in his complaint that his rights to due process, equal protection, and the fruits of his labor under the Constitution of North Carolina were violated, the Court of Appeals interpreted this Court's decision in *Tully* to acknowledge that plaintiff had adequately pleaded a claim for relief under the state constitution with regard to the City's failure to abide by their established disciplinary procedures. *Mole'*, 279 N.C. App. at 586. The majority of the Court has decided to utilize this case to inaugurate the extraordinary measure of unpublishing this Court of Appeals opinion, thus leaving the opinion bereft of any precedential value upon the majority's conclusion that discretionary review of this case was improvidently allowed.

Section 7A-31 of the North Carolina General Statutes governs the subject of discretionary review by this Court. In relevant part, section 7A-31 provides that:

> (c) In causes subject to certification under subsection (a) of this section, certification may be made by the Supreme Court after determination of the cause by the Court of Appeals when in the opinion of the Supreme Court any of the following apply:
>
> (1) The subject matter of the appeal has significant public interest.

(2) The cause involves legal principles of major significance to the jurisprudence of the State.

(3) The decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court.

N.C.G.S. § 7A-31(c) (2021). Plaintiff petitioned this Court for discretionary review pursuant to section 7A-31(c)(2) and (3), arguing both that the Court of Appeals opinion involved legal principles of major significance to the jurisprudence of the state and that the lower court's decision appeared to be in conflict with decisions of this Court; primarily, the momentously precedential case of *Tully*. Even the Court of Appeals itself, in its now-erased decision which it issued in this case, urged this Court to provide guidance with regard to the application of the Equal Protection Clause of the Constitution of North Carolina as compared to the federal counterpart of the fundamental rights protections established in the Equal Protection Clause of the United States Constitution. *Mole'*, 279 N.C. App. at 598 ("Because our constitution is to be liberally construed, we urge the Supreme Court to address this issue.").

Upon this Court's determination to accord discretionary review to this compelling case, the legal briefs subsequently submitted by the parties, along with three separate clusters of amici curiae composed of organizations with varying orientations and corresponding varying perspectives, underscored both the jurisprudential and policy implications of the complex constitutional issues presented by plaintiff's case. On one side, plaintiff and supportive amici curiae argued that the internal logic of this Court's previous decision in *Tully* and the interpretation of the Fruits of Labor Clause established by *Tully* were not necessarily constrained to the case's specific fact pattern. They also reminded us that this Court is not bound to construe provisions of the Constitution of North Carolina identically to their federal analogues, even where the language is exactly mirrored. *Evans v. Cowan*, 122 N.C. App. 181, 183–84, *aff'd per curiam*, 345 N.C. 177 (1996). Indeed, our state courts have in many instances found it proper to give the Constitution of North Carolina a more "liberal interpretation in favor of [North Carolina's] citizens," *Corum v. Univ. of N.C.*, 330 N.C. 761, 783 (1992), and to grant relief in circumstances where no relief would be afforded under the federal constitution. *Evans*, 122 N.C. App. at 184. Amici curiae which supported plaintiff's legal stances here also emphasized the increasingly challenging and often dangerous working conditions of public

employees—especially first responders like Mole'[2], whose lives *and* livelihoods can be endangered by government employers' refusal to abide by their own internal policies.

On the other side, defendant asked this Court to reconsider the Court of Appeals decision pronounced here, but also to reduce *Tully* expressly to the case's explicit holding concerning arbitrary refusals by government employers to follow their own personnel policies in promotional processes. Defendant contended that plaintiff's arguments possessed no meaningful limiting principle and therefore could be expanded well beyond the facts of his particular case. Defendant argued that any expansion of either the Fruits of Labor Clause or the Equal Protection Clause of the Constitution of North Carolina which would recognize plaintiff's claims as cognizable under state law would effectively nullify existing case law recognizing public employees as being employed at-will and would have the additional effect of exposing any municipal or operational policy enacted by a government employer to potential constitutional claims from public employees. For these reasons, defendant asked this Court to reject plaintiff's "novel claims" in order to preserve the at-will posture of public employment and managerial discretion of government employers.

Although the legal briefs submitted by the named parties and other interested parties highlighted the delicacy of resolving such intricate constitutional questions concerning the government's role as employer, there was nothing about the parties' submissions or their positions that suggested that this case did not legitimately harbor significant public interest, involve legal principles of major significance to the jurisprudence of the State, or present the question of a likely conflict between the Court of Appeals decision issued here and a decision of this Court, to wit: *Tully*. Likewise, there was nothing about the parties' respective presentations of their oral arguments to the Court that indicated that this case did not satisfy *any* of the above-referenced criteria established in N.C.G.S. § 7A-31(c) to warrant this Court's allowance of discretionary review.

It is therefore puzzling for me to identify a reasonable set of circumstances to reconcile this Court's institutionalized propensity to address complex constitutional issues with the majority's intentional dual avoidance here of the existence of any appellate court direction in this matter

2. The record before us contains two variations of plaintiff's surname—Molé and Mole'. In conformity with the majority of the legal documents before us, we have chosen to spell plaintiff's name as Mole'.

by virtue of the majority's unusual passiveness to review constitutional subjects, coupled with the majority's sensational aggressiveness to unpublish a major Court of Appeals opinion. The complexity of the issues and interests involved in this case, the intrinsic nature of which creates discomfort for the majority to render a binding opinion here, provides a detectable reticence of the majority to proverbially bury its head in the sand and to neglect this Court's obligation to answer necessary constitutional questions through the interpretation of state law. *See Union Carbide Corp. v. Davis*, 253 N.C. 324, 327 (1960) ("Courts must pass on constitutional questions when, but only when, they are squarely presented and necessary to the disposition of a matter then pending and at issue."); *see also Lea Co. v. N.C. Bd. of Transp.*, 308 N.C. 603, 610 (1983) ("Only this Court may authoritatively construe the Constitution and laws of North Carolina with finality.").

I embrace the concurrence's invitation to explore "what is really going on here" regarding the unpublication of the Court of Appeals opinion in the present case and the majority's determination that discretionary review of this matter was improvidently allowed.

Between the Court majority's per curiam opinion and the supportive concurring opinion, the two opinions utilize the terms "unpublishing" / "unpublished" and "without precedential value" interchangeably with regard to the Court's own eradication of the Court of Appeals opinion, in an effort to diminish the true irregular, unprecedented nature of this action. This Court's per curiam opinion in *Costner v. A.A. Ramsey and Sons, Inc.*, 318 N.C. 687 (1987) is cited by the majority as legal precedent for its "Discretionary Review Improvidently Allowed" opinion. In *Costner*, this Court expressly observed that two Justices of the seven-member forum—Justices Webb and Whichard—did not participate in the outcome of the case, and that with

> [t]he remaining members of this Court being divided three to two as to the result and thus there being no majority of the Court voting to either affirm or reverse, the decision of the Court of Appeals is left undisturbed and stands without precedential value.
>
> AFFIRMED.

Id. at 687.

This Court has similarly issued per curiam opinions in other cases in which there was not a majority of the Justices to vote for the same outcome in the resolution of a case, thus prompting the Court to declare

that the Court of Appeals decision would be left undisturbed and stand without precedential value. For example, in *Northwestern Bank v. Roseman*, 319 N.C. 394 (1987), we stated in a per curiam opinion:

> Justices Martin and Webb took no part in the consideration or decision of this case. The remaining members of the Court being divided three to two as to all issues presented and thus there being no majority of the Court voting to either affirm or reverse, the decision of the Court of Appeals is left undisturbed and stands without precedential value.
>
> AFFIRMED.

Id. at 395.

In *Couch v. Private Diagnostic Clinic*, 351 N.C. 92 (1999), we stated in a per curiam opinion:

> Justice Freeman did not participate in the consideration or decision of this case. . . . All members of the Court are of the opinion that the trial court erred by not sustaining defendant's objection and by not intervening *ex mero motu*. Justices Lake, Martin, and Wainwright believe that the error was prejudicial to the appealing defendant and would vote to grant a new trial. Chief Justice Frye and Justices Parker and Orr are of the opinion that the error was not prejudicial to the appealing defendant and would vote to affirm the result reached by the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value.
>
> The decision of the Court of Appeals is affirmed without precedential value.
>
> AFFIRMED.

Id. at 93.

We also issued a per curiam opinion in the determination of *Townes v. Portfolio Recovery Assocs., LLC*, 382 N.C. 681 (2022), opining:

> 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. . . .
>
> AFFIRMED.

Id. at 682 (citation omitted).

While both the majority's per curiam opinion and the concurring opinion which have been issued here rely on this Court's cited opinions, which were decided in the same vein as numerous other per curiam opinions in which this Court has directed that the Court of Appeals opinion under review was without precedential value because there was not a majority of the Court which voted to affirm or reverse the lower appellate court's determination, there are two stark omissions from the majority's current per curiam opinion that appear in the similar line of cases upon which the majority relies: (1) a transparent divulgence of the numerical breakdown of the Justices favoring affirmance or reversal of the Court of Appeals decision, and (2) the Court's clear declaration of the outcome of the case—"AFFIRMED" or "REVERSED"—based upon the lack of precedential value of the Court of Appeals opinion. In examining this Court's per curiam opinions cited here as authority by the majority and buttressed by the concurrence, along with additional harmonious per curiam opinions issued by us, all of the Court's previous cases cited here—*Costner*, *Northwestern Bank*, *Couch*, and *Townes*—revealed the identities of any Justices who did not participate in the outcome of the case, and disclosed the numerical vote of the remaining participating Justices which did not constitute a majority of votes on the Court to either affirm or reverse (i.e., 3-2 votes in *Costner* and *Northwestern Bank*) or which created a tie vote (i.e., 3-3 votes in *Couch* and *Townes*). Curiously, the majority, though painstakingly duplicating the Court's standard language that "the decision of the Court of Appeals is left undisturbed and stands without precedential value," somehow fails to replicate the disclosure of the specific votes of Chief Justice Newby, Justice Berger, Justice Barringer, Justice Dietz, and Justice Allen[3] as the Court did with each Justice's identified vote in *Couch*, or even to indicate the number of Justices who voted in one fashion or another in a manner which caused the Court of Appeals opinion to be without precedential value.

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3. Justices Morgan and Earls have recorded their respective dissenting votes in this case.

Furthermore, while all of the cases cited among the majority, the concurrence, and this dissent in the present case illustrate this Court's established practice of concluding a per curiam opinion with a definitive declaration of the case's outcome such as "affirmed" or "reversed" with regard to this Court's pronouncement that a Court of Appeals opinion theretofore will be "without precedential value," the majority interestingly neglected such clarity on this occasion. If the majority had employed this Court's well-established practice in cases which are resolved in the manner in which the majority has selected here, this Court would have made it plain that the Court of Appeals opinion was still effective in that discretionary review was improvidently allowed and that the Court of Appeals opinion would afford plaintiff the opportunity to pursue his claim against defendant municipality based on plaintiff's constitutional claim lodged under Article I, Section I of the North Carolina Constitution. This Court has traditionally even employed this direct and transparent approach in its per curiam opinions which result in a determination of discretionary review improvidently allowed, as shown in our per curiam opinion issued in *John Conner Constr., Inc. v. Grandfather Holding Co., LLC*, 366 N.C. 547 (2013):

> Justice Beasley 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 affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals stands without precedential value. As to the issue allowed in plaintiffs' petition for discretionary review, we hold that discretionary review was improvidently allowed.
>
> AFFIRMED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

Id. at 547.

Here, in the majority's per curiam opinion that discretionary review was improvidently allowed, the decision ends with the sole declaration of "DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED." The majority glaringly fails to adhere to this Court's tradition, with the issuance of a per curiam opinion, to unequivocally announce the ultimate outcome of the case in the last line of the opinion, such as the opinion of the Court of Appeals being affirmed or reversed. On its face, it appears that the majority has seen fit to initiate a new practice of refraining from

such a plain announcement of the final result of a case in order to be consistent with this Court's new practice of unpublishing a Court of Appeals opinion on this Court's own volition. With this approach, there would be no requirement for this Court to declare the conclusive result of a per curiam opinion—including one in which discretionary review was improvidently allowed—because this Court would no longer recognize the lower appellate court's opinion to exist, due to this Court's unilateral unpublication of the Court of Appeals opinion.

I do not agree with this majority's departures from well-established and time-honored practices, traditions, and customs of this Court merely because these deviations conveniently serve the majority's interests. The concurrence here engages in a tutorial discussion of the myriad of circumstances which a court can confront during its deliberations in a case which may ultimately end with an outcome that discretionary review was improvidently allowed. The concurrence even endeavors to intimate the existent circumstances in the present case which led to the majority's determination that discretionary review was improvidently allowed. The learned concurring Justice should not be placed in a position to attempt to explain the awkward aspects of this case's situation which he and the Court's other distinguished colleagues in the majority have implemented with their decision. In the first instance, this Court should definitively decide the critical constitutional issues which have been presented to us, especially those which are impacted by the North Carolina Constitution, since discretionary review by this Court is essential here to resolve substantial questions of law. And in the second instance, since the majority has deemed discretionary review to be improvidently allowed in the instant case, then it should follow the institutionalized precedent set by our per curiam opinions of *Costner*, *Northwestern Bank*, *Couch*, *Townes*, and *John Conner Constr., Inc.* and others to disclose, at the least, the numerical breakdown of the Justices here who favored affirmance, reversal, or some other reviewing disposition of the Court of Appeals, instead of adeptly utilizing the concepts of discretionary review improvidently allowed and unpublication of the Court of Appeals opinion to craftily shield their votes.

It is always within this Court's discretion to deny review where no appeal may be had as a matter of right. Likewise, it is within this Court's discretion to determine that it would be improvident to exercise our discretionary review over a matter previously evaluated as being appropriate for such review. However, I believe that a greater improvidence is flaunted when this Court leaves constitutional questions of such jurisprudential import as those presented here without any guiding appellate authority, either from this Court or in the form of a published opinion

of the Court of Appeals, due to clear and convenient unwillingness to engage with the issues at hand.

I respectfully dissent.

Justice EARLS joins in this dissenting opinion.

Justice EARLS dissenting.

I join Justice Morgan's dissent in this matter. I write separately to address two procedural issues. The majority concludes that discretionary review was improvidently allowed (DRIA) and therefore in theory, no review on the merits has occurred in this Court. Simultaneously, the Court for the first time in its history, when sitting as a seven-member court, is, without coherent explanation, ruling that the opinion issued by the Court of Appeals in this case has no "precedential value."As the opinion was published by the Court of Appeals, under our Rules of Appellate Procedure, it should be binding precedent unless reversed by this Court. *In re Civil Penalty*, 324 N.C. 373, 384 (1989). Because this Court's unspoken assertion of its authority to decide which Court of Appeals opinions have precedential value is the most destructive to the administration of justice, I begin with that aspect of today's two-line majority opinion.

I. "Unpublishing" a Court of Appeals Decision

The majority's decision to effectively "unpublish" the Court of Appeals decision in this case by denoting it as "without precedential value" does not have the doctrinal support the majority would wish it to have. None of the cases relied upon in the concurring opinion involved the full court, without explanation, deciding that discretionary review was improvidently granted while simultaneously holding that the Court of Appeals opinion will have no precedential effect. Not a single one. There is no precedent for what the Court does in this case. Vague references to oral argument with insinuations that this was a complicated case that divided the court do not distinguish it from the many complicated issues the court faces that often involve multiple possible outcomes.

The majority's effort to hide the ball through sleight of hand is all the more appalling because having moved the cups around, they can't remember where it is. While the per curiam opinion implies through its citation to *Costner v. A.A. Ramsey & Sons, Inc.*, 318 N.C. 687 (1987) that this Court chose to unpublish the Court of Appeals opinion in this case because "the Court was 'divided three to two as to the result and thus

there . . . [was] no majority of the Court,' "[1] *See Mole' v. City of Durham*, No. 394PA21, 384 N.C. 78, (April 6, 2023) (per curiam), the concurrence essentially states the opposite, *see id.* (Dietz, J., concurring). The concurrence points out that while in many cases a Court of Appeals opinion will be designated as having no precedential value "because there was a recusal and this Court's remaining members were equally divided, [that] is not the case here." *Id.* (Dietz, J., concurring). This inconsistency alone is sufficient to alert readers as to "what is really going on here." *See id.* Furthermore, because there are only two dissenting opinions in this case it is clear this case's per curiam opinion constitutes the majority, thus leaving no room for a "three to two" split, *see id.* (per curiam), or an "equally divided court," *see id.* (Dietz, J., concurring). The parties in this case and the citizens of this state deserve better than a shell game.

It is unwise for the Court to hand itself this new power without even publishing an amendment to the Rules of Appellate Procedure to establish clear and fair guidelines for taking such action. The Court is making a hasty and unexamined, yet fundamental and radically destabilizing shift in the authority to determine legal precedent. It has far-reaching implications for the jurisprudence of this state. "[T]he rules governing publication of and citation to judicial opinions are not only central to the judiciary's self-identity—they are also critical to lawyers and the public, shaping how litigants' cases are treated by the courts and how litigants communicate with courts through their counsel." Scott E. Gant, *Missing the Forest for a Tree: Unpublished Opinions and New Federal Rule of Appellate Procedure 32.1*, 47 B.C. L. Rev. 705, 734 (2006) [hereinafter Gant, *Missing the Forest for a Tree*].

Rule 30(e) of the North Carolina Rules of Appellate Procedure has careful guidelines for how the precedential value of Court of Appeals opinions should be determined. It states that:

> (1) In order to minimize the cost of publication and of providing storage space for the published reports, the Court of Appeals is not required to publish an opinion in every decided case. If the panel that hears the

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1. Ironically, and completely contrary to *Costner*, the Court is simultaneously issuing an opinion of the Court in *State v. Hobbs*, No. 263PA18-2, in which two Justices are recused and the remaining five members of the Court are divided three to two, without in any way suggesting that there was no majority of the Court or that the Court of Appeals opinion in that case therefore is without precedential value. Such an arbitrary and disparate application of procedural rules is the antithesis of due process and equal justice under the law. Compare *Costner*, 318 N.C. at 687 with *State v. Hobbs*, No. 263PA18-2, 384 N.C. 144, (April 6, 2023).

case determines that the appeal involves no new legal principles and that an opinion, if published, would have no value as a precedent, it may direct that no opinion be published.

(2) The text of a decision without published opinion shall be posted on the opinions web page of the Court of Appeals at https://appellate.nccourts.org/opinion-filings/coa and reported only by listing the case and the decision in the advance sheets and the bound volumes of the North Carolina Court of Appeals Reports.

(3) An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority. Accordingly, citation of unpublished opinions in briefs, memoranda, and oral arguments in the trial and appellate divisions is disfavored, except for the purpose of establishing claim preclusion, issue preclusion, or the law of the case. If a party believes, nevertheless, that an unpublished opinion has precedential value to a material issue in the case and that there is no published opinion that would serve as well, the party may cite the unpublished opinion if that party serves a copy thereof on all other parties in the case and on the court to which the citation is offered. This service may be accomplished by including the copy of the unpublished opinion in an addendum to a brief or memorandum. A party who cites an unpublished opinion for the first time at a hearing or oral argument must attach a copy of the unpublished opinion relied upon pursuant to the requirements of Rule 28(g). When citing an unpublished opinion, a party must indicate the opinion's unpublished status.

(4) Counsel of record and pro se parties of record may move for publication of an unpublished opinion, citing reasons based on Rule 30(e)(1) and serving a copy of the motion upon all other counsel and pro se parties of record. The motion shall be filed and served within ten days of the filing of the opinion. Any objection to the requested publication by counsel or pro se parties of record must be filed within five days after service of the motion requesting publication. The

> panel that heard the case shall determine whether to allow or deny such motion.

N.C. R. App. P. 30(e). Nothing in this detailed set of procedures would give any party notice that the North Carolina Supreme Court might take it upon itself to "overrule" a Court of Appeals determination that an opinion of that Court has precedential value while leaving the opinion otherwise undisturbed.

In terms of how appellate procedure rules should be adopted, while Article IV, Section 13(2) of the Constitution of North Carolina vests in the Supreme Court "exclusive authority to make rules of procedure and practice for the Appellate Division," N.C. Const. art. IV, § 13(2), this Court has previously enjoyed a strong working relationship with the Appellate Rules Committee of the North Carolina Bar Association. Indeed, that Committee has been advising the Court concerning the Rules of Appellate Procedure at least since 1974 when the North Carolina Bar Association Foundation's Appellate Rules Study Committee proposed the form of appellate rules that we use today, creating a unitary set of rules that combined three prior rule sets: The Supreme Court Rules, the Court of Appeals Rules, and the "Supplemental Rules" that defined the practice and procedure in appeals within the appellate division. *See* App. Rules Study Comm., N.C. Bar Ass'n Found., *Proposed Draft of the North Carolina Rules of Appellate Procedure with General Commentary* 1 (1974). The 1974 Committee included forty-three distinguished attorneys and jurists from across the state, some of whom later served on this Court and other appellate courts. The current committee likewise is composed of lawyers and judges from across the state who are dedicated to improving the quality of appellate practice in North Carolina. They previously have had an instrumental role in proposing, examining, and refining numerous revisions and clarifications of the rules. *See App. Rules*, N.C. Bar Ass'n, https://www.ncbar.org/members/communities/committees/appellate-rules/ (last visited Jan. 29, 2023).

While there is no constitutional or other mandate requiring this Court to consult with interested stakeholders prior to revising the Rules of Appellate Procedure, it is universally understood throughout the legal profession to be good practice to engage the most esteemed and experienced legal experts before modifying the rules that govern our legal system. The North Carolina Bar Association's Appellate Rules Committee can identify possible unintended consequences or implications for practitioners that this Court may overlook. In general, consultation and input from affected parties are important elements of improving the administration of justice.

Therefore, I object in the first instance because this Court is summarily making a fundamental change in how legal precedent is determined in this state without any opportunity for notice and comment from knowledgeable and experienced members of the bar and the judiciary, whether they are on a committee devoted to this issue or otherwise interested individuals with valuable expertise.

On the merits of unpublishing a lower court opinion without explanation, it is notable that very few states allow their supreme courts to unilaterally determine when an opinion of an intermediate appellate court will be published and therefore have precedential value. California and Kentucky are two examples that comprise this minority. *See* Melissa M. Serfass & Jessie W. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J. App. Prac. & Process 251, 258–85 tbl.2 (2001); *see also* Cal. Rules of Court, rule 8.1105(e)(2). This Court should be both informed about the experiences of the few states that allow this practice and wary of adopting a rule that is seldom used without closer examination.

To illustrate the consequences this new rule may trigger, one scholar at the University of Louisville School of Law observed that Kentucky's rule not allowing the citation of unpublished opinions as legal authority creates the perception that "non-publication is a rug under which judges sweep whatever they wish never to see the light of day." Edwin R. Render, *On Unpublished Opinions*, 73 Ky. L. J. 145, 164 (1984) [hereinafter Render, *On Unpublished Opinions*]; *see also* David S. Tatel, *Some Thoughts on Unpublished Decisions*, 64 Geo. Wash. L. Rev. 815, 818 (1996) (allowing citation of all court opinions increases public confidence in the courts, "eliminating any basis for believing that the court is dispensing second-class justice to some parties").

California's widely denounced depublication rule has been similarly criticized on the basis "that the public's expectation of justice fairly and consistently dispensed will be undermined by 'hidden' decisions, and that judicial accountability will be rendered impossible by the suppression of the tangible evidence of judges' work." Philip L. Dubois, *The Negative Side of Judicial Decision Making: Depublication as a Tool of Judicial Power and Administration on State Courts of Last Resort*, 33 Vill. L. Rev. 469, 476 (1988). Moreover, "depublication has become part of 'a process of covert substantive review which allows [a] supreme court to dispose of an objectionable interpretation of law without having to risk the exposure involved in hearing a case and reversing it on reasoned basis." *Id.* at 478 (cleaned up). For this Court to take it upon itself to decide an already published opinion of the Court of Appeals

will have no precedential value actually illustrates the problem of covert substantive review.

Further indication that the procedure used in this case is unwise is found in the fact that the question of when an appellate court opinion should become precedential has been the subject of extensive scholarly examination for many years. In 1973, the Advisory Council on Appellate Justice of the Federal Judicial Center, in collaboration with the National Center for State Courts, assembled a group of lawyers, law professors, and judges to study state and federal appellate systems in the United States. *See* Advisory Couns. on App. Just., Comm. on Use of App. Ct. Energies, *Standards for Publication of Judicial Opinions* (1973). In its model rule developed after extensive study of the practices of state and federal appellate courts across the country, the judges who decide the case are to consider the question of whether to publish the opinion and thereby make it binding precedent, based on clear and well-established criteria applied equally to every case. According to those model rules, the highest court in the state may order any unpublished opinion of the intermediate court to be published, but the reverse is not contemplated. *Id.* app. 1 at 22. No one recommends this as a good idea, only a handful of other states do it, and it has the effect of taking away from the intermediate court that heard the case the power to set precedent.

The Court's action in this case gave the parties no opportunity to be heard on the question of whether the opinion should have precedential effect, even though as currently drafted the Rules of Appellate Procedure do give litigants the opportunity to make a motion in the Court of Appeals and thereby be heard if they believe an opinion designed by the panel as "unpublished" should be published. *See* N.C. R. App. P. 30(e)(4). The Court's order is inconsistent with the spirit and purpose of the current rules in this regard.

Legal scholars and judges have questioned the constitutionality of issuing appellate opinions that are unpublished and therefore of no precedential value, particularly on legal issues otherwise not the subject of controlling authority. *See*, *e.g.*, Elizabeth Earle Beske, *Rethinking the Nonprecedential Opinion*, 65 UCLA L. Rev. 808 (2018) (arguing that the U.S. Supreme Court's retroactivity jurisprudence of *Harper v. Virginia Board of Taxation* and *Griffith v. Kentucky* "require[s] that any case's new rule apply not only to future litigants but also to those whose cases are pending"); Johanna S. Schiavoni, *Who's Afraid of Precedent?: The Debate Over the Precedential Value of Unpublished Opinions*, 49 UCLA L. Rev. 1859 (2002) (explaining the argument that the U.S. Constitution requires that decisions of appellate courts have

precedential effect).[2] An Eighth Circuit opinion concluding that it was unconstitutional for a court to fail to apply a prior decision was rooted in an examination of the intent of the Framers of the U.S. Constitution and what they understood to be the nature of judicial power. *See Anastasoff v. United States*, 223 F.3d 898, 901 (8th Cir.) (rule that states unpublished opinions are not precedent is unconstitutional under Article III), *vacated as moot*, 235 F.3d 1054 (2000); *see also United States v. Goldman*, 228 F.3d 942 (8th Cir. 2000).

In 2006, the Federal Rules of Appellate Procedure were amended to provide that a court of appeals may not prohibit a party from citing an unpublished opinion of a federal court for its persuasive value or for any other reason. *See* Fed. R. App. P. 32.1(a). The Committee Notes to the Rule further explain that "under Rule 32.1(a), a court may not place any restriction on the citation of such opinions. For example, a court may not instruct parties that the citation of unpublished opinions is discouraged, nor may a court forbid parties to cite unpublished opinions when a published opinion addresses the same issue." Fed. R. App. P. 32.1(a), notes of advisory committee on rules (2006). In part, this is a recognition of the fact that general principles of equal justice under law and the widespread availability of court documents electronically make the artificial limitation on the precedential value of appellate court decisions potentially an illegitimate exercise of judicial power. *See generally* Gant, *Missing the Forest for a Tree*, 47 B.C. L. Rev. 705 (reviewing history of deliberations over the federal rule change to allow citation of all court opinions as precedent).

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2. *See also* Jessie Allen, *Just Words? The Effects of No-Citation Rules in Federal Courts of Appeals*, 29 Vt. L. Rev. 555, 574–91 (2005) (no-citation rules violate litigants' due process rights); David Greenwald & Frederick A. O. Schwarz, Jr., *The Censorial Judiciary*, 35 U.C. Davis L. Rev. 1133, 1161–66 (2002) (no-citation rules violate the First Amendment guarantees of free speech and the right to petition); Daniel N. Hoffman, *Publicity and the Judicial Power*, 3 J. App. Prac. & Process 343, 347–52 (2001) (no-citation rules violate Article III); Salem M. Katsh & Alex V. Chachkes, *Constitutionality of "No-Citation" Rules*, 3 J. App. Prac. & Process 287, 315–23 (2001) (no-citation rules violate separation of powers because they are not within courts' Article III powers); Jon A. Strongman, Comment, *Unpublished Opinions, Precedent, and the Fifth Amendment: Why Denying Unpublished Opinions Precedential Value Is Unconstitutional*, 50 U. Kan. L. Rev. 195, 211–22 (2001) (no-citation rules violate procedural due process and equal protection under the Fifth Amendment); Marla Brooke Tusk, Note, *No-Citations Rules as a Prior Restraint on Attorney Speech*, 103 Colum. L. Rev. 1202, 1221–34 (2003) (no-citation rules violate the First Amendment's rule against prior restraints). The scholarly literature on unpublished opinions, non-precedential opinions, and no-citation rules is extensive. *See, e.g.*, Gant, *Missing the Forest for a Tree* at 706 n.5 (collecting citations); Coleen M. Barer, *Preface: Anastasoff, Unpublished Opinions, and "No-Citation Rules"*, 3 J. App. Prac. & Process 169 (2001) (surveying cases).

Similarly, in 2007, in amending its Rules of the Supreme Court and Court of Appeals upon recommendation of the Arkansas Supreme Court's Committee on Civil Practice and after general public notice and comment, the Arkansas Supreme Court concluded that published and unpublished opinions alike constitutionally should have precedential effect. *See In re Ark. Rules of Civ. Proc.*, 2007 Ark. LEXIS 332 (2007); Ark. R. Sup. Ct. R. 5-2(c).

I believe that we should not suddenly decide that a Court of Appeals opinion designed as one that has precedential value by that court cannot be binding precedent without careful consideration and input from stakeholders concerning the implications of this action for our system of justice. We should continue our institutional deference to the Court of Appeals' expertise in determining which of its own opinions should have precedential effect, should the practice of non-precedential opinions continue.

II. Discretionary Review Improvidently Allowed

The majority has chosen to simultaneously rule on the merits by leaving the Court of Appeals decision in place, yet usurp the role of the Court of Appeals to determine the precedential value of its own opinions by ruling that the Court of Appeals opinion in this case has no precedential value. Our use of the DRIA disposition should be rare. As Justice Harlan wrote over sixty years ago, once a case "ha[s] been taken" it should be "consider[ed] . . . on their merits." *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 521, 559 (1957) (Harlan, J., concurring in part and dissenting in part). In part this is because once a court votes on a petition and meets the threshold of votes required to take the case, allowing the objecting Justices to subsequently vote to dismiss the petition would render a court's procedures meaningless. Joan Maisel Leiman, *The Rule of Four*, 57 Colum. L. Rev. 975, 976 (1957). The use of DRIA also amounts to a waste of money, energy, and time. *Id.* In normal circumstances, litigants must assume their case could be dismissed based on newly revealed factors between the time the petition for discretionary review was allowed and the case was decided. But no such intervening events occurred here. In this case, Mr. Molé was given an "empty hearing" and forced to put forth "futile effort" to prove the merits of his case despite this Court never actually reaching them. *See id.* at 989. This raises questions of fundamental fairness.

Traditionally, DRIA's limited use as a disposition has been tied to issues regarding (1) a court's lack of jurisdiction when it first agrees to hear a case, *Forsyth v. City of Hammond*, 166 U.S. 506, 511 (1897)

(stating the question of jurisdiction is always open); (2) cases where after agreeing to hear the case the question presented becomes moot, *Texas Consol. Theatres Inc. v. Pittman*, 305 U.S. 3, 4 (1938); (3) cases where no relief is sought by or against the petitioner, *Penfield Co. of Cal. v. Sec. and Exch. Comm'n*, 330 U.S. 585, 589 (1947); or (4) when the petition raises a question that was not actually raised or determined below, *McCullough v. Kammerer Corp.*, 323 U.S. 327, 328–29 (1945). More recently, the United States Supreme Court has also used DRIA when a party " 'cho[o]se[s] to rely on a different argument' in their merits briefing" than the one provided in their petition for writ of certiorari. *Visa, Inc. v. Osborn*, 137 S. Ct. 289–90, 289 (2016) (mem.) ("After having persuaded us to grant certiorari on this issue, however, petitioners chose to rely on a different argument in their merits briefing. The Court, therefore, orders that the writs in these cases be dismissed as improvidently granted." (cleaned up)).

To be sure, none of these reasons apply to Mr. Molé's case. This Court allowed Mr. Molé's petition for discretionary review because it met our criteria under N.C.G.S. § 7A-31, which gives the Court authority to allow a case if "[t]he subject matter of the appeal has significant public interest," the case "involves legal principles of major significance to the jurisprudence of the State," or the Court of Appeals decision "appears likely to be in conflict with a decision of [our Court]." N.C.G.S. § 7A-31(c) (2021). This case is also not moot, and the petitioner, Mr. Molé, is seeking relief. *See In re A.K.*, 360 N.C. 449, 452 (2006) ("When a legal controversy between opposing parties ceases to exist, the case is generally rendered moot and is no longer justiciable."). There is also no "bait and switch" present, as Mr. Molé provided the same arguments in his brief as he presented in his petition for discretionary review. The only thing that has changed since having allowed Mr. Molé's petition in March of last year is the political composition of this Court.

Choosing to use DRIA as a mechanism to avoid ruling on a case, in conjunction with designating the Court of Appeals' published decision in that same case as without precedential value can be detrimental whenever it is used. However, in cases where the Court of Appeals explores issues of "significant public interest," issues that are "significan[t] to the jurisprudence of the State," or issues opinions "likely to be in conflict" with our precedent, use of these procedures are exceedingly harmful. *See* N.C.G.S. § 7A-31. Because this Court chose to allow Mr. Molé's petition for discretionary review, this Court believed one or more of these principles existed. Mr. Molé's case did not involve a strict application of our precedent. Instead, the Court of Appeals explained that a "strict

reading" of *Tully v. City of Wilmington*, 370 N.C. 527 (2018), would have foreclosed Mr. Molé's claim and limited claims arising under *Tully* to the "employment promotional process." *Molé v. City of Durham*, 279 N.C. App. 583, 588 (2021). Furthermore, on Mr. Molé's equal protection claim, the Court of Appeals noted it was bound by precedent and "urged" this Court to provide guidance on the resolution of Mr. Molé's class-of-one Equal Protection Clause claim. *Id.* at 598.

Accordingly, providing a ruling in this case would have allowed this Court to, *inter alia*, affirm or reverse the Court of Appeals on these issues. Under Mr. Molé's Fruit of One's Labor Clause claim, choosing to affirm would have granted workers in North Carolina greater protections by confirming that claims like Mr. Molé's could be brought under that section of our Constitution. *See id.* at 590. Under Mr. Molé's class-of-one Equal Protection Clause claim, this Court could have confirmed again that our Equal Protection Clause grants North Carolinians greater protection than the U.S. Constitution. *See State v. Carter*, 322 N.C. 709, 713 (1988) ("Even were the two provisions identical, we have the authority to construe our own constitution differently from the construction by the United States Supreme Court of the U.S. Constitution, as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision."); *see also Stephenson v. Bartlett*, 355 N.C. 354, 381 n.6 (2002); *Holmes v. Moore*, 383 N.C. 171, 179 (2022) ("North Carolina's guarantee of equal protection has also been held to be more expansive than the federal right.").

On any issue, this Court could have also chosen to reject Mr. Molé's claims on the merits. By reaching the merits of Mr. Molé's claims and issuing an opinion, the parties would receive an explanation of why their claim was successful or failed, and future litigants would have a foundation from which to bring or defend any subsequent claims. More generally, this Court's opinions also provide the citizens of this state with guidance on the types of relief available to them, and in this case could alert workers to applicable protections.

Rather than carry out its duty to the citizens of this state, the majority in this instance has shirked its responsibility to be the final arbiter of the North Carolina Constitution, *Lea Co. v. N.C. Bd. of Transp.*, 308 N.C. 603, 610 (1983), and to determine whether a lower court has committed an error of law. *See State v. Brooks*, 337 N.C. 132, 149 (1994) ("After there has been a determination by the Court of Appeals, review by this Court, whether by appeal of right or discretionary review, is to determine whether there is any error of law in the decision of the Court of Appeals[.]"). In more ways than one, this Court has chosen to "sweep"

this case under the rug never to be seen again without so much as an explanation. *See* Render, *On Unpublished Opinions* at 164.

The rule of law exists to curb the arbitrary exercise of power. *See The Federalist No. 15* (Alexander Hamilton) (explaining that laws are instituted "[b]ecause the passions of men will not conform to the dictates of reason and justice, without constraint"). Our justice system is protected by "rules that are known today and can be enforced tomorrow." *See* Thomas M. Reavley, *The Rule of Law for Judges*, 30 Pepp. L. Rev. 79 (2002). If rules are uncertain, our justice system will be affected. *Id.* The majority's use of DRIA and its designation of the Court of Appeals opinion as without precedential value both subvert the rule of law by creating uncertainty. This is precisely the type of exercise of arbitrary power the rule of law should guard against. In this instance, the use of the DRIA disposition deprives the parties, the attorneys who represented them, those who filed amicus briefs in support of one party's position, and the people of North Carolina collectively of these protections. Furthermore, taking from the Court of Appeals the ability to decide which of its opinions have precedential value without otherwise disturbing anything in the opinion is a disingenuous sleight of hand and a dangerous threat to the fair application of the laws to all citizens. Therefore, I dissent.

Justice MORGAN joins in this dissenting opinion.

DAVID SCHAEFFER
v.
SINGLECARE HOLDINGS, LLC, SINGLECARE SERVICES, LLC,
RXSENSE HOLDINGS, LLC, RICHARD A. BATES, AND DARCEY SCHOENEBECK

No. 321PA21

Filed 6 April 2023

1. Jurisdiction—personal—specific—nonresident corporation—resident employee terminated—entire relationship considered

In a suit brought by a former employee after he was terminated, nonresident corporate defendants were subject to personal jurisdiction in North Carolina because they purposefully availed themselves of the privileges of conducting business-related activities in this State and those activities arose from or were related to plaintiff's claims. Although defendants initiated the employment relationship with plaintiff in California where plaintiff was then living, defendants established minimum contacts with North Carolina to survive constitutional analysis through multiple voluntary and intentional acts, including subsequently approving of and assisting in plaintiff's move to North Carolina, communicating with and supporting plaintiff as he expanded defendants' business in North Carolina, employing at least three other individuals in this state, serving North Carolina consumers by offering discounts for pharmacy benefits at retail locations throughout the state and, ultimately, terminating plaintiff's employment when he was a North Carolina resident.

2. Jurisdiction—personal—specific—nonresident corporate officers—resident employee terminated—insufficient contacts

In a suit brought by a former employee after he was terminated, in which he sued both his corporate employer and two individual defendants who worked for the corporation (neither of whom lived in North Carolina), plaintiff did not establish sufficient minimum contacts between the individual defendants and the state of North Carolina to subject them to personal jurisdiction in this state, and his complaint lacked specific allegations that the individual defendants were the primary participants in the alleged wrongdoing that gave rise to the suit.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, No. COA20-427, 2021 WL 2426202 (N.C. Ct. App. June 15, 2021), reversing an order

entered on 22 November 2019 by Judge Susan Bray in Superior Court, Orange County. Heard in the Supreme Court on 7 February 2023.

Kornbluth Ginsberg Law Group, P.A., by Joseph E. Hjelt and Michael A. Kornbluth, for plaintiff-appellant.

Julia C. Ambrose, Charles B. Leuin, pro hac vice, and Mark S. Eisen for defendant-appellee.

Sam McGhee, Lauren O. Newton, Jennifer D. Spyker, and David G. Schiller for North Carolina Advocates for Justice, amicus curiae.

EARLS, Justice.

It is axiomatic that "where individuals 'purposefully derive benefit' from their interstate activities . . . it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473–74 (1985) (quoting *Kulko v. Cal. Super. Ct.*, 436 U.S. 84, 96 (1978)). But when a defendant's conduct in a forum is not so robust as to give rise to general jurisdiction, to conclude that the defendant has "purposefully derive[d] benefit from their interstate activities," the defendant must have "purposefully directed his activities at residents of the forum . . . and the litigation [must] result[ ] from alleged injuries that arise out of or relate to those activities." *Id.* at 472–73 (cleaned up).

At its heart, this case presents the question of which of a defendant's activities matter. Defendants here—both corporate entities and individuals—take the position that, in evaluating which forums' courts may exercise specific jurisdiction with respect to claims arising from an alleged breach of an employment agreement, only activities that occurred prior to or at the time of the execution of the relevant agreements bear on the analysis. However, such a position would require a court to turn a blind eye to activities a defendant conducts in a new forum after agreements are negotiated and executed. Because this position would "allow [defendants] to escape having to account in other States for consequences" that arise from their own intentional conduct, we decline to adopt this unduly narrow approach to specific jurisdiction. *Id.* at 474. Determining whether specific jurisdiction exists does not—and has never—required a court to treat a discrete, temporally-limited set of events as dispositive to the exclusion of all other activities that occur throughout the evolution of a relationship. Instead, we consider *all* of Defendants' activities,

including those that occurred after the employment agreements were executed, and hold that Corporate Defendants intentionally reached out to North Carolina to conduct business activities in the state, and the claims at issue in this litigation arise from or are related to those activities. *See Beem USA Ltd.-Liab. Ltd. P'ship v. Grax Consulting LLC*, 373 N.C. 297, 307 (2020) (rejecting Business Court's specific jurisdiction analysis as "requir[ing] too strict a temporal connection between" the defendant's forum-directed contacts and the plaintiffs' claims).

I. Factual Background

Plaintiff David Schaeffer, a North Carolina resident, brought this action against defendants SingleCare Holdings, LLC; SingleCare Services, LLC; RxSense Holdings, LLC, Darcey Schoenebeck, and Richard A. Bates (collectively, Defendants). SingleCare Holdings, SingleCare Services, and RxSense (Corporate Defendants) are Delaware limited liability companies with their principal offices in Massachusetts. Schoenebeck and Bates (Individual Defendants) are citizens and residents of Minnesota and Massachusetts, respectively. Corporate Defendants provide pharmacy benefit management and medical benefit management services. Bates is the Chief Executive Officer of each of the Corporate Defendants and Schoenebeck is the Executive Vice President of Business Development for SingleCare services.

Schaeffer was jointly employed by SingleCare and RxSense as the Senior Vice President of Business Development for SingleCare from 1 May 2017 until his termination on 22 October 2018. On 13 June 2019, Schaeffer brought this action against Defendants, alleging various tort and contract claims arising from his termination. Specifically, Schaeffer alleged that Defendants revoked fully vested shares that they promised Schaeffer during employment negotiations to incentivize him to accept his position. Schaeffer argues that he accepted the business development position based on Defendants' promises that he would be granted equity in SingleCare, a promise that Defendants reiterated throughout employment negotiations and during Schaeffer's employment.

Schaeffer lived in California during contract negotiations with Defendants and for the first several months of his employment. In 2018, he sought approval from Defendants to move to North Carolina, where he would continue to carry out his duties remotely.[1] According to Schaeffer, Defendants not only approved his request to move to North Carolina but helped facilitate his move. For example, Defendant

1. Schaeffer also worked remotely during the period of his employment when he was living in California.

Schoenebeck sent a letter to Schaeffer's North Carolina-based mortgage lender to confirm his authorization to work remotely.

After Schaeffer's move, he alleges that he "substantially performed [his work duties] in North Carolina." In his brief to this Court, he explains that he "made efforts to expand and further the Corporate Defendants' business in North Carolina," received reimbursements for work-related travel to and from North Carolina and for other expenses associated with his work in the state, and engaged in regular communications from North Carolina to carry out his sales duties. As a result of these activities, he argues that "Corporate Defendants derived revenue from services rendered . . . in his capacity as Senior Vice President on their behalf in North Carolina."

While Schaeffer was employed by Corporate Defendants and living in North Carolina, Corporate Defendants maintained other connections to the state. For example, they employed at least three other individuals in North Carolina, solicited applicants for business development positions in various cities within the state through LinkedIn posts that highlighted SingleCare's goal of hiring sales representatives in "all major U.S. cities," and provided North Carolina consumers with pharmacy discounts. Corporate Defendants also paid Schaeffer in North Carolina, paid state taxes based on his employment, and mailed tax documents to his North Carolina address.

Schaeffer was officially terminated from his position on 22 October 2018. On 13 June 2019, he brought an action against Defendants, alleging fraud, misrepresentation, and breach of contract, among other claims. On 19 August 2020, Defendants filed Rule 12(b)(6) and Rule 12(b)(2) motions to dismiss. *See* N.C.G.S. § 1A-1, Rule 12(b)(2) and Rule 12(b)(6) (2021). Relevant here, the Rule 12(b)(2) motion argued that the trial court lacked personal jurisdiction over Defendants for nine of Schaeffer's ten claims.[2] The trial court denied the motions, and Defendants timely appealed the denial of the Rule 12(b)(2) motion.

The Court of Appeals unanimously reversed the trial court's denial of Defendants' Rule 12(b)(2) motion in an unpublished opinion issued on 15 June 2021 and denied Schaeffer's subsequent Petition for Rehearing. The Court of Appeals concluded that Schaeffer's contacts with North Carolina that were relevant to the suit were the result of his own unilateral actions and explained that "Defendants' acquiescence

2. The Rule 12(b)(2) motion challenged jurisdiction only as to the first nine counts of the complaint.

with Plaintiff's move to North Carolina, and subsequent communications with Defendant in North Carolina, do not create personal jurisdiction." *Schaeffer v. SingleCare Holdings LLC*, No. COA20-427, 2021 WL 2426202, at *4 (N.C. Ct. App. June 15, 2021). The court recognized that some of Corporate Defendants' contacts with North Carolina weighed in favor of finding specific jurisdiction, including Corporate Defendants' solicitation of business and services, recruitment of employees, and operation of a third-party administrator in the state. *Schaeffer*, 2021 WL 2426202, at *4. Nonetheless, the Court of Appeals concluded that these activities "alone [were] not sufficient to establish specific jurisdiction" and held that Schaeffer's claims "[did] not arise out of, or even relate to, the alleged contacts between Defendants and North Carolina." *Schaeffer*, 2021 WL 2426202, at *5.

II. Analysis

A. Standard of Review

"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." *State ex rel. Stein v. E. I. du Pont de Nemours & Co.*, 382 N.C. 549, 555 (2022). "As an appellate court, we consider whether the trial court's determination regarding personal jurisdiction is supported by competent evidence in the record." *Id.* at 556.

B. Legal Standard

It is well established that "whether a nonresident defendant is subject to personal jurisdiction in this State's courts involves a two-step analysis." *Id.* at 556. First, North Carolina's long-arm statute, N.C.G.S. § 1-75.4, must authorize a court to exercise jurisdiction. *See Beem USA Ltd.-Liab. Ltd. P'ship*, 373 N.C. at 302; N.C.G.S. § 1-75.4 (2021). This statute "make[s] 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). Thus, the second step in the inquiry addresses the determinative issue: whether the Fourteenth Amendment's Due Process Clause permits a state court to exercise jurisdiction over a defendant. *See Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024 (2021).

Due process permits a state's courts to exercise jurisdiction over an out-of-state defendant 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." *See Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (cleaned up). Minimum contacts are established through "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." *Beem USA Ltd.-Liab. Ltd. P'ship*, 373 N.C. at 303 (quoting *Skinner v. Preferred Credit*, 361 N.C. 114, 133 (2006)). "In giving content to that formulation, the [U.S. Supreme] Court has long focused on the nature and extent of 'the defendant's relationship to the forum State.' " *Ford Motor Co.*, 141 S. Ct. at 1024 (quoting *Bristol-Myers Squibb Co. v. Super. Ct. of Cal., San Francisco Cty.*, 582 U.S. 255, 262 (2017)). To demonstrate this relationship, "the plaintiff has the burden of proving that the defendant deliberately 'reached out beyond' its home—by, for example, 'exploit[ing] a market' in the forum State or entering a contractual relationship centered there." *Mucha v. Wagner*, 378 N.C. 167, 171 (2021) (alteration in original) (quoting *Ford Motor Co.*, 141 S. Ct. at 1025).

Minimum contacts may give rise to one of two forms of jurisdiction: general or specific jurisdiction. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). General jurisdiction requires that a defendant's "affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Id.* (quoting *Int'l Shoe*, 326 U.S. at 317). When a defendant's conduct in a state is not so extensive, however, jurisdiction may still be proper if "the litigation results from the alleged injuries that arise out of or relate to the defendant's activities." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (cleaned up). Jurisdiction that is based on this relationship is known as specific jurisdiction. Because Schaeffer asserts only that the trial court has specific jurisdiction over Defendants, our analysis is limited to this kind of personal jurisdiction.

"Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice." *Id.* at 476 (cleaned up). These factors are:

> 'the burden on the defendant,' 'the forum State's interest in adjudicating the dispute,' 'the plaintiff's interest in obtaining convenient and effective relief,' 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies,' and the 'shared interest of the several States in furthering fundamental substantive social policies.'

Id. at 477 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

The purpose of the Due Process Clause's limitations on personal jurisdiction is to "treat[ ] defendants fairly," *Ford Motor Co.*, 141 S. Ct. at 1025, by providing them with "fair warning that a particular activity may subject them to the jurisdiction of a foreign sovereign," allowing them to "structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Burger King Corp.*, 471 U.S. at 472 (cleaned up) (first quoting *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977); then quoting *World-Wide Volkswagen Corp.*, 444 U.S. at 297).

C. Discussion

Applying this framework to the facts of this case, we conclude that specific jurisdiction exists over Corporate Defendants because they purposefully availed themselves of the privileges of conducting various business-related activities in North Carolina, and Schaeffer's claims arise out of or are related to those activities.[3] We further conclude that exercising jurisdiction in this case is constitutionally reasonable.

The same cannot be said for Individual Defendants, however, because Schaeffer's evidence fails to demonstrate that their conduct directed at North Carolina was sufficient to permit the trial court to exercise specific jurisdiction over them in this litigation.

1. Corporate Defendants

[1] Schaeffer urges that Defendants' suit-related activities in North Carolina are sufficient to enable the trial court to exercise specific jurisdiction in this litigation. But in Defendants' view, which was adopted by the Court of Appeals, Schaeffer's decision to move was his own unilateral choice, and "Defendants' acquiescence with Plaintiff's move to North Carolina, and subsequent communications with Defendant in North Carolina, do not create personal jurisdiction." *Schaeffer*, 2021 WL 2426202, at *4.

Defendants contend that the only relevant activities that give rise to Plaintiff's claims, such as the contract negotiations that took place between Schaeffer and Defendants and the execution of Schaeffer's employment-related agreements, occurred in another forum, and

3. Note that we do not address the separate question of whether any Defendants have consented to jurisdiction in this case or whether registering to do business in North Carolina is a valid basis for personal jurisdiction under the Fourteenth Amendment.

"SingleCare's contacts with Schaeffer *after* he moved to North Carolina have no bearing on the analysis." In short, Defendants argue that they did not voluntarily reach out to North Carolina to conduct suit-related activities here. Further, Defendants argue that their "contacts with North Carolina are limited and entirely unrelated to the claims at hand," meaning the activities "do not support jurisdiction . . . in North Carolina for *all employment-related suits*." But Defendants' position on both points ignores the import of Corporate Defendants' voluntary conduct in North Carolina in response to and following Schaeffer's move and misstates the character of Corporate Defendants' other North Carolina-directed activities.

First, we address whether Corporate Defendants purposefully availed themselves of the privileges of conducting business-related activities in North Carolina. It is true that the "unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984). Defendants assert that "SingleCare *did not* reach out to a citizen of North Carolina" because Defendants recruited Schaeffer and initiated his employment when he was a resident of California and "Schaeffer unilaterally moved to North Carolina" prior to his termination. But there is no legal basis for hinging the whole of the analysis on the forum in which the relationship was established (*i.e.* California) to the exclusion of the forum in which Corporate Defendants perpetuated the relationship.

Corporate Defendants emphasize the idea that "SingleCare created a . . . relationship with Schaeffer well *before* he moved to North Carolina" or "before SingleCare even knew Schaeffer would move to North Carolina." In Defendants' view then, there seems to be only *one* forum in which specific jurisdiction might exist—the forum in which the relationship was established. Under this approach, so long as Schaeffer's move was his own decision, there are very few subsequent activities Corporate Defendants could conduct in a new forum that would allow the new forum's courts to exercise jurisdiction over the claims at issue here. For example, Defendants could continue to employ Schaeffer in North Carolina for the next twenty years. Shaeffer could continue to grow Defendants' business in the state, and representatives of the company could visit him regularly to oversee his work. But because Defendants initially "reach[ed] out" to Schaeffer when he was a resident of California, none of those details would matter, even if Schaeffer's presence and work in North Carolina far exceeded any of his

activities in California. Though the forum in which a contractual relationship began is certainly relevant in determining where jurisdiction is proper, it is not the only event that is pertinent to this analysis.

Indeed, the U.S. Supreme Court "long ago rejected the notion that personal jurisdiction might turn on 'mechanical' tests or on 'conceptualistic theories of the place of contracting or of performance.' " *Burger King Corp.*, 471 U.S. at 478–79 (cleaned up) (first quoting *Int'l Shoe Co.*, 326 U.S. at 319; then quoting *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313, 316 (1943)). And though "prior negotiations" and "contemplated future consequences" are relevant "in determining whether the defendant purposefully established minimum contacts with the forum," so too is "the parties' actual course of dealing." *Id.* at 479.

Burger King demonstrates that the purposeful availment inquiry is a "flexible" one. *Universal Leather, LLC v. Koro AR, S.A.*, 773 F.3d 553, 560 (4th Cir. 2014). As the Fourth Circuit has recognized, it "depends on a number of factors" that should be considered "on a case-by-case basis." *Id.* Relevant here,

> [i]n the business context, those factors include, *but are not limited to*, an evaluation of: (1) whether the defendant maintains offices or agents in the forum state; (2) whether the defendant owns property in the forum state; (3) whether the defendant reached into the forum state to solicit or initiate business; (4) whether the defendant deliberately engaged in significant or long-term business activities in the forum state; (5) whether the parties contractually agreed that the law of the forum state would govern disputes; (6) whether the defendant made in-person contact with the resident of the forum in the forum state regarding the business relationship; (7) the nature, quality and extent of the parties' communications about the business being transacted; and (8) whether the performance of contractual duties was to occur within the forum.

Id. (emphasis added) (cleaned up). Defendants would have us forgo this flexible analysis and establish a rigid, per se rule that touches on few of these factors. Such an approach ignores decades of case law from both this Court and the U.S. Supreme Court that evaluates a range of activities to determine whether a defendant intentionally reached out to the forum state, and it would subvert the purpose of the protections

afforded by personal jurisdiction doctrine. *See, e.g.*, *Burger King Corp.*, 471 U.S. at 479–82; *World-Wide Volkswagen Corp.*, 444 U.S. at 295–98; *Int'l Shoe Co.*, 326 U.S. at 319–20; *Mucha*, 378 N.C. at 172–73; *Beem USA Ltd-Liab. Ltd. P'shp*, 373 N.C. at 306; *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 367 (1986).

Rather, as described above, to determine whether personal jurisdiction exists, we examine the totality of the circumstances that this case presents. In response to Schaeffer's decision to move, Corporate Defendants purposefully availed themselves of the privilege of conducting business in North Carolina, voluntarily engaging in a wide range of activities within the state.

The crux of the purposeful availment analysis is whether a defendant " 'reached out beyond' its home—by, for example, 'exploit[ing] a market' in the forum State or entering a contractual relationship centered there." *Ford Motor Co.*, 141 S. Ct. at 1025 (quoting *Walden v. Fiore*, 571 U.S. 277, 285 (2014)). The contacts cannot simply be "random, isolated, or fortuitous[,]" *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 774 (1984), and they must be such that the defendant has "fair warning that a particular activity may subject them to the jurisdiction of a foreign sovereign." *Burger King Corp.*, 471 U.S. at 472 (cleaned up). In short, the defendant's contacts with the forum state must be voluntary, and it must be foreseeable that the defendant could be hailed to court in that particular forum as a consequence.

Here, Defendants first approved Schaeffer's request to move to North Carolina where he would continue to carry out his work remotely. After approving Schaeffer's request to move, Schaeffer explains in his brief that Defendants "helped him purchase a house in North Carolina" by sending a letter to his "North Carolina mortgage lender in order to facilitate [his] move to the state." These activities are not, without more, enough to conclude that Corporate Defendants purposefully availed themselves of the North Carolina market. But they demonstrate that Corporate Defendants supported the transition, which becomes more significant in light of their subsequent North Carolina-targeted activities.

Once Schaeffer moved to North Carolina, Corporate Defendants paid state taxes based upon his work here, mailed tax documents to his North Carolina address, and paid him in the state. Defendants communicated frequently with Schaeffer through phone calls and emails as part of his employment and reimbursed him for expenses he incurred as a result of working in North Carolina, including for travel to and from the state and office maintenance costs. Based on business directives

Defendants issued, Schaeffer argues that "[he] furthered Defendants' pharmacy benefit management business and pharmaceutical benefit card services in North Carolina, which were targeted at North Carolina businesses and residents." For example, as part of his North Carolina-focused work and operating under the instructions of Defendants, Schaeffer sold services related to a third-party administrator—Towers Administrators LLC—that is both licensed in North Carolina and wholly owned by Corporate Defendants.[4] Due to his efforts, "Corporate Defendants derived revenue from services rendered by Schaeffer in his capacity as Senior Vice President on their behalf in North Carolina." Finally, Corporate Defendants terminated Schaeffer with the knowledge that he was a North Carolina-based employee.

These actions demonstrate that Corporate Defendants voluntarily and knowingly engaged with a North Carolina-based employee to support and expand his work in the state. Due to their own directives, Corporate Defendants reaped the business benefits of work that Schaeffer conducted in North Carolina. This work was, at least in part, targeted at the North Carolina market. Based on the extent of the communications and the various forms of support Corporate Defendants voluntarily provided Schaeffer to enable his work in North Carolina coupled with the profits and other benefits Corporate Defendants expected to gain as a result of that support, Corporate Defendants' activities in North Carolina were also sufficient to provide them with ample notice that they may be subject to suit in the state.[5]

On top of its activities in North Carolina as a result of employing Schaeffer, Corporate Defendants voluntarily conduct many other activities in the state that would fairly put them on notice of the possibility that litigation might arise in the forum. Corporate Defendants employed at least three other individuals in North Carolina, one of whom was a sales representative, and solicited candidates from around the state for business development roles. Schaeffer argues that the positions Corporate Defendants advertised in North Carolina "shared the same underlying goal and responsibility held by Schaeffer: to 'help drive growth' in

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4. Towers Administrators LLC holds itself out as "SingleCare Administrators" and is described on SingleCare's website as its "licensed discount medical plan organization."

5. *See*, *e.g.*, *Burger King Corp.*, 471 U.S. at 473–74 ("[W]here individuals 'purposefully derive benefit' from their interstate activities . . . it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities; the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed." (quoting *Kulko v. Cal. Super. Ct.*, 436 U.S. 84, 96 (1978))).

SingleCare." Further, SingleCare intentionally serves North Carolina consumers by providing them "with access to pharmacy discounts at retail locations across the state, including major grocery stores such as Harris Teeter, CVS, Walgreens, and Walmart."[6]

Schaeffer's claims further arise out of and are related to Corporate Defendants' activities in North Carolina. *See Ford Motor Co.*, 141 S. Ct. at 1026. Schaeffer's claims stem from an employment relationship that was partially carried out and allegedly breached in North Carolina. Though the alleged promises that are the basis for the claims were originally made in California, Schaeffer continued to act on Corporate Defendants' behalf in North Carolina based on those promises. The promises were then broken in North Carolina when Corporate Defendants reclaimed the shares they had allegedly granted Schaeffer, which is the event that gave rise to Schaeffer's claims. To be precise, the claims *arise from*, or were caused by, Corporate Defendants' revocation of the shares. *See id.* at 1026 (explaining that the "arise from" language in this standard "asks about causation").

Additionally, other activities conducted by Corporate Defendants are related to Schaeffer's claims. Corporate Defendants supported Schaeffer's employment-related needs and business efforts in North Carolina, directed Schaeffer to carry out certain activities directed at the North Carolina market on their behalf, and they terminated him when he was a North Carolina resident. It is one thing for Defendants to argue that these activities are not sufficient to conclude that Corporate Defendants *purposefully availed* themselves of the benefits of doing business in North Carolina so as to establish minimum contacts—an argument that we have already rejected—but there is simply no basis in law or logic to conclude that Schaeffer's claims are not *related* to these activities.

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6. In framing the California-directed activities as the only relevant events in the purposeful availment analysis, Defendants ignore their North Carolina-directed activities, brushing them off as irrelevant because they occurred after the employment relationship initially formed. As part of this error, Defendants muddle the distinction between the purposeful availment inquiry and the relatedness inquiry. For example, as part of their purposeful availment analysis, they assert that "[w]ithout soliciting a relationship with a North Carolina resident and the forum itself, there is no connection between the contracts at issue and this forum." At this point in the analysis, however, the task is to evaluate "the nature and extent of 'the defendant's relationship to the forum State.' " *Ford Motor Co.*, 141 S. Ct. at 1024 (quoting *Bristol-Myers Squibb Co.*, 582 U.S. at 262). Whether there is a connection between the at-issue contacts and North Carolina is a separate question that does not bear on whether the "quality and nature" of Corporate Defendants' contacts are sufficient to trigger specific jurisdiction. *Int'l Shoe Co.*, 326 U.S. at 319.

The U.S. Supreme Court's decision in *Ford Motor Co.* supports this result. *Ford Motor Co.* consolidated two product liability cases that arose after Ford-manufactured cars malfunctioned, injuring individuals in the cars when the vehicles crashed. 141 S. Ct. at 1023. The accidents occurred in the states where the suits were brought, the victims were residents of those states, and "Ford did substantial business in" both states. *Id.* at 1022. Ford sought to dismiss the suits for lack of personal jurisdiction, arguing that the state courts "had jurisdiction only if the company's conduct in the State had given rise to the plaintiff's claims. And that causal link existed . . . only if the company had designed, manufactured, or—most likely—sold in the State the particular vehicle involved in the accident." *Id.* at 1023. The U.S. Supreme Court rejected this argument, highlighting that jurisdiction can be established when a plaintiff's claims arise from or are related to a defendant's activities in the relevant forum. *Id.* at 1026. Applying this distinction, the Court held that the plaintiffs' claims were related to Ford's activities in their states, meaning the " 'relationship among the defendant, the forum[s], and the litigation'—[was] close enough to support specific jurisdiction." *Id.* at 1032 (first alteration in original) (quoting *Walden*, 571 U.S. at 284).

Applying *Ford Motor Co.* to the facts of this case, just as jurisdiction there was not limited "to where the car was designed, manufactured, or first sold," 141 S. Ct. at 1028, jurisdiction here is not limited to where Schaeffer was first recruited or where his contract was negotiated and executed. In *Ford Motor Co.*, the Court recognized that "Ford sold the specific products [that malfunctioned] in other states," but it explained that the plaintiffs' claims were related to Ford's activities anyway because "the plaintiffs [were] residents of the forum States. They used the allegedly defective products in the forum States. And they suffered injuries when those products malfunctioned in the forum States." *Id.* at 1031. Here, Schaeffer was a resident of North Carolina, he carried out his employment obligations in North Carolina based on both directives from Corporate Defendants and promises Corporate Defendants allegedly made to him, and he claims he suffered an injury in North Carolina when Corporate Defendants allegedly broke those promises. There is a clear connection between Corporate Defendants' activities in North Carolina—some of which were conducted by Corporate Defendants themselves to accommodate and support Shaeffer's remote work in North Carolina while others were conducted by Schaeffer at Corporate Defendants' behest for their own benefit—and Schaeffer's claims in this litigation. This conclusion "is faithful to the United States Supreme Court's characterization of specific jurisdiction as being based on 'case-linked' contacts." *Beem USA Ltd.-Liab. Ltd. P'ship*, 373 N.C. at 307.

To distort this straightforward analysis, Defendants again frame their recruitment of Schaeffer and execution of his employment-related agreements—activities that were completed in California—as their only relevant activities with respect to Schaeffer's claims. Through this narrow lens, Defendants assert that "Schaeffer seeks to relitigate alleged representations made to him, and agreements entered into, in California, and that have nothing whatsoever to do with North Carolina or [Defendants'] alleged North Carolina contacts. The only connection between the claims at issue and this forum is Schaeffer's unilateral decision to relocate to North Carolina." This contention mischaracterizes Corporate Defendants' activities in North Carolina as described above, and incorrectly focuses on a limited set of events during the parties' relationship to the exclusion of other relevant considerations. As discussed, conduct that occurred in North Carolina following the formation of the relationship between Schaeffer and Corporate Defendants is pertinent to this analysis as well.

Not only have Defendants purposefully established minimum contacts in North Carolina that arise out of and are related to Schaeffer's claims, but personal jurisdiction is also constitutionally reasonable in that "the assertion of personal jurisdiction would comport with 'fair play and substantial justice.' " *Burger King Corp.*, 471 U.S. at 476 (quoting *Int'l Shoe Co.*, 326 U.S. at 320). Most significantly, Corporate Defendants already independently conduct extensive activities in North Carolina apart from any activities they conducted in the state that were related to Schaeffer. What is more, Defendants have not challenged the trial court's jurisdiction as to one of Schaeffer's claims, so they are already subject to litigation in North Carolina in this very matter. As a result, there is virtually no burden on Corporate Defendants in litigating the additional claims in this state. Further, litigating all of the claims against Corporate Defendants in North Carolina preserves judicial resources, thereby promoting the interstate judicial system's interest in obtaining an efficient resolution of the case by consolidating the claims within a single court. Finally, contrary to the Court of Appeals' conclusion that "North Carolina has minimal interest in a contract negotiated outside of this State, formed between non-resident parties, and substantially performed outside of this State," *Schaeffer*, 2021 WL 2426202, at *5, North Carolina has a " 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 367 (citing *Burger King Corp.*, 471 U.S. at 473). All told, Corporate Defendants have established "minimum contacts with [North Carolina] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co.*, 326 U.S. at 316 (cleaned up).

2. Individual Defendants

[2] Importantly, foreign corporate officers, directors, or representatives are not subjected to jurisdiction simply because their employer-corporation is subject to suit in a particular forum. *See Calder v. Jones*, 465 U.S. 783, 790 (1984) ("Petitioners['] . . . contacts with California are not to be judged according to their employer's activities there."); *see also Robbins v. Ingham*, 179 N.C. App. 764, 771 (2006) (" '[P]laintiffs may not assert jurisdiction over a corporate agent without some affirmative act committed in his individual *official* capacity.' ") (emphasis added) (quoting *Godwin v. Walls*, 118 N.C. App. 341, 348, *disc. review allowed*, 341 N.C. 419 (1995)). Imputing a corporation's contacts to individuals employed by the corporation would ignore that specific jurisdiction turns on "the relationship between the *defendant*, the forum, and the litigation." *Mucha v. Wagner*, 378 N.C. 167, 174 (2021) (emphasis added) (cleaned up). Nevertheless, we do not conclude that any foreign corporate representative acting solely within their official capacity is shielded from jurisdiction, as such a blanket rule would itself risk ignoring the forum-directed activities of the individual defendant. But "more than mere participation in the affairs of the corporation is required." *King v. Prodea Sys., Inc.*, 433 F. Supp. 3d 7, 16 (D. Mass. 2019) (cleaned up). We instead conduct the same minimum contacts test for Individual Defendants as we have for Corporate Defendants. With respect to the relatedness inquiry, one particularly relevant consideration is whether Individual Defendants were "primary participants in the alleged wrongdoing intentionally directed at a [North Carolina] resident." *Calder*, 465 at 790.

Schaeffer's pleadings and affidavit do not provide a factual basis to conclude that Individual Defendants themselves engaged in sufficient activities giving rise to or related to the subject matter of the claims to be subjected to jurisdiction in North Carolina courts. Though Schaeffer's affidavit alleges, among other minor activities, that Defendant Schoenebeck "participated in [his] termination" and "[he] believes that" he was terminated "at the direction of Defendant Bates," Schaeffer does not make sufficiently specific allegations regarding the North Carolina-directed activities Individual Defendants themselves engaged in or the connection between those activities and his claims, such as by alleging their individual roles in bringing about the injuries he suffered. For example, while it might be the case that Defendant Schoenebeck *participated* in his termination, she may have had nothing to do with the decision to terminate him and did not necessarily know that his shares were being revoked. Without more, these general allegations

are insufficient to conclude that the exercise of personal jurisdiction is appropriate as to Individual Defendants.

III. Conclusion

Personal jurisdiction doctrine has necessarily evolved over time to account for "the fundamental transformation of our national economy." *Chadbourn, Inc. v. Katz*, 285 N.C. 700, 704 (1974). "Today[,] many commercial transactions touch two or more States and may involve parties separated by the full continent." *Id.* In the same vein, as technological innovation flourishes, remote work has become increasingly common. In the face of these advances, courts must balance the importance of a foreign defendant's "liberty interest in not being subject to the binding judgments of a forum in which he has established no meaningful contacts, ties, or relations," with the reality that such contacts are more easily and more widely cultivated today. *See Burger King Corp.*, 471 U.S. at 471–72 (cleaned up). Indeed, "because modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity, it usually will not be unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity." *Id.* at 473–74 (cleaned up).

Though our rapidly changing world has perhaps made it easier to hold foreign defendants to account for alleged wrongdoings in a variety of forums, our decision today breaks no new ground. It simply analyzes the whole of Schaeffer's relationship with Defendants, rather than focusing only on a narrow and discrete set of events. Because Corporate Defendants purposefully availed themselves of the privileges of conducting various business-related activities in North Carolina and those activities arise from or relate to Schaeffer's claims in this litigation, we hold that the trial court may exercise personal jurisdiction over Corporate Defendants pursuant to the Due Process Clause. Accordingly, we reverse the Court of Appeals decision in this case as to Corporate Defendants, affirm its decision with respect to Individual Defendants, and remand to the trial court for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART.

STATE OF NORTH CAROLINA
v.
RAYQUAN JAMAL BORUM

No. 505PA20

Filed 6 April 2023

Homicide—second-degree murder—malice—jury verdict—sentencing

In defendant's trial for second-degree murder, where the jury indicated on the verdict sheet its finding that all three forms of malice supported defendant's conviction—actual malice (a B1 felony), "condition of mind" malice (a B1 felony), and "depraved-heart" malice (a B2 felony)—the trial court properly imposed a B1 felony sentence (which is more severe than a B2 felony sentence). There was no ambiguity in the jury's verdict, which the trial court reviewed and confirmed with the jury, and the relevant statute, N.C.G.S. § 14-17(b), was unambiguous that a Class B2 sentence is required only when a second-degree murder conviction hinges on a finding of depraved-heart malice.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, No. COA19-1022, 2020 WL 6437413 (N.C. Ct. App. Nov. 3, 2020), vacating a judgment entered on 8 March 2019 by Judge Gregory R. Hayes in Superior Court, Mecklenburg County, and remanding for resentencing. This matter was calendared for argument in the Supreme Court on 7 February 2023 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Joshua H. Stein, Attorney General, by Caden William Hayes, Assistant Attorney General, for the State-appellant.

Meghan Adelle Jones for defendant-appellee.

EARLS, Justice.

This case requires us to determine whether, under all of the circumstances, the jury's verdict at trial was ambiguous as to what kind of malice supported the second-degree murder charge.

"Before 2012[,] all second-degree murders were classified at the same level [of severity] for sentencing purposes." *State v. Arrington*,

371 U.S. 518, 522 (2018). In 2012, however, the legislature amended North Carolina's murder statute to classify second-degree murders according to varying degrees of severity based on the level of culpability with which an offender acted. *See* Act of June 28, 2012, S.L. 2012-165, § 1, 2011 N.C. Sess. Laws (Reg. Sess. 2012) 781. Consequently, under the amended statute, most kinds of second-degree murder are classified at the Class B1 felony level. N.C.G.S. § 14-17(b) (2021). But when it is determined that a criminal defendant acted with depraved-heart malice, meaning the individual engaged in "an inherently dangerous act or omission, done in such a reckless and wanton manner as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief," second-degree murder is classified as a Class B2 felony. N.C.G.S. § 14-17(b)(1).

Defendant Rayquan Jamal Borum was convicted of second-degree murder in March 2019. The jury indicated on the verdict sheet that Mr. Borum acted with depraved-heart malice in addition to the two other forms of malice recognized in North Carolina, and the trial court sentenced him for a Class B1 felony. This appeal concerns whether Mr. Borum should have been sentenced at the lower B2 felony level, given the jury's conclusion that he acted, in part, with depraved-heart malice. Based on our precedents which establish that whether a verdict is unambiguous depends on all of the circumstances present in a case, including the indictment, the evidence, and the instructions of the trial court, *see State v. Abraham*, 338 N.C. 315, 356 (1994), we hold that under the circumstances of this particular case, the jury's completed verdict form was not ambiguous and the trial court properly sentenced Mr. Borum at the Class B1 level.

I. Background

On 21 September 2016, Mr. Borum shot and killed Justin Carr during a protest of the shooting of Keith Lamont Scott. At the time of the incident, witnesses heard a gunshot and subsequently saw Mr. Borum holding a gun before he ran away from the crowd. Witnesses then observed Mr. Carr lying on the ground in a pool of blood. Mr. Carr died the next day. Mr. Borum was indicted for Mr. Carr's murder on 3 October 2016. He was charged with first-degree murder and possession of a firearm by a felon.

Mr. Borum was tried before a jury beginning on 11 February 2019 in the Superior Court, Mecklenburg County, before the Honorable Gregory R. Hayes. During the jury charge conference, the court explained the three theories of malice that could support a murder conviction: actual malice, "condition of mind" malice, and "depraved-heart" malice. The

trial court provided the jury with a special verdict form to identify which theories of malice it found, if any. The verdict form again defined each form of malice and instructed the jury, "IF YOU FIND THE DEFENDANT GUILTY OF SECOND DEGREE MURDER YOU MUST UNANIMOUSLY FIND ONE OR MORE [FORMS OF MALICE] BELOW."

The jury found Mr. Borum guilty of possession of a firearm by a felon and second-degree murder. On the verdict sheet, the jury found that all three forms of malice supported the conviction. Upon reading the verdict in open court, the trial court confirmed with the jury that it was a unanimous verdict.

At sentencing, the State asserted that Mr. Borum should be sentenced for a Class B1 felony, given that the jury found that he acted with actual malice and condition of mind malice. In response, defense counsel argued that Mr. Borum should instead be sentenced in the lower Class B2 range. According to the defense, there was a possibility "that the verdict sheet [was] inconsistent with the actual sentence" because the jury found Mr. Borum acted with not just actual and condition of mind malice but also depraved-heart malice. When a verdict sheet indicates the latter form of malice, the defense argued, second-degree murder should be treated as a Class B2 felony to avoid a verdict that is inconsistent with the verdict sheet.

The trial court rejected the defense's argument and sentenced Mr. Borum to 276 to 344 months in prison for the Class B1 second-degree murder conviction and 14 to 26 months for the possession of a firearm by a felon conviction. The sentences were to be served consecutively, and he was credited with just over two years of time served during pretrial confinement. The defense entered notice of appeal.

Mr. Borum raised several arguments in the Court of Appeals. Relevant here, he argued that the trial court erred by sentencing him for a Class B1 felony rather than a Class B2 felony based on ambiguity in the jury's verdict. *State v. Borum*, No. COA19-1022, 2020 WL 6437413, at *7–9 (N.C. Ct. App. Nov. 3, 2020). The Court of Appeals agreed and remanded the case for resentencing at the Class B2 level, reasoning that "[t]he State presented evidence tending to show multiple malice theories. As in *Mosley*, evidence presented could support a Class B1 or Class B2 level felony. Also, as in *Mosley*, the jury's verdict was ambiguous because the theories supported different levels of felonies." *Borum*, 2020 WL 6437413, at *8; *see State v. Mosley*, 256 N.C. App. 148 (2017). The Court of Appeals concluded that because the jury's verdict was ambiguous and that "[c]onsistent with [the court's] holding in *Mosley*,

ambiguities in the verdict should be construed in favor of Defendant." *Borum*, 2020 WL 6437413, at *9. The State petitioned this case for discretionary review, arguing that the Court of Appeals erred in remanding Mr. Borum's case for resentencing on the second-degree murder conviction as a Class B2 felony. This Court allowed the State's petition for discretionary review on 9 February 2022.

II. Analysis

In order to prove that a criminal defendant committed second-degree murder, one of the essential elements the State must prove is malice. *See Arrington*, 371 N.C. at 518 ("Second-degree murder is defined as (1) the unlawful killing, (2) of another human being, (3) *with malice*, but (4) without premeditation and deliberation." (cleaned up) (emphasis added)). In North Carolina, there are three forms of malice: (1) "actual malice, meaning hatred, ill-will or spite;" (2) "that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification," or condition of mind malice; and (3) "an inherently dangerous act done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief," or depraved-heart malice. *Id.* (cleaned up).

Mr. Borum's position that he should have been sentenced for a Class B2 felony is based on N.C.G.S. § 14-17(b)(1). Under subsection 14-17(b), second-degree murder is generally a Class B1 felony. However, where "[t]he malice necessary to prove second degree murder [was] based on an inherently dangerous act or omission, done in such a reckless and wanton manner as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief," second-degree murder is considered a Class B2 felony. N.C.G.S. § 14-17(b) (2021).[1] In practice, this means that "the crime of second-degree murder has two potential classifications, B1 and B2, depending on the facts of the murder," *Arrington*, 371 N.C. at 522, and a defendant who is convicted of second-degree murder and is found to have acted with depraved-heart malice has committed an offense in a lower felony class than a defendant who is found to have acted with one of the other two types of malice.

Relying on subsection 14-17(b)(1), Mr. Borum argues that because the jury found that he acted with all three kinds of malice, including depraved-heart malice, "[u]nder the plain language of Section 14-17(b),

1. Subsection 14-17(b)(2) provides another exception to the Class B1 sentencing requirement when "[t]he murder is one that was proximately caused by the unlawful distribution of [certain illegal substances]." N.C.G.S. § 14-17(b)(2) (2021).

the trial court should have sentenced Mr. Borum for second-degree murder as a Class B2 felony." According to Mr. Borum's interpretation of subsection 14-17(b), "a Class B1 sentence is appropriate only where there are *no facts* . . . that give rise to a Class B2 sentence." Mr. Borum also argues that the jury's verdict was ambiguous. We disagree and hold that when, as here, the jury's verdict unambiguously supports a second-degree murder conviction based on actual malice or condition of mind malice, a Class B1 sentence is required, even when depraved-heart malice is also found.

Given all of the circumstances of this case, the jury's verdict convicting Mr. Borum of second-degree murder was not ambiguous. "A verdict may be given significance and a proper interpretation by reference to the indictment, the evidence, and the instructions of the court." *State v. Hampton*, 294 N.C. 242, 248 (1978); *see also State v. Tilley*, 272 N.C. 408, 416 (1968) ("A verdict, apparently ambiguous, may be given significance and correctly interpreted by reference to the allegations, the facts in evidence, and the instructions of the court." (cleaned up)). While any ambiguity in the verdict is to be construed in favor of the defendant, *Mosley*, 256 N.C. App. at 153, there can be circumstances "[w]hen the indictment, the evidence and the charge are reasonably considered in connection with the verdict returned, it is clear that the jury intended to find, and did find, defendant guilty," *Hampton*, 294 N.C. at 248.

Here, the trial court instructed the jury on the different forms of malice and provided a verdict form that both required the jury to specifically select which forms of malice supported a second-degree murder conviction and explicitly stated that the jury must unanimously find that Mr. Borum acted with the type(s) of malice indicated on the form. After the jury returned a verdict form finding that Mr. Borum acted with all three kinds of malice, the trial court reviewed the verdict with the jury, confirming that it was the jurors' unanimous verdict. These facts demonstrate that the jury understood its responsibility to unanimously determine each form of malice that supported the second-degree murder conviction, and the trial court took steps to ensure that this task was completed properly.

In support of his contention that the jury's verdict was ambiguous, Mr. Borum relies on the Court of Appeals' decision in *State v. Mosley*, 256 N.C. App. 148 (2017). In *Mosley*, the State charged the defendant with murder and during his trial, introduced evidence supporting that the defendant acted with all three forms of malice. *Id.* at 149–50. Prior to jury deliberations, the trial court provided the jury with a general verdict form, meaning the jury did not have a way to specifically indicate which

type of malice supported a second-degree murder conviction. *Id.* at 149, 152–53. The jury ultimately found the defendant guilty of second-degree murder, and the trial court subsequently sentenced him for a Class B1 felony. *Id.* at 149–50.

The Court of Appeals vacated the judgment and remanded for sentencing as a Class B2 felony based largely on the trial court's provision of a general verdict form to the jury.[2] *Id.* at 153. The general verdict form raised the possibility that the jury only found that the defendant acted with depraved-heart malice, which would require that he be sentenced at the B2 level. As the Court of Appeals explained, "[b]ecause there was evidence presented which would have supported a verdict on second degree murder on more than one theory of malice, and because those theories support different levels of punishment under . . . [N.C.G.S.] § 14-17(b), the verdict rendered in [*Mosley*] was ambiguous." *Id.* Based on the principle that "neither the [Court of Appeals] nor the trial court [wa]s free to speculate as to the basis of [the] jury's verdict," the court concluded that "the verdict should be construed in favor of the defendant." *Id.*; *see also State v. Goodman*, 298 N.C. 1, 16 (1979) ("If the jury's verdict were general, not specifying the theory upon which guilt was found, the court would have no way of knowing what theory the jury used and would not have proper basis for passing judgment."). Mr. Borum argues that *Mosley* is persuasive here because the special verdict sheet the jury received in this case did not differentiate between the Class B1 and Class B2 offenses by including the term "OR" between the different levels of second-degree murder like "it did between first and second-degree murder."

Mosley was correctly decided based on the circumstances presented in that case. However, the trial court in this case submitted a different verdict form that did allow the jury to indicate specifically which form of malice it was finding to have been proven beyond a reasonable doubt. Here, the jury was repeatedly instructed on the different forms of malice, and through a special verdict form, the jury explicitly found that all three forms of malice were present, including the types of malice that require a Class B1 felony sentence. There is no uncertainty regarding whether the jury's verdict was based only on a single form of malice that requires a lower level of punishment (*i.e.*, depraved-heart malice) or the two other forms that require a higher level of punishment.

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2. Additionally, the Court of Appeals' decision was based on the fact that the trial court only described the different forms of malice when instructing on first-degree murder, rather than explaining the distinction while instructing on second-degree murder as well. *See Mosley*, 256 N.C. App. at 149, 153.

Thus, the concerns in *Mosley* that led the Court of Appeals to conclude that the jury's verdict was ambiguous are not implicated here.

Next, we must decide whether N.C.G.S. § 14-17(b) requires a Class B2 felony sentence for any second-degree murder conviction in which a jury finds that a criminal defendant acted with depraved-heart malice. According to Mr. Borum, "[N.C.G.S. §] 14-17(b) does not say that a Class B2 sentence shall be imposed when 'the malice to prove second-degree murder is *necessarily* based on depraved-heart malice.' " In his view, under N.C.G.S. § 14-17(b), "a Class B1 sentence is appropriate only where there are *no facts* . . . that give rise to a Class B2 sentence." This reading of the statute is untenably broad.

"The goal of statutory interpretation is to determine the meaning that the legislature intended upon the statute's enactment." *State v. Rankin*, 371 N.C. 885, 889 (2018). "The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, the spirit of the act and what the act seeks to accomplish." *State v. Langley*, 371 N.C. 389, 395 (2018) (cleaned up). "The legislative purpose of a statute is first ascertained by examining the statute's plain language." *Correll v. Div. of Soc. Servs.*, 332 N.C. 141, 144 (1992). "Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209 (1990).

Subsection 14-17(b) states:

> Any person who commits second degree murder shall be punished as a Class B1 felon, except that a person who commits second degree murder shall be punished as a Class B2 felon in either of the following circumstances:
>
> (1) The malice necessary to prove second degree murder is based on an inherently dangerous act or omission, done in such a reckless and wanton manner as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief.
>
> (2) The murder is one that was proximately caused by the unlawful distribution of any opium, opiate, or opioid; any synthetic or natural salt, compound, derivative, or preparation of opium, or opiate, or opioid; cocaine or other substance

> described in G.S. 90-90(1)d.; methamphetamine; or a depressant described in G.S. 90-92(a)(1), and the ingestion of such substance caused the death of the user.

N.C.G.S. § 14-17(b). Thus, the statute plainly expresses that a person convicted of second-degree murder is only sentenced as a Class B2 felon where the malice *necessary* to prove the murder conviction is depraved-heart malice. The term "necessary" is commonly understood as a condition "[t]hat is needed for some purpose or reason; essential." *Necessary*, Black's Law Dictionary (11th ed. 2019).

Contrary to Mr. Borum's interpretation, this means that a Class B2 sentence is only appropriate where a second-degree murder conviction hinges on the jury's finding of depraved-heart malice. Here, however, depraved-heart malice is not necessary—or essential—to prove Mr. Borum's conviction because the jury also found that Mr. Borum acted with the two other forms of malice. Put another way, in this case, the verdict does not stand or fall based on the jury's finding of depraved-heart malice. This interpretation is consistent with this Court's decision in *Arrington*, which explained that N.C.G.S. § 14-17(b) "distinguishes between second-degree murders that involve an intent to harm (actual malice or the intent to take a life without justification) versus the less culpable ones that involve recklessness[,]" namely depraved-heart malice. 371 N.C. at 524. As explained, the jury here found that the murder involved "an intent to harm," so the murder necessarily was not "less culpable." *See id.* The plain language of the statute is determinative and forecloses reference to other interpretive tools.

III. Conclusion

It is true that "[w]hen a verdict is ambiguous, neither we nor the [lower courts are] free to speculate as to the basis of a jury's verdict, and the verdict should be construed in favor of the defendant." *See Mosley*, 256 N.C. App. at 153; *see also State v. Whittington*, 318 N.C. 114, 123 (1986). But not only was the verdict against Mr. Borum unambiguous, the text of N.C.G.S. § 14-17(b)(1) is plain as well. We therefore reverse the Court of Appeals' decision below and hold that the trial court correctly sentenced Mr. Borum at the Class B1 felony level.

REVERSED.

STATE OF NORTH CAROLINA
v.
ANTIWUAN TYREZ CAMPBELL

No. 97A20-2

Filed 6 April 2023

Jury—selection—Batson challenge—prima facie case—limited record—ratio of excused jurors

In defendant's prosecution for first-degree murder, the trial court did not err by determining that defendant had failed to establish a prima facie case of racial discrimination during jury selection pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), where the State used three out of four peremptory strikes to excuse black potential jurors and defendant was unable on appeal to produce any additional facts or circumstances for consideration—due largely to defendant's specific request at trial that jury selection not be recorded. The single mathematical ratio, standing alone, was insufficient to show clear error in the trial court's determination. Finally, the Supreme Court did not consider the State's race-neutral explanation for its peremptory strikes—which the trial court had ordered the State to provide—because the trial court's *Batson* inquiry should have concluded with the court's determination that defendant had failed to make a prima facie showing and should not have moved to the second step.

Justice EARLS dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 272 N.C. App. 554, 846 S.E.2d 804 (2020), finding no error in the trial court's determination that defendant failed to establish a prima facie case of purposeful discrimination during jury selection. On 15 December 2020, the Supreme Court allowed defendant's petition for discretionary review of additional issues. Heard in the Supreme Court on 8 February 2023.

Joshua H. Stein, Attorney General, by Michael T. Henry, Assistant Attorney General, for the State-appellee.

Olivia Warren for defendant-appellant.

University of North Carolina School of Law, Clinical Programs Civil Rights Clinic, by Erika K. Wilson; and Tiffany R. Wright for North Carolina Black Lives Matter Activists, amici curiae.

Cassandra Stubbs, Elizabeth R. Cruikshank, Sarah H. Sloan, Daniel Rubens, and Easha Anand for the Roderick and Solange Macarthur Justice Center and the American Civil Liberties Union, amici curiae.

BERGER, Justice.

Defendant appeals from a decision of the Court of Appeals concluding that there was no error in the trial court's determination that defendant failed to establish a prima facie case of racial discrimination during jury selection pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986). We affirm.

I. Factual and Procedural Background

On April 15, 2015, defendant was indicted for first-degree murder and second-degree kidnapping. Defendant's matter came on for trial in the Superior Court, Columbus County, on July 24, 2017.

Defendant's counsel filed a series of motions at the outset of trial, including a motion for complete recordation. Notably, although defendant's counsel stated that this motion was "[j]ust for appeal purposes," defendant's counsel specified she was "not requesting that [recordation] include jury selection." The trial court granted defendant's motion; thus, no transcript of voir dire is available. The record in this matter, as it relates to voir dire, contains only the deputy clerk's jury panel sheet and a transcript of the proceedings after defendant made his *Batson* objection.[1]

In seating twelve jurors for defendant's trial, the jury panel sheet shows that two prospective jurors were excused for cause. In addition, defendant exercised three peremptory challenges to excuse prospective jurors Pamela Moore, Richard Fowler, and Brentwood Parker, while the State excused prospective jurors Timothy Coe and Sylvia Vereen with peremptory challenges. The record contains no evidence of objections by defendant at the time the State used these peremptory challenges.

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1. The record in this case is sufficient for appellate review due to the trial court's care in ensuring that exchanges between counsel and the trial court relevant to *Batson* were put on the record.

However, while selecting alternate jurors, the State exercised two peremptory challenges to excuse Justin Staton and Andria Holden. Defendant raised a *Batson* objection to the State's excusal of Ms. Holden, arguing that the State had used three of its four peremptory challenges to strike black prospective jurors and "ha[d] tried extremely hard for every African-American, to excuse them for cause." Defendant further contended that "the last two alternate jurors that were excused showed no leaning one way or the other or indicated that they would not be able to hear the evidence, apply the law, and render a verdict."

After hearing from defendant, the trial court allowed the State to respond. The State noted that although it had race-neutral reasons justifying each peremptory challenge, the trial court was first required to determine that defendant had made a prima facie showing under *Batson*. Defendant agreed that "it's a decision for the [c]ourt at this point." The trial court denied defendant's *Batson* challenge, concluding that defendant had failed to establish a prima facie case even though such a showing "is a very low hurdle."

After determining that defendant had failed to establish a prima facie case, the trial court again asked the State if it would like "to offer a racially-neutral basis" for its peremptory strikes. Because the State noted that offering race-neutral reasons "could be viewed as a stipulation that there was a prima facie showing," the State declined to offer its reasons for the strikes. The trial court again reiterated that "the [c]ourt has found at this point there's not a prima facie showing, and the [c]ourt will deny the *Batson* challenge."

After a short recess, the trial court repeated that it "d[id] not find that a prima facie case has been established," but nevertheless "order[ed] the State to proceed as to stating a racially-neutral basis for the exercise of the peremptory challenges."

As to the first prospective juror, Ms. Vereen, the State explained:

> [S]he had indicated that she was familiar with Clifton Davis and actually dated his brother, who is a potential witness, and a potential witness who was . . . alleged to have been in the vehicle with . . . defendant on the night of this encounter in those early morning hours.
>
> . . . .
>
> . . . [W]e used our peremptory strike based upon blood relation to the people in the area of that

> community, . . . defendant's blood relation to the people in the area of the Bennett Loop community, and Mr. Davis, his blood brother being the person she dated around the time period or within a few years of this happening, and her being familiar with Mr. Clifton Davis, who is a witness.

Regarding the challenge to Mr. Staton, the State explained:

> [He] made several conflicting statements during the State's questioning to try and ensure if he could be fair and impartial or not.
>
> . . . [H]e was familiar with [a primary witness to the murder and alleged kidnapping] . . . any concern he may have preconceived notions about who she was and these events, was one of the State's concerns.
>
> In addition, he stated he needed to hear from both sides . . . [h]e had flip-flopped back and forth or had stated he needed to hear from both sides, he could only hear from the State, he needed to hear from both sides.
>
> . . . [S]ince he had gone from having to hear both sides to only hearing one side, being the State, back and forth on multiple occasions, that was a concern.
>
> Also, he indicated that he had two friends, one who was transgender who was killed in Cumberland County, that friend, he indicated, those events, and the one in California for the girlfriend or female friend he had who had been killed. When the State asked whether that would substantially impair his ability to be fair and impartial as a juror in this case and a trier of fact being presented here for this particular case-in-chief, he indicated it would.

The State provided the following race-neutral reasons for the challenge to Ms. Holden:

> [S]he was familiar with . . . [people] that are on the potential witness list, they are blood relatives to [a primary witness to the murder and alleged kidnapping] . . . .

> And based upon her familiarity with those three names, which are related to the facts in this case and potential witnesses, we did not—from our viewpoint, we wanted to ensure that a potential juror did not bring in outside knowledge or facts into this case about those people they were familiar with and saw socially . . . .
>
> . . .
>
> [A]n additional reason for the peremptory strike . . . was the fact [that] when she was describing her political science background and nature as a student, she was also indicating that she was a participant, if not an organizer, for Black Lives Matter at her current college with her professor, and whether or not that would have any implied unstated issues that may arise due to either law enforcement, the State, or other concerns we may have.

Thereafter, the trial court stated that "the [c]ourt continues to find, as I've already indicated, that there has not been a prima facie showing as to purposeful discrimination." The trial court subsequently entered a written order denying defendant's *Batson* claim for failure to establish a prima facie showing:

> The [c]ourt, pursuant to the *Batson v. Kentucky* objection made by the [d]efense during jury selection, finds that there was not a prima facie showing made to establish any violations by the State for its exercise of [per]emptory challenges to prospective jurors. The [c]ourt noted that the State excused two jurors by using [its per]emptory challenges before sitting the initial twelve jurors. When the State sought to use a [per]emptory challenge on the second prospective alternate juror, after excusing the previous alternate juror, the [d]efense made a *Batson v. Kentucky* based objection. During the subsequent hearing the [c]ourt found that the [d]efense did not make a prima facie showing.
>
> NOW THEREFORE, IT IS ORDERED, that the [c]ourt finds that the State's use of [per]emptory challenges during jury selection did not constitute a violation of *Batson v. Kentucky*.

At the conclusion of trial, the jury found defendant guilty of first-degree murder and not guilty of second-degree kidnapping. Defendant was sentenced to life imprisonment without parole and timely appealed.

In the Court of Appeals, defendant argued that the trial court erred in concluding that he failed to establish a prima facie case of impermissible racial discrimination during jury selection. *State v. Campbell* (*Campbell I*), 269 N.C. App. 427, 838 S.E.2d 660 (2020). A majority of the Court of Appeals found no error. *Id.* at 435, 838 S.E.2d at 666. One judge dissented, contending that the case should be remanded to the trial court "for specific findings of fact in order to permit appellate review of the trial court's decision." *Id.* at 439, 838 S.E.2d at 668 (Hampson, J., concurring in part and dissenting in part).

Defendant subsequently petitioned this Court for a writ of certiorari, which we allowed to remand the case to the Court of Appeals for reconsideration in light of our decisions in *State v. Hobbs*, 374 N.C. 345, 841 S.E.2d 492 (2020) and *State v. Bennett*, 374 N.C. 579, 843 S.E.2d 222 (2020). On remand, a majority of the Court of Appeals once again found no error, and, once again, there was a dissent urging remand to the trial court for additional findings of fact. *State v. Campbell* (*Campbell II*), 272 N.C. App. 554, 846 S.E.2d 804 (2020). Defendant appealed from this decision based upon the dissent.

In addition, defendant filed a petition for discretionary review as to additional issues, which was allowed by this Court. Defendant argues that the Court of Appeals erred in holding that there was no error in the trial court's conclusion that he failed to establish a prima facie case of purposeful discrimination during jury selection.

II. Standard of Review

"[T]he job of enforcing *Batson* rests first and foremost with trial judges." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019). "[T]rial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors." *Batson v. Kentucky*, 476 U.S. 79, 97, 106 S. Ct. 1712, 1723 (1986) (emphasis omitted); *see also United States v. Moore*, 895 F.2d 484, 486 (8th Cir. 1990) ("The trial judge, with his experience in voir dire, is in by far the best position to make the *Batson* prima facie case determination.").

Thus, when a trial court rules that a defendant has failed to demonstrate a prima facie case of discrimination, "[t]he trial court's ruling is accorded deference on review and will not be disturbed unless it is

clearly erroneous." *State v. Augustine*, 359 N.C. 709, 715, 616 S.E.2d 515, 522 (2005) (citing *State v. Nicholson*, 355 N.C. 1, 21–22, 558 S.E.2d 109, 125 (2002)); *see also Hernandez v. New York*, 500 U.S. 352, 366, 111 S. Ct. 1859, 1870 (1991) (plurality opinion) ("[I]n the absence of exceptional circumstances, we [sh]ould defer to [the trial] court['s] factual findings . . . ."); *Flowers*, 139 S. Ct. at 2244 (describing the "appellate standard of review of the trial court's factual determinations in a *Batson* hearing as highly deferential." (cleaned up)); *United States v. Stewart*, 65 F.3d 918, 923 (11th Cir. 1995) ("When we review the resolution of a *Batson* challenge, we give great deference to the [trial] court's finding as to the existence of a prima facie case.").

III. Analysis

A. *Batson* Claims

In selecting a jury, an attorney may exercise two different types of challenges against potential jurors. First, "attorneys may challenge prospective jurors for cause, which usually stems from a potential juror's conflicts of interest or inability to be impartial." *Flowers*, 139 S. Ct. at 2238. In criminal cases, the grounds supporting a challenge for cause are that the prospective juror:

> (1) Does not have the qualifications required by G.S. 9-3.
>
> (2) Is incapable by reason of mental or physical infirmity of rendering jury service.
>
> (3) Has been or is a party, a witness, a grand juror, a trial juror, or otherwise has participated in civil or criminal proceedings involving a transaction which relates to the charge against the defendant.
>
> (4) Has been or is a party adverse to the defendant in a civil action, or has complained against or been accused by him in a criminal prosecution.
>
> (5) Is related by blood or marriage within the sixth degree to the defendant or the victim of the crime.
>
> (6) Has formed or expressed an opinion as to the guilt or innocence of the defendant. It is improper for a party to elicit whether the opinion formed is favorable or adverse to the defendant.

(7) Is presently charged with a felony.

(8) As a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina.

(9) For any other cause is unable to render a fair and impartial verdict.

N.C.G.S. § 15A-1212 (2021).

In addition, attorneys are afforded peremptory challenges which "may be used to remove any potential juror for any reason—no questions asked." *Flowers*, 139 S. Ct. at 2238. In noncapital cases, each party is permitted to use six peremptory challenges, and "[e]ach . . . is entitled to one peremptory challenge for each alternate juror in addition to any unused challenges." N.C.G.S. § 15A-1217(b)–(c) (2021).

However, the "Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Snyder v. Louisiana*, 552 U.S. 472, 478, 128 S. Ct. 1203, 1208 (2008) (quoting *United States v. Vasquez–Lopez*, 22 F.3d 900, 902 (9th Cir. 1994)). An attorney's "privilege to strike individual jurors through peremptory challenges [ ] is subject to the commands of the Equal Protection Clause," *Batson*, 476 U.S. at 89, 106 S. Ct. at 1719, which forbids the striking of prospective jurors if "race was significant in determining who was challenged and who was not," *Miller-El v. Dretke*, 545 U.S. 231, 252, 125 S. Ct. 2317, 2332 (2005). Moreover, "Article I, Section 26 of the North Carolina Constitution likewise bars race-based peremptory challenges" and "[o]ur courts have adopted the *Batson* test for reviewing the validity of peremptory challenges under the North Carolina Constitution." *Nicholson*, 355 N.C. at 21, 558 S.E.2d at 124–25.

When a defendant raises a *Batson* objection, the trial court must engage in a three-step inquiry to evaluate the merits of the objection. First, the trial court must determine whether the defendant has met his or her burden of "establish[ing] a prima facie case that the peremptory challenge was exercised on the basis of race." *State v. Cummings*, 346 N.C. 291, 307–08, 488 S.E.2d 550, 560 (1997) (emphasis omitted) (citing *Hernandez*, 500 U.S. at 359, 111 S. Ct. at 1866). While "the first step [is not] to be so onerous that a defendant would have to persuade the judge—on the basis of all the facts," *Johnson v. California*, 545 U.S. 162, 170, 125 S. Ct. 2410, 2417 (2005), "[t]he prima facie inquiry is a hurdle that preserves the traditional confidentiality of a lawyer's reason for

peremptory strikes unless good reason is adduced to invade it." *Sorto v. Herbert*, 497 F.3d 163, 170 (2d Cir. 2007) (emphasis omitted).

"[A] defendant c[an] make out a prima facie case of discriminatory jury selection by the totality of the relevant facts about a prosecutor's conduct during the defendant's own trial." *Miller-El*, 545 U.S. at 239, 125 S. Ct. at 2324 (cleaned up); *see also Higgins v. Cain*, 720 F.3d 255, 266 (5th Cir. 2013) (emphasis omitted) ("[P]roof of a prima facie case is fact-intensive, and '[i]n deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances.' " (second alteration in original) (quoting *Batson*, 476 U.S. at 96, 106 S. Ct. at 1723)). A defendant meets his or her burden at step one "by showing that the totality of the relevant facts gives rise to inference of discriminatory purpose." *Batson*, 476 U.S. at 94, 106 S. Ct. at 1721.

"In response to this initial challenge, the prosecutor may argue that the defendant has failed to establish [a] prima facie showing of discrimination." *State v. Clegg*, 380 N.C. 127, 146, 867 S.E.2d 885, 901 (2022). A "prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose." *Batson* at 97, 106 S. Ct. at 1723 (emphasis omitted).

In addition, "[o]ur prior cases have identified a number of factors" for a trial court to consider at the initial stage of a *Batson* inquiry, including, but not limited to, the race of the defendant, the race of the victim, the race of the key witnesses, repeated use of peremptory challenges demonstrating a pattern of strikes against black prospective jurors in the venire, disproportionate strikes against black prospective jurors in a single case, and the State's acceptance rate of black potential jurors. *State v. Hobbs*, 374 N.C. 345, 350, 841 S.E.2d 492, 497–98 (2020).

If the trial court finds that a defendant has met his or her burden at step one, then the trial court moves to the second step of the *Batson* inquiry where "the burden shifts to the prosecutor to offer a racially neutral explanation to rebut [the] defendant's prima facie case."[2] *Cummings*, 346 N.C. at 308, 488 S.E.2d at 560 (emphasis omitted) (citing *Hernandez*, 500 U.S. at 359, 111 S. Ct. at 1866). "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will

2. Courts may conclude that step one in a *Batson* inquiry is moot if race-neutral reasons are offered "before the trial court rules whether the defendant has made a prima facie showing," *State v. Hoffman*, 348 N.C. 548, 551, 500 S.E.2d 718, 721 (1998) (emphasis omitted). Although defendant argues that the Court of Appeals erred in concluding step one was not moot in this case, defendant abandoned this argument. *See* N.C. R. App. P. 16(b), 28(a).

be deemed race neutral." *Hernandez*, 500 U.S. at 360, 111 S. Ct. at 1866. Put another way, "*Batson*'s requirement of a race-neutral explanation means an explanation other than race." *Id.* at 374, 111 S. Ct. at 1874 (O'Connor, J., concurring). "[E]ven if the State produces only a frivolous or utterly nonsensical justification for its strike, the case does not end—it merely proceeds to step three." *Johnson*, 545 U.S. at 170–71, 125 S. Ct. at 2417.

Finally, at step three, the trial court must "determine the persuasiveness of the defendant's constitutional claim." *Hobbs*, 374 N.C. at 371, 841 S.E.2d at 498 (quoting *Johnson*, 545 U.S. 171, 125 S. Ct. at 2417–18). The "burden is, of course, on the defendant who alleges discriminatory selection of the venire to prove the existence of purposeful discrimination." *Batson*, 476 U.S. at 93, 106 S. Ct. at 1721 (cleaned up). "The ultimate inquiry is whether the State was motivated in substantial part by discriminatory intent." *Flowers*, 139 S. Ct. at 2244 (cleaned up). Thus, "[n]o matter how closely tied or significantly correlated to race the explanation for a peremptory strike may be, the strike does not implicate the Equal Protection Clause unless it is based on race." *Hernandez*, 500 U.S. at 375, 111 S. Ct. at 1874 (O'Connor, J., concurring).

B. Discussion

Defendant argues that the Court of Appeals erred in affirming the trial court's determination that defendant failed to make a prima facie showing of purposeful discrimination.[3] Specifically, defendant contends that the State's use of three out of four of its peremptory strikes against black jurors was sufficient to establish a prima facie case.

Jury selection is typically not recorded by the court reporter in noncapital trials. N.C.G.S. § 15A-1241(a) (2021). However, voir dire must be recorded if requested by a party or the trial judge. N.C.G.S. § 15A-1241(b). Defendant here did not move for recordation of jury selection and specifically requested that jury selection not be recorded. Thus, the record before us does not contain the intimate details of the interaction between counsel and prospective jurors.[4]

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3. In this appeal, we do not address whether defendant established all of the elements of a successful *Batson* claim because, as defendant's counsel conceded at oral argument, this case "is a step one case." Oral Argument at 13:24, *State v. Campbell* (No. 97A20-2) (Feb. 8, 2023), https://www.youtube.com/watch?v=gxGNuMocyT0 (last visited Mar. 17, 2023).

4. This, perhaps, is another reason that great deference is given to our trial courts on *Batson* inquiries.

However, "[w]hen a party makes an objection to unrecorded statements or other conduct in the presence of the jury, upon motion of either party the judge must reconstruct for the record, as accurately as possible, the matter to which objection was made." N.C.G.S. § 15A-1241(c). One could argue that the trial court's order for the State to offer race-neutral reasons may have been an attempt to comply with this statute or to facilitate appellate review. Whatever the reason, the *Batson* inquiry should have concluded when the trial court first determined that defendant failed to make a prima facie showing.

The State appropriately objected to the trial court's attempt to move beyond step one. Where "the trial court clearly ruled there had been no prima facie showing . . . before the State articulated its reasons," this Court does "not consider whether the State offered proper, race-neutral reasons for its peremptory challenge." *State v. Hoffman*, 348 N.C. 548, 552, 500 S.E.2d 718, 721 (1998) (emphasis omitted). Accordingly, we do not consider at step one the State's *post facto* reply to the trial court's request for a step two response.

Thus, we review only the trial court's initial determination that defendant failed to make a prima facie showing of purposeful discrimination. *Id.* We do so by looking at the totality of the information in the record relevant to step one of a *Batson* inquiry, giving appropriate deference to the trial court's determination.

Here, the record shows that both defendant and the victim, as well as at least one key witness, were black; the State exercised two peremptory strikes during selection of the initial twelve jurors, one on a white prospective juror and one on a black prospective juror; and the State exercised two peremptory strikes during alternate juror selection, both on black prospective jurors.[5] Defendant has failed to produce any additional facts or circumstances for consideration.

Defendant argues that the State's exercise of three out of four peremptory strikes against black prospective jurors is sufficient to establish a prima facie case of purposeful discrimination. Specifically, defendant asserts that our opinion in *State v. Barden*, 356 N.C. 316, 572 S.E.2d 108 (2002) can be read to mean that a 71.4% strike rate—the corollary to a 28.6% acceptance rate—establishes a prima facie case,

5. We note that, when reviewing the totality of the relevant evidence, a trial court is not required to ignore statements made by prospective jurors which may provide a readily apparent and legitimate basis for the exercise of the peremptory strike. Here, however, no such information is available because voir dire was not recorded.

and that the 75% strike ratio in this case therefore compels reversal. Defendant's argument is without merit.

In *Barden*, this Court calculated the State's acceptance rate of black prospective jurors to be 28.6% and compared that rate to cases where this Court "held that a defendant had failed to establish a prima facie case of discrimination." *Barden*, 356 N.C. at 344, 572 S.E.2d at 128 (emphasis omitted). This Court recounted that defendants had previously failed to establish prima facie cases "where the minority acceptance rate was 66%, 50%, 40%, and 37.5%," but nevertheless held that although "the issue [wa]s a close one," the trial court erred in concluding the defendant failed to establish a prima facie case where the acceptance rate was 28.6%. *Id.* at 344–45, 572 S.E.2d at 128 (citations omitted).

While it is correct that this Court has stated that "a numerical analysis . . . can be useful in helping us and the trial court determine whether a prima facie case of discrimination has been established," such an analysis is not dispositive when reviewing the totality of the relevant facts available to a trial court. *Id.* at 344, 572 S.E.2d at 127 (emphasis omitted).

Reliance on a single mathematical ratio, standing alone in a cold record, is insufficient here. Not only would such an approach result in this Court "splitting hairs," *id.* at 344, 572 S.E.2d at 128, but it would also demand that we abandon all pretense of deference to the trial judge, who, "with his experience in voir dire, is in by far the best position to make the *Batson* prima facie case determination," *Moore*, 895 F.2d at 486.

Our decision in *Barden* was not an invitation for defendants to manufacture minimal records on appeal and force appellate courts to engage in a purely mathematical analysis.[6] We expressly reject defendant's suggested interpretation, as it would "remove[ ] the defendant's burden and eliminate[ ] the first step of *Batson*." *Bennett*, 374 N.C. at 616, 843 S.E.2d at 246 (Newby, J., dissenting).[7]

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6. It is also worth noting that defendant's reliance in *Barden* is further misplaced because defendant's argument conflates strike rates, acceptance rates, and strike ratios. The State's exercise of three of its four peremptory challenges on black prospective jurors yields a strike ratio of 75%. However, because the record that defendant presents to us does not disclose the total number of black prospective jurors in the pool of prospective jurors or the racial make-up of the jurors who were seated, this metric reveals nothing about the State's strike rate or acceptance rate.

7. As stated, we review a trial court's finding at step one to determine whether it was "clearly erroneous." *State v. Augustine*, 359 N.C. 709, 715, 616 S.E.2d 515, 522 (2005). Because *Batson* inquiries involve analysis of the totality of relevant circumstances, it is extremely unlikely that a single mathematical calculation will be sufficient for a defendant to demonstrate such clear error or compel an appellate court to abandon all deference to the trial court.

Finally, defendant argues the dissent below concluded that "this case requires more explanation and context for the trial court's determination [that] no prima facie showing had been made." *Campbell II*, 272 N.C. App. at 568, 846 S.E.2d at 813–14 (Hampson, J., concurring in part and dissenting in part). Specifically, defendant contends that the trial court failed to sufficiently explain its reasoning as required by our decision in *Hobbs* and that this Court should therefore "grant the limited remedy of remanding this case to the trial court for specific findings of fact in order to permit appellate review of the trial court's decision." *Id.* at 568, 846 S.E.2d at 814.

As the dissent below noted, in *Hobbs* this Court "was not addressing the prima facie inquiry," and it is therefore both factually and legally distinguishable from the present case. *Id.* at 567, 846 S.E.2d at 813 (citing *Hobbs*, 374 N.C. at 357–59, 841 S.E.2d at 502). In *Hobbs*, this Court reviewed the trial court's *Batson* ruling, but did not engage in a step one analysis because that portion of the inquiry was moot. *Hobbs*, 374 N.C. at 355, 841 S.E.2d at 500–01. The *Batson* review in *Hobbs* instead focused on steps two and three and the trial court's ultimate determination that the State's peremptory challenges were not based on race. *Id.* at 356, 841 S.E.2d at 501. Notably, the record in *Hobbs* included evidence regarding the racial composition of the venire and the acceptance and rejection rates of both white and black prospective jurors. *Id.* at 348, 841 S.E.2d at 496.

Here, unlike in *Hobbs*, we are concerned only with step one of the *Batson* inquiry. Defendant has provided no case law from this state or any other jurisdiction establishing that a trial court is required to enter extensive written factual findings in support of its determination that a defendant has failed to establish a prima facie case, and we decline to impose such a requirement.

IV. Conclusion

"An appellate court is not required to, and should not, assume error by the trial judge when none appears on the record before the appellate court." *State v. Alston*, 307 N.C. 321, 341, 298 S.E.2d 631, 645 (1983) (quoting *State v. Williams*, 274 N.C. 328, 333, 163 S.E.2d 353, 357 (1968)). Following this principle, the Court of Appeals concluded that "defendant has not shown us that the trial court erred in its finding that no prima facie showing had been made." *Campbell II*, 272 N.C. App. at 563–64, 846 S.E.2d at 811 (majority opinion) (emphasis omitted).

Based on a review of the record in this case and the arguments of the parties, we agree that defendant has failed to demonstrate that the

trial court's determination that defendant failed to prove a prima facie showing of racial discrimination was "clearly erroneous." *Augustine*, 359 N.C. at 715, 616 S.E.2d at 522. The decision of the Court of Appeals is affirmed.

AFFIRMED.

Justice EARLS dissenting.

Justice Marshall observed that "[m]isuse of the peremptory challenge to exclude black jurors has become both common and flagrant. Black defendants rarely have been able to compile statistics showing the extent of that practice, but the few cases setting out such figures are instructive." *Batson v. Kentucky*, 476 U.S. 79, 103 (1986) (Marshall, J., concurring). He went on to highlight cases from a variety of state and federal courts that shed some light on what was known at the time about the use of peremptory challenges to exclude potential Black jurors from being empaneled as a juror for a trial. Today, this Court returns to the practice of refusing to acknowledge what is in plain sight and turns a blind eye to evidence of racial discrimination in jury selection in this case by contorting the doctrine and turning the *Batson* test into an impossible hurdle. *Cf. State v. Clegg*, 380 N.C. 127, 170 (2022) (Earls, J., concurring) (demonstrating that from 1986 until 2022, this Court never reversed a conviction based on a *Batson* challenge to a prosecutor's use of a peremptory challenge).

As the majority explains, at the time that Mr. Campbell's defense counsel raised a *Batson* challenge during the second day of jury selection, the State had used three of its four total peremptory strikes to exclude African American jurors. The trial court denied the *Batson* objection, concluding that Mr. Campbell had failed to make a prima facie showing of discrimination under *Batson*'s Step 1, but it inquired whether, "out of an abundance of precaution," the State nevertheless "wish[ed] to offer a racially-neutral" reason for its peremptory challenges. The State declined, explaining it had "reasons [it] could attribute, but . . . if [it were to] give the race-neutral reasons[,]" that "could be viewed as a stipulation there was a *prima facie* showing." The trial court accepted this explanation and noted, "again, the [c]ourt has found at this point there's not a *prima facie* showing, and the [c]ourt will deny the *Batson* challenge."

Later that day, however, the trial court explained that "upon further reflection, although I do not find that a prima facie case has been

established for discrimination pursuant to *Batson*, in my discretion, I am still going to order the State to . . . stat[e] a racially-neutral basis for the exercise of the peremptory challenges in regards to" the challenged jurors. The State then offered its reasons for the peremptory strikes, including that one of the jurors was "a participant, if not an organizer, for Black Lives Matter at her current college."

The majority admonishes that "the *Batson* inquiry should have concluded when the trial court first determined that defendant failed to make a prima facie showing." But the inquiry did not stop there. Instead, the trial court ordered the State to share its race-neutral justifications for its peremptory challenges, which is exactly what would have been required under Step 2 of *Batson*. But because the trial court already rejected Mr. Campbell's *Batson* challenge, concluding that he did not make a prima facie showing of discrimination under Step 1, the majority "do[es] not consider at step one the State's *post facto* reply to the trial court's request for a step two response."

This Court has addressed similar circumstances before. For example, in *State v. Smith*, 351 N.C. 251 (2000), the trial court rejected the defendant's *Batson* challenge, but the court permitted the State to explain its race-neutral reasons for the record. *Id.* at 262. This Court held that "[w]here the trial court rules that a defendant has failed to make a *prima facie* showing, . . . [appellate] review is limited to whether the trial court erred in finding that defendant failed to make a *prima facie* showing, even if the State offers reasons for its exercise of the peremptory challenges." *Id.*

Similarly, in *State v. Williams*, 343 N.C. 345 (1996), after the trial court denied the defendant's *Batson* challenge, it granted the defendant's request that the State provide its reasons for its peremptory challenges for the record. *Id.* at 357. This Court explained that when the State provides its reasons for juror challenges prior to the trial court's ruling on whether a prima facie case has been established "or if the trial court requires the prosecutor to give his reasons without ruling on the question of a *prima facie* showing, the question of whether the defendant has made a *prima facie* showing becomes moot," and the trial court must proceed to Step 3 of the *Batson* analysis. *Id.* at 359. But the Court explained that this "rule d[id] not apply in [*Williams*] because the trial court made a ruling that defendant failed to make a *prima facie* showing before the prosecutor articulated his reasons for the peremptory challenges." *Id.* As such, the Court held that "review [was] limited to whether the trial court erred in finding that defendant failed to make a *prima facie* showing." *Id.*

Thus, in similar circumstances where a trial court rules that a prima facie showing has not been made and subsequently orders the State to provide its race-neutral reasons for the strikes or the State proffers these reasons voluntarily, this Court has held that the prima facie showing is not moot and appellate review is limited to whether the trial court's conclusion on Step 1 of the *Batson* analysis is correct. However, the facts of this case demonstrate the fundamental flaw in the reasoning of *Smith*, *Williams*, and the majority's decision here.

Imagine, for example, that when ordered to provide his race-neutral reasons for his peremptory challenges, the prosecutor in Mr. Campbell's case stated, among other reasons, that he struck one of the jurors because of her race. Once this plainly unconstitutional sentiment has been expressed, it could hardly be argued that the trial court is not obligated under *Batson* to consider the prosecutor's statements under Step 3 of the *Batson* analysis, regardless of whether the defendant initially failed to make a prima facie showing of racial discrimination. Such a result would be absurd in light of a blatant admission of racial discrimination. This means that when a prosecutor provides supposedly race-neutral reasons for peremptory challenges, the trial court has some obligation to consider the substance of those statements.

Indeed, when the prosecutor's "race-neutral" reasons are actually indicative of racial bias in jury selection, the prosecutor has himself stated precisely that which was the defendant's burden to demonstrate at *Batson* Step 1. The prosecutor's proffered reasons obviate the initial requirement that the defendant make a prima facie showing of discrimination. This is particularly true where, as here, the trial court *orders* the prosecutor to provide its race-neutral reasons. A court cannot on the one hand insist that the prima facie showing requirement from *Batson* Step 1 has not been met while, on the other hand, compel the State to provide race-neutral reasons for its jury strikes, precisely as a trial court would be required to do under *Batson* when the prima facie burden in Step 1 has been met. Feigning that the trial court's conduct in this case is materially different from a scenario in which the trial court actually proceeds to *Batson* Step 2, *or* prior to making a finding with respect to the defendant's prima facie showing, requires the State to provide its race-neutral reasons for its challenges, meaning that the defendant's prima facie burden has become moot, defies logic, and this Court should recognize as much.

"America's trial judges operate at the front lines of American justice. In criminal trials, trial judges possess the primary responsibility to enforce *Batson* and prevent racial discrimination from seeping into

the jury selection process." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019). Trial courts cannot be permitted to spurn this responsibility through hyper-technical constructions of *Batson* that lack common sense and are at odds with *Batson*'s central purpose of preventing racial discrimination in jury selection. *See Batson*, 476 U.S. at 85–87 (majority opinion).

This case also demonstrates Justice Marshall's prescient concern, expressed in his concurring opinion in *Batson*, that "[m]erely allowing defendants the opportunity to challenge the racially discriminatory use of peremptory challenges in individual cases will not end the illegitimate use of the peremptory challenge." *Batson*, 476 U.S. at 105 (Marshall, J., concurring).

In this case, the prosecutor's explanation for excluding an African American juror in part based on her involvement with Black Lives Matter, which was revealed only after the trial court ruled that Mr. Campbell failed to make a prima facie showing, could not have been known to Mr. Campbell when attempting to meet his burden during *Batson* Step 1. This excuse for excluding a juror is "just another [way of expressing] racial prejudice." *Batson*, 476 U.S. at 106.

It is a troubling and illogical proposition to assert that it is race-neutral for a prosecutor to excuse a Black woman as a prospective juror on the grounds that she cannot be unbiased due to her association with a predominately Black organization that brings to light "what it means to be [B]lack in this country" and "[p]rovide[s] hope and inspiration for collective action to build collective power to achieve collective transformation." Garrett Chase, *The Early History of the Black Lives Matter Movement, and the Implications Thereof*, 18 Nev. L.J. 1091, 1096 (2018) (quoting Jennings Brown, *One Year After Michael Brown: How a Hashtag Changed Social Protest*, Vocativ (Aug. 7, 2015, 5:41 PM), http://www.vocativ.com/218365/michael-brown-and-black-lives-matter). The majority's only way to overcome the natural force of this race-conscious rationale is to pretend it did not happen.

In contrast, in *Cooper v. State*, 432 P.3d 202 (Nev. 2018), the Supreme Court of Nevada held that a prosecutor's questions to potential jurors about whether they had strong opinions about Black Lives Matter were race-based. *Id.* at 206. The court expressed the "concern[ ] that by questioning a venire[ ]member's support for social justice movements with indisputable racial undertones, the person asking the question believes that a 'certain, cognizable racial group of jurors would be unable to be impartial, an assumption forbidden by the Equal Protection Clause.' " *Id.*

(quoting *Valdez v. People*, 966 P.2d 587, 595 (Colo. 1998)). As in *Cooper*, the prosecutor's reliance on the juror's Black Lives Matter involvement appears to have had "minimal relevance to the circumstances of this case." *Id.* But the trial court made no findings regarding the relevance of this stated reason to the State's case.

I would hold that the Step 1 requirement that Mr. Campbell demonstrate a prima facie case of discrimination was rendered moot when the trial court required the prosecution to explain its reasons for excluding the three Black jurors. At that point, the trial court needed to examine all of the evidence and the circumstances to assess whether the prosecutor's strikes were motivated in part by impermissible race-based considerations. I would accordingly vacate the decision of the Court of Appeals and remand to the trial court to make proper findings regarding whether the prosecutor's use of three of four peremptory challenges to excuse Black prospective jurors was in violation of *Batson* based on all of the evidence, including the prosecutor's proffered justifications. Therefore, I respectfully dissent.

STATE OF NORTH CAROLINA
v.
CEDRIC THEODIS HOBBS, JR.

No. 263PA18-2

Filed 6 April 2023

Jury—selection—Batson challenge—third step of inquiry—juror comparison

The trial court did not clearly err in determining that defendant failed to prove, pursuant to the third step of the analysis set forth in *Batson v. Kentucky*, 476 U.S. 79 (1986), that the State engaged in purposeful discrimination in peremptorily striking three black prospective jurors in defendant's trial for first-degree murder. The trial court properly considered numerous factors and its findings were supported by the evidence, including, among other things, that the case was not susceptible to racial discrimination; that a study relied upon by defendant regarding the history of prosecutors' use of peremptory strikes in the jurisdiction was misleading and potentially flawed; that a side-by-side comparison of the three excused black prospective jurors—whom the State had explained were excused based on their reservations about the death penalty, connections with mental health issues, connections with substance abuse issues, or criminal record—with similarly situated non-excused white jurors did not support a finding of purposeful discrimination; and that even if the juror comparisons supported a finding of discrimination, the totality of the remaining circumstances outweighed the probative value of the comparisons.

Justice EARLS dissenting.

Justice MORGAN joins in this dissenting opinion.

On appeal pursuant to the Supreme Court's decision in *State v. Hobbs*, 374 N.C. 345, 841 S.E.2d 492 (2020), after remand to the Superior Court, Cumberland County, for further proceedings. Heard in the Supreme Court on 8 February 2023.

Joshua H. Stein, Attorney General, by Jonathan P. Babb Sr., Special Deputy Attorney General, and Zachary K. Dunn, Assistant Attorney General, for the State-appellee.

Glenn Gerding, Appellate Defender, by Sterling Rozear, Assistant Appellate Defender, for defendant-appellant.

Elizabeth Simpson and Joseph Blocher for Social Scientists, amicus curiae.

NEWBY, Chief Justice.

In this case, applying the well-established standard of review, we must determine whether the trial court clearly erred in concluding there was no violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986). This case is before us for the second time after this Court remanded it to the trial court to conduct further proceedings under *Batson*. Specifically, this Court ordered the trial court to conduct a hearing under the third step of *Batson* and instructed it to consider specific factors in making its decision. *See State v. Hobbs* (*Hobbs I*), 374 N.C. 345, 360, 841 S.E.2d 492, 503–04 (2020). Thus, only the third step of *Batson* is at issue here. In reviewing the trial court's order, we apply the well-established standard of review which affords "great deference" to the trial court's determination unless it is clearly erroneous. *Id.* at 349, 841 S.E.2d at 497 (quoting *State v. Golphin*, 352 N.C. 364, 427, 533 S.E.2d 168, 211 (2000)). After reviewing the trial court's findings of fact and conducting our own independent review of the entire evidence, we hold that the trial court's conclusion that there was no *Batson* violation is not clearly erroneous. We affirm.

I. Procedural History

In *Hobbs I*, this Court remanded this case to the trial court to conduct a hearing and make findings of fact under the third *Batson* step, namely whether defendant proved the State engaged in purposeful discrimination in peremptorily striking three black prospective jurors.[1] *Id.* at 347, 841 S.E.2d at 496. Specifically, this Court instructed the trial court to consider the following:

> On remand, considering the evidence in its totality, the trial court must consider whether the primary reason given by the State for challenging juror McNeill was pretextual. This determination must be made in light of all the circumstances, including how McNeill's responses during voir dire compare to any

1. The three prospective jurors at issue are Brian Humphrey, Robert Layden, and William McNeill.

> similarly situated white juror, the history of the use of peremptory challenges in jury selection in that county, and the fact that, at the time that the State challenged juror McNeill, the State had used eight of its eleven peremptory challenges against black potential jurors. At the same point in time, the State had used two of its peremptory challenges against white potential jurors. Similarly, the State had passed twenty out of twenty-two white potential jurors while passing only eight out of sixteen black potential jurors.

Id. at 360, 841 S.E.2d at 503.[2] In accordance with this Court's instructions, the trial court on remand conducted a hearing and made extensive findings of fact under step three of *Batson* and concluded there was no *Batson* violation. We must now determine whether the trial court's conclusions are clearly erroneous.

II. Analysis

The ability to serve on a jury is one of "the most substantial opportunit[ies] that most citizens have to participate in the democratic process." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2238 (2019) (citing *Powers v. Ohio*, 499 U.S. 400, 407, 111 S. Ct. 1364, 1369 (1991)). The right to jury service is protected by the Equal Protection Clause of the Federal Constitution and Article I, Section 26 of the North Carolina Constitution. In jury trials, however, attorneys are given the right to excuse a certain number of prospective jurors through discretionary strikes known as peremptory strikes. "Peremptory strikes have very old credentials and can be traced back to the common law." *Id.* Notably, "peremptory strikes traditionally may be used to remove any potential juror for any reason—no questions asked." *Id.*

The Equal Protection Clause prevents purposeful discrimination against a protected class, however, and thus it can limit an attorney's

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2. While the Court specifically referenced juror McNeill in its remand instructions, it appears the trial court was required to conduct the same analysis for all three excused prospective jurors. *See id.* at 347, 841 S.E.2d at 496 (holding "[a]s to all three jurors, we remand for reconsideration of the third stage of the *Batson* analysis, namely whether [defendant] proved purposeful discrimination in each case.").

The dissent in *Hobbs I* would not even have reached steps two or three of *Batson* because the trial court's findings were not clearly erroneous. *Id.* at 361, 841 S.E.2d at 504 (Newby, J., dissenting). Moreover, the dissent emphasized the majority's failure to apply the correct deferential standard of review. *Id.* at 368, 841 S.E.2d at 509. In failing to apply the correct deferential standard of review, the dissent argued that the majority made "arguments not presented to the trial court or the Court of Appeals and then fault[ed] both courts for not specifically addressing them." *Id.* at 361, 841 S.E.2d at 504.

ability to exercise peremptory strikes. *See id.* Accordingly, the Supreme Court of the United States has recognized limitations on peremptory strikes to ensure that strikes are not used for a discriminatory purpose against a protected class. *See Batson*, 476 U.S. 79, 106 S. Ct. 1712. In *Batson*, the Supreme Court of the United States set forth a three-prong test to determine whether a prosecutor improperly excused a prospective juror based on the juror's race. *See id.* This Court expressly "adopted the *Batson* test for review of peremptory challenges under the North Carolina Constitution." *State v. Fair*, 354 N.C. 131, 140, 557 S.E.2d 500, 509 (2001) (citing *State v. Lawrence*, 352 N.C. 1, 13, 530 S.E.2d 807, 815 (2000), *cert. denied*, 531 U.S. 1083, 121 S. Ct. 789 (2001)). Under the *Batson* framework, the defendant must first present a prima facie showing of purposeful discrimination. *Batson*, 476 U.S. at 93–94, 106 S. Ct. at 1721. Second, if the trial court finds that the defendant has presented a prima facie showing of purposeful discrimination, the burden then shifts to the State to provide race-neutral reasons for its peremptory strike. *Id.* at 97, 106 S. Ct. at 1723. Third, the trial court then determines whether the defendant, who has the burden of proof, established that the prosecutor acted with purposeful discrimination. *Id.* at 98, 106 S. Ct. at 1724.

On appeal, "[t]he trial court's ruling will be sustained 'unless it is clearly erroneous.' " *State v. Waring*, 364 N.C. 443, 475, 701 S.E.2d 615, 636 (2010) (quoting *Snyder v. Louisiana*, 552 U.S. 472, 477, 128 S. Ct. 1203, 1207 (2008)). In other words, this Court conducts an "independent examination of the record," *Foster v. Chapman*, 578 U.S. 488, 502, 136 S. Ct. 1737, 1749 (2016), and will uphold the trial court's conclusions unless this Court, upon reviewing "the entire evidence," is "left with the definite and firm conviction that a mistake ha[d] been committed," *Hernandez v. New York*, 500 U.S. 352, 369, 111 S. Ct. 1859, 1871 (1991) (alteration in original) (quoting *United States v. U. S. Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 542 (1948)). Moreover, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *State v. Thomas*, 329 N.C. 423, 433, 407 S.E.2d 141, 148 (1991) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574, 105 S. Ct. 1504, 1511 (1985)).

Because this Court's decision in *Hobbs I* ordered the trial court to conduct further proceedings solely under the third step of *Batson*, we address only the third step here.

A. Step Three of *Batson*

In reviewing the trial court's decision as to the third step of *Batson*, this Court has previously stated factors to consider in determining whether the trial court's conclusions of law are clearly erroneous.

See Golphin, 352 N.C. at 427, 533 S.E.2d at 211. These factors include the race of the witnesses, the prosecutor's questions during voir dire, whether the State exhausted all of its peremptory strikes, whether the State accepted any black jurors, and whether the case is susceptible to racial discrimination. *Id.* The ultimate determination under step three, however, is whether the prosecutor's peremptory strike was "motivated in substantial part by discriminatory intent." *Snyder*, 552 U.S. at 485, 128 S. Ct. at 1212. This determination "involves an evaluation of the prosecutor's credibility." *Id.* at 477, 128 S. Ct. at 1208. In assessing the prosecutor's credibility, "the best evidence [of discriminatory intent] often will be the [prosecutor's] demeanor." *Hernandez*, 500 U.S. at 365, 111 S. Ct. at 1869. Notably, the trial court is in the best position to assess prosecutor credibility and demeanor.

Thus, because "[t]he trial court has the ultimate responsibility of determining 'whether the defendant has satisfied his burden of proving purposeful discrimination[,]' " this Court will "give [the trial court's] determination 'great deference,' overturning it only if it is clearly erroneous." *Hobbs I*, 374 N.C. at 349, 841 S.E.2d at 497 (quoting *Golphin*, 352 N.C. at 427, 533 S.E.2d at 211).

In *Hobbs I*, this Court remanded to the trial court and instructed it to conduct a hearing and make findings of fact based on "the evidence in its totality." *Id.* at 360, 841 S.E.2d at 503. Specifically, this Court ordered the trial court to consider whether the State's reasons for its strikes were pretextual, the history of peremptory strikes in that county, the comparison between the three excused jurors and any similarly situated white prospective jurors, and the statistical comparison between the State's number of peremptory strikes used on white jurors versus black jurors. *Id.* On remand, the trial court conducted a hearing and made extensive findings of fact in accordance with this Court's directive in *Hobbs I*. Based on those findings, the trial court concluded there was no *Batson* violation as to any of the three prospective jurors. After reviewing the trial court's findings of fact and conducting our own independent review of the record, we determine that the trial court's conclusions are not clearly erroneous.

B. Trial Court's Findings of Fact

As instructed by this Court, the trial court considered numerous factors under the third step of *Batson* as to all three prospective jurors at issue, including: the races of defendant, the victim, and the key witnesses; whether the case was susceptible to racial discrimination; whether the State asked questions or made statements tending to support an inference of discrimination; whether the State disparately questioned jurors;

a comparison of questions and juror answers; whether the State had a pattern of using peremptory strikes against black jurors; whether the State accepted any black jurors; and whether the State's reasons for striking the prospective jurors were pretextual.

The trial court first found that defendant is black and the victim in this case is white, while some of the key witnesses are black. Additionally, the trial court found the race of the victim in the Rule 404(b) evidence that was presented at trial was black. Next, the trial court found this case was not susceptible to racial discrimination because there was no evidence that defendant's race, the victim's race, or the witnesses' races were "in any way significant before or during the trial." Additionally, the trial court found the State did not ask questions or make statements that support a finding of discrimination. Instead, the trial court found "that as to each of the three excused jurors, the State asked questions [and made statements] in an even-handed manner," which mitigated against a finding of purposeful discrimination. In a similar context, the trial court found that the State did not disparately question the black jurors as compared to the white jurors. Instead, the trial court found "that the only significant differences in the questioning was a function of the different styles of three prosecutors engaged in the jury selection process."

Moreover, the trial court considered the history of prosecutors' use of peremptory strikes in the jurisdiction and found this history did not support a finding of purposeful discrimination. In particular, the trial court found defendant's reliance on a study conducted by researchers at Michigan State University (MSU) regarding North Carolina prosecutors' use of peremptory strikes to be misleading. First, while the study showed a higher percentage of strikes against black jurors, all of the *Batson* claims in each of the cases mentioned in the study had been rejected by our state's appellate courts. Second, the trial court found that the MSU study was potentially flawed in three ways: (1) the study identified juror characteristics without input from prosecutors, thus failing to reflect how prosecutors evaluate various characteristics; (2) recent law school graduates with little to no experience in jury selection evaluated the juror characteristics; and (3) the recent law school graduates conducted their study solely based on trial transcripts rather than assessing juror demeanor and credibility in person. Notably, however, the trial court found that even assuming the relevant history supports a finding of discrimination, "the probative value of the inference is significantly reduced by the fact that the prosecutors in this case were not the prosecutors in any of the cases identified by the historical evidence."

Additionally, the trial court conducted side-by-side juror comparisons of the three excused prospective jurors at issue with similarly situated prospective white jurors whom the State did not strike. The trial court declined to adopt defendant's suggested "single factor approach" to compare the prospective jurors because that approach fails to consider each juror's characteristics "as a totality." Instead, the trial court adopted the State's "whole juror" approach in its comparisons. *See Flowers*, 139 S. Ct. at 2246 (stating that the Court looks at the "overall record" of a *Batson* case and makes a determination "[i]n light of all of the circumstances"). It found that this approach "provided the State with the complete image or picture of the juror[,] thereby informing its decision as to whether the juror was either appropriate or inappropriate for this specific case." Importantly, however, the trial court found that even if the juror comparisons supported a finding of discrimination, the totality of the remaining circumstances outweighed the probative value of these comparisons. After reviewing the entire evidence, we agree that the evidence supports the trial court's findings of fact.

1. Brian Humphrey

The trial court first considered whether defendant proved purposeful discrimination in the State's strike of prospective juror Brian Humphrey. To reach its conclusion, the trial court made extensive findings of fact based on the totality of the evidence in the record. Specifically, the trial court compared Humphrey's responses to the State's questions with the responses of prospective jurors James Stephens and Sharon Hardin. In each comparison, the trial court found the differences between the two prospective jurors' responses outweighed the similarities. After considering the relevant factors and conducting a thorough comparative juror analysis, the trial court concluded that defendant failed to prove the State acted with purposeful discrimination in peremptorily striking Humphrey. Accordingly, the trial court ruled there was no *Batson* violation. After conducting our own independent review of the record, we agree with the trial court's findings.

In comparing prospective juror Stephens to Humphrey, the trial court found that although defendant alleged that Stephens "answered similarly to excused juror Humphrey regarding suffering depression and being uncomfortable with the death penalty," there are significant differences between the two prospective jurors' experiences. For instance, Stephens's battle with depression ended in 1986, whereas Humphrey was currently employed in the mental health field. Humphrey's current involvement with mental health professionals was notable because "[d]efendant planned to rely heavily on the testimony of mental health

providers in his defense," thus indicating a risk that Humphrey may be partial to those witnesses. Second, Stephens's alleged comfort issues regarding the death penalty only arose during defense questioning. Ultimately, however, Stephens preferred imposing the death penalty over life imprisonment without parole. Indeed, in response to defense counsel questioning him on the death penalty, Stephens stated, "I have said that I have a leaning toward the death penalty in a case as being the appropriate sentence in the case of conviction of first-degree murder." Humphrey, on the other hand, expressed difficulty on the issue, stating that he is "not a killer."

In the next comparison, the trial court found that although defendant alleged that Hardin answered similarly to Humphrey regarding the death penalty and similar experiences working with young people, the differences between the two were significant. First, Hardin expressed no reservations about voting for the death penalty, while Humphrey expressed hesitation and sympathy for defendant. The record shows Hardin expressly stated she "would not have a problem" with considering the death penalty. Humphrey, however, expressly stated he would "be kind of hesitant" to vote for the death penalty. Second, Hardin worked with the youth in her church whereas Humphrey served in group homes helping individuals facing criminal charges and suffering from mental health issues. This distinction is important because Humphrey's involvement in group homes may cause him to identify with defendant's background.

In addition to the comparative juror analysis, the trial court found that the State did not use all of its peremptory strikes and accepted 45% of black prospective jurors after striking Humphrey. The trial court found that both of these factors mitigated against a finding of racial discrimination. The trial court similarly determined that the State's reasoning was not pretextual, which further negated a finding of purposeful racial discrimination.

Accordingly, the trial court concluded that because defendant failed to prove the State acted with purposeful discrimination in striking prospective juror Humphrey, there was no *Batson* violation. The trial court's findings of fact and our own examination of the record support this conclusion. Thus, the trial court's decision regarding prospective juror Humphrey is not clearly erroneous.

2. Robert Layden

Next, the trial court concluded that defendant failed to prove that the State acted with purposeful discrimination in peremptorily striking prospective juror Robert Layden, and thus there was no *Batson* violation.

In reaching this conclusion, the trial court made extensive findings of fact based on the entire evidence in the record. These findings include a side-by-side juror comparison between Layden and similarly situated white prospective jurors whom the State did not strike. Specifically, the trial court compared Layden's responses to the responses of prospective jurors James Elmore, James Stephens, and Johnny Chavis. In each comparison, the trial court found that the differences between the prospective jurors' responses and experiences outweighed any similarities. After conducting our own independent review of the record, we agree with the trial court's findings.

In comparing Elmore and Layden, the trial court found that although defendant alleged that Elmore "answered similarly to excused juror Layden regarding alleged concerns about the death penalty, having an alleged criminal record, and having family members with alcohol problems," there were significant differences between the two prospective jurors' experiences. First, Elmore did not express hesitation about the death penalty, while Layden "had clear hesitations." Indeed, the voir dire transcript reflects that Layden stated that "every human being should have reservations" but that he would have to put his personal feelings aside. On the other hand, Elmore stated he would not "have any reservations" about voting for the death penalty. Second, Elmore's criminal record consisted of various traffic incidents that did not require a court appearance, whereas Layden refused to discuss his breaking and entering conviction. Finally, while Elmore had family members with substance abuse issues, Layden served as a "father figure" to individuals with substance abuse issues and expressed his belief in giving people second chances. Layden's personal involvement in mentoring these individuals and his personal beliefs raised the risk that he would improperly sympathize with defendant.

The trial court's findings similarly emphasized the differences between prospective jurors Stephens and Layden. First, Stephens suffered from depression that ended in 1986, whereas Layden's sister, with whom he had a close relationship, was currently experiencing similar symptoms to those alleged by defendant. Again, similar to the concern with Humphrey, Layden's relationship with his sister may have caused him to give more credibility to the mental health providers on whom defendant relied at trial. Second, Stephens did not know anyone close to him with substance abuse issues, while Layden mentored individuals with substance abuse issues and supported giving them a second chance. Again, this fact raised the concern that Layden would improperly sympathize with defendant. Finally, Stephens expressly preferred the death penalty over life imprisonment without parole, whereas

Layden clearly hesitated on the subject. The record reflects the following exchange between the prosecutor and Layden:

> [PROSECUTOR]: So, if you thought the death penalty was the appropriate punishment after going through the four-step process, then you yourself could vote for it?
>
> [LAYDEN]: Unfortunately I would have to.
>
> . . .
>
> [PROSECUTOR]: Okay. Any hesitations or reservations about either one of them?
>
> [LAYDEN]: I think every human being should have reservations, especially about having someone's life taken . . . .

Furthermore, the trial court's findings highlighted key differences between Chavis and Layden despite some similar answers regarding substance abuse and criminal records. First, Chavis had no reservations about the death penalty, whereas Layden had clear reservations. The record reflects that Chavis stated he had been in favor of the death penalty since he "was old enough to be held accountable for [his] decisions." Layden, on the other hand, expressly stated he would have to "put [his] personal feelings aside and try to follow the letter of the law," and he believed that "every human being should have reservations" about the death penalty. Second, while Chavis had family members with substance abuse issues, he did not mentor those struggling with substance abuse issues as Layden did, and thus there was no clear risk that Chavis would improperly sympathize with defendant. Finally, Chavis willingly disclosed his failure to appear charge on his criminal record, while Layden "did not want to discuss" his breaking and entering conviction.

In addition to the comparative juror analysis, the trial court found that the State's 45% acceptance rate of black jurors after the State excused Layden did not support a finding of purposeful racial discrimination. Moreover, the trial court found that the State's proffered reasons for striking Layden were not pretextual, and the history of the State's use of peremptory strikes in the jurisdiction was not persuasive.

Based on these findings, the trial court determined that defendant failed to prove the State acted with purposeful discrimination in striking prospective juror Layden. Therefore, the trial court concluded there was no *Batson* violation. This conclusion is supported by the trial court's

findings as well as our own independent review of the entire record. Thus, the trial court's conclusions regarding prospective juror Layden are not clearly erroneous.

3. William McNeill

In its final juror comparison, the trial court similarly determined that defendant failed to prove the State acted with purposeful discrimination in peremptorily striking prospective juror William McNeill. Therefore, the trial court concluded there was no *Batson* violation. Based on our own review of the record, the trial court's conclusion is supported by its findings of fact. In making its findings, the trial court considered the relevant factors and conducted a side-by-side juror comparison between McNeill and similarly situated white prospective jurors whom the State did not strike. Specifically, the trial court compared McNeill's responses to the State's questions to prospective jurors James Stephens, Sharon Hardin, Amber Williams, Johnny Chavis, Vickie Cook, and James Elmore. Again, in each comparison, the trial court found that the differences between the two prospective jurors' answers and experiences outweighed any similarities. After conducting our own independent examination of the record, we agree with the trial court's findings.

In comparing Stephens and McNeill, the trial court found that although defendant alleged that the two prospective jurors "answered similarly . . . regarding suffering depression, knowledge of people with substance abuse issues, ministry work, and being uncomfortable with the death penalty," it ultimately found that the differences outweighed the similarities. For instance, the trial court first noted that Stephens suffered from depression that ended over thirty-five years prior, whereas McNeill had a sister with current mental health issues that required his parents to care for her. Like Layden, McNeill's relationship with his sister may have caused him to give more credibility to defendant's mental health witnesses. Second, Stephens did not know anyone close to him with substance abuse issues, while McNeill's father and uncle both drank heavily. This difference is notable because McNeill's experiences may have caused him to improperly sympathize with defendant. Third, Stephens participated in ministry work in assisted living facilities, whereas McNeill participated in outreach in "drug-infested areas." Again, this difference implies that McNeill may be inclined to sympathize with defendant. Finally, Stephens expressed that he preferred the death penalty over life imprisonment without parole, while McNeill preferred life imprisonment without parole over the death penalty. Indeed, the record reflects that McNeill stated he had "some feelings about the death penalty," and he was "not for the death penalty."

The trial court similarly noted the differences between prospective jurors Hardin and McNeill despite Hardin's similar "alleged concerns about the death penalty, working with youth in her church, and her brother's substance abuse issues." First, Hardin had no reservations about the death penalty, while McNeill preferred life imprisonment without parole. Again, the record shows McNeill expressly stated he was "not for the death penalty," whereas Hardin "would not have a problem" with voting for the death penalty. Second, Hardin mentored the youth at her church, whereas McNeill helped people in "drug-infested areas." This fact raised the risk that McNeill would improperly sympathize with defendant. Finally, both Hardin and McNeill had family members who suffered from substance abuse issues. The trial court found, however, that Hardin herself did not have any such issues but McNeill, on the other hand, mentioned prior "sensitive issues with being 'in the streets too, going out to clubs and stuff.' "

Further, the trial court distinguished prospective juror Williams from McNeill. Although defendant alleged that their answers regarding mental health and substance abuse were similar, the trial court found that the notable differences between the two prospective jurors outweighed the similarities. First, Williams was the victim of an armed robbery at a convenience store, a crime similar to the crime committed by defendant. The trial court thus noted that Williams's previous experience made it "more likely that she would identify with the Victims" in defendant's case. Second, Williams expressed no reservations about the death penalty, whereas McNeill preferred life imprisonment without parole. Our review of the evidence shows Williams unequivocally agreed she could consider and vote for the death penalty, whereas McNeill expressly stated he was "not for the death penalty."

The trial court next found that although defendant alleged that prospective jurors Chavis and McNeill had some similarities, there were significant differences between the two. First, Chavis did not express hesitation regarding the death penalty, while McNeill clearly hesitated. Indeed, our examination of the record shows Chavis stated he believed "a person[has] to be held [accountable] for their actions," and he agreed he could consider and vote for the death penalty. Second, while Chavis had family members who suffered from mental health and substance abuse issues like McNeill's family members, the trial court found Chavis himself did not have these issues, whereas McNeill had a previous "lifestyle . . . in the streets [and] going out to clubs and stuff." This distinction suggests that McNeill was more likely to give credibility to defendant's mental health witnesses because of his personal experience.

The trial court similarly distinguished prospective juror Cook from McNeill. First, Cook expressed no hesitation about the death penalty while McNeill expressed a preference for life imprisonment without parole. The record reflects Cook answered definitively that she could consider and vote for the death penalty, whereas McNeill expressly stated he was "not for the death penalty." Second, while Cook's parents suffered from mental health and substance abuse issues, the trial court found she did not have a similar experience as McNeill with his previous "lifestyle."

Lastly, the trial court found that the differences between prospective jurors Elmore and McNeill outweighed the similarities. First, Elmore had no concerns about imposing the death penalty, whereas McNeill preferred life imprisonment without parole. Our review of the record reveals Elmore explicitly stated he would not "have any reservations" about voting for the death penalty. Second, Elmore stated that he was not close with his sister who suffered from substance abuse issues and did not share her lifestyle, while McNeill had a previous "lifestyle . . . in the streets [and] going out to clubs and stuff." Accordingly, Elmore did not seem to possess personal experiences that might cause him to give undue credibility to defendant's mental health witnesses.

In addition to the extensive comparative juror analysis, the trial court found that the State's acceptance rate of black jurors was 50% after the State excused McNeill, which did not support a finding of purposeful discrimination. Moreover, as previously explained, the trial court found that the relevant history of the State's peremptory strikes in the jurisdiction was flawed and therefore misleading. Finally, the trial court found the State's reasoning for striking McNeill was not pretextual.

Based on these findings, the trial court concluded that defendant failed to prove the State acted with purposeful discrimination in striking prospective juror McNeill, and thus there was no *Batson* violation. The trial court's findings of fact, as well as our own independent review of the record, support the trial court's conclusions. Thus, the trial court's conclusions regarding prospective juror McNeill are not clearly erroneous.

III. Conclusion

The trial court is in the best position to weigh credibility and assess the demeanor of both the prosecutor and the prospective jurors. Here the trial court fully complied with this Court's remand instructions in *Hobbs I* by extensively "considering the evidence in its totality" and making findings of fact based on that evidence. *Hobbs I*, 374 N.C. at 360, 841 S.E.2d at 503. After carefully weighing the evidence, the trial

court concluded that defendant had failed to prove there was a *Batson* violation under step three of the analysis. Applying the proper deferential standard of review, the trial court's conclusions are supported by its findings of fact. Additionally, our independent examination of the entire evidence supports the trial court's findings and conclusions. Thus, the trial court's order on remand is not clearly erroneous. The decision of the trial court is affirmed.

AFFIRMED.

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

Justice EARLS dissenting.

This case involves the State's use of peremptory challenges to strike three Black prospective jurors, Brian Humphrey, Robert Layden, and William McNeill, during Mr. Hobbs's 2014 capital murder trial. While Mr. Hobbs objected to the State's use of peremptory challenges under *Batson v. Kentucky*, 476 U.S. 79 (1986), the trial court denied those objections, and the Court of Appeals found no error. *See State v. Hobbs*, 260 N.C. App. 394, 409 (2018). This Court allowed Mr. Hobbs's petition for discretionary review and subsequently held that the Court of Appeals had erred as a matter of law in deciding Mr. Hobbs's *Batson* claim. *State v. Hobbs* (*Hobbs I*), 374 N.C. 345, 360 (2020). The case was remanded to the trial court with instructions on the proper application of *Batson*. *Id.* On remand, Judge Frank Floyd, the same judge who conducted Mr. Hobbs's 2014 trial, denied Mr. Hobbs's *Batson* challenge.

In *Batson*, the United States Supreme Court held that while peremptory challenges are permissible for almost any reason, "a State may not discriminate on the basis of race when exercising peremptory challenges against prospective jurors in a criminal trial." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2234 (2019) (citing *Batson*, 476 U.S. 79). This is in part because "[e]qual justice under law requires a criminal trial free of racial discrimination in the jury selection process." *Id.* at 2242. Indeed, "racial discrimination in the selection of jurors casts doubt on the integrity of the judicial process and places the fairness of a criminal proceeding in doubt." *Powers v. Ohio*, 499 U.S. 400, 411 (1991) (cleaned up). Furthermore, "[t]he Fourteenth Amendment[ ] mandate[s] that race discrimination be eliminated from all official acts and proceedings of the State." *Id.* at 415; *see also* N.C. Const. art. I, § 19 ("No person shall

be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.").

Although trial judges have the primary responsibility of enforcing *Batson*, on appeal this Court is required to review the same factors the trial court did and determine whether the trial court's ruling was clearly erroneous. *Flowers*, 139 S. Ct. at 2243–44. In doing so, this Court must consider whether "all of the relevant facts and circumstances taken together establish that the trial court committed clear error in concluding that the State's peremptory strike of [a] black prospective juror . . . was not 'motivated in substantial part by discriminatory intent.' "[1] *Id.* at 2235 (quoting *Foster v. Chatman*, 578 U.S. 488, 513 (2016)). Despite evidence to the contrary, and through a misapplication of *Batson* and its progeny, the majority holds that the trial court's order is not clearly erroneous. Because the evidence Mr. Hobbs presented supports a finding of racial discrimination in his trial's jury selection process and because the trial court misapplied the *Batson* standard, I dissent.

I. The *Batson* Standard

Under *Batson*, a trial judge must consider "all relevant" evidence a defendant presents that raises an inference of discrimination. *Hobbs I*, 374 N.C. at 356 (quoting *Flowers*, 139 S. Ct. at 2245). This duty requires a trial judge to "appropriately" consider "all of the evidence," conduct a "meaningful" analysis of it, and "explain how it weighed" that evidence. *Id.* at 356, 358–59. In *Flowers*, the United States Supreme Court provided a non-exhaustive list of evidence a defendant may present to support a *Batson* challenge, including:

> • statistical evidence about the prosecutor's use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case;
>
> • evidence of a prosecutor's disparate questioning and investigation of black and white prospective jurors in the case;

1. It is important to note that the reason for the State's use of a peremptory challenge need not be based "solely" on discriminatory intent. Instead, as we explained in *State v. Waring*, 364 N.C. 443, 480 (2010), and reiterated in *Hobbs I*, "the third step in a *Batson* analysis is the less stringent question [of] whether the defendant has shown 'race was *significant* in determining who was challenged and who was not.' " *State v. Hobbs (Hobbs I)*, 374 N.C. 345, 352 n.2 (2020) (quoting *Waring*, 364 N.C. at 480).

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

139 S. Ct. at 2243. Accordingly, in *Hobbs I*, this Court indicated that a trial court must "consider[ ] the evidence [presented] in its totality," compare the responses of the challenged juror to "any similarly situated white juror," and consider historical evidence of the use of peremptory challenges in jury selection in that county, as well as any statistics detailing the prosecution's strike pattern in that particular case. *Hobbs I*, 374 N.C. at 360. At the same time, this Court emphasized that by "[f]ailing to apply the correct legal standard," the trial court had inadequately considered the evidence Mr. Hobbs had presented. *Id.* Despite having delineated these requirements, the trial court has failed again to adequately consider all the evidence Mr. Hobbs presented.

II. Susceptibility to Racial Discrimination

First, the trial court's conclusion that Mr. Hobbs's case was not susceptible to racial discrimination was a clearly erroneous factual finding. In *State v. Tirado*, 358 N.C. 551 (2004), this Court held that "susceptibility of the particular case to racial discrimination" is a relevant factor to consider at the third step of the *Batson* analysis. *Id.* at 569–70 (quoting *State v. Golphin*, 352 N.C. 364, 427 (2000)). The Supreme Court has also acknowledged that it "remains an unfortunate fact in our society that violent crimes perpetrated against members of other racial or ethnic groups often raise [the] possibility" of racial prejudice. *Rosales-Lopez v. United States*, 451 U.S. 182, 192 (1981). Similarly, in *State v. Golphin*, this Court explained that a case "may be . . . susceptible to racial discrimination [when] defendants are African-Americans and the victims were Caucasian." 352 N.C. at 432 (citing *State v. White*, 349 N.C. 535, 548–49 (1998)).

In the present case, defendant, Mr. Hobbs, is Black, while four of his victims are white. But rather than focus on these facts, the trial court focused on (1) the race of the victim based on the evidence the State presented under Rule 404(b) of the North Carolina Rules of Evidence,

which was Black, *see* N.C.G.S. § 8C-1, Rule 404(b) (2021); and (2) the race of "key witnesses, some of whom [the court found] to be [B]lack." In doing so, the trial court determined that this "particular case . . . was [not] susceptible to racial discrimination." The trial court also concluded that "the race of the Defendant, the Victim[s], . . . or any of the witnesses was [not] in any way significant before or during the trial of this matter."

While a trial court is permitted to consider the races of witnesses in the case, *see White*, 349 N.C. at 548, it does not necessarily follow that every case involving a Black defendant and a Black witness or a Black victim will lead a trial court to conclude the case is not susceptible to racial discrimination. Although that was the conclusion in *White*, the circumstances here are quite different. Mr. Hobbs's case involves a Black defendant and multiple white victims. As noted above, cases involving interracial violence are particularly susceptible to racial discrimination. *See Rosales-Lopez*, 451 U.S. at 192.

In reaching its conclusion, the trial court ignored our own Court's precedent as well as Supreme Court precedent.[2] *See, e.g.*, *White*, 349 N.C. at 550; *Rosales-Lopez*, 451 U.S. at 192. It also discounted pertinent facts in this case, namely Mr. Hobbs's race, his victims' races, and the fact that he was being tried capitally for crimes against victims who were a different race than him. Taking this information together, the trial court should have found Mr. Hobbs's case was susceptible to racial discrimination. Accordingly, it was clear error for the trial court to find otherwise.

III. The Michigan State University (MSU) Study

Next, the trial court committed clear error in its findings relating to the Michigan State University (MSU) study. This Court as well as the United States Supreme Court has previously said that to establish a *Batson* violation, defendants may present "relevant history of the State's peremptory strikes in past cases." *Hobbs I*, 374 N.C. at 351 (quoting *Flowers*, 139 S. Ct. at 2243); *see also Miller-El v. Cockrell* (*Miller-El I*), 537 U.S. 322, 346 (2003). In *Hobbs I*, this Court also explained that "a [trial] court must consider historical evidence of discrimination in a jurisdiction." *Hobbs I*, 374 N.C. at 351. Accordingly, Mr. Hobbs presented evidence from a study by scholars at MSU, who reviewed data in Cumberland County from 1990 to 2010. Catherine M.

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2. *See also Flowers v. Mississippi*, 139 S. Ct. 2228, 2274 (2019) (Thomas, J., dissenting) ("The Court knows these prejudices exist. Why else would it say that 'a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias'?").

Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 Iowa L. Rev. 1531 (2012). According to two professors who led the MSU study, this data showed that "prosecutors in 11 cases struck qualified black venire members at an average rate of 52.3% but struck qualified non-black venire members at an average rate of only 20.8%." This data also showed that in Cumberland County, the State was "2.5 times more likely to strike qualified venire members who were black" and that "[t]his difference in strike levels [was] significant."

Despite being confronted with statistical evidence showing a disparate pattern of peremptory strikes against Black venire members in Cumberland County, the trial court chose to discount the study as "potentially flawed." Additionally, the trial court determined that the study "[did] not tend to support an inference of racial discrimination . . . [by] the State in this case." To support its conclusion that the study was "potentially flawed," the trial court cited to the trial transcript in *State v. Robinson*, 375 N.C. 173 (2020). However, the court failed to acknowledge the trial court's findings in that case, namely that the "MSU study [was] a valid, highly reliable, statistical study." Furthermore, the *Robinson* trial court determined the study showed that "race [was] highly correlated with strike decisions in North Carolina."

Additionally, the trial court criticized the MSU study for employing "unqualified" recent law school graduates to conduct the study. While the trial court characterized recent law school graduates as "unqualified," the United States Supreme Court has cited studies on racial disparities in jury strikes in which law students were research assistants. *See, e.g.*, *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231, 268 (2005) (Breyer, J., concurring) (citing David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. Pa. J. Const. L. 3, 3 (2000) ("The authors gratefully acknowledge the expert research assistance of Iowa law students . . . .")). Furthermore, the use of recent law school graduates as law clerks and research assistants in this Court and others across the country severely undercuts the trial court's conclusion that recent law school graduates are unqualified.

The trial court was also misguided in disregarding the MSU study because it was based on "cold trial transcripts." As all appellate review is conducted in this manner, this criticism is without merit. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view."). Indeed, the Supreme Court has decided our nation's most critical cases on a "cold" record. Yet under the trial court's logic, this Court would have to question not only our own past cases but also those decided by any other appellate court.

Moreover, the trial court disregarded the MSU study because the prosecutors in that study were not involved in Mr. Hobbs's case. However, this is a legal error. In *Miller-El I*, the United States Supreme Court addressed and rejected a similar argument. 537 U.S. at 347. There, the Court explained that historical evidence can be used to show "the culture of [a] District Attorney's Office in the past" and that this evidence is "relevant to the extent it casts doubt on the legitimacy of . . . the State's actions." *Id.* Specifically, the Court found it significant that the prosecutors in Miller-El's case were employed during the time the State had used racially discriminatory tactics to exclude prospective jury members. *Id.* Indeed, the Court reasoned that "[e]ven if [it] presume[d] . . . that the prosecutors in Miller-El's case were not part of this culture of discrimination, the evidence suggest[ed] they were likely not ignorant of it." *Id.*

Similarly, in Mr. Hobbs's case, the MSU study provides evidence of the culture in the Cumberland County District Attorney's Office from 1990 to 2010. As noted above, the data indicates a disparate pattern of peremptory strikes, which supports the conclusion that a culture of discrimination existed in the Cumberland County District Attorney's Office. This "casts doubt on the legitimacy of the motives underlying the State's actions in [Mr. Hobbs's] case." *See Miller-El I*, 537 U.S. at 347. Furthermore, the prosecutors in Mr. Hobbs's case, Billy West, Robby Hicks, and Rita Cox, were employed in that office during previous administrations. Thus, just like in *Miller-El I*, the prosecutors in Mr. Hobbs's case were likely "not ignorant" of the culture of discrimination identified by the MSU study. *See id.* Accordingly, it was error for the trial court to disregard the MSU study.

IV. The State's Pattern of Peremptory Challenges in Mr. Hobbs's Case

"[S]tatistical evidence about the prosecutor's use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case" can be used to support a *Batson* challenge. *Flowers*, 139 S. Ct. at 2243. In some cases, "the statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors." *Miller-El I*, 537 U.S. at 342; *see also Miller-El II*, 545 U.S. at 240–41 ("The numbers describing the prosecution's use of peremptories are remarkable.").

Similarly, to *Miller-El I* and *Miller-El II*, the statistics in Mr. Hobbs's case raise suspicion about whether the State struck prospective jurors Humphrey, Layden, and McNeill because of their races. When Mr. Hobbs raised his *Batson* challenge after Humphrey and Layden were struck, six

of the State's first eight strikes (75%) were used against Black prospective jurors. The State had also struck six of eleven Black prospective jurors, resulting in a Black prospective juror acceptance rate of 45% and a Black prospective juror rejection rate of 55%. In contrast, the State had only struck two of twenty non-Black prospective jurors. This resulted in a non-Black prospective juror rejection rate of 10% and an acceptance rate of 90%.

At the time McNeill was struck, eight of the State's first eleven strikes (72%) had been used against Black prospective jurors. The State had also excused eight of sixteen Black prospective jurors, providing a Black prospective juror rejection rate of 50%. At the same time, the State had only challenged three of twenty-two non-Black prospective jurors, providing a non-Black prospective juror rejection rate of approximately 13%. Ultimately, the State's strike pattern caused a jury pool composed of roughly 50% Black and 50% non-Black prospective jurors, to become a jury of twelve that was 83% non-Black.

"Happenstance is unlikely to produce this disparity." *Miller-El II*, 545 U.S. at 240–41 (quoting *Miller-El I*, 537 U.S. at 342). Despite this, the trial court found that the acceptance rate of Black prospective jurors "tend[ed] to negate an inference of discrimination and motivation." In doing so, the trial court failed to explain how a 45% acceptance rate and a 55% rejection rate for Black prospective jurors at the time Humphrey and Layden were struck is evidence against an inference of discrimination. Similarly, the trial court also did not explain how a 55% rejection rate of Black prospective jurors at the time of the Humphrey and Layden strikes could negate an inference of discrimination when compared to a 10% rejection rate for non-Black prospective jurors. The trial court repeated the same errors in reviewing the statistics at the time of the McNeill strike, failing to explain how the State's strike pattern removing 50% of Black prospective jurors but only 13% percent of non-Black prospective jurors could be evidence against a finding of discrimination.

Our decision in *Hobbs I* found error in part because the trial court did not "explain how it weighed the totality of the circumstances surrounding the prosecution's use of peremptory challenges." *Hobbs I*, 374 N.C at 358. The Court in *Hobbs I* also ordered the trial court to consider all the evidence "in its totality" to determine "whether the primary reason given by the State for challenging . . . McNeill [, Humphrey, and Layden] was pretextual." *Id.* at 360. However, a trial court cannot meet this standard by simply reciting statistics and concluding, without explaining, that those statistics "tend to negate an inference of discrimination and motivation."

V. Comparative Juror Analysis

More powerful than bare statistics are "side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve." *Miller-El II*, 545 U.S. at 241. "Potential jurors do not need to be identical in every regard for this to be true." *Hobbs I*, 374 N.C. at 359. "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination . . . ." *Id.* (quoting *Miller-El II*, 545 U.S. at 241). At this step, "the critical question" relates to "the persuasiveness of the prosecutor's justification for his peremptory strike." *Miller-El I*, 537 U.S. at 338–39. "[I]mplausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." *Id.* (quoting *Purkett v. Elem*, 514 U.S. 765, 768 (1995)).

In this case, a comparative juror analysis shows that the State passed twenty-one non-Black prospective jurors who matched at least one of the reasons the State offered to support its strikes of Black prospective jurors. Many of the non-Black prospective jurors accepted by the State also shared more than one characteristic matching the excuses the State gave for striking Humphrey, Layden, and McNeill. The State's purported reasons for striking Humphrey, Layden, and McNeill fall into four categories: (1) death penalty reservations; (2) mental health connections; (3) substance abuse connections; and (4) criminal record. By providing these reasons, the State asserts their dismissal of Humphrey, Layden, and McNeill was not based on race.

Specifically, the State purports to have struck McNeill because (1) he had "significant" reservations about imposing the death penalty, (2) he had "a sister with some anxiety issues," (3) he had family members with substance abuse problems, and (4) as a pastor, he had provided outreach "to folks . . . going through drugs and other difficult issues."

Next, the State contends it struck Layden because (1) "his sister had significant mental health issues," (2) he had some reservations about the death penalty, (3) he wanted to give soldiers who made "alcohol related or dumb mistakes" a "second chance," and (4) he had a prior arrest that he did not want to answer detailed questions about.

Lastly, the State asserts it struck Humphrey because (1) he had reservations about the death penalty, (2) he had connections to the mental health field and "thought [mental health professionals] did a good job," and (3) the State feared he would identify with Mr. Hobbs because Humphrey previously served as a mentor for people who had mental

health issues and pending criminal charges. However, the reasons the State gave for striking Humphrey, Layden, and McNeill also applied to non-Black prospective jurors the State passed.

A. Death Penalty Reservations

First, the State asserts that Humphrey, Layden, and McNeill had reservations regarding the death penalty and expressed being hesitant to impose it. Specifically, McNeill noted that he "wouldn't say [he was] for the death penalty totally; but, [he could] understand the nature of the crime and—and make a fair—a fair decision based on the evidence." Layden stated he thought "every human being should have reservations, especially about having someone's life taken, . . . but those reservations [wouldn't] keep [him]" from following the court's instructions and that he could impose the death penalty if "the elements line[d] up." Lastly, in response to questioning about the death penalty, Humphrey noted he would "pray on it" and that he would "be kind of hesitant, but . . . wouldn't have no problem going through with it." Based on this information, neither Humphrey, Layden, nor McNeill would have had an issue imposing the death penalty. Yet, the State purported to have struck them based on this issue.

At the same time, the State passed four non-Black prospective jurors who expressed reservations about the death penalty. For example, when asked for his opinion about the death penalty, Antonio Flores stated, "I'm not crazy about it . . . I love life." Furthermore, James Elmore specifically told the State he had "some reservations about the death penalty," and James Stephens expressed being uncomfortable with the process. Additionally, Sharon Hardin noted she would probably be praying about the death penalty throughout the trial. Based on the similarities between Humphrey's, Layden's, and McNeill's answers to those given by Flores, Elmore, Hardin, and Stephens, it is evident their answers do not reflect significant reservations about the death penalty. By excusing Humphrey, Layden, and McNeill for answers that were similar to those given by Flores, Elmore, Hardin, and Stephens, the State's choices illustrate that this rationale was a pretext.

B. Mental Health Connections

Next, the State cited mental health connections as a reason for striking Humphrey, Layden, and McNeill. In doing so, the State speculated that these connections would make Humphrey, Layden, and McNeill more likely to credit the testimony of the defense's mental health experts. The State took issue with Layden having a sister with "significant mental health issues" and McNeill having a sister with anxiety issues

and learning difficulties. Lastly, the State cited the fact that Humphrey worked in a mental health facility, had mentored people with mental health issues, and thought mental health professionals "did a good job" as a reason for its strike.

Yet, the State accepted eight non-Black prospective jurors with mental health connections. First, while the State purported to be concerned Humphrey, Layden, and McNeill would be more likely to credit the testimony of a mental health professional, it did not have the same concern when it came to non-Black jurors. For example, the State accepted prospective juror Stephens who specifically stated that, "if a person [was] presented to [him] as an expert [, he was] going to accept what they say pretty much." Furthermore, Stephens had a second mental health connection, based on his own experience with mental health treatment and depression. The State also accepted Amber Williams who self-identified as having "severe anxiety and depression." Importantly, when asked if she could be fair and impartial and conduct her job as a juror, she responded, "I honestly don't know." Thus, not only were Stephens and Williams perhaps as likely, if not more likely, as Humphrey, Layden, and McNeill to identify with mental health professionals, Williams was also unsure if she could conduct her job as a juror. Despite this, the State struck Humphrey, Layden, and McNeill, while passing both of the non-Black prospective jurors.

Similarly to Layden and McNeill, six non-Black prospective jurors the State passed had family members with mental health concerns. For example, Johnny Chavis had a brother and sister who both required inpatient treatment and were diagnosed with posttraumatic stress disorder. Thus, non-Black prospective juror Chavis, despite having a stronger mental health connection than Black prospective jurors Layden and McNeill, was allowed to serve on the jury, but Layden and McNeill were not.

Moreover, one juror had a family member taking antidepressants, another juror had a nephew with bipolar disorder, and two jurors' family members had attempted suicide. If the State had truly been concerned about Humphrey's, Layden's, and McNeill's mental health connections, it would not have passed thirteen non-Black prospective jurors with that same characteristic. Accordingly, this explanation is pretextual.

C. Substance Abuse Connections

The State also cited substance abuse connections as a reason for striking Layden and McNeill; however, it passed fourteen non-Black prospective jurors who had connections to substance abuse. Specifically, the State took issue with McNeill having family members with substance

abuse problems and that he and his family, in their work as pastors, had conducted outreach to people "going through drugs and other difficult issues." Furthermore, the State purports to have struck Layden because he wanted to give soldiers second chances when they made "alcohol related or dumb mistakes."

However, if McNeill's religious leadership was the true reason for his strike, then the State would not have accepted Sharon Hardin or James Stephens as jurors, both of whom held leadership positions in their church. Additionally, the State's concerns regarding Layden's and McNeill's familial or personal connections to people with substance abuse issues also fails when compared to the fourteen non-Black jurors the State passed who also had connections to substance abuse. Indeed, all fourteen of those jurors knew someone who had substance abuse issues, and thirteen of them identified a family member with drug or alcohol problems.

In some cases, the non-Black jurors the State passed reported having more than one family member with substance abuse concerns (e.g., Amber Williams, Johnny Chavis, David Adams, and Richard Heins). In the end, the prospective jurors the State accepted had connections to substance abuse just as strong or stronger than Layden or McNeill. Accordingly, when comparing Layden's and McNeill's responses with those of similarly situated non-Black prospective jurors, the State's reasons for striking Layden and McNeill are pretextual.

D. Criminal Record

The State also noted Layden's criminal record as a reason he was struck. At the same time, the State passed four non-Black prospective jurors who had criminal records. For example, James Carter had been arrested for several driving while impaired offenses and failed to disclose it during voir dire. Ronnie Trumble had been in jail for a driving while impaired offense, and Elmore had a few issues with speeding. Furthermore, at the time of the trial, Chavis had a pending shoplifting case and a failure to appear related to driving with a revoked license. Additionally, Chavis seemed hesitant to discuss the shoplifting charge and did not initially mention it during the prosecution's questioning.

E. Non-Black Prospective Jurors who Shared More Than One Characteristic with Humphrey, Layden, and McNeill

Perhaps even more compelling is evidence that several of the prospective jurors passed by the State shared more than one of the characteristics the State gave as an excuse to strike Humphrey, Layden,

and McNeill. For example, the record shows that Stephens gave very similar responses to those McNeill had given, yet he was seated as a juror, while McNeill was not. Specifically, Stephens was a minster who engaged in outreach work while McNeill was a pastor who had also engaged in outreach work. Also, both Stephens and McNeill knew people with substance abuse issues. They also both had mental health connections; however, Stephens' connections were likely stronger than McNeill's because while McNeill had a family member with mental illness, Stephens had experienced it himself. Additionally, in regard to the death penalty, McNeill noted that he "wouldn't say [he was] for the death penalty totally; but, [he could] understand the nature of the crime and—and make a fair—a fair decision based on the evidence." Similarly, Stephens had expressed being "uncomfortable" with being on a jury that might impose the death penalty. Moreover, while the State speculated that McNeill might be more likely to credit the testimony of a mental health professional, Stephens actually expressed that he would. When McNeill's and Stephens' responses are compared, the only significant difference between the two men is that McNeill is Black and Stephens is not.

Regarding Layden, the record shows that seated non-Black prospective juror James Elmore gave answers similar to Layden's. Specifically, Elmore demonstrated caution about the death penalty, had a criminal history, and had several family members with substance abuse issues. Layden also had similar characteristics to non-Black prospective juror Stephens, who had mental health and substance abuse connections and explicitly mentioned being uncomfortable with the possibility of imposing the death penalty. Lastly, non-Black prospective juror Johnny Chavis had several family members with a history of mental health and substance abuse issues and had a criminal record. Thus, while many non-Black prospective jurors shared characteristics with Layden, only Layden was struck.

Regarding Humphrey, the record shows that two of the State's reasons for striking him applied to at least two non-Black prospective jurors. Like Humphrey, non-Black prospective juror Stephens had mental health connections and expressed hesitancy about imposing the death penalty. Furthermore, non-Black prospective juror Hardin also shared two similarities with Humphrey. Namely, they both participated in mentorship roles and expressed that they wanted to pray about the death penalty.

Despite the similarities between the non-Black prospective jurors the State passed and Black prospective jurors Humphrey, Layden, and

McNeill, the trial court determined that "the State's explanations for its challenge were [not] merely pretextual." But in conducting its comparative juror analysis, the trial court not only erred in its factual conclusion but also in its application of *Batson*. The question of whether the prosecution's reasons for striking a juror are pretextual is properly addressed during the third step of a *Batson* challenge. Here, the trial court appears to have misapplied the standard, concluding at step two of the analysis that the State's excuses were not "merely pretextual." This is incorrect.

Under *Batson*, step two only addresses "the facial validity of the prosecutor's explanation," *Hernandez v. New York*, 500 U.S. 352, 360 (1991), and it "does not demand an explanation that is persuasive, or even plausible," *Purkett v. Elem*, 514 U.S. 765, 767–68 (1995). This is in contrast to *Batson*'s third step where "the persuasiveness of the justification becomes relevant" and "the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." *Id.* at 768. Importantly, at the third step, "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." *Id.* Here, the trial court "erred by combining *Batson*'s second and third steps into one." *See id.* In doing so, the trial court foreclosed any meaningful analysis under step three. Indeed, having already decided at step two that the State's reasons for striking Humphrey, Layden, and McNeill were not "merely pretextual," the trial court had no reason to properly consider the comparative juror analysis.

Moreover, instead of focusing on the similarities between the Black stricken prospective jurors and the non-Black seated jurors, the trial court chose to focus on their differences. In doing so, it applied "the State's whole juror approach" and disregarded more than fifteen years of United States Supreme Court precedent. *See Miller-El II*, 545 U.S. at 241; *Snyder v. Louisiana*, 552 U.S. 472, 478–79 (2008); *Foster*, 578 U.S. at 505; *Flowers*, 139 S. Ct. at 2248–49. *Batson*'s progeny does not task the trial court with distinguishing between the jurors, but instead those cases require a trial court to acknowledge similarities among the stricken and non-stricken prospective jurors when they exist and determine whether the prosecution's reasons for striking a prospective juror are pretextual. *See Miller-El II*, 545 U.S. at 241 (focusing the Court's analysis on whether the "prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve"); *see also Snyder*, 552 U.S. at 478–79 (conducting a comparative juror analysis); *Foster*, 578 U.S. at 505 (finding it "difficult to credit [the prosecutor's proffered reasons] because the State willingly accepted white jurors with the same traits that supposedly rendered [a Black juror] an unattractive juror").

In *Miller-El II*, the Supreme Court noted that "[t]he fact that [the State's] reason [for striking a Black prospective juror] also applied to . . . other panel members, most of them white, none of them struck, is evidence of pretext." 545 U.S. at 248. The use of trait-by-trait juror comparison was reaffirmed most recently in *Flowers*, where the Court explained that "[t]he comparison can suggest that the prosecutor's proffered explanations for striking black prospective jurors were a pretext for discrimination." *Flowers*, 139 S. Ct. at 2248. Importantly, on remand, the trial court was instructed to "compare . . . [the responses of the challenged juror] to any similarly situated white juror." *Hobbs I*, 374 N.C. at 360.

Accordingly, the trial court in Mr. Hobbs's case was required to compare the prospective jurors' responses and determine, based on their similarities, if the reasons given by the prosecution for striking Humphrey, Layden, and McNeill were pretextual. *Id.* By focusing on the differences between the jurors, the trial court foreclosed the possibility of any meaningful comparative juror analysis. *See Flowers*, 139 S. Ct. at 2248–49 ("When a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack panelist who is permitted to serve, that is evidence tending to prove purposeful discrimination." (cleaned up)). It will always be possible to find something different between two people, even identical twins. The trial court's "whole juror" analysis was not consistent with well-established legal principles.

VI. Conclusion

"[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race . . . ." *Batson*, 476 U.S. at 89. Ensuring that race is not the basis for a peremptory challenge "enforces the mandate of equal protection and furthers the ends of justice." *Id.* at 99.

As explained above, Mr. Hobbs's case is susceptible to racial discrimination because he is Black and four of his victims are white. The MSU study Mr. Hobbs presented is evidence of a culture of discrimination in Cumberland County from 1990 to 2010. The State's use of peremptory challenges in this case supports an inference of discrimination. And when a comparative juror analysis is properly conducted, it becomes clear that the State's race-neutral excuses for striking Humphrey, Layden, and McNeill are pretextual. Taking all this information together, I would conclude the State impermissibly used race to exclude Black prospective jurors and that the trial court committed several factual and legal errors in concluding otherwise. Accordingly, I dissent.

Justice MORGAN joins in this dissenting opinion.

MICHAEL G. WOODCOCK, M.D., CAROL WADON, CAMILLE WAHBEH, AND GEORGE DEMETRI

v.

CUMBERLAND COUNTY HOSPITAL SYSTEM, INC. AND CAPE FEAR VALLEY AMBULATORY SURGERY CENTER, LLC

No. 376A21

Filed 6 April 2023

Attorney Fees—complex business case—motion for fees as part of costs—section 6-21.5—nonjusticiable case

In a complex business case involving a limited partnership—in which several limited partners (plaintiffs) sued the general partner (an ambulatory surgery center) and its owner (together, defendants)—the trial court did not abuse its discretion either by granting defendants' motion for award of attorney fees as part of their costs under Civil Procedure Rule 41(d) pursuant to N.C.G.S. § 6-21.5 or by entering an order that required plaintiffs to pay $599,262.00 in attorney fees as costs. The court's unchallenged findings and conclusions established that defendants were the prevailing party pursuant to section 6-21.5 because plaintiffs lacked standing to bring their claims as direct, individual actions, and therefore had no justiciable case.

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from an order on defendants' motion for award of attorneys' fees as part of costs under Rule 41(d) of the North Carolina Rules of Civil Procedure entered on 23 March 2021 and an order on defendants' application for attorneys' fees and costs entered on 17 June 2021 both by Judge Gregory P. McGuire, Special Superior Court Judge for Complex Business Cases, in Superior Court, Guilford County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(a). Heard in the Supreme Court on 1 February 2023.

Douglas S. Harris for plaintiff-appellants.

K&L Gates LLP, by Susan K. Hackney, Marla T. Reschly, and Daniel D. McClurg, for defendant-appellees.

BARRINGER, Justice.

In this matter, we address plaintiffs' challenges to the trial court's entry of an order granting defendants' motion for award of attorneys' fees as part of their costs under North Carolina Rule of Civil Procedure 41(d) pursuant to N.C.G.S. § 6-21.5 and the trial court's subsequent order awarding $599,262.00 in attorneys' fees as costs. Given the unchallenged findings of fact and unchallenged conclusions of law, we affirm the trial court's order allowing attorneys' fees as part of costs and the resulting order awarding $599,262.00 in attorneys' fees. On the record and arguments before us, the trial court did not abuse its discretion as it relates to either order.

I. Background

As set forth in the trial court's order allowing an award of attorneys' fees, plaintiffs are limited partners of the Fayetteville Ambulatory Surgery Center Limited Partnership (FASC), which operates an ambulatory surgery center in Fayetteville, North Carolina. Plaintiffs in their individual capacities sued the general partner of FASC, defendant Cape Fear Valley Ambulatory Surgery Center, LLC (CFV), and CFV's owner, defendant Cumberland County Hospital System, Inc. (CCHS).

Specifically, the trial court found the procedural history of this matter to be as follows:[1]

> 2. Plaintiff Michael Woodcock ("Woodcock") filed his initial Complaint against CCHS on September 26, 2019, asserting various causes of action in his individual capacity, all of which related to the ownership and operation of FASC. On October 14, 2019, Woodcock filed his first Amended Complaint, adding an additional claim, also in his individual capacity.
>
> 3. On December 12, 2019, CCHS filed a motion to stay, forecasting that it intended to seek dismissal under Rules 12(b)(1) and 12(b)(6) "because Plaintiff lack[ed] standing to assert any of the claims that he purport[ed] to bring." A week later, on December 18, 2019, CCHS filed its Motion to Dismiss Plaintiff's Amended Complaint Pursuant to Rule 12(b)(1) or, Alternatively, Rule 12(b)(6). Featured prominently in the introduction section of CCHS's brief in support of their Motion to Dismiss, Defendants argued "Plaintiff

1. For readability, the trial court's citations to the record have been omitted.

[Woodcock] lacks standing to assert any of the claims that he purports to bring." In its reply in support of the Motion to Dismiss filed January 31, 2020, CCHS again argued that Woodcock lacked individual standing: "[t]he sole ground upon which [CCHS] moves to dismiss is that Plaintiff lacks individual standing to assert any of the claims that he purports to bring."

4. A week later, on February 5, 2020, Woodcock moved for leave to amend the First Amended Complaint, and simultaneously filed a proposed Second Amended Complaint. The Court granted Woodcock's motion, allowed Wadon, Wahbeh, and Demitri[2] to join as plaintiffs, deemed the Second Amended Complaint filed as of that date, and denied the pending Motion to Dismiss as Moot. Through the Second Amended Complaint, Plaintiffs, in their individual capacities, asserted five claims against CCHS and/or CFV.

5. On March 19, 2020, Defendants filed their Answer and Affirmative Defenses to Plaintiffs' Second Amended Complaint. Among Defendants' affirmative defenses, Defendants contended that "Plaintiffs' claims were barred due to subject matter jurisdiction" and "for failure to state a claim upon which relief may be granted."

6. On June 26, 2020, Defendants filed a Motion for Judgment on the Pleadings Pursuant to Rule 12(c). In the first two sentences of the introduction section of Defendants' brief in support of the Motion for Judgment, Defendants argued:

> [The Second Amended Complaint] suffers from the same fatal deficiency as Woodcock's [F]irst Amended Complaint, a deficiency addressed at length in [CCHS's] prior [M]otion to [D]ismiss. Plaintiffs, all of whom are limited partners, improperly attempt to bring individual claims against Defendants.

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2. This plaintiff's name is spelled "Demetri" in the case caption and elsewhere in the Record on Appeal.

7. Plaintiffs only responded to the Defendants' standing argument with respect to the second cause of action—breach of contract against CFV—advancing arguments completely absent from their Second Amended Complaint; notably, that Plaintiffs' [sic] were denied their voting rights under Section 14.3 of the Partnership Agreement, and that such deprivation of voting rights creates an individual right properly the subject of a direct claim. In their reply, Defendants argue, *inter alia*, that Plaintiffs did not plead facts in their complaint that Plaintiffs now argue confer standing. At the September 23, 2020 hearing on the Motion for Judgment, the Court expressed skepticism as to Plaintiffs' arguments, noting Plaintiffs' failure to include facts in the Second Amended Complaint that would support their theories, and explaining that North Carolina law requires Plaintiffs to assert their claims derivatively, not individually.

8. For the next two months, Plaintiffs served discovery and sought to depose senior CCHS executives and the corporate representative of CFV.

9. On November 24, 2020, Plaintiffs voluntarily dismissed the case, without prejudice, pursuant to Rule 41(a)(1), and forecasted their intent to re-file some or all of their claims as derivative claims on behalf of FASC.

10. On January 11, 2021, Plaintiffs' counsel sent a formal demand to CFV, demanding CFV re-assert the claims Plaintiffs previously brought in this action, plus a claim arising out of the PPP.[3] The letter indicated that:

> [i]f the General Partner does not take these actions, then the Limited Partners will take these actions in place of the General Partner in a combination of derivative actions on behalf of FAC [sic] and actions to pursue the Limited Partner's [sic] individual rights—their voting rights—which have been wholly denied . . . .

3. "PPP" stands for "Paycheck Protection Program."

> 11. On February 3, 2021, Defendants brought the Motion for Fees. Plaintiff's [sic] filed a Response to Defendants' Motion for Attorneys' Fees and Defendants filed a Reply in Support of Motion for Award of Attorneys' Fees. The Motion for Fees is now ripe for decision.

(Alterations in original and footnotes omitted).

The trial court further found and concluded:[4]

> 18. The Initial Complaint, First Amended Complaint, and Second Amended Complaint all brought claims against Defendants in Plaintiffs' individual capacities for what essentially amounted to breaches of Section 14.5, Section 10.1, and Article XII of the Partnership Agreement.
>
> . . . .
>
> 21. . . . Plaintiffs did not allege derivative claims and did not allege that a pre-suit demand was made on the general partner or partnership relating to the claims they raised in this lawsuit, or any reason that would have excused such a demand. . . .
>
> 22. . . . Plaintiffs do not argue that their claims were subject to the "special duty" exception in their response to the Motion for Judgment or in their Response Brief to the Motion for Fees. . . .
>
> 23. Instead of a special duty owed by Defendants, Plaintiffs argue that they suffered a "separate and distinct injury" because they were denied their contractual right to vote under Section 14.3 and Section 19.1 of the Partnership Agreement. However, nowhere in the Initial Complaint, First Amended Complaint, or Second Amended Complaint is there any reference to or allegation that Defendants denied Plaintiffs' voting rights under the Partnership Agreement, nor is there

4. Because plaintiffs have not challenged the trial court's conclusions of law, we do not address the soundness of the trial court's legal analysis herein. We also have omitted the trial court's statement of the law and citations to court decisions to avoid any suggestion that we are affirming the trial court's summary of the law and legal analysis as it relates to standing.

> any mention of Section 14.3 or 19.1 of the agreement. In other words, despite their multiple amendments and opportunities to raise claims, Plaintiffs failed to make allegations supporting their claim of separate and distinct injury. . . .
>
> 24. The [c]ourt concludes that Plaintiffs lacked standing to bring the claims asserted in the Initial Complaint, First Amended Complaint, and Second Amended Complaint as direct, individual actions. Defendants repeatedly placed Plaintiffs on notice of the deficiency in their claims through multiple motions and briefs expressly and specifically challenging Plaintiffs' standing. . . . Instead, Plaintiffs ignored Defendants' standing arguments, and persisted litigating their non-justiciable claims despite having multiple opportunities to amend.

(Footnotes omitted).

The trial court thus granted defendants' motion for attorneys' fees as part of their costs under Rule 41(d) pursuant to N.C.G.S. § 6-21.5. The trial court also ordered defendants to file an application for attorneys' fees and costs and submit invoices for in camera review by the trial court.

Defendants subsequently filed the application and submitted the invoices for in camera review. Plaintiffs filed a response and objection to the contents of the application. The trial court requested additional billing information, to which plaintiffs also objected. After its review of the filings and submissions, the trial court awarded $3,277.34 in costs and $599,262.00 in attorneys' fees. Plaintiffs appealed both orders but do not challenge the award of costs.

II. Analysis

Although attorneys' fees generally are not recoverable under the common law, our legislature has enacted provisions allowing for the recovery of attorneys' fees, including N.C.G.S. § 6-21.5. *See Sunamerica Fin. Corp. v. Bonham*, 328 N.C. 254, 257 (1991).

Section 6-21.5 provides that:

> In any civil action, special proceeding, or estate or trust proceeding, the court, upon motion of the prevailing party, may award a reasonable attorney's fee to the prevailing party if the court finds that there was

> a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading. The filing of a general denial or the granting of any preliminary motion, such as a motion for judgment on the pleadings pursuant to G.S. 1A-1, Rule 12, a motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6), a motion for a directed verdict pursuant to G.S. 1A-1, Rule 50, or a motion for summary judgment pursuant to G.S. 1A-1, Rule 56, is not in itself a sufficient reason for the court to award attorney's fees, but may be evidence to support the court's decision to make such an award. A party who advances a claim or defense supported by a good faith argument for an extension, modification, or reversal of law may not be required under this section to pay attorney's fees. The court shall make findings of fact and conclusions of law to support its award of attorney's fees under this section.

N.C.G.S. § 6-21.5 (2021).

This Court previously construed this statute in *Sunamerica Financial Corp. v. Bonham*, explaining that:

> A justiciable issue has been defined as an issue that is real and present as opposed to imagined or fanciful. In order to find complete absence of a justiciable issue it must conclusively appear that such issues are absent even giving the pleadings the indulgent treatment they receive on motions for summary judgment or to dismiss. However, it is also possible that a pleading which, when read alone sets forth a justiciable controversy, may, when read with a responsive pleading, no longer present a justiciable controversy.

328 N.C. at 257–58 (cleaned up). In that matter, this Court affirmed on the grounds that "the trial court's findings and conclusions suffice to support the court's order of an attorney's fee." *Id.* at 261–22. Here, we reach the same result: the unchallenged findings and conclusions suffice to support the trial court's order of attorneys' fees.[5]

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5. Plaintiffs only challenged the finding that "this matter involved a dispute over the ownership and operation of the limited partnership." We have disregarded this finding for purposes of our review.

Plaintiffs make several arguments: The trial court erred by allowing attorneys' fees without finding that plaintiffs voluntarily dismissed their action in bad faith; plaintiffs advanced a claim supported by a good faith argument for an extension, modification, or reversal of law; and the trial court abused its discretion by allowing attorneys' fees when the trial court previously directed plaintiffs to continue with discovery.

These arguments fail or are not preserved. First, plaintiffs rely on a decision from this Court, *Brisson v. Santoriello*, 351 N.C. 589, 597 (2000), which stated that "[t]he only limitations [on Rule 41 voluntary dismissals] are that the dismissal not be done in bad faith and that it be done prior to a trial court's ruling dismissing plaintiff's claim or otherwise ruling against plaintiff at any time prior to plaintiff resting his or her case at trial." *Id.* Yet, we are not reviewing plaintiffs' Rule 41 voluntary dismissal. Rather, we are reviewing an order allowing attorneys' fees to defendants as the prevailing party pursuant to N.C.G.S. § 6-21.5. Thus, we are not persuaded by this argument.

Second, plaintiffs only advanced before the trial court one "good faith argument for an extension, modification, or reversal of law" in opposition to defendants' motion for attorneys' fees as the prevailing party pursuant to N.C.G.S. § 6-21.5. Plaintiffs argued before the trial court and now this Court that because the Partnership Agreement of FASC was incorporated by reference in the amended complaint, "defendants could easily deduce that there was only one way not to violate Section 14.5 after the actions they had taken and that was for [CCHS] to have successfully sought to modify or amend the [Partnership] Agreement, [which] in turn could only be done by the use of Section 19.1 which required a vote of two-thirds in interest of the limited partners."

We are bound by the trial court's unchallenged determination that all claims brought against defendants were alleged breaches of Section 14.5, Section 10.1, and Article XII of the Partnership Agreement, which plaintiffs brought in their *individual* capacities. Also unchallenged is the trial court's conclusion that plaintiffs lacked standing to bring direct, individual claims for these alleged breaches. We are further bound by the trial court's finding that plaintiffs' "good faith argument" concerns a non-pleaded breach of the Partnership Agreement. Thus, we disagree with plaintiffs' assertion that the trial court abused its discretion.[6]

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6. The remaining arguments that plaintiffs make or allude to in their briefing before this Court concerning "good faith arguments" were not advanced before the trial court. Therefore, these arguments are not preserved, and we decline to address them. N.C. R. App. P. 10(a).

Third, plaintiffs did not argue before the trial court that its actions concerning discovery precluded the court from exercising its discretion to award attorneys' fees. Hence, we do not address this unpreserved argument that is raised for the first time on appeal. N.C. R. App. P. 10(a).

Concerning the award of attorneys' fees in the amount of $599,262.00, plaintiffs also raise objections. Plaintiffs allege that the trial court improperly relied on billing records that were not provided to plaintiffs for their review, contrary to plaintiffs' due process rights under the Fourteenth Amendment. But plaintiffs did not object to the trial court's in camera consideration of these billing invoices in their response to defendants' application for attorneys' fees. "Constitutional issues not raised and passed upon [by the] trial [court] will not be considered for the first time on appeal." *State v. Lloyd*, 354 N.C. 76, 86–87 (2001) (citing *State v. Benson*, 323 N.C. 318, 322 (1988)). Plaintiffs did subsequently raise an objection to the trial court's request for additional billing information. However, plaintiffs' counsel was copied on both related e-mails—the message from the trial court requesting additional billing information and the response from defendants' counsel providing the additional documentation. From our review of the record, we are not persuaded that this objection has merit.

Plaintiffs additionally complain that the trial court erred and abused its discretion in the order on defendants' application for attorneys' fees and costs by not considering some of plaintiffs' arguments and by reciting the parties' contentions rather than making findings of fact. Nonetheless, after reviewing the trial court's order, we conclude that the trial court's findings and conclusions are sufficient. The order reflects that the trial court considered plaintiffs' objections to the fee application and scrutinized the time and monies expended by defendants.

III. Conclusion

Based on the record before us and the preserved arguments, we conclude that the trial court did not abuse its discretion by granting defendants' motion for award of attorneys' fees as part of their costs under Rule 41(d) of the North Carolina Rules of Civil Procedure pursuant to N.C.G.S. § 6-21.5 and awarding $599,262.00 in attorneys' fees as costs. Accordingly, we affirm the trial court's orders.

AFFIRMED.

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

From N.C. Court of Appeals
22-16

From Wake
18CVS15292

N0. 342PA19-3

ORDER

Pursuant to this Court's Administrative Order of 23 December 2021, and after thorough and thoughtful deliberation, I have concluded that I can and will be fair and impartial in deciding the rehearing of *Holmes, et al. v. Moore, et al.* (No. 342PAl9-3). Accordingly, the 3 March 2023 Motion for Disqualification filed therein is Dismissed as Moot since the almost identical Motion in this same case was denied on the merits over one year ago.

In reaching this conclusion, I thoughtfully considered:

(1) the arguments presented by the parties, giving special attention to the possibility, however remote, that any material circumstances may have changed since my previous decision in this case, and it is self-evident that no facts or circumstances of my State Senate service have or even could have changed since I left that office on December 31, 2018;

(2) my ethical responsibilities as an Associate Justice of the Supreme Court of North Carolina under our Code of Judicial Conduct;

(3) my solemn oath to serve on North Carolina's Court of last resort, rather than recusing myself to avoid public scrutiny or criticism; and,

(4) my resulting judicial duty to all North Carolinians and my personal ability to fairly and impartially discharge that duty.

For the reasons summarized above, specifically including the denial on the merits of the identical Motion in this same case over a year ago, the present Motion for Disqualification is Dismissed as Moot.

This the 13th day of March 2023.

/s/ Tamara Patterson Barringer

Tamara Patterson Barringer
Associate Justice

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 13th day of March 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

IN THE MATTER OF R.D.	From Mecklenburg 17JT614

No. 268A19

ORDER

This matter is before the Court on Counsel for Respondent-Father's motion to release his brief to the State Bar in connection with his application for appellate specialization certification. On 18 December 2020, this Court issued its opinion in *In re R.D.*, 376 N.C. 244 (2020). Respondent-Father filed his brief in this matter on 17 September 2019 under seal as provided in N.C. R. App. P. 42(b). Counsel for Respondent-Father now moves this Court for leave to provide the brief he authored on behalf of Respondent-Father to the North Carolina State Bar Appellate Specialization Committee in partial satisfaction of the certification requirements.

The motion is allowed, provided that:

1. To the extent the brief contains the correct names of the parents of the child who was the subject of this action, or any other identifying information, Counsel must redact such information from the copy of the brief made available to the North Carolina State Bar appellate specialization committee in whatever format the brief is transmitted; and

2. The North Carolina State Bar Appellate Specialization Committee maintains the confidentiality of the brief. Counsel must attach a copy of this Order to the redacted brief provided to the State Bar.

By order of the Court in Conference, this the 21st day of March 2023.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 21st day of March 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

IN RE R.G.L

[384 N.C. 183 (2023)]

IN THE MATTER OF R.G.L.	From Person 18JT75

No. 99A21

ORDER

This matter is before the Court on Counsel for Respondent-Father's motion to release his brief to the State Bar in connection with his application for appellate specialization certification. On 17 December 2021, this Court issued its opinion herein, *In re R.G.L.*, 397 N.C. 452 (2021). Respondent-Father filed his brief in this matter on 14 May 2021 under seal as provided in N.C. R. App. P. 42(b). Counsel for Respondent-Father now moves this Court for leave to provide the brief he authored on behalf of Respondent-Father to the North Carolina State Bar Appellate Specialization Committee in partial satisfaction of the certification requirements.

The motion is allowed, provided that:

1. To the extent the brief contains the correct names of the parents of the child who was the subject of this action, or any other identifying information, Counsel must redact such information from the copy of the brief made available to the North Carolina State Bar appellate specialization committee in whatever format the brief is transmitted; and

2. The North Carolina State Bar Appellate Specialization Committee maintains the confidentiality of the brief. Counsel must attach a copy of this Order to the redacted brief provided to the State Bar.

By order of the Court in Conference, this the 21st day of March 2023.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 21st day of March 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

STATE v. LANE

[384 N.C. 184 (2023)]

STATE OF NORTH CAROLINA	From N.C. Court of Appeals 20-764
v.	
MATTHEW LANE, JR.	From Wake 16CRS203857

No. 415P21

ORDER

The Court denies defendant's petition for discretionary review.

However, upon reviewing the Court of Appeals opinion, we note that the opinion suggests that an individual traveling by motor vehicle never has a reasonable expectation of privacy in his or her movement. *See State v. Lane*, 280 N.C. App. 264, 271, 866 S.E.2d 912, 918 (2021) ("A person traveling in an automobile on public throughfares [sic] has no reasonable expectation of privacy in his movements from one place to another." (emphasis omitted) (quoting *United States v. Knotts*, 460 U.S. 276, 281, 103 S. Ct. 1081, 1085 (1983))). Although this is an accurate quotation, the Court of Appeals took the quotation out of context. *Knotts* concerned whether an individual had a reasonable expectation of privacy to guard against "visual observation" of his travels "over particular roads in a particular direction . . . whatever stops he made, and . . . his final destination." *Knotts*, 460 U.S. at 281–82, 103 S. Ct. at 1085. This statement is irrelevant to the issue in this case which involves a GPS monitoring device placed on a vehicle pursuant to a warrant. We note that "[o]ne who owns and possesses a car, like one who owns and possesses a house, almost always has a reasonable expectation of privacy in it." *Byrd v. United States*, 138 S. Ct. 1518, 1527 (2018).

Therefore, we disavow use of the quotation from *Knotts* in this circumstance to prevent confusion and improper reliance on the language of the Court of Appeals in this case.

By order of the Court in Conference, this the 6th day of April 2023.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 6th day of April 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

STATE v. RUTH

[384 N.C. 185 (2023)]

STATE OF NORTH CAROLINA	From N.C. Court of Appeals 20-657
v.	
BRODERICK TYWONE RUTH	From Forsyth 17CRS55391 17CRS55399-400 17CRS56332

No. 21P22

ORDER

Upon consideration of the State's petition for discretionary review, the Court allows defendant's petition for the limited purpose of remanding this case to the Court of Appeals for reconsideration in light of this Court's opinion in *State v. Campbell* issued 6 April 2023.

By order of the Court in Conference, this the 6th day of April 2023.

/s/ Allen, J.
For the Court

Justice EARLS dissenting.

The State's petition in this case seeks to raise the following specific question: "Did the Court of Appeals err as a matter of law by ordering a new trial when the record revealed that remand would be sufficient to protect defendant's rights under *Batson v. Kentucky*." That question does not arise in, and was not addressed by, this Court's opinion in *State v. Campbell*. Therefore, *Campbell* is not controlling in this case as it was presented to us and I dissent from this order remanding for reconsideration.

Justice MORGAN joins in this dissent.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 6th day of April 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

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

6 APRIL 2023

11P23	State v. Juan Renardo Chunn	Def's PDR Under N.C.G.S. § 7A-31 (COA22-486)	Denied
13P23	Dianne G. Nickles v. Tabitha Gwynn	1. Plt's Pro Se Motion for Notice of Appeal 2. Plt's Pro Se Petition for Writ of Certiorari 3. Plt's Pro Se Motion to Proceed *In Forma Pauperis* 4. Def's Motion to Dismiss Appeal 5. Plt's Pro Se Petition for Writ of Certiorari 6. Plt's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Dismissed 3. Allowed 4. Dismissed as moot 5. Dismissed 6. Allowed
21P22	State v. Broderick Tywone Ruth	1. State's Motion for Temporary Stay (COA20-657) 2. State's Petition for Writ of Supersedeas 3. State's Motion for Extension of Time to File PDR 4. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/19/2022** Dissolved 2. Denied 3. Allowed **01/25/2022** 4. Special Order
23P23	In the Matter of T.B.	1. Respondent's Pro Se Motion for En Banc Rehearing (COA22-337) 2. Respondent's Pro Se PDR Under N.C.G.S. § 7A-31	1. Dismissed 2. Denied
30P23	State v. Leopoldo Andrade Gomez	Def's PDR Under N.C.G.S. § 7A-31 (COA21-696)	Denied
32P23	In the Matter of the Adoption of B.M.T., a Minor	1. Petitioners' PDR Under N.C.G.S. § 7A-31 (COA22-377) 2. Petitioners' Motion for Temporary Stay 3. Petitioners' Petition for Writ of Supersedeas	1. Allowed 2. Allowed **02/14/2023** 3. Allowed
35PA21	In the Matter of A.J.L.H., C.A.L.W., M.J.L.H.	Respondent-Father's Motion for Clarification Regarding Which of the Sixteen Proposed Issues Are Now Under Discretionary Review	Dismissed as moot
35P22	State v. Edward Thorpe	Def's PDR Under N.C.G.S. § 7A-31 (COA21-268)	Dismissed

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

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45PA18-3	State v. Pierre Alexander Amerson	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Lee County 2. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed
48P23	Eric S. Erickson v. North Carolina Department of Public Safety, Adult Corrections and Juvenile Justice	Petitioner's Pro Se Petition for Writ of Certiorari to Review Decision of the COA (COA20-704)	Denied
67P23	Lorraine Ghee v. Walmart Stores East, LP	1. Plt's Pro Se Motion to Proceed *In Forma Pauperis* 2. Plt's Pro Se Motion for Review	1. Allowed 2. Dismissed
69P23	In the Matter of the Imprisonment of Rayvon Marquis Flowers	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **03/07/2023**
72A23	Earl James Watson v. North Carolina Department of Public Safety	Plt's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA22-538)	Dismissed *ex mero motu* **Dietz, J., recused**
77A19-2	In the Matter of the Proposed Foreclosure of a Claim of Lien Filed on Calmore George and Hygiena Jennifer George by the Crossings Community Association, Inc. Dated August 22, 2016, Recorded in Docket NO. 16-M-6465 in the Office of the Clerk of Court of Superior Court for Mecklenburg County Registry by Sellers, Ayers, Dortch & Lyons, P.A. Trustee	1. Intervenor's (National Indemnity Group) PDR Under N.C.G.S. § 7A-31 (COA22-33) 2. Respondent's (KPC Holdings) PDR Under N.C.G.S. § 7A-31	1. Denied 2. Denied

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

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79P23	James Chandler Abbott, et al. v. Michael C. Abernathy, et al.	1. Defs' (Rodney and Lynne Worthington) Motion for Temporary Stay (COA22-162) 2. Defs' (Rodney and Lynne Worthington) Petition for Writ of Supersedeas 3. Defs' (Rodney and Lynne Worthington) PDR Under N.C.G.S. § 7A-31	1. Allowed **03/16/2023** 2. 3.
80P23	State v. Jim Robinson, III	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **03/16/2023**
83P23	In re T.H., R.H., J.P.	Respondent-Mother's Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-452)	Denied **04/03/2023**
87P23	Camden Summit Partnership, LP v. Mone't Byrd	Def's Pro Se Petition for Writ of Supersedeas	Dismissed **03/27/2023**
89P22	Eric Steven Fearrington, Craig D. Malmrose v. City of Greenville, Pitt County Board of Education	1. Defs' Motion for Temporary Stay (COA20-877) 2. Defs' Petition for Writ of Supersedeas 3. Def's (City of Greenville) Notice of Appeal Based Upon a Constitutional Question 4. Def's (City of Greenville) PDR Under N.C.G.S. § 7A-31 5. Plts' Conditional PDR Under N.C.G.S. § 7A-31 6. Def's (City of Greenville) Motion to File Supplement to PDR 7. Def's (City of Greenville) Motion for Judicial Review	1. Allowed **03/30/2022** 2. Allowed 3. Dismissed *ex mero motu* 4. Allowed 5. Denied 6. Allowed 7. Allowed **Dietz, J., recused**
89P23	Barcelo v. Wijewickrama, et al.	Petitioner's Pro Se Motion for Void Judgment Relief Habeas Writ	Dismissed **04/03/2023**
99A21	In the Matter of R.G.L.	Counsel's Motion to Release Brief to State Bar for Appellate Specialization Application	Special Order **03/21/2023**
100P19-2	Linda Byrd-Russ v. Nefertiti Byrd	Def's Petition for Writ of Certiorari to Review Order of District Court, Warren County	Denied **Dietz, J., recused**
102P13-6	State v. Charles Anthony Ball	Def's Pro Se Motion for Petition for Rehearing	Dismissed **03/31/2023**

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

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102P19-5	State v. Christopher Lee Neal	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **03/29/2023**
109P16-3	State v. Curtis Joel Smith	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Cumberland County	Dismissed
122P22	State v. Kiyona Lashawn Brown	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA20-737) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
131P16-25	State v. Somchai Noonsab	Def's Pro Se Motion for Injunctions to Supreme Court's Claimed Jurisdiction	Dismissed
131P16-26	State v. Somchai Noonsab	1. Def's Pro Se Motion for Direct Attack Complaint 2. Def's Pro Se Motion for Immediate Release	1. Dismissed **03/31/2023** 2. Dismissed **03/31/2023**
163P22	Warren Paul Kean v. Amy Delene Kean	Def's Motion for Reconsideration	Dismissed **03/16/2023**
225P22	Gleason v. The Charlotte-Mecklenburg Hosp. Auth.	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA21-501) 2. Plt's Motion to Amend PDR	1. Denied 2. Allowed
226P06-5	State v. De'Norris L. Sanders	1. Def's Pro Se Motion to Void Judgments and/or Nullify Jury Verdict 2. Def's Pro Se Motion for Restoration of Liberty Post-Haste and for Reasonable Compensation and Restitution	1. Denied **03/02/2023** 2. Denied **03/02/2023**
235P21	North Carolina Farm Bureau Mutual Insurance Company, Inc. v. Lanier Law Group, P.A., and Lisa Lanier	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA19-926) 2. Plt's Conditional PDR	1. Allowed 2. Allowed **Dietz, J., recused**
245P22	Lakisha Smith v. AutoMoney, Inc.	1. Def's PDR Under N.C.G.S. § 7A-31 (COA21-271) 2. Def's Motion to Amend PDR	1. Denied 2. Allowed
246P22	Joshua Hundley v. AutoMoney, Inc.	1. Def's PDR Under N.C.G.S. § 7A-31 (COA21-305) 2. Def's Motion to Amend PDR	1. Denied 2. Allowed

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

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247P22	Jennifer Leake and Elizabeth Wakeman v. AutoMoney, Inc.	1. Def's PDR Under N.C.G.S. § 7A-31 (COA21-411) 2. Def's Motion to Amend PDR	1. Denied 2. Allowed
248P22	Martha Wallace v. AutoMoney, Inc.	1. Def's PDR Under N.C.G.S. § 7A-31 (COA21-418) 2. Def's Motion to Amend PDR	1. Denied 2. Allowed
249P22	Doris Wall, Patricia Smith, Corey Davis, Mario Robinson, Timothy Smith, Gloria Gilliam, Michael Waddell, Teria Bouknight, June Barbour, Emmanuel Smith, Donquis Jones, Dianne Kirkpatrick, Asbury Forte, III, Aretha Hayes, and Poonam Patel v. AutoMoney, Inc.	1. Def's PDR Under N.C.G.S. § 7A-31 (COA21-419) 2. Def's Motion to Amend PDR	1. Denied 2. Allowed
250P22	Becky Troublefield v. AutoMoney, Inc.	1. Def's PDR Under N.C.G.S. § 7A-31 (COA21-421) 2. Def's Motion to Amend PDR	1. Denied 2. Allowed
254P22	County of Moore v. Randy Acres and Soek Yie Phan	1. Defs' Notice of Appeal Based Upon a Constitutional Question (COA21-552) 2. Defs' PDR Under N.C.G.S. § 7A-31 3. Plt's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
263P22-2	State v. David Anthony Harris	1. Def's Pro Se Motion to File as Indigent Pro Se Litigant 2. Def's Pro Se Petition for Writ of Habeas Corpus	1. Dismissed 2. Denied **03/09/2023**
268A19	In the Matter of R.D.	Counsel's Motion to Release Brief to State Bar for Appellate Specialization Application	Special Order **03/21/2023**
268A22	Schooldev East, LLC v. Town of Wake Forest	1. Petitioner's Notice of Appeal Based Upon a Dissent (COA21-359) 2. Petitioner's PDR as to Additional Issues 3. Respondent's Conditional PDR Under N.C.G.S. § 7A-31	1. --- 2. Allowed 3. Allowed

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

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281P06-12	Joseph E. Teague, Jr., P.E., C.M. v. N.C. Department of Transportation	1. Plt's Pro Se Motion for Procedural Challenge 2. Plt's Pro Se Petition in the Alternative for Writ of Habeas Corpus	1. Dismissed **03/21/2023** 2. Dismissed **03/21/2023**
282P22	Jennifer Snipes v. TitleMax of Virginia, Inc.	Plt's PDR Under N.C.G.S. § 7A-31 (COA21-374)	Denied
306A20	Sound Rivers, Inc., et al. v. NC Department of Environmental Quality, et al.	Intervenor's Motion to Extend Time for Oral Argument by Twenty Minutes	Denied **03/24/2023** **Berger, J., recused**
317P22-2	State v. Joseph Ngigi Kariuki	1. Def's Pro Se Motion for Appropriate Relief 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
339P22	State v. Jimmy Harris	Def's Pro Se Motion for Notice of Appeal (COAP22-331)	Dismissed **Dietz, J., recused**
342PA19-3	Holmes, et al. v. Moore, et al.	1. Plts' Motion for Disqualification of Justice Tamara Patterson Barringer 2. Plts' Motion for Disqualification of Justice Berger, Jr.	1. Special Order **03/13/2023** 2. Dismissed **03/14/2023**
346P22	Richard L. Neeley v. William C. Fields, Jr.; Willcox, McFadyen, Fields & Sutherland PLLC; Nancy Y. Wiggins, as the Executrix of the Estate of Richard M. Wiggins; Kenneth B. Dantinne; and McCoy Wiggins, PLLC	Plt's PDR Under N.C.G.S. § 7A-31 (COA22-30)	Denied **Dietz, J., recused**
366P21-2	State v. Sharif Hakim Moore	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-368)	Denied **Dietz, J., recused**
366P22	Alice Bracey (formerly Murdock) v. Michael Welborn Murdock	Def's PDR Under N.C.G.S. § 7A-31 (COA22-198)	Denied

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

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376A21	Woodcock, et al. v. Cumberland County Hospital System, et al.	Defs' Motion for Sanctions	Denied
384P16-3	Phillip Wayne Broyal v. Todd Ishee, Secretary of North Carolina Department of Adult Correction; Brett Bullis, Superintendent of Avery Mitchell Correctional Institution	1. Def's Pro Se Petition for Writ of Habeas Corpus 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Denied **03/07/2023** 2. Allowed **03/07/2023** 3. Dismissed as moot **03/07/2023** **Dietz, J., recused**
384P16-4	Phillip Wayne Broyal v. Todd Ishee, Secretary of North Carolina Department of Adult Correction; Brett Bullis, Superintendent of Avery Mitchell Correctional Institution	Def's Pro Se Motion for Reconsideration of Petition for Writ of Habeas Corpus	Dismissed **03/28/2023** **Dietz, J., recused**
403P21	Louis M. Bouvier, Jr., Karen Andrea Niehans, Samuel R. Niehans, and Joseph D. Golden v. William Clark Porter, IV, Holtzman Vogel Josefiak Torchinsky PLLC, Steve Roberts, Erin Clark, Gabriela Fallon, Steven Saxe, and the Pat McCrory Committee Legal Defense Fund	1. Defs' (Holtzman Vogel Josefiak Torchinsky PLLC, Steve Roberts, Erin Clark, Gabriela Fallon, Steven Saxe, and the Pat McCrory Committee Legal Defense Fund) PDR Under N.C.G.S. § 7A-31 2. Plts' Motion to Expedite Consideration of PDR 3. Defs' (Holtzman Vogel Josefiak Torchinsky PLLC, Steve Roberts, Erin Clark, Gabriela Fallon, Steven Saxe, and the Pat McCrory Committee Legal Defense Fund) Motion to Recuse 4. Plts' Motion to Withdraw Allison Riggs as Counsel of Record 5. Defs' (Holtzman Vogel Josefiak Torchinsky PLLC, Steve Roberts, Erin Clark, Gabriela Fallon, Steven Saxe, and the Pat McCrory Committee Legal Defense Fund) Motion for Temporary Stay. 6. Defs' (Holtzman Vogel Josefiak Torchinsky PLLC, Steve Roberts, Erin Clark, Gabriela Fallon, Steven Saxe, and the Pat McCrory Committee Legal Defense Fund) Petition for Writ of Supersedeas	1. Allowed 2. Dismissed as moot 3. Dismissed as moot **01/18/2022** 4. Allowed **01/03/2023** 5. Allowed **02/07/2023** 6. Allowed **Earls, J., recused**

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

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415P21	State v. Matthew Lane, Jr.	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA20-764) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Special Order 3. Allowed
428P21	State v. Brandon Tyler Stacy	Def's Pro Se Motion for Grievance	Dismissed
450P20-2	State v. Clifton William Batts	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **03/20/2023**

CMTY. SUCCESS INITIATIVE v. MOORE

[384 N.C. 194 (2023)]

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

No. 331PA21

Filed 28 April 2023

1. Jurisdiction—standing—facial constitutional challenge—felon voting rights statute—direct injury—redressability

In a declaratory action challenging the facial constitutionality of N.C.G.S. § 13-1 (regarding felon voting rights), the six individual plaintiffs—convicted felons who were unable to vote while on felony supervision—had standing to bring their action because they sufficiently alleged a direct injury and the redressability of the alleged violations if they were to prevail. Only one of the four nonprofit organization plaintiffs (N.C. NAACP), however, had standing to sue on behalf of its members, where the complaint alleged that some of its members were ineligible for re-enfranchisement under the law and that the interest of those members in regaining the franchise was tied to the organization's mission, and where the organization could obtain relief for those members without their participation in the lawsuit. The remaining three nonprofit organization plaintiffs did not allege that they had members who were directly injured by the statute but instead referenced vague harms such as the need to divert resources to educate members about how the law might affect their voting rights.

2. Constitutional Law—North Carolina—facial challenge—felon voting rights statute—discriminatory intent—disparate impact

In a declaratory action challenging the facial constitutionality of N.C.G.S. § 13-1 (regarding felon voting rights, in particular for convicted felons on felony supervision), the trial court erred by failing to apply the presumption of legislative good faith and by assuming that

past discrimination infected the legislative process that led to the enactment of the current law, which led it to erroneously conclude that the legislature enacted the law with discriminatory intent; therefore, the court's findings made under these misapprehensions of the law were not binding on appellate review. The trial court reached its decision by misapplying the analytical framework contained in *Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977), to determine whether the statute violated the Equal Protection Clause (Article I, Section 19) of the state constitution and by adopting unreliable statistical evidence regarding the alleged disparate impact of the law on African Americans. Where plaintiffs failed to carry their burden of overcoming the presumptive validity of section 13-1, the trial court should have entered judgment for defendants on this claim.

3. Constitutional Law—facial challenge—restoration of felon voting rights—wealth-based classification—standard of review

In a declaratory action challenging the facial constitutionality of N.C.G.S. § 13-1 (regarding felon voting rights, in particular for convicted felons on felony supervision), the trial court erred by applying strict scrutiny to the question of whether the statute created an impermissible wealth classification in violation of the Equal Protection Clause (Article I, Section 19) of the state constitution by conditioning felons' eligibility to vote on their ability to comply with the financial obligations of their sentences such as the payment of court costs, fines, or restitution. Where the statute did not burden a fundamental right, since felons have no right to vote pursuant to Article VI, Section 2(3) of the constitution, or particularly burden a suspect class, the appropriate standard was rational basis review, under which the statute passed constitutional muster because the conditions placed on felons related to a legitimate government interest—ensuring that felons take responsibility for their crimes and exercise their voting rights responsibly.

4. Constitutional Law—facial challenge—restoration of felon voting rights—property qualifications

In a declaratory action challenging the facial constitutionality of N.C.G.S. § 13-1 (regarding felon voting rights, particularly for convicted felons on felony supervision), the trial court erred by concluding that the statute violated the Property Qualifications Clause (Article I, Section 11) of the state constitution by conditioning felons' eligibility to vote on their ability to comply with the financial obligations of their sentences such as the payment of court costs,

fines, or restitution. Since Article VI, Section 2(3) of the constitution prohibits felons from voting, the requirement of felons fulfilling the financial terms of their sentences before having their voting rights restored by statute does not implicate the Property Qualifications Clause, which affects how people may exercise their right to vote or seek office, nor does the requirement equate to a ban on requiring property ownership before exercising those rights.

5. Constitutional Law—facial challenge—restoration of felon voting rights—Free Elections Clause

In a declaratory action challenging the facial constitutionality of N.C.G.S. § 13-1 (regarding felon voting rights, particularly for convicted felons on felony supervision), the trial court erred by concluding that the statute violated the Free Elections Clause (Article I, Section 10) of the state constitution by prohibiting a large number of people from voting. Since Article VI, Section 2(3) of the constitution prohibits felons from voting, the exclusion of felons whose voting rights have not been restored from the electoral process does not implicate the concerns that the Free Elections Clause was enacted to address.

Justice EARLS dissenting.

Justice MORGAN joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-27(b) from a final judgment and order entered on 28 March 2022 by a three-judge panel in Superior Court, Wake County, following transfer of the matter to the panel pursuant to N.C.G.S. § 1-267.1. On 4 May 2022, pursuant to N.C.G.S. § 7A-31(a) and (b)(2), the Supreme Court allowed plaintiffs' petition for discretionary review prior to determination by the Court of Appeals. Heard in the Supreme Court on 2 February 2023.

Forward Justice, by Daryl Atkinson, Whitley Carpenter, Kathleen F. Roblez, Ashley Mitchell, and Caitlin Swain; Arnold & Porter Kaye Scholer LLP, by R. Stanton Jones and Elisabeth S. Theodore; and Protect Democracy Project, by Farbod K. Faraji, for plaintiff-appellees.

Cooper & Kirk, PLLC, by Nicole J. Moss, David Thompson, Peter A. Patterson, Joseph O. Masterman, and William V. Bergstrom; and K&L Gates, by Nathan A. Huff, for defendant-appellants Legislative Defendants.

Tin, Fulton, Walker & Owen, PLLC, by Abraham Rubert-Schewel, for Cato Institute and Due Process Institute, amici curiae.

Poyner Spruill LLP, by Caroline P. Mackie; and Karl A. Racine, Attorney General for the District of Columbia, by Caroline S. Van Zile, Solicitor General, for the District of Columbia and the States of California, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Nevada, New Jersey, New York, Rhode Island, and Washington, amici states.

Law Offices of F. Bryan Brice, Jr., by Anne M. Harvey; and Proskauer Rose LLP, by Lloyd B. Chinn and Joseph C. O'Keefe, for Institute for Innovation in Prosecution at John Jay College, amicus curiae.

North Carolina Justice Center, by Sarah Laws, Laura Holland, and Quisha Mallette, for the North Carolina Justice Center and Down Home NC, amici curiae.

Patterson Harkavy LLP, by Paul E. Smith and Burton Craige, for the Sentencing Project, the Lawyers' Committee for Civil Rights Under Law, and the Southern Poverty Law Center, amici curiae.

ALLEN, Justice.

Our state constitution ties voting rights to the obligation that all citizens have to refrain from criminal misconduct. Specifically, it denies individuals with felony convictions the right to vote unless their citizenship rights are restored "in the manner prescribed by law." N.C. Const. art. VI, § 2(3). No party to this litigation disputes the validity of Article VI, Section 2(3) of the North Carolina Constitution. This case is therefore not about whether disenfranchisement should be a consequence of a felony conviction. The state constitution says that it must be, and we are bound by that mandate.

This case involves instead challenges to N.C.G.S. § 13-1, the statute that sets out the criteria that felons must satisfy to be eligible for reenfranchisement. In the early 1970s, the General Assembly embarked on a series of reforms to section 13-1 and related statutory provisions. The first round of reforms eliminated the complicated petition-and-hearing procedure that had long hindered attempts by eligible felons to regain their rights. The second round left us with essentially the version

of section 13-1 in effect today, under which felons automatically regain the right to vote once they complete their sentences, including any periods of probation, parole, or post-release supervision to which they are subject.[1]

Nearly fifty years after the legislature rewrote section 13-1 to make re-enfranchisement automatic for all eligible felons, plaintiffs filed suit alleging equal protection and other state constitutional challenges to the requirement that felons complete their probation, parole, or post-release supervision before they regain their voting rights. In particular, plaintiffs alleged that the legislators who imposed this requirement intended to discriminate against African Americans. To prove this claim, plaintiffs introduced statistical evidence to show that African Americans constitute a disproportionate share of felons on probation, parole, or post-release supervision. Plaintiffs also argued that the requirement perpetuates the racist intent behind nineteenth century laws enacted to disenfranchise or suppress the votes of African Americans.

The trial court ruled in plaintiffs' favor and entered an order allowing all felons not in jail or prison to register and vote. In so doing, the trial court misapplied the law and overlooked facts crucial to its ruling. The statistical evidence relied on by the court does not establish that requiring felons to finish their sentences prior to re-enfranchisement disproportionately affects African American felons. Moreover, the trial court wrongly imputed the discriminatory views of nineteenth century lawmakers to the legislators who made it easier for eligible felons of all races to regain their voting rights. The changes to section 13-1 appear to have been undertaken in good faith.

The evidence does not prove that legislators intended their reforms to section 13-1 in the early 1970s to disadvantage African Americans, nor does it substantiate plaintiffs' other constitutional claims. It is not unconstitutional to insist that felons pay their debt to society as a

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1. "Probation" refers to a term of court-ordered supervision that eligible offenders may serve in the community instead of in confinement. *See generally* N.C.G.S. ch. 15A, art. 82 (2021) (Probation). The term "parole" refers to the early release, subject to conditions, of persons serving sentences of imprisonment for convictions of impaired driving under N.C.G.S. § 20-138.1. N.C.G.S. § 15A-1370.1 (2021); *see generally* N.C.G.S. ch. 15A, art. 85 (Parole). Certain inmates whose crimes occurred before the Structured Sentencing Act took effect on 1 October 1994 are also eligible for parole. "Post-release supervision" refers to a "period of supervised release, similar to probation, that an inmate serves in the community upon release from prison." James M. Markham, *The North Carolina Justice Reinvestment Act* 5 (UNC School of Government 2012); *see generally* N.C.G.S. ch. 15A, art. 84A (2021) (Post-Release Supervision).

condition of participating in the electoral process. We therefore reverse the trial court's final order and judgment.

I. Background

Laws prohibiting persons convicted of felonies from voting have long been common features of the American legal system. When the Fourteenth Amendment to the United States Constitution was ratified in 1868, twenty-nine of the nation's then thirty-seven states had provisions in their state constitutions that either denied felons the right to vote or allowed their respective legislatures to enact legislation to that effect. *Richardson v. Ramirez*, 418 U.S. 24, 48 (1974). "Today, almost all States disenfranchise felons in some way, although the recent trend is toward expanding access to the franchise." *Jones v. Governor of Fla.*, 975 F.3d 1016, 1029 (11th Cir. 2020) (en banc).

North Carolina's 1776 constitution did not prohibit felons from voting. Rather, "the 1776 constitution . . . granted the franchise indiscriminately to all 'freemen' who met the property qualification, including free blacks." John V. Orth and Paul Martin Newby, *The North Carolina State Constitution* 14 (2d ed. 2013) [hereafter *State Constitution*].

In 1835 the citizens of North Carolina ratified a group of extensive amendments to the 1776 constitution regulating elections and office-holding. John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. Rev. 1759, 1771 (1992) [hereafter *Constitutional History*]. One noted the loss of citizenship rights by "any person convicted of an infamous crime" but authorized the General Assembly to "pass general laws regulating" the restoration of such rights. N.C. Const. of 1776, amends. of 1835, art. I, § 4, cls. 3–4. Another amendment deprived free African Americans of the right to vote. N.C. Const. of 1776, amends. of 1835, art. I, § 3, cl. 3.

In 1841 the General Assembly enacted legislation providing for the restoration of citizenship rights for persons convicted of infamous crimes. An Act Providing for Restoring to the Rights of Citizenship Persons Convicted of Infamous Crimes, ch. 36, §§ 1–6, 1841 N.C. Sess. Laws 68, 68–69. The legislation instituted a lengthy and burdensome petition-and-hearing procedure for rights restoration. A petitioner had to wait a minimum of four years after his conviction to file his petition. *Id.* § 3. Notwithstanding where the petitioner resided, he had to file the petition in the superior court of the county where he had been indicted. *Id.* § 4. The petition had to set out the petitioner's "conviction and the punishment inflicted," as well as his current residence, his occupation since conviction, and the "meritorious causes" justifying the restoration

of his rights. *Id.* § 1. The clerk of court then had to advertise the substance of the petition at the courthouse door for three months prior to the petitioner's proposed hearing date. *Id.* At the hearing, the petition's contents had to be "proved" by "five respectable witnesses" who had known the petitioner for the three years immediately preceding the petition's filing date and who could confirm "his character for truth and honesty." *Id.* If the five witnesses supplied the necessary character evidence and the court was "satisfied of the truth of the facts set forth in the petition," the court was to "decree [the petitioner's] restoration to the lost rights of citizenship." *Id.*

Following the Civil War, North Carolinians ratified a new state constitution drafted by a convention held in compliance with federal Reconstruction legislation. *State Constitution* at 19. The 1868 constitution removed all property qualifications for voting and extended voting rights to all male citizens, regardless of race, who had reached the age of twenty-one and satisfied certain residency requirements. N.C. Const. of 1868, art. I, § 22 (eliminating property qualifications for voting); *id.* art. VI, § 1 (designating as an "elector" every male aged twenty-one or older who fulfilled specified residency requirements). Although the 1868 constitution did not expressly prohibit felons from voting, it repeated the "infamous crimes" language that had been added to the 1776 constitution in 1835. *Id.* art. II, § 13.

In 1875 the General Assembly called a convention to propose amendments to the 1868 constitution. An Act to Call a Convention of the People of North Carolina, ch. 222, 1874–75 N.C. Sess. Laws 303, 303–05. Ratified by voters in 1876, the thirty amendments approved by the convention contained several racially discriminatory measures. One amendment banned interracial marriage between whites and African Americans, N.C. Const. of 1868, amend. XXX of 1875, while another mandated racially segregated schools, *id.* amend. XXVI. Other amendments that did not mention race had the deliberate effect of reducing the political influence of African Americans. One such amendment restored the General Assembly's power to appoint local government officials. *See id.* amend. XXV. "[A]s was well understood," the purpose of that amendment "was to block control of local government in the eastern counties by blacks who were in the majority there." *State Constitution* at 26.

The 1875 amendments contained the state's first constitutional provision expressly denying the franchise to individuals convicted of felonies. Under that provision, "no person . . . adjudged guilty of [a] felony, or of any other crime infamous by the laws of this State" could vote without first having been "restored to the rights of citizenship in a

mode prescribed by law." N.C. Const. of 1868, amend. XXIV of 1875. In 1877 the General Assembly criminalized voting by felons whose rights had not been restored.[2] An Act to Regulate Elections, ch. 275, §§ 10, 62, 1877 N.C. Sess. Laws 516, 519–20, 537. The 1877 law did not articulate the steps that felons had to follow to have their citizenship rights restored, so the procedures set out in the 1841 rights restoration legislation remained in place, including the four-year waiting period and the petition-and-hearing requirements.

Between 1897 and 1941, the General Assembly enacted legislation that relaxed some of the rules for petitions filed by felons seeking restoration of their citizenship rights. *See*, *e.g.*, An Act to Amend Section 2940 of the Code in Reference to Restoration of Citizenship, ch. 110, § 1, 1897 N.C. Sess. Laws 155, 155–56 (allowing a petitioner to file in the county of indictment or county of residence). Some of the enactments reduced the waiting period for felons in designated categories. *See*, *e.g.*, An Act to Amend Section Two Thousand Nine Hundred and Forty-One of the Code, and to Facilitate the Restoration to the Rights of Citizenship in Certain Cases, ch. 44, § 1, 1899 N.C. Sess. Laws 139, 139 (shortening to one year the waiting period after conviction when the petitioner (1) had not been sentenced to a term of imprisonment and (2) had been pardoned by the Governor); An Act to Amend Chapter 44, Acts of 1899, and to Facilitate the Restoration to the Rights of Citizenship in Certain Cases, ch. 547, § 2, 1905 N.C. Sess. Laws 553, 554 (allowing a petitioner to file at any time after conviction and without alleging or proving a pardon if the court suspended judgment); An Act to Provide for the Return of Rights of Citizenship to Offenders Committed to Certain Training Schools, ch. 384, § 1, 1937 N.C. Sess. Laws 713, 713 (reducing to one year after discharge the waiting period for felons committed to certain "training schools"). In 1933, the legislature replaced the requirement that felons wait four years after conviction to file their petitions with a requirement that they wait two years after being discharged. An Act to Amend Consolidated Statutes with Reference to Restoration to Citizenship, ch. 243, § 1, 1933 N.C. Sess. Laws 370, 370.

By 1969 the General Assembly had codified the rules for the restoration of felons' citizenship rights as Chapter 13 of our General Statutes. N.C.G.S. § 13-1 (1969) (repealed 1971). On 2 July 1969, the General Assembly passed legislation to submit what became our current state constitution to the electorate for approval. An Act to Revise and Amend

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2. It remains a crime for any felon whose rights have not been restored to vote in a primary or general election. N.C.G.S. § 163-275(5) (2021).

the Constitution of North Carolina, ch. 1258, 1969 N.C. Sess. Laws 1461. Voters ratified the new constitution in the 1970 general election, and it went into effect on 1 July 1971.

The 1971 constitution continues our state's general prohibition against voting by felons:

> No person adjudged guilty of a felony against this State or the United States, or adjudged guilty of a felony in another state that also would be a felony if it had been committed in this State, shall be permitted to vote unless that person shall be first restored to the rights of citizenship in the manner prescribed by law.

N.C. Const. art. VI, § 2(3). The text of Article VI, Section 2(3) tracks that of the corresponding 1876 amendment, though there are differences. Article VI, Section 2(3) does not refer to infamous crimes. It encompasses not just individuals convicted of felonies under our state's laws but also persons convicted of felonies under federal law or, if the conduct would have been felonious here, convicted of felonies in other states. *Id.*

During the 1971 legislative session, Representatives Joy Johnson of Robeson County and Henry Frye of Guilford County[3]—then the only African American members of the General Assembly—introduced a bill to amend Chapter 13 of the General Statutes.[4] In its original form, the bill provided for the automatic restoration of citizenship rights for any felon "upon the full completion of his sentence or upon [his] receiving an unconditional pardon." A legislative committee amended the bill to remove the word "automatically" and to clarify that the phrase "full completion of his sentence" included "any period of probation or parole." The final form of the bill passed into law by the legislature in 1971 repealed Chapter 13 "in its entirety" and enacted "a new Chapter 13." An Act to Amend Chapter 13 of the General Statutes to Require the Automatic Restoration of Citizenship to Any Person Who Has Forfeited Such Citizenship Due to Committing a Crime and has Either Been Pardoned or Completed His Sentence, ch. 902, § 1, 1971 N.C. Sess. Laws 1421, 1421.

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3. Representative Henry Frye subsequently served as an Associate Justice and then as Chief Justice of this Court.

4. The trial court's final judgment and order states that Representatives Johnson and Frye both introduced the bill to amend Chapter 13. However, the copy of the bill in the record names only Representative Johnson as a sponsor.

The new Chapter 13 did not make rights restoration automatic, but it did dramatically streamline the process, largely by eliminating the petition-and-hearing requirements. Under N.C.G.S. § 13-1, anyone convicted of a felony became eligible for rights restoration if (1) the Department of Correction recommended restoration at the time of release, (2) the individual received an unconditional pardon, *or* (3) "two years ha[d] elapsed since [the person's] release by the Department of Correction, including probation or parole." *Id.* Once any of the three conditions was met, the eligible felon could regain his citizenship rights by going "before any judge of the General Court of Justice in Wake County or in the county where [the felon] reside[d] or in which [the felon] was last convicted" and taking an oath verifying compliance with section 13-1 and pledging loyalty and obedience to "the Constitution and laws of the United States, and the Constitution and laws of North Carolina not inconsistent therewith." *Id.*

In 1973 Representatives Johnson and Frye, joined by a new African American legislator, Representative (later Senator) Henry Michaux Jr., tried again to make the restoration of citizenship rights automatic for some felons. Their bill as introduced amended section 13-1 to make rights restoration automatic "[u]pon the unconditional discharge of an inmate by the Department of Correction or Department of Juvenile Correction, of a probationer by the Probation Commission, or of a parolee by the Board of Paroles[,] . . . [o]r upon [a felon's] receiving an unconditional pardon." The version of the bill ultimately passed by the General Assembly did not differ materially from the initial bill. *See* An Act to Provide for the Automatic Restoration of Citizenship, ch. 251, § 1, 1973 N.C. Sess. Laws 237, 237–38.

The few changes that the legislature has made to section 13-1 since 1973 have no bearing on the issues raised in this litigation. In its current form, section 13-1 reads as follows:

> Any person convicted of a crime, whereby the rights of citizenship are forfeited, shall have such rights automatically restored upon the occurrence of any one of the following conditions:
>
> (1) The unconditional discharge of an inmate, of a probationer, or of a parolee by the agency of the State having jurisdiction of that person or of a defendant under a suspended sentence by the court.
>
> (2) The unconditional pardon of the offender.

> (3) The satisfaction by the offender of all conditions of a conditional pardon.
>
> (4) With regard to any person convicted of a crime against the United States, the unconditional discharge of such person by the agency of the United States having jurisdiction of such person, the unconditional pardon of such person or the satisfaction by such person of a conditional pardon.
>
> (5) With regard to any person convicted of a crime in another state, the unconditional discharge of such person by the agency of that state having jurisdiction of such person, the unconditional pardon of such person or the satisfaction by such person of a conditional pardon.

N.C.G.S. § 13-1 (2021). The parties to this litigation agree that subsection (1) of section 13-1 renders persons convicted of felonies in our state courts ineligible for rights restoration until they have finished any applicable period of probation, parole, or post-release supervision (collectively, felony supervision).

Plaintiffs consist of four nonprofit organizations (plaintiff-organizations) that work with or advocate for persons involved with the criminal justice system and six individuals with felony convictions (plaintiff-felons) who are unable to vote while on felony supervision. On 20 November 2019, plaintiffs filed suit against defendants in their official capacities challenging section 13-1 as facially unconstitutional under various provisions of our state constitution.[5] Specifically, plaintiffs alleged that section 13-1 is unconstitutional in that it violates (1) the Equal Protection Clause in Article I, Section 19 by discriminating against African Americans in intent and effect; (2) the Equal Protection Clause in Article I, Section 19 and the Property Qualifications Clause in Article I, Section 11 by conditioning the restoration of citizenship rights on the ability to pay court costs, fines, or restitution; (3) the Equal Protection Clause in Article I, Section 19 by depriving convicted felons of the

5. Defendants Timothy K. Moore, Speaker of the North Carolina House of Representatives, and Philip E. Berger, President Pro Tempore of the North Carolina Senate, are pursuing this appeal. Plaintiffs' lawsuit also named as defendants the North Carolina State Board of Elections and members of the same, but none of those defendants appealed the trial court's order.

"fundamental right" to vote on "equal terms" and with "substantially equal voting power"; and (4) the Free Elections Clause in Article I, Section 10 by producing elections that do not reflect the will of the people.[6]

Pursuant to N.C.G.S. § 1-267.1, the Chief Justice assigned the case to a three-judge panel in the Superior Court, Wake County. With one judge dissenting in part, the trial court granted partial summary judgment and a preliminary injunction in favor of plaintiffs, finding that section 13-1 "condition[s] the restoration of the right to vote on the ability to make financial payments" in violation of the Equal Protection Clause and the Property Qualifications Clause. On 28 March 2022, following a trial on the remaining claims, the court in another two-to-one decision issued a final judgment and order ruling that section 13-1 discriminates against African Americans and deprives felons of the fundamental right to vote in violation of the Equal Protection Clause and results in elections that do not reflect the will of the people contrary to the Free Elections Clause. The trial court issued a permanent injunction under which any person otherwise eligible to vote and "not in jail or prison for a felony conviction . . . may lawfully register and vote in North Carolina." Defendants timely appealed.

On 26 April 2022, a split panel of the Court of Appeals issued a partial writ of supersedeas, staying the trial court's injunction for the "elections on 17 May 2022 and 26 July 2022." The panel also ordered the State Board of Elections "to take actions to implement" the trial court's order "for subsequent elections." On 4 April 2022, and in accordance with N.C.G.S. § 7A-31, plaintiffs filed in this Court a petition for discretionary review prior to a determination by the Court of Appeals. This Court allowed the petition on 4 May 2022.

II. Jurisdiction

[1] Defendants argue that plaintiffs lack standing to dispute the constitutionality of section 13-1. "Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy such that he or she may properly seek adjudication of the matter." *Am. Woodland Indus. v. Tolson*, 155 N.C. App. 624, 626, 574 S.E.2d 55, 57 (2002). "A plaintiff must establish standing in order to assert a claim for relief." *United Daughters of the Confederacy v. City of Winston-Salem*,

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6. Plaintiffs likewise challenged section 13-1 under Article I, Sections 12 (right of assembly and petition) and 14 (freedom of speech and press). The trial court granted summary judgment in favor of defendants on those claims, and plaintiffs did not appeal that ruling.

383 N.C. 612, 625, 881 S.E.2d 32, 44 (2022). We must therefore address defendants' standing arguments before we may reach the substance of the trial court's rulings.

Defendants contend that plaintiffs lack standing because (1) plaintiffs have "challenged the wrong law" and (2) plaintiffs' claims are not judicially redressable. In support of their first argument, defendants point out that plaintiffs have been disenfranchised by Article VI, Section 2(3) of the North Carolina Constitution, not by section 13-1, which merely sets out the "manner prescribed by law" for felon *re-enfranchisement*. With respect to their redressability argument, defendants maintain that, since only the legislature has the power to define the rights restoration process for persons disenfranchised under Article VI, Section 2(3), a final judgment striking down section 13-1 would not open the door to voting by individuals on felony supervision; rather, it would "close[ ] off the sole avenue by which a felon may regain the franchise while leaving in place the constitutional provision that strips it away in the first place." Hence, as defendants see things, the real impact of a final judgment in plaintiffs' favor would be to deny to all felons whose rights have not yet been restored any path to regaining the franchise.

Plaintiffs insist that they do have standing to challenge the constitutionality of section 13-1 because that statute "prevents people from registering and voting as long as they are on felony probation, parole, or post-release supervision." Plaintiffs argue that any rights restoration legislation enacted by the General Assembly pursuant to Article VI, Section 2(3) "must comport with all other provisions of the North Carolina Constitution." They further contend that the remedy ordered by the trial court falls within the judiciary's broad discretion to fashion equitable remedies for constitutional violations. Plaintiffs cite decisions in which the Supreme Court of the United States has ordered federal agencies to extend benefits to classes of persons that federal law unconstitutionally excluded. *See*, *e.g.*, *Califano v. Westcott*, 443 U.S. 76, 92–93 (1979) (affirming a lower court's order that a federal benefits program offer the same financial support to dependent children of unemployed mothers that the law provided for dependent children of unemployed fathers).

The standing requirements articulated by this Court are not themselves mandated by the text of the North Carolina Constitution. *See Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 599, 853 S.E.2d 698, 728 (2021) ("[T]he 'judicial power' provision [in Article IV] of our Constitution imposes no particular requirement regarding 'standing' at all."). This Court has developed standing requirements out of a "prudential self-restraint" that respects the separation

of powers by narrowing the circumstances in which the judiciary will second guess the actions of the legislative and executive branches. *Id.*

When a plaintiff challenges the constitutionality of a statute, "[t]he 'gist of the question of standing' is whether" the plaintiff "has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' " *Stanley v. Dep't of Conservation and Dev.*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973) (quoting *Flast v. Cohen*, 392 U.S. 83, 99 (1968)). To ensure the requisite concrete adverseness, "a party must show they suffered a 'direct injury.' The personal or 'direct injury' required in this context could be, but is not necessarily limited to, 'deprivation of a constitutionally guaranteed personal right or an invasion of his property rights.' " *Forest*, 376 N.C. at 607–08, 853 S.E.2d at 733 (citations omitted).

"[T]he rule requiring direct injury to challenge the constitutionality of a statute is based on the rationale 'that only one with a genuine grievance, one personally injured by a statute, can be trusted to battle the issue.' " *Id.* at 594, 853 S.E.2d at 724. (quoting *Stanley*, 284 N.C. at 28, 199 S.E.2d at 650). The direct injury criterion applies even where, as here, a plaintiff assails the constitutionality of a statute through a declaratory judgment action. *See United Daughters*, 383 N.C. at 629, 881 S.E.2d at 46–47 ("[P]laintiff is still required to demonstrate that it has sustained a legal or factual injury arising from defendants' actions as a prerequisite for maintaining the present declaratory judgment action.").

Defendants make plausible arguments in urging us to throw out plaintiffs' lawsuit on standing grounds. The amended complaint repeatedly mischaracterizes section 13-1 as "North Carolina's felony disenfranchisement statute." Section 13-1 does not disenfranchise anyone. Like other felons, plaintiff-felons had their right to vote eliminated by Article VI, Section 2(3). Had the General Assembly not enacted section 13-1 or some other statute providing for the restoration of their citizenship rights, plaintiff-felons and all other felons in this state would be disenfranchised permanently. *See Richardson v. Ramirez*, 418 U.S. 24, 56 (1974) (holding that the federal constitution's Equal Protection Clause did not bar California from denying the vote to felons who had completed their sentences and periods of parole).

Moreover, the trial court may well have exceeded the bounds of its remedial powers by ordering that all felons not in jail or prison be allowed to register and vote. In depriving felons of the right to vote

unless their citizenship rights have been restored "in the manner prescribed by law," Article VI, Section 2(3) unquestionably assumes that the General Assembly—not the courts—will set the conditions for rights restoration, and as discussed above, the legislature has declined to extend automatic rights restoration to persons on felony supervision.

Despite the force of defendants' standing arguments, we hold that plaintiff-felons have standing to bring their claims against defendants. While it is true that section 13-1 confers a statutory benefit that the General Assembly was under no legal obligation to grant, it is also true that the legislature may not condition eligibility for a statutory benefit on criteria that violate the North Carolina Constitution. *See*, *e.g.*, *Harvey v. Brewer*, 605 F.3d 1067, 1079 (9th Cir. 2010) ("Even a statutory benefit can run afoul of the Equal Protection Clause . . . if it confers rights in a discriminatory manner . . . . For instance, a state could not choose to re-enfranchise voters of only one particular race . . . .").

The amended complaint alleges that the General Assembly has imposed unconstitutional conditions on the restoration of felons' voting rights. For example, the law makes payment of any court-ordered costs, fines, and restitution a condition of probation. N.C.G.S. § 15A-1343(b)(9) (2021). If a felon is found to have violated this condition, his time on probation—and thus his ineligibility to vote—can be extended. N.C.G.S. §§ 15A-1342(a) (2021), 15A-1344(a), (d) (2021). The amended complaint asserts that, by tying a felon's eligibility to vote to the completion of probation, section 13-1 "condition[s] the right to vote on whether people have a type of property—money." According to the amended complaint, this condition violates Article I, Section 11 of the state constitution, which provides that "no property qualification shall affect the right to vote or hold office." N.C. Const. art. I, § 11. We ultimately reject this claim, but it does not follow that plaintiff-felons lacked standing to bring it or their other constitutional claims. The amended complaint alleges that plaintiff-felons are on felony supervision and subject to the allegedly unconstitutional re-enfranchisement conditions of which they complain. Plaintiff-felons thus have been "personally injured by [the] statute" and "can be trusted to battle the issue." *Stanley*, 284 N.C. at 28, 199 S.E.2d at 650.

Furthermore, the constitutional violations alleged in the amended complaint are redressable. The question of redressability turns not on whether a plaintiff can obtain her preferred form of relief but on whether the law provides a remedy for the plaintiff's injury. *See Lozano v. City of Hazleton*, 620 F.3d 170, 192 (3d Cir. 2010) ("Redressability . . . does not require that a court be able

to solve all of a plaintiff's woes. Rather, [it] need only be able to redress, to some extent, the specific injury underlying the suit."), *vacated and remanded for further consideration*, 563 U.S. 1030 (2011), *aff'd in part and rev'd in part on other grounds*, 724 F.3d 297 (3d Cir. 2013). The essence of the amended complaint's claims is that section 13-1 attaches conditions to the restoration of citizenship rights that unlawfully distinguish between felons based on race or wealth. A court order that simply struck down section 13-1 would leave plaintiff-felons and all other felons whose rights had not already been restored in precisely the same position regardless of race or wealth: disenfranchised without any avenue for re-enfranchisement. This outcome would not give plaintiff-felons what they want, but it would halt the alleged violations of the North Carolina State Constitution.

Although plaintiff-felons have standing, some plaintiff-organizations clearly do not. For a legal entity other than a natural person to have standing, it or one of its members "must suffer some immediate or threatened injury." *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 129, 388 S.E.2d 538, 555 (1990). "An association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy." *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 511 (1975)). Standing exists for an association to bring a lawsuit on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* at 130, 388 S.E.2d at 555 (quoting *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)).

The amended complaint alleges that plaintiff-organizations Community Success Initiative, Justice Served N.C., Inc., and Wash Away Unemployment have standing because they work to reintegrate into society "people who find themselves entangled in the criminal justice system" and that section 13-1 forces them to redirect some of their resources "to educate people, including people disenfranchised under [section] 13-1, about their voting rights (or lack thereof)." Such vague allegations of resource reallocation do not evince the kind of direct injury necessary for an association acting in its own right to attack the constitutionality of a statute, nor do they offer grounds to believe that section 13-1 infringes on any rights or immunities that these three plaintiff-organizations may possess. Additionally, inasmuch as the amended complaint does not allege that Community Success Initiative, Justice Served N.C., Inc., and Wash Away Unemployment have any members

who could challenge section 13-1, they lack standing to sue on behalf of their members. *See id.*

Similarly, the amended complaint's allegations concerning plaintiff-organization North Carolina State Conference of the NAACP do not establish that it has standing in its own right to dispute the validity of section 13-1. In language that echoes the descriptions of "harm" allegedly suffered by other plaintiff-organizations, the amended complaint alleges that the North Carolina NAACP "is currently forced to divert organizational resources away from activities core to its mission in furtherance of education and voter engagement efforts required to assist potential voters . . . in understanding North Carolina's felony-based disenfranchisement laws." Again, this vague allegation of resource reallocation does not identify a direct injury for standing purposes.

The amended complaint's factual allegations are sufficient, however, to show that the North Carolina NAACP qualifies under *River Birch* to sue on behalf of its members. The amended complaint alleges that some of those members are ineligible for re-enfranchisement under section 13-1. It ties the interest of those members in regaining the franchise to the North Carolina NAACP's "fundamental mission of . . . advanc[ing] and improv[ing] . . . the political, civil, educational, social, and economic status of minority groups." Finally, because plaintiffs brought a declaratory judgment action, it appears that the North Carolina NAACP can obtain relief for its members without their participation in the lawsuit. *See id.* ("When an organization seeks declaratory or injunctive relief on behalf of its members, 'it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured.' " (quoting *Warth*, 422 U.S. at 515)).

Plaintiff-felons and one plaintiff-organization have standing to pursue the claims alleged in the amended complaint. Accordingly, we now take up defendants' legal challenges to the merits of the trial court's ruling.

III. Standard of Review

Whether made at summary judgment or at trial, a trial court's ruling on the constitutionality of a statute receives de novo review on appeal. *State v. Whittington*, 367 N.C. 186, 190, 753 S.E.2d 320, 323 (2014); *Hart v. State*, 368 N.C. 122, 130–31, 774 S.E.2d 281, 287 (2015). Under de novo review, this Court " 'considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Appeal of Greens of Pine Glen Ltd.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)). When the trial court has conducted a trial

without a jury, we examine whether the trial court's findings of fact support its conclusions of law. *Blanton v. Blanton*, 40 N.C. App. 221, 225, 252 S.E.2d 530, 533 (1979). "[T]he trial court's findings of fact have the force and effect of a jury verdict and are conclusive on appeal if there is competent evidence to support them, even though the evidence could be viewed as supporting a different finding." *In re Estate of Skinner*, 370 N.C. 126, 139, 804 S.E.2d 449, 457 (2017) (quoting *Bailey v. State*, 348 N.C. 130, 146, 500 S.E.2d 54, 63 (1998)).

We review permanent injunctions for abuse of discretion. *See Roberts v. Madison Cnty. Realtors Ass'n*, 344 N.C. 394, 399, 474 S.E.2d 783, 787 (1996) ("When equitable relief is sought, courts claim the power to grant, deny, limit, or shape that relief as a matter of discretion."). "A [trial] court by definition abuses its discretion when it makes an error of law." *State v. Rhodes*, 366 N.C. 532, 536, 743 S.E.2d 37, 39 (2013) (alteration in original) (quoting *Koon v. United States*, 518 U.S. 81, 100 (1996)).

IV. Analysis

Given the number and complexity of the legal issues raised by the parties to this appeal, we briefly review the fundamental principles that guide our inquiry when an appeal squarely presents a state constitutional challenge to the validity of a statute. One such principle is that we defer to legislation enacted by the General Assembly. *See State ex rel. Martin v. Preston*, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989) ("Since our earliest cases applying the power of judicial review under the Constitution of North Carolina, . . . we have indicated that great deference will be paid to acts of the legislature . . . .").

We defer to legislative enactments for at least two reasons. The first is the status of legislative enactments in our constitutional order. In this state, "[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. Ordinarily, the people exercise this sovereign power through their elected representatives in the General Assembly. *State ex rel. Ewart v. Jones*, 116 N.C. 570, 570, 21 S.E. 787, 787 (1895). This Court therefore looks upon laws enacted by our General Assembly as expressions of the people's will. *Preston*, 325 N.C. at 448, 385 S.E.2d at 478. It follows that we may not strike down a law unless it violates federal law or the supreme expression of the people's will, the North Carolina Constitution. *See id.* at 448–49, 385 S.E.2d at 478; *see also State v. Emery*, 224 N.C. 581, 583, 31 S.E.2d 858, 860 (1944) ("The will of the people as expressed in the Constitution is the supreme law of the land.").

The second reason for deference is more practical. Almost by definition, legislation involves the weighing and accommodation of competing interests, and "it is the role of the legislature, rather than this Court, to balance disparate interests and find a workable compromise among them." *Beaufort Cnty. Bd. of Educ. v. Beaufort Cnty. Bd. of Comm'rs*, 363 N.C. 500, 502, 681 S.E.2d 278, 280 (2009). When a statute constitutes a permissible exercise of legislative authority, we must uphold the statute regardless of whether we agree with the General Assembly's public policy choices. *See In re Appeal of Philip Morris U.S.A.*, 335 N.C. 227, 231, 436 S.E.2d 828, 831 (1993) ("[T]he determination of whether a particular policy is wise or unwise is for determination by the General Assembly."); *Martin v. N.C. Hous. Corp.*, 277 N.C. 29, 41, 175 S.E.2d 665, 671 (1970) ("[Q]uestions as to public policy are for legislative determination."). Put differently, "[t]his Court will only measure the balance struck in the statute against the minimum standards required by the constitution." *Beaufort Cnty. Bd. of Educ.*, 363 N.C. at 502, 681 S.E.2d at 280–81.

Consistent with the deference owed to legislative enactments, when this Court is called upon to decide the constitutionality of a statute, we start with a strong presumption of the statute's validity. *Am. Equitable Assurance Co. v. Gold*, 249 N.C. 461, 462–63, 106 S.E.2d 875, 876 (1959); *see also Hart*, 368 N.C. at 131, 774 S.E.2d at 287 ("We therefore presume that a statute is constitutional . . . ."). The burden is on the party challenging the statute to demonstrate its unconstitutionality. *Raleigh Mobile Home Sales, Inc. v. Tomlinson*, 276 N.C. 661, 669, 174 S.E.2d 542, 548 (1970). To prevail, the challenger must demonstrate that the law is unconstitutional beyond a reasonable doubt. *See Hart*, 368 N.C. at 126, 774 S.E.2d at 284; *see also Glenn v. Bd. of Educ.*, 210 N.C. 525, 529–30, 187 S.E. 781, 784 (1936) ("If there is any reasonable doubt [as to a law's constitutionality], it will be resolved in favor of the lawful exercise of their powers by the representatives of the people.").

Notwithstanding our deference to legislative enactments, when a challenger proves the unconstitutionality of a law beyond a reasonable doubt, this Court will not hesitate to pronounce the law unconstitutional and to vindicate whatever constitutional rights have been infringed. Glenn, 210 N.C. at 529, 187 S.E. at 784; *see also Roller v. Allen*, 245 N.C. 516, 518, 96 S.E.2d 851, 854 (1957) ("An Act will be declared unconstitutional and its enforcement will be enjoined when it clearly appears either that property or fundamental human rights are denied in violation of constitutional guarantees."); *N.C. Real Est. Licensing Bd. v. Aikens*, 31 N.C. App. 8, 11, 228 S.E.2d 493, 495 (1976) ("[T]he courts of this State have not hesitated to strike down regulatory legislation [that is] repugnant

to the State Constitution." (citing *Roller*, 245 N.C. 516, 96 S.E.2d 851; *State v. Ballance*, 229 N.C. 764, 51 S.E.2d 731 (1949); *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854 (1940))).

Plaintiffs have brought a facial challenge to section 13-1. In contrast to an as-applied challenge, which "represents a plaintiff's protest against how a statute was applied in the particular context in which plaintiff acted or proposed to act," *Town of Beech Mountain v. Genesis Wildlife Sanctuary, Inc.*, 247 N.C. App. 444, 460, 786 S.E.2d 335, 347 (2016) (quoting *Frye v. City of Kannapolis*, 109 F. Supp. 2d 436, 439 (M.D.N.C. 1999)), a facial challenge "is an attack on a statute itself as opposed to a particular application," *Holdstock v. Duke Univ. Health Sys., Inc.*, 270 N.C. App. 267, 272, 841 S.E.2d 307, 311 (2020) (quoting *City of L.A. v. Patel*, 576 U.S. 409, 415 (2015)). "[A] facial challenge to the constitutionality of an act . . . is the most difficult challenge to mount successfully." *Hart*, 368 N.C. at 131, 774 S.E.2d at 288. To establish the unconstitutionality of a statute beyond a reasonable doubt on a facial challenge, "[a] party must show that there are *no circumstances* under which the statute might be constitutional." *Beaufort Cnty. Bd. of Educ.*, 363 N.C. at 502, 681 S.E.2d at 280 (emphasis added). "The fact that a statute 'might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.' " *State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 282 (1998) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

Of course, this Court cannot properly evaluate a challenge to the constitutionality of a statute without understanding the meaning of the constitutional provision at issue. Our interpretive endeavor begins with the text of the provision. "[W]here the meaning is clear from the words used, we will not search for a meaning elsewhere." *Preston*, 325 N.C. at 449, 385 S.E.2d at 479. If the text does not resolve the matter, we examine the available historical record in an effort to isolate the provision's meaning at the time of its ratification. *See Sneed v. Greensboro City Bd. of Educ.*, 299 N.C. 609, 613, 264 S.E.2d 106, 110 (1980) ("Inquiry must be had into the history of the questioned provision and its antecedents, the conditions that existed prior to its enactment, and the purposes sought to be accomplished by its promulgation."). We also seek guidance from any on-point precedents from this Court interpreting the provision. *Elliott v. State Bd. of Equalization*, 203 N.C. 749, 753, 166 S.E. 918, 921 (1932). With these fundamental principles in mind, we now direct our attention to the constitutional issues raised by this appeal.

A. Racial Discrimination

[2] The trial court concluded that "[s]ection 13-1's denial of the franchise to people on felony supervision" unconstitutionally discriminates against African Americans in "intent and effect" and "denies [them] substantially equal voting power on the basis of race" in violation of our state constitution's Equal Protection Clause. Defendants argue that this Court should reverse the trial court because "[s]ection 13-1's historical background demonstrates definitively that the law as it currently stands was not motivated by racial discrimination." Plaintiffs urge us to affirm the trial court, contending that section 13-1 is the successor to earlier felon voting legislation designed to discriminate against African Americans; that the passage of time did not purge section 13-1 of that racially discriminatory intent; and that the General Assembly's refusal in the 1970s to extend the franchise to individuals on felony supervision "was independently motivated by racism."

"The civil rights guaranteed by the Declaration of Rights in Article I of [the North Carolina] Constitution are individual and personal rights entitled to protection against state action . . . ." *Corum v. Univ. of N.C.*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992). Article I, Section 19 reads in part: "No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin." N.C. Const. art I, § 19. Because the text of this provision does not tell us how to analyze plaintiffs' claims of racial discrimination, we turn to the provision's historical context and pertinent caselaw for assistance.

Unlike most other provisions in Article I, which "may be traced back through [this state's] 1868 constitution to [its] Revolutionary Constitution of 1776[,]" *State Constitution* at 45, the Equal Protection Clause and the Nondiscrimination Clause in Article I, Section 19 did not become part of our fundamental law until 1971, when the current state constitution went into effect. The drafters of the two clauses based their work on the Equal Protection Clause in the Fourteenth Amendment to the United States Constitution and on federal nondiscrimination laws. *Id.* at 68. Accordingly, "[t]his Court's analysis of the State Constitution's Equal Protection Clause generally follows the analysis of the Supreme Court of the United States in interpreting the corresponding federal clause." *Blankenship v. Bartlett*, 363 N.C. 518, 522, 681 S.E.2d 759, 762 (2009). "However, in the construction of the provision of the State Constitution, the meaning given by the Supreme Court of the United States to even an identical term in the Constitution of the United States is, though highly persuasive, not binding upon this

Court."[7] *Bulova Watch Co. v. Brand Distribs. of N. Wilkesboro, Inc.*, 285 N.C. 467, 474, 206 S.E.2d 141, 146 (1974).

Section 13-1 makes no reference to race and thus appears to be race neutral. Yet even an apparently race-neutral statute can violate equal protection if enacted with a racially discriminatory purpose. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.").

Decisions by the Supreme Court of the United States describe a burden-shifting framework that federal courts must employ when a plaintiff alleges that an apparently race-neutral law was motivated by a racially discriminatory purpose contrary to the Fourteenth Amendment's Equal Protection Clause. Under that framework, "the burden of proof lies with the challenger, not the State." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). Moreover, the court must approach any evidence introduced by the plaintiff with a presumption that the legislature acted in good faith. *See Miller v. Johnson*, 515 U.S. 900, 915 (1995) ("[T]he good faith of a state legislature must be presumed . . . .").

To overcome the presumption of good faith and carry the burden of proof, the plaintiff must almost always do more than show that the statute "produces disproportionate effects along racial lines."[8] *Hunter v. Underwood*, 471 U.S. 222, 227 (1985); *see also Arlington Heights*, 429 U.S. at 264–65 ("[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact."). In its *Arlington Heights* decision, the Supreme Court identified other, nonexclusive factors that can support federal equal protection challenges to ostensibly race-neutral government actions: (1) the historical background of an action; (2) the legislative or administrative history of an action; and (3) deviations from normal procedures. *Arlington Heights*, 429 U.S. at 267–68.

If the plaintiff proves that racial discrimination motivated the legislature, "the burden shifts to the law's defenders[,]" *Hunter*, 471 U.S. at

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7. Of course, this Court must follow Supreme Court precedent when we interpret provisions of the United States Constitution.

8. In rare cases, statistical evidence alone can establish discriminatory intent. *McCleskey v. Kemp*, 481 U.S. 279, 293–94 (1987) ("[S]tatistical proof normally must present a 'stark' pattern to be accepted as the sole proof of discriminatory intent under the Constitution . . . ." (quoting *Arlington Heights*, 429 U.S. at 266)). Here, however, plaintiffs do not argue that the statistical evidence presented at trial suffices to prove an equal protection violation.

228, and "judicial deference [to the legislature] is no longer justified[,]" *Arlington Heights*, 429 U.S. at 266. To avoid defeat on the plaintiff's federal equal protection claim at that point, the defenders must show that the statute would have been enacted even if the legislature had not intended to discriminate on racial lines. *Hunter*, 471 U.S. at 228.

Here, the parties and the trial court assumed that the Supreme Court's burden-shifting framework applies to plaintiffs' racial discrimination claims. We are not bound by their assumption, however. *See Baxley v. Nationwide Mut. Ins. Co.*, 104 N.C. App. 419, 422, 410 S.E.2d 12, 14 (1991) ("Generally, parties may stipulate as to matters which involve individual rights and obligations of the parties but may not stipulate as to what the law is."), *aff'd*, 334 N.C. 1, 430 S.E.2d 895 (1993). When resolving claims that a facially neutral law discriminates against persons of a particular race in violation of our state Equal Protection Clause, we are free to depart from the federal burden-shifting framework if we deem it incompatible with the principles that guide our review of state constitutional challenges to the validity of statutes. Nonetheless, applying that framework to this case solely for the sake of argument, we hold that the trial court erred in ruling that section 13-1 unlawfully discriminates based on race. The court misapplied the framework to the evidence by ignoring Supreme Court precedent that should have informed its approach. Furthermore, and contrary to the court's findings of fact and conclusions of law, the available evidence does not show that racial discrimination inspired the General Assembly to require that felons complete their felony supervision before they regain the right to vote.

1. Trial Court's Findings of Discriminatory Intent not Binding

The trial court committed legal error by failing to apply the presumption of legislative good faith to the General Assembly's 1971 enactment of a new section 13-1 and 1973 amendments to the same. That presumption applied notwithstanding the lamentable catalogue of measures adopted by legislators in times past for the purpose of disenfranchising African Americans. *See Abbott*, 138 S. Ct. at 2324 ("The allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination."). Rather than presuming good faith, the trial court assumed that past discrimination infected the 1971 and 1973 felon voting legislation because "[t]he legislature cannot purge through the mere passage of time an impermissibly racially discriminatory intent." As explained below, this is precisely the kind of error criticized by the Supreme Court of the United States in *Abbott*.

Inasmuch as the trial court did not presume legislative good faith, its findings of fact concerning the discriminatory intent allegedly infecting section 13-1 are not binding on appeal. *See id.* at 2326 ("[W]hen a finding of fact is based on the application of an incorrect burden of proof, the finding cannot stand." (citing *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 (1984) (referring to "an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law"))).

2. **Arlington Heights *Factors***

Serious defects in its treatment of the *Arlington Heights* factors led the trial court to the erroneous conclusion that section 13-1 embodies an unconstitutional legislative intent to suppress the votes of African Americans. The evidence corresponding to each factor should have led the trial court to render judgment in favor of defendants.

a. Disproportionate Impact

"Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action—whether it bears more heavily on one race than another—may provide an important starting point." *Arlington Heights*, 429 U.S. at 266 (internal quotation marks and citation omitted).

According to the trial court, the statistical evidence presented by plaintiffs reveals that "North Carolina's denial of the franchise [to those] on felony . . . supervision disproportionately affects African Americans by wide margins." At the statewide level, "African Americans comprise 21% of North Carolina's voting-age population, but over 42% of those denied the franchise due to felony . . . supervision from a North Carolina state court conviction alone. . . . In comparison, White people comprise 72% of the voting-age population, but only 52% of those denied the franchise." Moreover, "[i]n total, 1.24% of the entire African American voting-age population in North Carolina are denied the franchise due to felony . . . supervision, whereas only 0.45% of the White voting-age population are denied the franchise." The result is that African Americans are "denied the franchise at a rate 2.76 times as high as the rate of the White population."

The trial court likewise found that "[e]xtreme racial disparities in denial of the franchise to persons on [felony] supervision also exist at the county level." For instance, "[i]n 77 counties, the rate of African

Americans denied the franchise due to felony . . . supervision is high (more than 0.83% of the African American voting-age population), whereas there are only 2 counties where the rate of African American disenfranchisement is low (less than 0.48% of the African American voting-age population)." On the other hand, "the rate of White disenfranchisement is high in only 10 counties, while the rate of White disenfranchisement is low in 53 counties." Indeed, "[a]mong the 84 counties where there is sufficient data for comparison, African Americans are denied the franchise due to felony . . . supervision at a higher rate than White people in every single county." With respect to felony convictions in our state courts, "the percentage [in 44 counties] of the African American voting-age population that is denied the franchise due to [felony] supervision . . . is more than three times greater than the comparable percentage of the White population." Taken together, in the trial court's view, the statewide data and county-level data show that "North Carolina's denial of the franchise to persons on felony . . . supervision has an extreme disparate impact on African American people."

The trial court's disparate impact analysis suffers from at least two major flaws. First, the court incorrectly held section 13-1 responsible for the disenfranchisement of individuals on felony supervision. Like other felons, felons in that category have been disenfranchised by Article VI, Section 2(3) of the state constitution, not by section 13-1. If the General Assembly were to repeal section 13-1 tomorrow, Article VI, Section 2(3) would still exclude anyone on felony supervision from the electoral process. Affording the trial court the benefit of the doubt, we assume it meant that the criteria imposed by section 13-1 for felon *re-enfranchisement* operate to the peculiar disadvantage of African Americans.

Second, the trial court erred by not making any findings concerning the racial makeup of the overall felon population. Absent such findings, the court could not determine whether section 13-1 affects African American felons differently than white felons.[9] Defendants' expert

9. The dissent contends that our reasoning could have been employed by defenders of the poll tax to argue that, since "African Americans were disproportionately poor . . . wealth inequality, rather than laws implementing poll taxes, was to blame for the disproportionate number of African Americans barred from voting." The dissent misapprehends our position. We do not hold that a court must refuse to credit a plaintiff's disparate impact showing unless the plaintiff can also prove that race alone accounts for the disparity. Rather, we point out that the trial court should have compared the percentages of African American felons and white felons ineligible for re-enfranchisement under section 13-1 with the racial makeup of the total felon population because, unlike the poll tax that all would-be voters had to pay, section 13-1's scope is limited to individuals with felony convictions.

witness, Dr. Keegan Callanan, stated that African Americans constitute forty-two percent of the total felon population. The trial court found that, despite his expertise in the "broad field of political science," Dr. Callanan lacked expertise in the "particular issues" presented by this case and thus that his opinions were entitled to "no weight." The percentage of felons who are classified as African Americans is not a matter of opinion, however, and none of plaintiffs' experts disputed the forty-two percent figure.

On its face, the fact that African Americans make up about forty-two percent of the felon population seems to account for the disproportionate share (forty-two percent) of African Americans on felony supervision. In other words, the trial court's findings provide no reason to believe that section 13-1 re-enfranchises African American felons at a rate that differs from the re-enfranchisement rate for white felons.[10]

Interestingly, if the statistics cited by the trial court amount to proof of disparate impact, the court's own remedy becomes vulnerable to equal protection objections. Since a disproportionately large percentage of felons are African American, it stands to reason that African Americans constitute a disproportionate share of felons currently incarcerated. Thus, if we accept the trial court's logic, extending the franchise to persons on felony supervision but not to felons in jail or prison would almost certainly have a disparate impact on African Americans. It may be that the only practical way to avoid this kind of "disparate impact" is to allow all felons to vote. Were we to construe the Equal Protection Clause in Article I, Section 19 to require such a solution, we would essentially hold that the felon voting prohibition in Article VI, Section 2(3) violates Article I, Section 19. Because we must give effect to both provisions, we may not adopt that interpretation. *See Leandro v. State*, 346 N.C. 336, 352, 488 S.E.2d 249, 258 (1997) ("Plaintiffs are essentially reduced to arguing that one section of the North Carolina Constitution violates another. It is axiomatic that the terms or requirements of a constitution cannot be in violation of the same constitution—a constitution cannot violate itself.").

The trial court's findings of fact do not support its ultimate finding that section 13-1 has a disproportionate impact on African Americans. Undisputed evidence in the record but ignored by the trial court

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10. Our disparate impact analysis might have come out differently if, for instance, the evidence had shown that African American felons are significantly more likely than white felons to be placed on felony supervision and thus to be ineligible for re-enfranchisement under section 13-1. On those facts, plaintiffs would have had a credible argument that section 13-1 disproportionately affects African American felons.

undermines the court's position. Accordingly, the trial court's disparate impact finding cannot be relied upon to sustain its conclusion that the General Assembly enacted a new section 13-1 in 1971 and then amended it in 1973 with the intent of discriminating against African Americans.

b. Historical Background

The "historical background" of a legislative enactment is relevant to discriminatory motive determinations, "particularly if it reveals a series of official actions taken for invidious purposes." *Arlington Heights*, 429 U.S. at 267. The trial court's order contains extensive findings about the efforts of many white North Carolinians in the nineteenth century to manipulate the legal system to exclude African Americans from the political process. For example, the order discusses an "extensive campaign" in the late 1860s by "White former Confederates" to "convict[ ] African American men of petty crimes *en masse* and whip[ ] them to disenfranchise them 'in advance' of the Fifteenth Amendment." (At the time, receiving an "infamous punishment," such as a public whipping, could disqualify someone from voting.) According to the trial court's order, an 1867 article in the *National Anti-Slavery Standard* reported that "in all country towns the whipping of Negroes is being carried on extensively," the motive being "to guard against their voting in the future." Regarding the 1876 constitutional ban on felon voting and the corresponding 1877 felon voting legislation, the trial court found that "[t]he goal of the felony disenfranchisement regime established in 1876 and 1877, including the 1877 expansion of the onerous 1840 [sic] rights restoration regime to apply to all felonies, was to discriminate against and disenfranchise African American people."

Far from denying the incontrovertible record of racism that mars the history just described, defendants' legal counsel conceded at trial:

> The plaintiffs here presented a lot of evidence; much of it, if not all of it, all of it, troubling and irrefutable. You can't — I can't say anything about a newspaper report that says what it says. I can't say anything about the history that is in the — in the archives. What I can say is that the evidence . . . presented certainly demonstrates a shameful history of our state's use of laws, and with regard to voting in particular, to suppress the African American population. That I can't — I can't contest that. We never tried to contest that.

The trial court's historical findings say little about the period between 1877 and 1971, the year in which Representatives Johnson and

Frye introduced their first proposal to reform the procedures for the restoration of felons' citizenship rights. According to the trial court, "[b]etween 1897 and 1970, the legislature made various small adjustments to the procedure for restoration of rights and recodified that law at N.C.G.S. § 13-1, but the substance of the law was largely unchanged." The court's order does remark that, while "the requirements for rights restoration were slightly relaxed . . . during th[e] period [between 1877 and 1971], none of those changes were likely to help African American people, who had been 'effectively' disenfranchised by this time 'by other means,' including North Carolina's poll tax and literacy test established in 1899."

The pre-1971 events recounted in the trial court's order, along with much of the history summarized at the beginning of this opinion, paint a profoundly troubling portrait of a legal system used time and again to deny African Americans a voice in government by banning or restricting their participation in elections. Yet it is not those deplorable measures that are in dispute. Plaintiffs have challenged section 13-1 as enacted in 1971 and amended in 1973. The question therefore is whether the trial court rightly understood the relevance of the pre-1971 history to its deliberations on the constitutionality of section 13-1.

The conclusions of law in the trial court's order indicate that the pre-1971 history of felon voting laws in North Carolina was a substantial factor in the outcome. The order asserts that "[t]he legislature cannot purge through the mere passage of time an impermissibly racially discriminatory intent." As legal authority for the importance that it assigns to pre-1971 events, the order cites the 1985 decision of the Supreme Court of the United States in *Hunter v. Underwood*, 471 U.S. 222 (1985). There, the plaintiffs brought an equal protection challenge to a provision in the 1901 Alabama Constitution that disenfranchised persons convicted of certain crimes, some of them minor offenses. *Id.* at 226–29. The evidence overwhelmingly showed that the constitutional convention at which the provision had been adopted "was part of a movement that swept the post-Reconstruction South to disenfranchise blacks." *Id.* at 229. In his opening remarks, the convention's president publicly announced that the goal of the 1901 convention was "to establish white supremacy" in Alabama "within the limits imposed by the Federal Constitution." *Id.* Additionally, "the crimes selected for inclusion in [the 1901 felon voting provision] were believed by the delegates to be more frequently committed by blacks." *Id.* at 227. Influenced by those facts and the provision's ongoing discriminatory impact on African Americans, the Supreme Court held that the provision violated the federal Equal

Protection Clause. *Id.* at 233. The Court expressly declined to decide, though, whether the provision "would be valid if enacted today without any impermissible motivation." *Id.*

The *Hunter* decision is plainly not on point. Unlike *Hunter*, this case does not concern the constitutionality of a now 122-year-old provision adopted at a proceeding held for the avowed purpose of ensuring white supremacy. As previously observed, the General Assembly in 1971 repealed Chapter 13 of the General Statutes "in its entirety" and enacted "a new Chapter 13" with a new section 13-1. An Act to Amend Chapter 13 of the General Statutes to Require the Automatic Restoration of Citizenship to Any Person Who Has Forfeited Such Citizenship Due to Committing a Crime and has Either Been Pardoned or Completed His Sentence, ch. 902, § 1, 1971 N.C. Sess. Laws 1421, 1421. The new Chapter 13 was much friendlier to felons than its predecessor legislation. It replaced the onerous petition-and-hearing procedure with a simple oath requirement. *Id.* It also eliminated the waiting period for "[a]ny person convicted of a [felony when] . . . the Department of Correction at the time of release recommend[ed] restoration of citizenship." *Id.* The legislature's amendments to Chapter 13 in 1973 terminated the oath requirement altogether, making the restoration of citizenship rights automatic upon a felon's unconditional discharge. An Act to Provide for the Automatic Restoration of Citizenship, ch. 251, § 1, 1973 N.C. Sess. Laws 237, 237–38. In short, the *Hunter* decision does not apply to a case such as this one, where the legislature repealed allegedly discriminatory laws and replaced them with a substantially different statutory scheme.

The trial court should have looked to the Supreme Court's more recent decision in *Abbott v. Perez*, 138 S. Ct. 2305 (2018), which arose from the Texas legislature's adoption in 2011 of new maps for state legislative and congressional districts. *Id.* at 2313. Litigation immediately ensued over claims that the 2011 maps improperly took race into account, and a federal district court in Texas drew up interim maps for the state's upcoming primaries without deferring to the maps enacted by the legislature. *Id.* at 2315–16. Texas challenged the interim maps, and the Supreme Court reversed and remanded, directing the district court to start with the 2011 maps drawn by the Texas legislature and modify them as necessary to comply with federal law. *Id.* at 2316. In 2013 the Texas legislature repealed the original 2011 maps and enacted the interim maps as modified by the district court. *Id.* at 2317. Litigation again ensued, and the district court struck down the 2013 maps, reasoning that (1) the 2011 legislature had intended the original maps to discriminate on the basis of race and (2) the 2011 legislature's discriminatory

intent should be attributed to the 2013 legislature because the latter "had failed to engage in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans." *Id.* at 2318 (internal quotation marks and citations omitted).

Texas appealed again, and the Supreme Court reversed the district court a second time, primarily because the maps adopted by the 2013 legislature were not the original 2011 maps. *Id.* at 2325. "Under these circumstances," said the Court, "there can be no doubt about what matters: It is the intent of the 2013 Legislature." *Id.* Furthermore, the Court explained, a finding of past discrimination did not alter the burden of proof or the presumption of legislative good faith. *Id.* at 2324–25 ("[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." (alteration in original) (quoting *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980) (plurality opinion))). The district court thus erred by "revers[ing] the burden of proof" and "impos[ing] on the State the obligation of proving that the 2013 Legislature had experienced a true 'change of heart' and had 'engage[d] in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans.' " *Id.* at 2325 (third alteration in original) (quoting *Perez v. Abbott*, 274 F. Supp. 3d 624, 649 (D.C. Cir. 2017)). The district court should have held the plaintiffs "to their burden of overcoming the presumption of [legislative] good faith and proving discriminatory intent." *Id.* Examining the available evidence, the Supreme Court held that it was "plainly insufficient to prove that the 2013 Legislature acted in bad faith and engaged in intentional discrimination." *Id.* at 2327. The "direct evidence" of intent in the record revealed that the 2013 legislature adopted the modified interim maps for the acceptable purpose of shortening any redistricting litigation that might follow. *Id.* Inasmuch as those maps had already been approved by the district court in earlier litigation, the 2013 legislature had "good reason to believe that [they] were legally sound." *Id.* at 2328.

When applied to this case, *Abbott* leads us to conclude that the trial court erred as a matter of law by requiring the General Assembly to prove that it had purged past discriminatory intent prior to its enactment of a new section 13-1 in 1971. While it would be an overstatement to say that the trial court should have ignored the pre-1971 history recounted in its order, plaintiffs' claims must finally rise or fall on whether their evidence overcomes the presumption of legislative good faith and proves that discriminatory intent motivated the legislators who voted in the early 1970s to reduce the barriers to felon re-enfranchisement. *See id.* at 2327 ("[W]e do not suggest . . . that the intent of the 2011 Legislature is

irrelevant . . . . Rather, . . . the intent of the 2011 Legislature . . . [is] relevant to the extent that [it] naturally give[s] rise to—or tend[s] to refute—inferences regarding the intent of the 2013 Legislature.").

Before proceeding, we observe that the trial court's order omits a major historic development close in time to the General Assembly's 1971 and 1973 rewrites of section 13-1: the legislature's approval in 1969 of what became our current state constitution. As noted above, that document incorporated equal protection and nondiscrimination guarantees that had not appeared in our previous state constitutions. *State Constitution* at 45, 68. In other words, not long before it took action to dismantle procedural obstacles to the restoration of eligible felons' citizenship rights, the General Assembly adopted a draft constitution that explicitly prohibited government discrimination based on race, color, religion, or national origin. The trial court should have considered the relevance of this event to plaintiffs' racial discrimination claims.

c. Legislative History

For a court conducting an *Arlington Heights* inquiry, "[t]he legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." *Arlington Heights*, 429 U.S. at 268. The principal findings of fact in the trial court's order that chronicle the events of 1971 and 1973 read as follows:

> 42. In 1971, Reps. Joy Johnson and Henry Frye proposed a bill amending section 13-1 to eliminate the petition and witness requirement and to "automatically" restore citizenship rights to anyone convicted of a felony "upon the full completion of his sentence." But their proposal was rejected. Their proposed bill was amended to retain section 13-1's denial of the franchise to people living in North Carolina's communities. In particular, the African American legislators' 1971 proposal was successfully amended in committee to specifically require the completion of "any period of probation or parole"—words that had not appeared in Rep. Johnson and Frye's original proposal—and then successfully amended again to require "two years [to] have elapsed since release by the Department of Corrections, including probation or parole." The amendments also deleted the word "automatically" and added a requirement to take an

oath before a judge to obtain rights restoration. The 1971 revision to section 13-1 passed as amended. It thus required people with felony convictions to wait two years from the date of the completion of their probation or parole, and then to go before a judge and take an oath to secure their voting rights.

43. Rep. Frye explained on the floor of the North Carolina House of Representatives in July 1971 that "he preferred the bill's original provisions which called for automatic restoration of citizenship when a felon had finished his prison sentence, but he would go along with the amendment if necessary to get the bill passed."

44. In 1973, the three African American legislators were able to convince their 167 White colleagues to further amend the law to eliminate the oath requirement and to eliminate the two-year waiting period after completion of probation and parole, but they were not able to reinstate voting rights upon release from incarceration. Senator Michaux explained, with respect to the 1973 revision, that "[o]ur aim was a total reinstatement of rights, but we had to compromise to reinstate citizenship voting rights only after completion of a sentence of parole or probation." "To achieve even that victory, we vehemently argued and appealed to our colleagues that if you had served your time, you were entitled to your rights. Ultimately, what we achieved was a compromise."

45. The record evidence is clear and irrefutable that the goal of these African American legislators and the NC NAACP was to eliminate section 13-1's denial of the franchise to persons released from incarceration and living in the community, but that they were forced to compromise in light of opposition by their 167 White colleagues to achieve other goals, such as eliminating the petition requirement. Both Henry Frye's statement on the House floor and Senator Michaux's affidavit make[ ] clear that the African American legislators wanted disenfranchisement to end at the conclusion of "prison" or "imprisonment." But as Senator Michaux explained: "We

> understood at the time that we would have to swallow the bitter pill of the original motivations of the law—the disenfranchisement at its core was racially motivated—to try to make the system practiced in North Carolina somewhat less discriminatory and to ease the burdens placed on those who were disenfranchised by the state."
>
> . . . .
>
> 49. Rep. Jim Ramsey, who chaired the House Committee offering the committee substitute adding back in the words "probation and parole," openly acknowledged in 1971 that the provision governing restoration of voting rights was "archaic and inequitable." Rep. Ramsey provided no explanation for the Committee's decision to nonetheless preserve the existing law's disenfranchisement of people after their release from any incarceration.

(First and second alterations in original) (citations omitted).

The only evidence cited by the trial court in the above findings to show that racial discrimination motivated white legislators in 1971 and again in 1973 consists of (1) committee amendments to the initial 1971 bill and (2) statements by three legislators. It does not take much inspection to perceive the meagerness of this evidence. We have already seen that, even as amended by committee, the 1971 legislation streamlined the rights restoration process for all eligible felons by, *inter alia*, substituting an oath requirement for the time-consuming and complicated petition-and-hearing procedure.

A closer examination of the contemporaneous records pertaining to the 1973 amendments to section 13-1 further undercuts the trial court's findings. To begin with, though the trial court ignored this fact, the automatic restoration bill introduced by Representatives Johnson, Frye, and Michaux in 1973 did *not* cover individuals on felony supervision; rather, it expressly *excluded* felons on probation or parole. Moreover, the record shows that white legislators voted down attempts to weaken the legislation. They rejected, for instance, an amendment that would have retained the oath requirement. The final legislation enacted by the General Assembly in 1973 did not differ materially from the original bill. It ended the waiting period and mandated automatic rights restoration for eligible felons. An Act to Provide for the Automatic Restoration of Citizenship, ch. 251, § 1, 1973 N.C. Sess. Laws 237, 237–38.

With the enactment of the 1973 amendments to Chapter 13, Representatives Johnson, Frye, and Michaux obtained everything they had sought, save automatic restoration for individuals on felony supervision, and their 1973 bill did not even propose automatic restoration for felons in that category. Especially when viewed through the presumption of legislative good faith, the unwillingness of their white colleagues to compromise on this one issue hardly substantiates a charge of racism. As Senator Michaux himself testified during his deposition on 24 June 2020, "everything that comes out of that legislature is a compromise." *See NLRB v. SW Gen., Inc.*, 580 U.S. 288, 306 (2017) ("Passing a law often requires compromise, where even the most firm public demands bend to competing interests.").

Similarly, the legislators' statements relied on by the trial court provide a thoroughly inadequate foundation for its conclusion that racism drove the legislature's refusal to restore the rights of individuals on felony supervision. As the Supreme Court has explained:

> Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. *It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it.* What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.

United States v. O'Brien, 391 U.S. 367, 383–84 (1968) (emphasis added) (footnote omitted).

The statements by Representatives Frye and Ramsey are the only ones cited by the trial court that were made during the General Assembly's consideration of the 1971 legislation. They appeared in a brief 1971 newspaper article reporting on the House's debate. Significantly, there is no mention of race in the article, much less any allegation that racism played a role in the legislation's development.

The trial court's order does not quote or reference any statements made by legislators during the General Assembly's consideration of the 1973 amendments to Chapter 13. The statements by Senator Michaux quoted in Findings of Fact 44 and 45 come from an affidavit executed on 7 May 2020, roughly 50 years after the legislative actions that plaintiffs challenge. While the affidavit broadly alleges that many state legislators held racist views in 1973, it contains few details and speculates a great deal about the motives of Senator Michaux's white colleagues. In recounting the defeat of a "Landlord-Tenant rights bill[,]" for instance, Senator Michaux opined, "[The] bill . . . was ultimately defeated based, I believe, on bias in the legislative body."

Taken at face value, the comments by Representatives Frye and Ramsey do not so much as imply that racism had anything to do with amendments to the 1971 bill introduced by Representatives Johnson and Frye. In any case, "floor statements by individual legislators rank among the least illuminating forms of legislative history." *SW Gen.*, *Inc.*, 580 U.S. at 307. The only statements by a legislator that accuse the white legislators who voted to amend section 13-1 in 1973 of racially discriminatory motives were made by Senator Michaux nearly half a century after the fact. The probative value of those statements is diminished by the length of time between the statements and the events they recount, as well as the general and speculative quality of the statements. The trial court should have heeded the warning in *O'Brien* against striking down a law based on the comments of a few legislators, however respected and distinguished they may be. *See O'Brien*, 391 U.S. at 383–84.

Finally, the trial court's inference of discriminatory intent from the legislative history seems curiously at odds with the cumulative effect of the 1971 and 1973 legislation, which has been to restore automatically the citizenship rights of all felons, whatever their race, who have completed their sentences. To the degree that African Americans make up a disproportionate share of the felon population, this sea change in the law may well have led to a disproportionate number of African American felons regaining the right to vote. In light of the legislation's impact and the absence of reliable evidence of discriminatory intent, the legislative history in this case did little, if anything, to help plaintiffs prove that racial prejudice motivated the white legislators who reformed our felon re-enfranchisement statutes in 1971 and 1973.

d. Procedural Sequence

"Departures from the normal procedural sequence might also afford evidence that improper purposes are playing a role" in a government

action. *Arlington Heights*, 429 U.S. at 267. In this case, there is no contention by plaintiffs or finding by the trial court that the General Assembly deviated from its normal procedures during its consideration and enactment of felon rights legislation in 1971 and 1973. Like the other *Arlington Heights* factors, this one favors defendants.

e. Arlington Heights *Conclusion*

The trial court misapplied the *Arlington Heights* factors and relied on manifestly insufficient evidence to bolster its conclusion that racial discrimination prompted the General Assembly in 1971 and again in 1973 not to restore the citizenship rights of persons on felony supervision. When viewed through the presumption of legislative good faith, as it must be, the statistical and historical evidence presented by plaintiffs does not show racial discrimination "to have been a 'substantial' or 'motivating' factor behind" the 1971 repeal and replacement of section 13-1 or the 1973 amendments to that statute. *Hunter*, 471 U.S. at 228. Consequently, the burden of proof did not shift to defendants "to demonstrate that the law[s] would have been enacted without this factor." *Id.* The trial court should have rendered judgment for defendants on plaintiffs' claim that section 13-1 discriminates against African Americans in violation of our state Equal Protection Clause.

B. Wealth-Based Classification

[3] State law makes the payment of court costs, fines, and restitution a condition of probation, parole, and post-release supervision. N.C.G.S. §§ 15A-1343(b)(9) (2021) (probation); 15A-1374(b)(11a)–(11b) (2021) (parole); 15A-1368.4(e)(11)–(12) (2021) (post-release supervision). In its order granting partial summary judgment to plaintiffs, the trial court offered an example of how this requirement can interact with section 13-1 to postpone the restoration of a felon's right to vote: "[P]robation may be extended for up to five years, then an additional three with the consent of the probationer, to allow time for the compliance with the financial obligation of restitution. The impact is that a person remains disenfranchised for up to eight years because he has been unable to pay . . . ." The court concluded that, "by requiring an unconditional discharge that includes payments of all monetary obligations imposed by the court, [section] 13-1 creates a wealth classification" in violation of the Equal Protection Clause in Article I, Section 19.

Defendants argue that the trial court "relied on the . . . mistaken premise that felons have a fundamental right to vote to apply strict scrutiny to [p]laintiffs' claim that [s]ection 13-1 creates an impermissible wealth classification." Defendants further contend that "[s]ection 13-1

does not create a wealth classification[,]" and even if it did, the trial court erred in subjecting that classification to strict scrutiny. Plaintiffs would have us affirm the trial court's ruling, contending that equal protection " 'bars a system which excludes' from the franchise those unable to pay a fee[,]' " quoting *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668 (1966), and that the trial court rightly applied strict scrutiny to their wealth classification claim.

"The Equal Protection Clause necessarily operates as a restraint on certain activities of the State that either create classifications of persons or interfere with a legally recognized right." *Blankenship*, 363 N.C. at 521–22, 681 S.E.2d at 762. For most equal protection claims, this Court employs one of three tiers of scrutiny. "The upper tier of equal protection analysis requiring strict scrutiny of a governmental classification applies only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." *White v. Pate*, 308 N.C. 759, 766, 304 S.E.2d 199, 204 (1983). When a statute draws such a classification, strict scrutiny "requires that the government demonstrate that the classification it has imposed is necessary to promote a compelling governmental interest." *Id.*

On the other hand, when a statute does not burden a fundamental right or peculiarly disadvantage a suspect class, we typically apply rational basis review, "the lowest tier of review." *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 181, 594 S.E.2d 1, 16 (2004). A statute survives rational basis review so long as the classification at issue "bear[s] some rational relationship to a conceivable legitimate interest of the government." *White*, 308 N.C. at 766–67, 304 S.E.2d at 204; *see also Rhyne*, 358 N.C. at 180–81, 594 S.E.2d at 15 ("Rational basis review is 'satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.' " (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992))).

We have applied intermediate scrutiny to one kind of equal protection claim under Article I, Section 19. In *Blankenship*, we held that intermediate scrutiny is the proper standard of review for claims that superior court districts drawn by the General Assembly deny citizens "the right to vote in superior court elections on substantially equal terms." 363 N.C. at 525–26, 681 S.E.2d at 765. Under intermediate scrutiny, "[j]udicial districts will be sustained if the legislature's formulations advance

important governmental interests unrelated to vote dilution and do not weaken voter strength more than necessary to further those interests." *Id.* at 527, 681 S.E.2d at 766.

Although "[t]he right to vote on equal terms is a fundamental right[,]" *Northampton Cnty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 747, 392 S.E.2d 352, 356 (1990), the suffrage provisions in Article VI limit the scope of that right. Pursuant to Article VI, Section 1, for instance, no one under the age of eighteen has the right to vote.[11] We thus would not apply strict scrutiny to a claim that denying the vote to sixteen-year-olds violates the Equal Protection Clause. Likewise, the default rule under Article VI, Section 2(3) is that felons do not have the right to vote. The provision authorizes the General Assembly to adopt a process by which felons may regain that right, but it leaves the details to the legislature's sound discretion. Usually, then, laws that set out the process by which felons may have their rights restored do not trigger strict scrutiny. *See Jones v. Governor of Fla.*, 975 F.3d 1016, 1030 (11th Cir. 2020) (en banc) ("[A]bsent a suspect classification that independently warrants heightened scrutiny, laws that govern felon disenfranchisement and reenfranchisement are subject to rational basis review.").

The trial court applied strict scrutiny to section 13-1 because the statute conditions felons' eligibility to vote on their ability to pay any court costs, fines, or restitution owed. According to the court, "when a wealth classification is used to restrict the right to vote or in the administration of justice, it is subject to heightened scrutiny, not the rational basis review urged by Defendants in this case."

The trial court got the standard wrong. The Supreme Court case cited by the court to justify its use of strict scrutiny did not concern voting rights. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 107 (1996) (holding that a state may not "condition appeals from trial court decrees terminating parental rights on the affected parent's ability to pay record preparation fees"). Moreover, federal appellate courts that have confronted claims akin to plaintiffs' wealth classification argument have not resorted to strict scrutiny.[12]

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11. "Every person born in the United States and every person who has been naturalized, 18 years of age, and possessing the qualifications set out in this Article, shall be entitled to vote at any election by the people of the State, except as herein otherwise provided." N.C. Const. art. VI, § 1.

12. The dissent argues that strict scrutiny should apply to plaintiffs' wealth classification claim but does not cite a single case that supports the application of strict scrutiny in this context.

In *Jones*, the United States Court of Appeals for the Eleventh Circuit, sitting en banc, used rational basis review to evaluate an equal protection challenge to Florida laws that allowed felons to regain their voting rights upon completion of their sentences, "including imprisonment, probation, and payment of any fines, fees, costs, and restitution." 975 F.3d at 1025. The court noted that under the federal Equal Protection Clause felons do not have a fundamental right to vote and wealth is not a suspect classification. *Id.* at 1029–30; *see also Harvey v. Brewer*, 605 F.3d 1067, 1079 (9th Cir. 2010) (stating that the plaintiffs "cannot complain about their loss of a fundamental right to vote because felon disenfranchisement is explicitly permitted under the terms of" the Supreme Court's decision in *Richardson v. Ramirez*, 418 U.S. 24 (1974)); *Wesley v. Collins*, 791 F.2d 1255, 1261 (6th Cir. 1986) ("It is undisputed that . . . the right of felons to vote is not fundamental."). The court distinguished Florida's requirement that felons pay fines, fees, costs, and restitution to regain their voting rights from a poll tax. "Unlike [a] poll tax . . . , that requirement is highly relevant to voter qualifications. It promotes full rehabilitation of returning citizens and ensures full satisfaction of the punishment imposed for the crimes by which felons forfeited the right to vote." *Jones*, 975 F.3d at 1031 (citation omitted); *see also Harvey*, 605 F.3d at 1080 ("That restoration of [the plaintiff-felons'] voting rights requires them to pay all debts owed under their criminal sentences does not transform their criminal fines into poll taxes.").

The Eleventh Circuit further reasoned:

> The only classification at issue is between felons who have completed all terms of their sentences, including financial terms, and those who have not. This classification does not turn on membership in a suspect class: the requirement that felons complete their sentences applies regardless of race, religion, or national origin. Because this classification is not suspect, we review it for a rational basis only.

Jones, 975 F.3d at 1030; *see also Johnson v. Bredesen*, 624 F.3d 742, 746 (6th Cir. 2010) (applying rational basis review to felon re-enfranchisement law); *Hayden v. Paterson*, 594 F.3d 150, 170 (2d Cir. 2010) (applying rational basis review to statutes disenfranchising felons); *Owens v. Barnes*, 711 F.2d 25, 27 (3d Cir. 1983) ("[T]he standard of equal protection scrutiny to be applied when the state makes classifications relating to disenfranchisement of felons is the traditional rational basis standard."); *Shepherd v. Trevino*, 575 F.2d 1110, 1114–15 (5th Cir. 1978) (holding that state laws on felon re-enfranchisement receive rational basis review).

Employing rational basis review, the Eleventh Circuit held that Florida's felon re-enfranchisement laws were reasonably related to legitimate government interests. *Jones*, 975 F.3d at 1035. The state could rationally have believed "that felons who have completed all terms of their sentences, including paying their fines, fees, costs, and restitution, are more likely to responsibly exercise the franchise than those who have not." *Id*.

We find the Eleventh Circuit's approach in *Jones* persuasive. The trial court should have subjected section 13-1 to rational basis review on plaintiffs' claim that the statute unconstitutionally conditions felon re-enfranchisement on the capacity of felons to satisfy the financial terms of their sentences. The statute unquestionably survives rational basis review because the General Assembly could reasonably have believed in 1971 and 1973 that felons who pay their court costs, fines, or restitution are more likely than other felons to vote responsibly. The legislature could also have rationally viewed the requirement as an incentive for felons to take financial responsibility for their crimes.

In their brief to this Court, plaintiffs argue that, under our current re-enfranchisement laws, "[t]wo North Carolinians could be convicted of the same crime, receive the same sentence, and each complete all other terms of their probation, but the person with financial means to pay will be re-enfranchised while the person without will remain barred from voting." Even if that assertion is correct, it does not save plaintiffs' equal protection claim. Practically every law affects those who come within its ambit differently based on their individual situations. The question under rational basis review is whether distinctions drawn by the law are reasonable and connected to a legitimate government interest. When it comes to section 13-1's requirement that felons satisfy the conditions of their felony supervision, the answer to that question is undoubtedly yes. Once again, we find the Eleventh Circuit's analysis convincing:

> To be sure, the line Florida drew might be imperfect. The classification may exclude some felons who would responsibly exercise the franchise and include others who are arguably less deserving. But Florida was not required to draw the perfect line nor even to draw a line superior to some other line it might have drawn. The Constitution requires only a rational line. The line between felons who have completed their sentences and those who have not easily satisfies that low bar.

Jones, 975 F.3d at 1035.

We should add that, even if the scenario posed by plaintiffs were constitutionally problematic, it would not be enough to sustain their equal protection claim. Plaintiffs brought a facial challenge to section 13-1, "the most difficult challenge to mount successfully." *Hart v. State*, 368 N.C. 122, 131, 774 S.E.2d 281, 288 (2015). To prevail, they must show that "there are *no circumstances* under which the statute might be constitutional." *Beaufort Cnty. Bd. of Educ. v. Beaufort Cnty. Bd. of Comm'rs*, 363 N.C. 500, 502, 681 S.E.2d 278, 280 (2009) (emphasis added). "The fact that a statute might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 282 (1998).

Section 13-1 does not impermissibly condition the right to vote on a felon's ability to pay whatever court costs, fines, or restitution the felon may owe. Because this equal protection claim lacks merit, the trial court should have granted summary judgment for defendants. *See* N.C.G.S. § 1A-1, Rule 56(c) (2021) ("Summary judgment, when appropriate, may be rendered against the moving party.").

C. Property Qualifications

[4] The Property Qualifications Clause in our state constitution declares: "As political rights and privileges are not dependent upon or modified by property, no property qualification shall affect the right to vote or hold office." N.C. Const. art. I, § 11. In granting summary judgment for plaintiffs on their Property Qualifications Clause claim, the trial court reasoned that, "when legislation is enacted that restores the right to vote, thereby establishing qualifications which certain persons must meet to exercise their right to vote, such legislation must not do so in a way that makes the ability to vote dependent on a property qualification." The trial court opined that section "13-1 does exactly that" by making the re-enfranchisement of felons depend on whether they satisfy the financial terms of their sentences.

Defendants argue that section 13-1 does not violate the Property Qualifications Clause because "[t]he requirement that felons complete their sentences, including financial aspects of their sentences, is a predicate for felons having their rights *restored*, not a qualification for *exercising* their rights." In defendants' view, "[t]he Constitution's demand that 'political rights and privileges' not be made 'dependent upon or modified by property' is inapplicable to felons who have no political right to vote until [that right is] reinstated by [s]ection 13-1." Defendants also maintain that the trial court's interpretation conflicts with the original understanding of property qualifications. Plaintiffs

argue in response that money constitutes a form of property and consequently the Property Qualifications Clause prohibits the state from withholding the franchise over a felon's nonpayment of court costs, fines, or restitution.

The Property Qualifications Clause does not exist in a textual vacuum. It forbids the imposition of property qualifications on "the right to vote," but it does not define that right. Other provisions in the state constitution give that right content. Thus, for example, Article I, Section 9 guarantees anyone entitled to vote in North Carolina the right to do so in elections that are held frequently. *See* N.C. Const. art. I, § 9 ("[E]lections shall be often held."). Under Article I, Section 10, those frequent elections must be conducted "free from interference or intimidation." *State Constitution* at 56; *see also* N.C. Const. art. I, § 10 ("[E]lections shall be free."). Article VI sets out the qualifications that individuals must satisfy to have the right to vote in the frequent and free elections mandated by Article I, Sections 9 and 10. In general, as we have seen, that right belongs to anyone who has reached eighteen years of age and meets certain residency requirements. N.C. Const. art. VI, § 1, § 2(1)–(2).

Article VI expressly disqualifies from voting, however, anyone "adjudged guilty of a felony . . . unless that person shall first be restored to the rights of citizenship in the manner prescribed by law." *Id.* § 2(3). The obvious import of these words is that felons whose rights have not been restored as provided by law have no right to vote under our state constitution. Put differently, felon re-enfranchisement through section 13-1 "is not a . . . right; it is a mere benefit that" the General Assembly could "choose to withhold entirely." *Harvey*, 605 F.3d at 1079. Because felons whose citizenship rights have not been restored have no state constitutional right to vote, requiring them to fulfill the financial terms of their sentences as a condition of re-enfranchisement cannot be said to violate the Property Qualifications Clause. Financial obligations imposed on individuals who already lack the right to vote simply do not trigger that provision.

The historical background of the Property Qualifications Clause lends weight to our interpretation of the provision's scope. Under the 1776 constitution, all freemen aged twenty-one or older who satisfied a one-year residency requirement and had paid "public taxes" could vote for members of the state house. N.C. Const. of 1776, Declaration of Rights, § VIII. When it came to voting for a member of the state senate, though, a freeman could not vote unless he met the residency requirement and was "possessed of a freehold within the same county of fifty acres of land for six months next before, and at the day of election." *Id.*

§ VII. The 1776 constitution also imposed property ownership qualifications on the governor and members of the legislature.[13]

The property qualifications in the 1776 constitution were meant to ensure that the people who voted and those for whom they voted had a personal investment in the governance of the state. "Although [Article I, Section 11 of the current state constitution] confidently declare[s] that politics and property are not related . . . , the fact was not self-evident to the generation that made the Revolution. On the contrary, the state's 1776 constitution excluded paupers from the franchise: Those without property had, it was thought, no stake in society." *State Constitution* at 57.

The 1835 amendments to the state constitution left the property qualifications intact. "In 1857, voters approved the only amendment submitted to them between 1836 and [their ratification of the 1868 constitution]. The amendment . . . abolished the 50-acre land ownership requirement for voters to cast ballots in state senate races."[14] John L. Sanders, *Our Constitutions: An Historical Perspective*, https://www.sosnc.gov/static_forms/publications/North_Carolina_Constitution_Our_Co.pdf (last visited Apr. 14, 2023). The 1857 amendment did not alter property qualifications for governor and members of the legislature, which remained in effect until after the Civil War. *State Constitution* at 57.

The Property Qualifications Clause that now resides in Article I, Section 11 first appeared in the 1868 constitution. It banned—and continues to ban—property qualifications for voting or officeholding. "[A] milestone on the road to modern democracy[,]" the provision owes its existence to Republican delegates to the 1868 constitutional convention, who insisted "that popular sovereignty not be limited by property." *Id.*

The requirement that felons pay what they owe differs in kind and purpose from the 1776 constitution's property qualifications. As we have

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13. "[M]embership in the senate was restricted to men with 'not less than three hundred acres of land in fee,' while each member of the house of commons had to hold 'not less than one hundred acres of land in fee, or for the term of his own life.' The governor had to be a man of still more substantial property, possessed of 'a freehold in lands and tenements, above the value of one thousand pounds.' " John V. Orth, *Fundamental Principles in North Carolina Constitutional History*, 69 N.C. L. Rev. 1357, 1361 (1991) (footnotes omitted) (citing N.C. Const. of 1776, §§ 5–6, 15).

14. "Every free white man of the age of twenty-one years, being a native or naturalized citizen of the United States and who has been an inhabitant of the State for twelve months immediately preceding the day of an election, and shall have paid public taxes, shall be entitled to vote for a member of the senate for the district in which he resides." N.C. Const. of 1776, amends. of 1857.

seen, the framers of the 1776 constitution restricted voting and certain offices to owners of real property in the belief that propertyless individuals lacked a stake in the conduct of government affairs. Insisting that felons *pay* their court costs, fines, and restitution is not the same thing as mandating that they *own* real or personal property in particular amounts. Nothing prohibits a relative, for instance, from paying a felon's court costs. Moreover, section 13-1's re-enfranchisement criteria are not premised on the outdated notion that the poor have no interest in how the state is run.

Plaintiffs cite *Wilson v. Board of Aldermen*, 74 N.C. 748 (1876), for the proposition that money constitutes property for purposes of the Property Qualifications Clause. There, the plaintiff disputed the constitutionality of a provision in the City of Charlotte's charter that endowed the city with the power to tax his bonds and income. *Id.* at 748–49. The plaintiff based his argument on Article VII, Section 9 of the 1868 constitution, which directed that any property taxes levied by counties or municipalities be "uniform and *ad valorem*." *Id.* at 754 (quoting N.C. Const. of 1868, art. VII, § 9). The plaintiff interpreted Article VII, Section 9 to confine local government property taxes to tangible property. *Id.* We disagreed, pointing out that other provisions in the 1868 constitution, such as the Property Qualifications Clause, used the term "property" more generally. *Id.* at 755–56.

The *Wilson* case does not lead to the conclusion that section 13-1 violates the Property Qualifications Clause. While money is a form of property, the Property Qualifications Clause bans laws that make property ownership a condition of voting, and we have just explained that section 13-1 does not mandate that felons own property.[15]

The trial court erred in ruling that section 13-1 violates the Property Qualifications Clause. When read alongside related constitutional provisions, the Property Qualifications Clause does not bar the General Assembly from requiring that felons satisfy the financial terms of their sentences before they regain the franchise. The history behind the Property Qualifications Clause reenforces this view. Section 13-1 does not implicate "the purposes sought to be accomplished by [the] promulgation" of the Property Qualifications Clause. *Sneed v. Greensboro City Bd. of Educ.*, 299 N.C. 609, 613, 264 S.E.2d 106, 110 (1980). Defendants were entitled to summary judgment on this claim.

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15. The dissent incorrectly asserts that we construe the Property Qualifications Clause to refer to real property only.

D. Free Elections Clause

[5] In its final order, the trial court ruled that section 13-1 "violates the Free Elections Clause [in Article I, Section 10 of the North Carolina Constitution] by preventing elections that ascertain the will of the people." The trial court reasoned that "North Carolina's elections do not faithfully ascertain the will of the people when such an enormous number of people living in communities across the state—over 56,000 individuals [on felony supervision]—are prohibited from voting."[16]

Defendants argue that section 13-1 does not violate the Free Elections Clause because (1) felons have no right to vote under the state constitution and thus fall outside the scope of the Free Elections Clause; (2) section 13-1 cannot be said to contravene the Free Elections Clause because it is more lenient on felons than the version of section 13-1 that was in effect when voters ratified the current state constitution in 1970; and (3) "[p]laintiffs have failed to prove that [s]ection 13-1 constrains any voter's choice in voting for particular candidates." According to plaintiffs, the Free Elections Clause requires allowing individuals on felony supervision to vote because elections must "reflect to the greatest extent possible the will of *all* people living in North Carolina communities."

We hold that section 13-1 does not violate the Free Elections Clause in Article I, Section 10. Like the Property Qualifications Clause in Article I, Section 11, the Free Elections Clause must be harmonized with the provisions of Article VI. Pursuant to Article VI, Section 2(3), only those felons whose citizenship rights have been restored in the manner prescribed by law have the right to vote. Accordingly, the Free Elections Clause is not violated when felons whose rights have not been restored are excluded from the electoral process. In plain English, it is not unconstitutional merely to deny the vote to individuals who have no legal right to vote.

The historical background of the Free Elections Clause substantiates our holding. Our opinion issued today in *Harper v. Hall*, No. 413PA21-2 (N.C. Apr. 28, 2023), discusses that background in detail, so we need not duplicate the discussion here. Suffice to say that a free elections guarantee has appeared in each of our state's constitutions, the first of which declared that "elections of members, to serve as Representatives in

16. The trial court further concluded that section 13-1 "strikes at the core of the Free Elections Clause . . . because of its grossly disproportionate effect on African American people." We explained earlier in this opinion why the trial court's disparate impact findings are unreliable.

General Assembly, ought to be free." N.C. Const. of 1776, Declaration of Rights, § VI. The wording of the free elections guarantee in the 1776 constitution echoes a parallel provision in the 1689 Bill of Rights adopted by the English Parliament following the overthrow of King James II. *See* Bill of Rights 1689, 1 W. & M. Sess. 2, ch. 2, § I, cl. 13 ("[E]lection of Members of Parlyament ought to be free."); *State Constitution* at 56 ("The word ['free' as used in the Free Elections Clause] originally derives . . . from the English Declaration of Rights (1689)[.]").

As explained in *Harper*, "the drafters of the English Bill of Rights sought to secure a 'free [P]arliament,' a Parliament where the electors could vote for candidates of their choice, and the members, once elected, could legislate according to their own consciences without threat of intimidation or coercion from the monarch." *Harper*, slip op. at 111–12 (alteration in original) (quoting Michael Barone, *Our First Revolution: The Remarkable British Upheaval that Inspired America's Founding Fathers* 230 (2007)). The framers of our 1776 constitution hoped to achieve a similar goal: state legislative elections "free from interference or intimidation." *State Constitution* at 56.

This Court's decisions interpreting the Free Elections Clause further illuminate the contours of that provision. In *Swaringen v. Poplin*, 211 N.C. 700, 191 S.E. 746 (1937), the plaintiff alleged that the county board of elections had fraudulently altered the results of his county commissioner race, thereby depriving him of office. *Id.* at 700–01, 191 S.E. at 746. We rejected the defendant's argument that the complaint failed to state a claim and held that, under the Free Elections Clause, "[a] free ballot and a fair count must be held inviolable to preserve our democracy." *Id.* at 702, 191 S.E. at 747. We thus construed the Free Elections Clause to prohibit fraudulent vote counts.

In *Clark v. Meyland*, 261 N.C. 140, 134 S.E.2d 168 (1964), the plaintiff challenged a statutory requirement that voters seeking to change their party affiliation take an oath promising to support their new party's nominees until "in good faith" they changed their party affiliation again. *Id.* at 141, 134 S.E.2d at 169. We held that the portion of the oath requiring support for future candidates violated the Free Elections Clause because "[i]t denie[d] a free ballot—one that is cast according to the dictates of the voter's judgment." *Id.* at 143, 134 S.E.2d at 170. We explained that "the Legislature [was] without power to shackle a voter's conscience by requiring the objectionable part of the oath as a price to pay for his right to participate in his party's primary." *Id.* In summary, "[b]ased upon . . . this Court's precedent, the free elections clause means a voter is deprived of a 'free' election if (1) a law prevents a voter from

voting according to one's judgment, or (2) the votes are not accurately counted." *Harper*, slip op. at 117 (citations omitted).

"[A] constitution cannot violate itself[,]" *Leandro*, 346 N.C. at 352, 488 S.E.2d at 258, so denying the franchise to felons as required by Article VI, Section 2(3) cannot be a violation of the Free Elections Clause. Furthermore, excluding felons whose rights have not been restored from the electoral process does not expose our elections to the sort of interference, intimidation, fraud, or infringements on conscience that the Free Elections Clause exists to prevent. The trial court therefore erred in ruling that section 13-1 contravenes the Free Elections Clause.

E. Fundamental Right to Vote

Lastly, the trial court concluded that section 13-1 unconstitutionally "interferes with the fundamental right to vote on equal terms[,]" reasoning that felons "on felony supervision share the same interest as . . . North Carolina residents who have not been convicted of a felony or [felons] who have completed their supervision." We have already concluded that felons have no fundamental right to vote, as Article VI, Section 2(3) expressly divests them of this right upon conviction. Contrary to the trial court's reasoning, felons are not "similarly situated" to non-felons when it comes to voting; our state constitution could not be clearer on this point.

V. Disposition

Plaintiffs failed to prove the unconstitutionality of section 13-1 beyond a reasonable doubt. The General Assembly did not engage in racial discrimination or otherwise violate the North Carolina Constitution by requiring individuals with felony convictions to complete their sentences—including probation, parole, or post-release supervision—before they regain the right to vote. We therefore reverse the trial court's grant of summary judgment and declaratory and injunctive relief to plaintiffs and remand this case to the trial court for dismissal of plaintiffs' claims with prejudice.

REVERSED AND REMANDED.

Justice EARLS dissenting.

The majority's decision in this case will one day be repudiated on two grounds. First, because it seeks to justify the denial of a basic human right to citizens and thereby perpetuates a vestige of slavery, and second, because the majority violates a basic tenet of appellate review

by ignoring the facts as found by the trial court and substituting its own. *See, e.g.*, *State v. Taylor*, 379 N.C. 589, 608 (2021) ("[A]n appellate court is not entitled to 'make its own findings of fact and credibility determinations, or overrule those of the trier of fact.' " (quoting *Desmond v. News & Observer Publ'g Co.*, 375 N.C. 21, 44 n.16 (2020))).

With regard to the first and most serious issue, the majority interprets the North Carolina Constitution to reduce the humanity of individuals convicted of felony offenses to the point of cruelty: People who are convicted of felony offenses are no longer people, they are felons.[1] The majority believes that, as felons, they are not free even after their sentences are complete, they are merely felons for the rest of their lives. At about the same time that the state constitution was amended to disenfranchise all Blacks, both those who were slaves and those who were free, this Court held that "[t]he power of the master must be absolute to render the submission of the slave perfect." *State v. Mann*, 13 N.C. (2 Dev.) 263, 266 (1829). The Court found that proposition to be inherent in the institution of slavery and professed no power to "chang[e] the relation in which these parts of our people stand to each other." *Id.* at 267. Today, the Court again consigns a portion of the state's population to a less than free status, unable to participate in the fundamental exercise of self-governance upon which democracy is based. *See Blankenship v. Bartlett*, 363 N.C. 518, 522 (2009); *see also Reynolds v. Sim*s, 377 U.S. 533, 554–55 (1964) (declaring that the right to vote is a fundamental right, preservative of all other rights). As preservative of all other rights, the right to vote also recognizes the inherent humanity of every adult citizen. The state constitution contemplates that the right to vote, along with all rights of citizenship, shall be restored to people who commit felony offenses. N.C. Const. art. VI, § 2(3). The only question in this case is whether the statute that prescribes how restoration is accomplished, N.C.G.S. § 13-1, unconstitutionally discriminates against individuals with felony convictions. The trial court heard extensive evidence, made detailed findings of fact, and applied the correct legal standards to answer that question. The trial court's final judgment and order should be affirmed.

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1. The rationale for denying the franchise to returning citizens was questioned at the time the statute at issue here was under consideration. *See, e.g.*, North Carolina Law Review, *Notes*, 50 N.C. L. Rev. 903, 910 (1972) ("If the prisoner is worthy of being released to the community he should be made to feel that he is ready to rejoin society as a participant and not as an outsider.").

I. Factual Background

A. The Racist Origins of N.C.G.S. § 13-1

Years before the original version of N.C.G.S. § 13-1 was adopted, the North Carolina Constitution expressly forbade all African Americans, whether free or enslaved, from voting. This wholesale prohibition came about in 1835. Prior to 1835, the state constitution already prohibited slaves from voting. But in response to African Americans' growing political influence in certain parts of the state and broader fears surrounding racial empowerment, there were calls to amend the state constitution to deny the franchise to all African Americans, regardless of their status as slaves or free people. This fear is encapsulated by a plea from white North Carolinians to the state legislature, urging the General Assembly to deny the franchise to free African Americans:

> A very large portion of our population are slaves, and recent occurrences must deeply impress . . . the vital necessity of keeping them in a state of discipline and subordination. . . . [P]ermitting free negroes to vote at elections, contributes to excite and cherish a spirit of discontent and disorder among the slaves. . . . Will not practices such as these . . . 'naturally excite in the slaves discontent with their condition, encourage idleness and disobedience, and lead possibly in the course of human events, to the most calamitous of all contests, a *bellum servile* a servile war.'

The Sentinel (New Bern, N.C.), December 7, 1831, at 3. This plea further decried that *free* African Americans were not truly free: "[T]hey are forbidden to contract marriage except with their own class . . . [and] they are not called upon to aid in the execution of the civil or criminal processes of the law: they may be subjected even to the punishment of death on the testimony of a slave. Can these disabilities belong to the Freeman?" *Id.*

Concerns like these prevailed during the 1835 Constitutional Convention.[2] And so, in 1835, the North Carolina constitution was amended to provide that "[n]o free negro, free mulatto, or free person

2. For example, Jesse Wilson of Perquimans County argued that "[c]olor is a barrier" and "[i]f you make it your business to elevate the condition of the blacks, in the same proportion do you degrade that of the poorer whites," which could lead to "an *increase of mixed breeds*." *State Convention*, The Weekly Standard (Raleigh, N.C.), June 19, 1835, at 2.

of mixed blood, descended from negro ancestors to the fourth generation inclusive[ ] (though one ancestor of each generation may have been a white person[ ]) shall vote for members of the Senate or House of Commons." N.C. Const. of 1776, amend. 1835, art. I, § 3(3) (1835). The constitution of 1835 did not contain a felony disenfranchisement provision. *See generally* N.C. Const. of 1776, amends. of 1835. Instead, the constitution prohibited individuals convicted of "infamous" crimes, such as treason, bribery, or perjury, from voting. N.C. Const. of 1776, amends. of 1835, art. I, § 4, pt. 4. Receiving an infamous punishment, such as a whipping, also served to bar individuals from voting.

The 1835 constitutional amendments were in effect for just over thirty years. Following the Civil War, however, North Carolina adopted a new constitution during the 1868 Reconstruction Convention as a condition for its return to the Union. The 1868 constitution provided for universal male suffrage, eliminated property ownership requirements as a condition for voting, and abolished slavery. Notably, the 1868 constitution did not contain any provision that denied the franchise to felons. *See generally* N.C. Const. of 1868.

The 1868 constitution's promise of equal treatment for African Americans sparked an immediate and vicious backlash. Violence against African Americans and their sympathizers was rampant, as were efforts to prevent African Americans from voting. As part of these disenfranchisement efforts, "White former Confederates in North Carolina conducted an extensive campaign of convicting African American men of petty crimes *en masse* and whipping them to disenfranchise them 'in advance' of the Fifteenth Amendment," which was not ratified until 1870. The whipping campaign exploited a North Carolina law that disenfranchised anyone subject to this brutal and degrading form of punishment. One Congressman explained before the United States House of Representatives that "in North Carolina . . . they are now whipping negroes for a thousand and one trivial offenses . . . and in one county . . . they had whipped every adult male negro" in order to "prevent[ ] these negroes from voting."

White conservative Democrats ultimately regained control over the General Assembly in 1870 and doubled-down on efforts to suppress African Americans' newly won freedom. These efforts culminated in 1875 when a series of constitutional amendments were introduced that were intended to curb the rights of African Americans. For example, the amendments, which were ratified in 1876, banned interracial marriage, required segregation in public schools, and stripped counties of their ability to elect their own local officials, delegating that power instead to

the General Assembly.[3] N.C. Const. of 1868, amends. of 1875, amends. XXVI, XXV, XXX.

Particularly significant to this case, the 1876 amendments disenfranchised any person "adjudged guilty of felony" and provided that disenfranchised persons would be "restored to the rights of citizenship in a mode prescribed by law." N.C. Const. of 1868, amends. of 1875, amend. XXIV. The felon disenfranchisement amendment was introduced in the General Assembly by a former Confederate who had been "instructed by his nominating county to lead a 'crusade' against the 'radical civil rights officers' holders party,' *i.e.*, the party that supported equal rights for African American people[,]" as the trial court explained.

The trial court recognized that the General Assembly's disenfranchisement scheme "capitalized on Black Codes that North Carolina had enacted in 1866, which allowed sheriffs to charge African American people with crimes at their discretion," enabling targeted and systematic disenfranchisement. The amendment's purpose was no secret. As one conservative Democrat explained, felon disenfranchisement would result in "a purification of the ballot box." *Address of the Executive Democratic Central Committee to the People of North Carolina*, The Raleigh News (Raleigh, N.C.), June 23, 1875. This amendment remains on the books today, and it is largely unchanged since its ratification in 1876. *See* N.C. Const. art. VI, § 2(3).

During the first legislative session after the 1876 amendments were ratified, the General Assembly enacted a new law to implement the constitution's new felony disenfranchisement provision. The 1877 law prohibited people convicted of felonies from voting unless their rights were restored "in the manner prescribed by law." In turn, the "manner prescribed by law" incorporated an 1840s statute that governed rights restoration for individuals convicted of the most heinous crimes, namely treason and other "infamous crimes." In so doing, as the trial court stated, "[t]he 1877 statute took all of the onerous requirements for rights restoration that had previously applied only to people convicted of treason and for the first time extended them to anyone convicted of any felony."

Importantly, the 1877 law did not merely disenfranchise convicted felons during the duration of their prison sentences. Rather, the law

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3. According to the trial court, "[t]he purpose of [the latter] amendment was to prevent African Americans from electing African American judges, or judges who were likely to support equality."

continued to bar people from voting even after they were released from incarceration. An Act to Regulate Elections, ch. 275, §§ 10, 62, 1877 N.C. Sess. Laws 516, 519–20, 537. The law also imposed burdensome procedural requirements that convicted felons had to meet in order to have their rights restored. Namely, they had to wait four years from the date of their felony conviction to file a petition for rights restoration. *See* An Act Providing for Restoring to the Rights of Citizenship Persons Convicted of Infamous Crimes, ch. 36, § 3, 1841 N.C. Sess. Laws 68, 68. Once eligible to file a petition, they had to secure the testimony of "five respectable witnesses who have been acquainted with the petitioner's character for three years next preceding the filing of the petition, that his character for truth and honesty during that time has been good." *Id.* § 1. The witness requirement served to bar people from petitioning for rights restoration until three years after their release from prison. Once a petition was filed, judges had complete discretion to approve or deny it, and the clerk of court was required to post the individual's petition on the courthouse door for a three-month period before the restoration hearing. *Id.* Any member of the public could then challenge the petition. *Id.*

The law's message was simple: once a felon, always a felon. Once an individual bore this label, only that person's extensive efforts coupled with the lucky draw of a sympathetic judge could restore the rights every other citizen enjoyed. But such luck could be difficult to come by. Indeed, according to the trial court, "[t]he 1877 law's adoption of the requirement to petition an individual judge for restoration had a particularly discriminatory effect against African American people considering the contemporaneous 1876 constitutional amendment stripping African American communities of the ability to elect local judges."

Together, the 1876 constitutional amendments and the 1877 law were intended to "instill White supremacy and . . . disenfranchise African-American voters." Legislative Defendants themselves conceded that the historical evidence presented at trial "demonstrates a shameful history of our state's use of laws, and with regard to voting in particular, to suppress the African American population."

B. N.C.G.S. § 13-1's Modern History

Despite some minor changes, the 1877 law went largely unchanged from 1897 until 1970. Most notably here, it was recodified at N.C.G.S. § 13-1 during this period, where it remains in effect today. Then in the early 1970s, the General Assembly's only African American members sought to amend the law to eliminate its denial of the franchise to individuals who had completed their prison sentences.

These efforts were first rejected in 1971. That year, two African American members of the General Assembly proposed a bill that would remove N.C.G.S. § 13-1's denial of the franchise to convicted felons who had finished serving their period of incarceration. Despite the purpose behind their original proposal, the bill was amended in committee to require the completion of "any period of probation or parole" before an individual could retain the right to vote, among other modifications. And as if this deprivation of the right to vote was not sufficiently severe, as the trial court's order explained, N.C.G.S. § 13-1 was further amended to require "two years [to] have elapsed since release by the Department of Corrections, including probation or parole" before an individual could petition for rights restoration.

In 1973, the only three African American members of the General Assembly again attempted to reform N.C.G.S. § 13-1. As before, their efforts to amend the law to restore a convicted felon's right to vote upon completion of the individual's prison sentence were unsuccessful. They were, however, able to persuade their colleagues to do away with the 1971 amendment that required a two-year waiting period *after* an individual finished serving a period of probation or parole. An Act to Provide for the Automatic Restoration of Citizenship, ch. 251, § 1, 1973 N.C. Sess. Laws 237, 237–38.

The trial court found that "[t]he record evidence is clear and irrefutable that the goal of these African American legislators . . . was to eliminate section 13-1's denial of the franchise to persons released from incarceration and living in the community, but . . . they were forced to compromise in light of opposition by their 167 White colleagues" and to accept other modifications to the law.

C. N.C.G.S. § 13-1's Modern Discriminatory Effects

Extreme racial disparities in disenfranchisement between African Americans and White individuals convicted of felonies persist. In North Carolina, a staggering 56,516 people are denied the franchise due to probation, parole, or post-release supervision from a felony conviction in state or federal court. Of North Carolina's voting-age population, 21% are African Americans yet, critically, over 42% of those denied the franchise due to felony probation, parole, or post-release supervision from a state court conviction alone are African American. By contrast, White people represent 72% of North Carolina's voting-age population yet only constitute 52% of those who are similarly denied the franchise. African Americans in North Carolina are denied the franchise at a rate 2.76 times as high as the rate of White people with 1.24% of the African American

voting-age population being denied the franchise, whereas only 0.45% of the White voting-age population is similarly disenfranchised. These statistics demonstrate the stark reality of N.C.G.S. § 13-1's disproportionate effect on African Americans.

Countless extreme racial disparities in voter disenfranchisement of persons on community supervision also exist at the county level. The rate of African American disenfranchisement due to felony probation, parole, or post-release supervision is considered "high" in seventy-seven counties. However, the rate of White disenfranchisement is only considered "high" in ten counties. In North Carolina, the highest rate of White disenfranchisement in any county is 1.25% whereas rates of African American disenfranchisement are as high as 2% in nineteen counties, 3% in four counties, and over 5% in one county. This means that one out of every twenty African American adults in that county cannot vote due to felony probation, parole, or post-release supervision.

There is not a single county in the state where the White disenfranchisement rate is greater than the African American disenfranchisement rate. The African American disenfranchisement rate is at least four times greater than the White rate in twenty-four counties and at least five times greater than the White rate in eight counties.

These grave differences represent the extreme disparate impact that the state's denial of the franchise to people on felony probation, parole, or post-release supervision has on African Americans. As one of Plaintiffs' experts opined, "We find in every case that it works to the detriment of the African American population." Although the Legislative Defendants' expert claims that there is no racial disparity in voter disenfranchisement of people on community supervision because "100% of felons of every race in North Carolina" are disenfranchised, the statistics tell a very different, grim story.[4]

II. Analysis

A. Standing

I agree with the Court's conclusion that "plaintiff-felons have standing to bring their claims against defendants" as well as its reasoning in reaching its conclusion as to the traceability issue. I reject the deference

4. In its September 2020 summary judgment order, the trial court concluded that this expert's report was entitled to "no weight" because it was "unpersuasive in rebutting the testimony of Plaintiffs' experts, was flawed in some of its analysis and, while [he] is an expert in the broad field of political science, his experience and expertise in the particular issues before this panel are lacking."

the Court affords Defendants' arguments, however, as they are entirely divorced from this Court's standing doctrine. They are so dumbfounding that they do not even warrant being acknowledged as "plausible." I therefore address these arguments separately. Though I also agree that Plaintiffs' injuries are redressable, I reach this conclusion on different grounds. Finally, I dissent from the majority's holding that plaintiff-organizations Community Success Initiative, Justice Served N.C., Inc., and Wash Away Unemployment lack standing in this litigation.

1. Traceability

Defendants argue that the Plaintiffs lack standing to challenge N.C.G.S. § 13-1 because "Plaintiffs have not been injured by Section 13-1. Rather, they have targeted the very avenue by which they may *regain* their right to vote." Instead, Defendants argue that article VI, section 2(3) is responsible for depriving individuals on community supervision of the right to vote. In Defendants' view then, Plaintiffs have challenged the wrong law, and therefore the alleged injury is not traceable to the statute that is the subject of this litigation.

This argument fails because, as Plaintiffs point out, N.C.G.S. "§ 13-1 is the law that prevents people from registering to vote as long as they are on felony probation, parole, or post-release supervision." "As a general matter, the North Carolina Constitution confers standing on those who suffer harm . . . ." *Magnum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 642 (2008) (citing N.C. Const. art. I, § 18). In other words, Plaintiffs are "required to demonstrate that [they have] sustained a legal or factual injury arising from defendants' actions." *United Daughters of the Confederacy v. City of Winston-Salem*, 383 N.C. 612, 629 (2022). Here, Plaintiffs do not challenge article VI's felon disenfranchisement provision itself. Rather, they challenge N.C.G.S. § 13-1's specific extension of article VI to individuals who have completed their prison sentences and have been released into their communities on probation, parole, or post-release supervision.

It is a first principle of constitutional interpretation that constitutional provisions "cannot be applied in isolation or in a manner that fails to comport with other requirements of the State Constitution." *Stephenson v. Bartlett*, 355 N.C. 354, 376 (2002). This means that article VI, section 2's denial of the franchise to anyone "adjudged guilty of a felony against this State or the United States, or adjudged guilty of a felony in another state" cannot be read in such a way that would violate other provisions of the North Carolina constitution. *See* N.C. Const. art. VI, § 2(3). Thus, if Plaintiffs are correct that it violates other constitutional

provisions to deny the franchise to individuals who have been released back into the community, article VI, section 2's disenfranchisement provision must necessarily be read to exclude those individuals. And if article VI, section 2(3) does not include individuals on probation, parole, or post-release supervision, then N.C.G.S. § 13-1 is singularly responsible for bringing those individuals within the reach of the constitution's disenfranchisement provisions.

But at this stage, the conclusion that Plaintiffs have standing does not turn on agreeing with their argument on the merits that N.C.G.S. § 13-1, rather than the North Carolina constitution, is responsible for disenfranchising the population of convicted felons that have reintegrated into the community. Defendants' argument that Plaintiffs lack standing is simply a misapplication of well-established standing doctrine.

Traceability is the requirement that an alleged "injury was likely caused by the defendant" in a case. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). In other words, "there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.' " *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (alterations in original) (quoting *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 41–42 (1976)). In Defendants' view, there is no connection between the alleged injury—the disenfranchisement of individuals on community supervision in violation of multiple constitutional provisions—and Defendants' actions—the passage and continued implementation of N.C.G.S. § 13-1—because the constitution, rather than N.C.G.S. § 13-1, is responsible for Plaintiffs' injury.

In effect, Defendants' argument that Plaintiffs' injury is not traceable to the challenged law is based on the resolution of one of the primary issues that this Court must address on the merits—whether various provisions of the North Carolina constitution, namely the equal protection clause, the free elections clause, and the constitution's ban on property qualifications, require that convicted felons who have completed their prison sentences and have returned to their communities be permitted to vote. But whether Plaintiffs have standing to bring suit is a " 'threshold question' to be resolved before turning attention to more 'substantive' issues." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 490 (1982) (Brenan, J., dissenting). Indeed, "the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Here, however, Defendants argue

that this Court should hold that Plaintiffs lack standing *by deciding* the merits of this dispute. The error lies in the wholesale integration of these two distinct analyses.

What is more, "[w]hile federal standing doctrine can be instructive as to general principles . . . and for comparative analysis, the nuts and bolts of North Carolina standing doctrine are not coincident with federal standing doctrine." *Goldston v. State*, 361 N.C. 26, 35 (2006). In North Carolina, "[w]hen a person *alleges* the infringement of a legal right directly under a cause of action at common law, a statute, or the North Carolina Constitution, . . . the legal injury itself gives rise to standing." *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 609 (2021) (emphasis added). Here, Plaintiffs have alleged that they have been deprived of a legal right under N.C.G.S. § 13-1, and they have therefore established standing under North Carolina law. Even if one disagrees about whether there has, in fact, been a deprivation of any legal right, at this point in the analysis, Plaintiffs allegations are sufficient to establish their legal standing.

2. Redressability

Defendants also argue that Plaintiffs lack standing because their injury cannot be redressed by a favorable decision. This is perhaps an even more egregious misapplication of standing doctrine than Defendants' clumsy attempt to apply the federal traceability requirement. Redressability is the idea that, for a plaintiff to have standing, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.' " *Lujan*, 504 U.S. at 561. Here, it is not merely likely but certain that a decision favorable to Plaintiffs, which holds that N.C.G.S. § 13-1 violates the North Carolina constitution, would redress the alleged injury.

If such a favorable decision were rendered, two conclusions would necessarily follow. First, Defendants' argument that article VI, section 2(3) itself disenfranchises individuals on probation, parole, or post-release supervision would fail based on the principle previously explained: that one constitutional provision "cannot be applied . . . in a manner that fails to comport with other requirements of the State Constitution." *Stephenson*, 355 N.C. at 376. Second, once it has been determined that the constitution prohibits the disenfranchisement of individuals on probation, parole, or post-release supervision, a court can redress the injury by striking the portions of N.C.G.S. § 13-1 that discriminate against this class of people. This is precisely what the trial court's injunction did here.

Perhaps aware of this straightforward redressability analysis, Defendants argue that such a remedy is not within the power of the courts. Specifically, Defendants contend that the trial court's injunction directing that "if a person otherwise eligible to vote is not in jail or prison for a felony conviction, they may lawfully register and vote in North Carolina" was an "attempt[ ] to prescribe the manner for felon reenfranchisement itself," and thus the "Superior Court improperly exercised the lawmaking power reserved for the General Assembly."

The idea that the trial court "re[wrote] Section 13-1 [to] make new law to restore voting rights upon 'release from prison' rather than 'unconditional discharge' from a criminal sentence" is a dishonest mischaracterization of the trial court's injunction. As explained, after concluding that the equal protection clause, the free elections clause, and the constitution's ban on property qualifications prohibit the General Assembly from discriminating against individuals on probation, parole, or post-release supervision, the trial court struck down the specific language in N.C.G.S. § 13-1 that denies the franchise to this class of individuals and imposed an injunction instructing that such individuals be permitted to register and vote.

Defendants do not cite a *single* case that supports the proposition that the trial court here lacked the authority to strike down N.C.G.S. § 13-1's discriminatory provisions and issue an injunction directing that individuals on probation, parole, or post-release supervision not be denied their constitutional right to vote. Nor could they. The trial court here did no more than "enjoin only the unconstitutional applications of [§ 13-1] while leaving other applications in force," *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006)—a routine action that courts must take when faced with an unconstitutional statute. "Each time a court strikes down a statutory provision, it must determine whether to invalidate only the unconstitutional provision or instead whether to invalidate the statute in its entirety or in substantial part." Kenneth A. Klukowski, *Severability Doctrine: How Much of a Statute Should Federal Courts Invalidate?*, 16 Tex. Rev. L. & Pol. 1, 3 (2011). Indeed, "[f]ew would suggest that a court should invalidate an entire statute every time any aspect of the statute is unconstitutional." *Id.* at 7; *see also Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 508 (2010) ("[T]he 'normal rule' is 'that partial, rather than facial, invalidation is the required course.' " (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985))).

This Court has *never* suggested that North Carolina's courts lack such authority. In fact, this Court has done just the opposite and has

conducted severability analyses in countless cases virtually since its inception. *See*, *e.g.*, *Pope v. Easley*, 354 N.C. 544, 548 (2001) (determining "whether the trial court properly severed the unconstitutional part of" a statute); *Appeal of Springmoor, Inc.*, 348 N.C. 1, 13 (1998) ("[S]everance may be applied to save the remainder of a statute if it is apparent that the legislative body, had it known of the invalidity of the one portion, would have enacted the remainder alone." (cleaned up)); *State v. Waddell*, 282 N.C. 431, 442 (1973) ("If the objectionable parts of a statute are severable from the rest . . . the statute may be enforced as to those portions of it which are constitutional." (cleaned up)), *superseded on other grounds by statute*; An Act to Amend G.S. 14-17 Murder Defined and Punishment Provided for Murder, Rape, Burglary and Arson, ch. 1201, § 1, 1973 N.C. Sess. Laws 323, 323; *Keith v. Lockhart*, 171 N.C. 451 (1916) ("It is the recognized principle that . . . [w]here a part of the statute is unconstitutional, but the remainder is valid, the parts will be separated, if possible, and that which is constitutional will be sustained." (cleaned up)); *Gamble v. McCrady*, 75 N.C. 509, 512 (1876) ("[W]hile the general provisions of an act may be unconstitutional, one or more clauses may be good, provided they can be separated from the others so as not to depend upon the existence of the others for their own."). There is simply nothing unique or unusual about the trial court's injunction here, and it is certainly not a basis from which to conclude that Plaintiffs lack standing in this case.

3. Organizational Standing

The majority relies on *River Birch Associates v. City of Raleigh*, 326 N.C. 100 (1990), for the proposition that two of the Organizational Plaintiffs do not have standing because they have failed to allege their own injuries with sufficient particularity and failed to allege that they have members who are injured by the statute they challenge.[5] *River Birch Associates* relied on two federal cases decided in the 1970s, *Warth*, 442 U.S. 490 (1979), and *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977). *River Birch Assocs.*, 326 N.C. at 129–30. None of these cases consider this Court's careful analysis of the distinction between standing in federal court and standing in state court as elaborated in *Committee to Elect Dan Forest*, 376 N.C. 558. Moreover, the majority relies solely on allegations in the complaint rather than

5. The majority also concluded that similar resource allocation allegations were insufficient to establish the North Carolina State Conference of the NAACP's standing. However, the Court held that this Organizational Plaintiff established standing through additional allegations in the amended complaint.

examining all the evidence produced at the trial, which potentially also bears on organizational standing at this stage of the proceedings.

Since none of the parties made the argument now relied upon by the majority, it is unwise to undergo the superficial standing analysis advanced here. Claiming that assertions in the complaint regarding resource allocation are too vague without acknowledging the fuller testimony in the record from Plaintiff Organizations is unfair to plaintiffs. In light of the relaxed "injury in fact" requirement established by this Court only two years ago in *Committee to Elect Dan Forest* and the fuller testimony in the record regarding the activities and efforts of the Organizational Plaintiffs that the majority summarily concludes do not have standing, that conclusion is in error.

III. N.C.G.S. § 13-1 Violates Multiple Provisions of the North Carolina Constitution

A. The Equal Protection Clause

Plaintiffs allege and the trial court concluded that N.C.G.S. § 13-1 violates the equal protection clause based on three distinct grounds: (1) that the statute unconstitutionally discriminates based on race; (2) that it deprives African Americans of the fundamental right to vote on equal terms; and (3) that it imposes an unconstitutional wealth-based classification. The majority does not dispute much of the evidence that the trial court relied on in finding these constitutional violations. But in spite of the extensive evidence upon which the trial court's findings and conclusions are based, the majority nonetheless determines that N.C.G.S. § 13-1 does not violate the equal protection clause in any respect. This conclusion can follow only from a complete disregard of the evidence before this Court.

1. Discrimination Based on Race

The trial court held that N.C.G.S. § 13-1's denial of the franchise to people on felony supervision violates the equal protection clause because it discriminates against African Americans in intent and effect. The majority holds otherwise, reasoning that "[t]he trial court misapplied the *Arlington Heights* factors and relied on manifestly insufficient evidence to bolster its conclusion that racial discrimination prompted the General Assembly . . . not to restore the citizenship rights of persons on felony supervision." *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267–68 (1977). Considering the ample evidence of racial discrimination Plaintiffs have produced and the trial court accepted, the majority demonstrates that it would prefer to simply

pretend racial discrimination does not exist today, rather than grapple with the plain and undisputed facts in front of it.

a. Analyzing Facially Neutral, Discriminatory Laws

Though the parties do not dispute that *Arlington Heights* controls here, the majority finds it necessary to point out that this Court is "free to depart from the federal burden-shifting framework" imposed by *Arlington Heights* "if [the Court] deem[s] it incompatible with the principles that guide our review of state constitutional challenges."

True enough. If this Court believed it appropriate, it could indeed apply a framework of its own design to determine whether a facially neutral law discriminates based on race in violation of the equal protection clause. What the majority fails to mention, however, is that any test it fashions must render the state constitution's equal protection clause at least as potent as its federal counterpart. *See State v. Carter*, 322 N.C. 709, 713 (1988) ("Even were the two provisions identical, we have the authority to construe our own constitution differently from the construction by the United States Supreme Court of the Federal Constitution, as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision."); *see also Stephenson v. Bartlett*, 355 N.C. 354, 381 n.6 (2002). Unsurprisingly then, and despite its musings about its authority to apply a framework other than *Arlington Heights*, the majority proceeds with the *Arlington Heights* analysis.[6]

b. The Trial Court's Findings of Fact are Binding

Before the majority analyzes N.C.G.S. § 13-1 under the *Arlington Heights* framework, it first criticizes the trial court's final judgment and order for omitting a direct reference to "the presumption of legislative good faith." The majority therefore concludes that "[i]nasmuch as the trial court did not presume legislative good faith, its findings of fact concerning the discriminatory intent allegedly infecting section 13-1 are

6. This Court has, in fact, applied *Arlington Heights* to a facially neutral law before. *See Holmes v. Moore*, 383 N.C. 171 (2022), *rev'd*, No. 342PA19-3 (N.C. Apr. 28, 2023). Today, the majority overturns this decision in a separate opinion, expressing the same inexplicable resistance to applying the *Arlington Heights* framework. *See Holmes*, slip op. at 22. In repeatedly challenging the applicability of *Arlington Heights* but applying its framework anyway, as here, or adopting an inadequate framework as in the newly issued *Holmes* opinion, it appears that the Court's current majority is merely reluctant to accept that facially neutral laws can be found to be discriminatory. The Court seems poised to make this endeavor more challenging. Unfortunately for the majority, the federal Constitution will constrain these efforts.

not binding on appeal." For one thing, the presumption of legislative good faith is built into the *Arlington Heights* framework when properly applied in that plaintiffs must first present evidence of the discriminatory intent behind a legislative act. But "[w]hen there is . . . proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified." *Arlington Heights*, 429 U.S. at 265–66.

In holding that the trial court did not clearly apply the presumption of good faith, the majority perhaps attempts to follow the reasoning of federal circuit court cases that have concluded that the trial court failed to apply the presumption. *See*, *e.g.*, *N.C. State Conf. of the NAACP v. Raymond*, 981 F.3d 295 (4th Cir. 2020); *League of Women Voters of Fla., Inc. v. Fla. Sec'y of State*, 32 F.4th 1363 (11th Cir. 2022). But cases in the federal circuit courts of appeals that have held that the trial court rulings at issue failed to apply the presumption of good faith examine the content of the trial courts' *Arlington Heights* analyses themselves, rather than admonish the trial courts for failing to declare that the presumption of good faith has been applied. *See*, *e.g.*, *League of Women Voters of Fla.*, 32 F.4th at 1373 ("[W]hile we do not require courts to incant magic words, it does not appear to us that the district court here meaningfully accounted for the presumption at all.").

The trial court need not explicitly state that it has applied the presumption, as the majority suggests. The presumption is better assessed by reference to the trial court's actual analysis of racial discrimination than by simplistically noting whether it used certain magic words, and the majority need not agree with this analysis to understand that the presumption has been applied. Here, and analyzed in depth below, the trial court considered in exhaustive detail Plaintiffs' evidence of racial discrimination under N.C.G.S. § 13-1. After concluding that Plaintiffs introduced ample evidence of discriminatory intent, the trial court properly shifted the burden to Defendants to prove race-neutral justifications. Ignoring the trial court's painstaking analysis, the majority forsakes a thoughtful review of the trial court's decision for expediency—in the majority's view, the trial court did not directly mention the presumption of good faith, so it must not have been applied.

Moreover, though a trial court's failure to apply the presumption of good faith may impact its conclusions of law, a trial court's findings of fact are based on concrete facts contained in the record. Put another way, a failure to apply the presumption of good faith does not change the veracity of the facts themselves—only the conclusions drawn from them. As much as the majority may like to resist the trial court's findings,

as they reveal the malicious and racist intent of N.C.G.S. § 13-1, a fact is a fact. And in this case, Defendants contested almost none of the trial court's factual findings. The presumption of good faith is not a magic wand that transforms such uncontested facts into mere ruminations that this Court, as an appellate court, can accept or reject at will without a specific legal basis for doing so. But that is how the majority treats the presumption—without mentioning a *single* finding of fact that demonstrates that the trial court failed to apply the presumption of good faith, the majority inexplicably declares *all* of them nonbinding. This it cannot do.

c. Discriminatory Impact

As to N.C.G.S. § 13-1's discriminatory impact, the majority holds that "[t]he trial court's findings of fact do not support its ultimate finding that section 13-1 has a disproportionate impact on African Americans." This conclusion is plainly incorrect.

The trial court made extensive findings based on evidence introduced by Plaintiffs that N.C.G.S. § 13-1 has a discriminatory impact. Its findings include:

- That African Americans represent 21% of the voting-age population in North Carolina, but 42% of the people who are denied the franchise under N.C.G.S. § 13-1 from a North Carolina state court conviction alone. African American men make up 9.2% of the total voting-age population but constitute 36.6% of the people who are disenfranchised by N.C.G.S. § 13-1. By contrast, White people make up a much larger share of North Carolina's voting-age population—72%, to be precise—but only constitute 52% of those denied the franchise under N.C.G.S. § 13-1.

- That 1.24% of the total African American voting-age population in North Carolina is on community supervision compared to 0.45% of the total White voting-age population. African Americans are therefore disenfranchised at a rate that is 2.76 times as high as White people.

- That the number of African Americans on community supervision that are denied the franchise under N.C.G.S. § 13-1 relative to the overall number of African American registered voters is almost three times as high as the number of White people on community supervision that are denied the franchise under N.C.G.S. § 13-1.

- That African Americans are disenfranchised under N.C.G.S. § 13-1 at higher rates than White people in the eighty-four counties that have sufficient data to perform comparative analyses. There is not a single county where the White disenfranchisement rate is greater than the African American disenfranchisement rate.
- That in seventy-seven of those counties, the rate of African American disenfranchisement is high (over 0.83% of the African American voting-age population), whereas the rate of White disenfranchisement is high in only ten counties.
- That in forty-four counties, the percentage of the African American voting-age population that is denied the franchise under N.C.G.S. § 13-1 is at least three times greater than the comparable percentage of the White population. In twenty-four counties, the African American disenfranchisement rate is at least four times greater than the White disenfranchisement rate. In eight counties, the African American disenfranchisement rate is at least five times greater than the White disenfranchisement rate.

This non-exhaustive list covers only a few of the trial court's findings regarding N.C.G.S. § 13-1's discriminatory impact. Based on this extensive statewide and county-level data, the trial court found that "North Carolina's denial of the franchise [to individuals] on felony probation, parole, or post-release supervision disproportionately affects African Americans by wide margins." Importantly, the trial court found that "[a]lthough more White people are denied the franchise due to felony post-release supervision than African American people in [the] aggregate, this does not affect the finding that African American people are disproportionately affected by section 13-1." In North Carolina, there are nearly 6 million White voting-age individuals compared to fewer than 1.8 million African American voting-age individuals. Thus, the trial court found that "to determine whether racial disparities exist, it is necessary to compare African American and White rates of disenfranchisement, rather than aggregate numbers of disenfranchised African American and White people."

Notably, the majority does not hold that these findings are erroneous. Instead, it reasons only that the fact that "African Americans make up about forty-two percent of the felon population seems to account for the disproportionate share . . . of African Americans on felony supervision." But this reasoning ignores a core reality of this case—N.C.G.S.

§ 13-1 was designed to prohibit as many African Americans from voting as possible by preying on the disproportionate makeup of the felon population. The issue the majority raises simply demonstrates that N.C.G.S. § 13-1 is working precisely as it was intended.

Take a moment to consider the import of the majority's logic. If this argument were correct, then any disparate impact analysis would be meaningless—it would be impossible to prove that *any* facially-neutral, discriminatory law designed to exploit a societal inequality causes a disparate impact. Using the majority's logic, poll taxes would not have a discriminatory impact because at the time the poll tax was held to be unconstitutional, African Americans were disproportionately poor, meaning wealth inequality, rather than laws implementing poll taxes, was to blame for the disproportionate number of African Americans barred from voting. Likewise, literacy tests would not have a discriminatory impact because, applying the majority's rationale, "the fact that African Americans [made up a disproportionate share of those who were illiterate would] seem[ ] to account for the disproportionate share . . . of African Americans" who were barred from voting because they could not pass literacy tests.[7] It is no wonder Defendants themselves did not even raise this point as a basis for concluding that there is no evidence that N.C.G.S. § 13-1 has a disparate impact. The majority's fundamentally flawed logic is no basis for concluding that, in spite of the overwhelming evidence, "[t]he trial court's findings of fact do not support its ultimate finding that section 13-1 has a disproportionate impact on African Americans."[8]

d. Historical Background

The historical background of N.C.G.S. § 13-1 also supports that the law was motivated by discriminatory intent. Importantly, as noted by

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7. It is well understood that literacy tests were "particularly effective" at suppressing African American voters. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 219–20 (2009). "These laws were based on the fact that as of 1890," in many southern states, including North Carolina, "more than two-thirds of the adult Negroes were illiterate while less than one-quarter of the adult whites were unable to read or write." *South Carolina v. Katzenbach*, 383 U.S. 301, 311 (1966).

8. The majority attempts to salvage its conclusion and asserts that the dissent misunderstands its position. The majority explains "the trial court should have compared the percentages of African American felons and white felons ineligible for re-enfranchisment under section 13-1 with the racial makeup of the total felon population because, unlike the poll tax that all would-be voters had to pay, section 13-1's scope is limited to individuals with felon convictions." This explanation is nonsensical, but it appears to merely rephrase the reasoning already described. It fails for the same reasons.

the trial court, "[i]t was well understood and plainly known in the 1970s that the historical and original motivation for denial of the franchise to persons on community supervision in the post-reconstruction era had been to attack and curb the political rights of African Americans." At no time during this litigation have Legislative Defendants disputed that the General Assembly was aware of this fact at the time that N.C.G.S. § 13-1 was amended both in 1971 and 1973. Despite its knowledge of the racist history and lasting discriminatory impact of N.C.G.S. § 13-1's denial of the franchise to individuals on community supervision, the General Assembly maintained this provision when amending N.C.G.S. § 13-1 in 1971 and 1973. During trial, Legislative Defendants did not offer *any* race-neutral explanation for this decision. Meanwhile, Defendants "presented no evidence at any time during trial advancing any race-neutral explanation for the legislature's decision in 1971 and 1973 to preserve, rather than eliminate, the 1877 bill's denial of the franchise to persons on community supervision."

Further, at the time that N.C.G.S. § 13-1 was amended in the 1970s, the General Assembly was plagued by racism among its members. In 1973, there were only three African American members of the General Assembly compared to 167 White representatives.[9] Many of these White representatives held openly racist views about African Americans and used racial slurs to refer to the General Assembly's three African American members. This evidence demonstrates the tenor of the General Assembly at the time that it chose to retain N.C.G.S. § 13-1's community supervision disenfranchisement provision despite being aware of the law's intended and continued impact on African American voters.

At this point in the analysis, it is important to remember that *Arlington Heights* "does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one." 429 U.S. at 265. This means that we do not have to decide how important the racist motivations were behind the General Assembly's decision to continue disenfranchising individuals on community supervision because "racial discrimination is not just another competing consideration." *Id.* Any degree of a racially-fueled motivation is too much. Based on the evidence before it, the trial court correctly concluded that race was at

9. In 1971, there were only two African American legislators in the General Assembly.

least one of the motivating factors in the General Assembly's decision to retain N.C.G.S. § 13-1's disenfranchisement provision for individuals on community supervision and shifted the burden to the Defendants to offer a race-neutral explanation for the decision to retain the provision. As noted, Defendants did not provide any such evidence.[10]

Though it is true that the intentions of the General Assembly in the 1970s ultimately determine whether N.C.G.S. § 13-1 was motivated by discriminatory intent, as the majority recognizes, the law's pre-1971 history is not irrelevant to this analysis. Indeed, this history provides important context for understanding the changes that came about in the 1970s. The United States Supreme Court has similarly held that even when a law undergoes changes over time, its history remains relevant.

In *Hunter v. Underwood*, 471 U.S. 222 (1985), the United States Supreme Court held that a felon disenfranchisement provision in the Alabama constitution constituted an equal protection violation under the Fourteenth Amendment. There, despite acknowledging the racist history of the constitutional provision, the defendants argued that this history was inapposite because subsequent changes to the law's enforcement, including court decisions striking down various portions of the provision, rendered what remained constitutional. *Id.* at 232–33.

The United States Supreme Court rejected this argument, explaining that regardless of whether the provision would be constitutional had it been passed with race-neutral motivations and in its current form today, "its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect." *Id.* at 233. The same is true here: Section 13-1 was passed with racist motivations, it was amended with full knowledge of both those motivations and its discriminatory impact, members of the General Assembly themselves engaged in racist behavior at the time N.C.G.S. § 13-1 was amended, and no alternative reason for retaining the discriminatory provision of N.C.G.S. § 13-1 that Plaintiffs challenge has been provided. Though there may be instances "where a legislature actually confronts a law's tawdry past in reenacting it [and] the new law may well be free of discriminatory taint[, t]hat cannot be said

10. In applying the *Arlington Heights* framework in this manner, the trial court gave Defendants all of the legislative good faith they were due: It placed the burden on Plaintiffs to present convincing evidence of racial discrimination and gave Defendants an opportunity to provide race-neutral explanations for the General Assembly's decisions. When Defendants failed to provide such explanations, there was simply no more deference that could be afforded.

of" N.C.G.S. § 13-1. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1410 (2020) (Sotomayor, J., concurring).[11]

The majority disagrees that N.C.G.S. § 13-1's historical background demonstrates its discriminatory intent. The majority explains that "[w]hile it would be an overstatement to say that the trial court should have ignored [N.C.G.S. § 13-1's] pre-1971 history recounted in its order, plaintiffs' claims must finally rise or fall on whether their evidence overcomes the presumption of legislative good faith and proves that discriminatory intent" motivated N.C.G.S. § 13-1 as amended in the 1970s. The majority notes that the trial court should have considered "the legislature's approval in 1969 of what became our current state constitution" because "that document incorporated equal protection and nondiscrimination guarantees that had not appeared in our previous state constitutions." Confusingly, however, the majority's analysis ends there. It does not actually analyze the evidence presented surrounding N.C.G.S. § 13-1's post-1971 history.

e. Legislative Process and History

Section 13-1's relevant legislative process and history is somewhat limited because the General Assembly did not explicitly declare its reasons for retaining the disenfranchisement provision at issue. Though N.C.G.S. § 13-1's legislative history is not enough on its own to prove racially discriminatory intent, it adds further support to the trial court's conclusion that the decision was motivated by such intent.

The trial court made several important findings with respect to N.C.G.S. § 13-1's amendments in the 1970s. Specifically, in 1971, the only two African American members of the General Assembly proposed a bill that would, among other changes, " 'automatically' restore citizenship rights to anyone convicted of a felony 'upon the full completion of his sentence.' " The proposal was rejected and the bill was "amended to retain N.C.G.S. § 13-1's denial of the franchise to people living in North Carolina's communities." The bill was further amended to both add an oath requirement and mandate that a felon wait two years after completion of all terms of a sentence before rights could be restored. The 1971 version of N.C.G.S. § 13-1 passed as amended. At the time, one of the

11. The majority rejects *Hunter* as inapplicable here because the General Assembly "repealed allegedly discriminatory laws and replaced them with a substantially different statutory scheme." But this argument ignores that the specific provision in N.C.G.S. § 13-1 that is challenged here originates in the version of the law that was passed in 1877. Any amendments in the 1970s that altered the statutory scheme or made it easier for felons to have their rights restored do not bear on the unchanged challenged provision.

African American legislators who introduced the original version of the bill—Representative Henry Frye—explained on the floor of the North Carolina House of Representatives that "he preferred the bill's original provisions which called for automatic restoration of citizenship when a felon had finished his prison sentence, but he would go along with the amendment if necessary to get the bill passed."

In 1973, the General Assembly's three African American members again attempted to reform N.C.G.S. § 13-1. Though they were successful in convincing their fellow members to eliminate the oath requirement and the two-year waiting period from the 1971 amendments, "they were not able to reinstate voting rights upon release from incarceration." Senator Henry Michaux Jr., who was previously a member of the North Carolina House of Representatives and was one of the members who introduced the 1973 proposal, explained that the intention behind the 1973 proposal to amend N.C.G.S. § 13-1 "was a total reinstatement of rights, but [they] had to compromise to reinstate citizenship voting rights only after completion of a sentence of parole or probation."

Based on these facts, the trial court found that it "is clear and irrefutable that the goal of these African American legislators . . . was to eliminate section 13-1's denial of the franchise to persons released from incarceration and living in the community, but that they were forced to compromise in light of opposition by their 167 White colleagues to achieve other goals." As before, this legislative history is useful in contextualizing N.C.G.S. § 13-1's continued disenfranchisement of individuals on community supervision. To repeat, "[i]t was well understood and plainly known in the 1970s that the historical and original motivation for denial of the franchise to persons on community supervision in the post-reconstruction era had been to attack and curb the political rights of African Americans." Aware of N.C.G.S. § 13-1's history and its lasting effects, the predominantly White General Assembly chose to retain the challenged provision and in the process, rejected multiple attempts to eliminate it without having ever provided justifications for doing so.

f. Race-Neutral Motivations

In light of the extensive evidence supporting that discriminatory intent was a motivating factor in passing N.C.G.S. § 13-1, the trial court correctly "shifted to [Legislative Defendants] the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered." *Arlington Heights*, 429 U.S. at 270 n.21. Defendants utterly failed this task.

As the trial court found, "Defendants failed to introduce any evidence supporting a view that section 13-1's denial of the franchise to people on felony supervision serves any valid state interest today." For example, the interrogatory responses for the State Board Defendants identified interests behind N.C.G.S. § 13-1, including "regulating, streamlining, and promoting voter registration and electoral participation among North Carolinians convicted of felonies who have been reformed"; "simplifying the administration of the process to restore the rights of citizenship to North Carolinians convicted of felonies who have served their sentences"; and "avoiding confusion among North Carolinians convicted of felonies as to when their rights are restored." However, "[t]he Executive Director testified that the State Board is not asserting that the denial of the franchise to people on felony supervision serves any of these interests as a factual matter in the present day, and she admitted that the State Board is unaware of any evidence that denying the franchise to such people advances any of these interests." Moreover, "the State Board's Executive Director conceded that *striking down* section 13-1's denial of the franchise to people on felony supervision would 'promote their voter registration and electoral participation.' "[12]

In this Court, Defendants argued that N.C.G.S. § 13-1's denial of the franchise to individuals on felony supervision is "easily administrable by the State and easily understood by the felons it impacts." They also argued that it advances the State's "interest in *restoring* felons to the electorate after justice has been done and they have been fully rehabilitated by the criminal justice system," quoting *Jones v. Governor of Florida*, 975 F.3d 1016, 1034 (2020).

But Defendants provide no citation or explanation for why the current requirements of N.C.G.S. § 13-1 are "easily administrable." Presumably, amending N.C.G.S. § 13-1 to restore rights once an individual is released from jail or prison would be just as easy to administrate, if not more so. Similarly, such language would be easily understood by individuals who have been convicted of a felony. In the face of extensive evidence of N.C.G.S. § 13-1's discriminatory intent and effect, these proffered race-neutral justifications are little more than a weak attempt to mask N.C.G.S. § 13-1's nefarious purpose.

In sum, N.C.G.S. § 13-1's discriminatory impact is both statistically and practically significant, and its racist motivations are clear. Because

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12. Though the State Board Defendants are not a party to this appeal, these responses demonstrate the lack of a plausible explanation for N.C.G.S. § 13-1's retention of the community supervision disenfranchisement provision.

"there is proof that a discriminatory purpose has been a motivating factor [behind § 13-1] . . . judicial deference [to the legislature] is no longer justified," *see Arlington Heights*, 429 U.S. at 265–66, and it became Defendants burden to provide race-neutral justifications for the law under *Arlington Heights*. Defendants failed at this task, and N.C.G.S. § 13-1 therefore discriminates based on race in violation of North Carolina's equal protection clause.

2. The Fundamental Right to Vote on Equal Terms

The right to vote on equal terms is a fundamental right. *Northampton Cnty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 747 (1990). The right not only protects an individual's ability to participate in the electoral process but also "the principles of substantially equal voting power and substantially equal legislative representation." *Stephenson v. Bartlett*, 355 N.C. 354, 382 (2002). When a law "impermissibly interferes with the exercise of a fundamental right," strict scrutiny applies. *Id.* at 377 (quoting *White v. Pate*, 308 N.C. 759, 766 (1983)).

The trial court correctly concluded that N.C.G.S. § 13-1's denial of the franchise to people on felony supervision violates their fundamental right to vote, as well as the right of all African Americans to vote with substantially equal voting power. "The right to vote is the right to participate in the decision[ ]making process of government" among all persons "sharing an identity with the broader humane, economic, ideological, and political concerns of the human body politic." *Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 13 (1980). By denying individuals the right to vote until they have completed any period of felony supervision, N.C.G.S. § 13-1 denies individuals who have been released from prison the opportunity to engage in this civic process.

Yet again, with tautological insistence, the majority holds that N.C.G.S. § 13-1 violates neither the fundamental right to vote nor its inextricable promise of the right to vote on equal terms, reasoning that N.C.G.S. § 13-1 does not deprive individuals on felony supervision of the fundamental right to vote because "felons have no fundamental right to vote, as Article VI, Section 2(3) expressly divests them of this right upon conviction." Repeating this argument to the point of absurdity does not make it stronger. Again, article VI, section 2(3)'s felon disenfranchisement provision does not enable N.C.G.S. § 13-1 to function as a blank check to the legislature to impose any "re-enfranchisement" requirements it desires.

An example demonstrates this point. No one would contend that, as a result of article VI, section 2(3)'s expansive language, N.C.G.S. § 13-1

could contain a provision that expressly prohibits only African American felons from voting until they have completed felony supervision, while individuals of any other race have their rights restored upon completion of their prison sentences. Such a provision, which is an example of an express, race-based classification, would violate other sections of the North Carolina constitution, namely the equal protection clause. In the same vein, article VI, section 2(3) is not a blanket permission to the General Assembly to use N.C.G.S. § 13-1 as a means of passing racially discriminatory restrictions that are race-neutral on their face.

N.C.G.S. § 13-1 denies individuals on community supervision of the right to vote in the most literal way possible: It forbids this class of people from voting. As previously explained, N.C.G.S. § 13-1 is unconstitutional on other grounds because, in singling out individuals on felony supervision, it discriminates against African Americans in violation of the equal protection clause's guarantee that no "person [shall] be subjected to discrimination by the State because of race," N.C. Const. art. I, § 19, and it is not justified by any compelling state interest. Because N.C.G.S. § 13-1's denial of the franchise to individuals on felony supervision unconstitutionally discriminates on the basis of race, it follows that this provision illegitimately deprives this class of people of their fundamental right to vote.

The trial court also concluded that N.C.G.S. § 13-1 violates the equal protection clause because it "unconstitutionally denies [African Americans] substantially equal voting power on the basis of race." As explained above, the right to substantially equal voting power derives from the fundamental right to vote itself and was recognized by this Court in *Stephenson*, 355 N.C. at 379. There, the Court, applying strict scrutiny, held that "use of *both* single-member and multi-member districts within the same redistricting plan violates the Equal Protection Clause of the State Constitution unless it is established that inclusion of multi-member districts advances a compelling state interest." *Id.* at 380–81 (footnote omitted). The Court held that certain uses of multi-member districts could violate the state constitution's equal protection clause by depriving North Carolina voters of "the fundamental right . . . to substantially equal voting power." *Id.* at 379.

The majority does not address this issue, but Defendants contend that N.C.G.S. § 13-1 does not deprive African Americans of equal voting power because "convicted felons are not constitutionally entitled to vote *at all* until their voting rights are restored in a manner that the General Assembly provides." Aside from repeating the same point that this dissent has repeatedly rejected, this argument fails to recognize the

full class of people who are denied the right to substantially equal voting power. This class is not limited to African Americans on felony supervision as Defendants imply. Rather, N.C.G.S. § 13-1 denies substantially equal voting power to the entire African American electorate by disproportionately disenfranchising African American potential voters.

To repeat, at the statewide level, the rate of African American disenfranchisement under N.C.G.S. § 13-1 is 2.76 times as high as the comparable percentage of the White population that is disenfranchised. At the county level, the percentage of voting-age African Americans who are disenfranchised is at least three times as high as the disenfranchised White population in forty-four counties, four times as high in twenty-four counties, and five times as high in eight counties. In every single county where there is sufficient data to perform a comparison, voting-age African Americans are disenfranchised under N.C.G.S. § 13-1 at higher rates than White people. These numbers are glaring, and it stands to reason that a law that was motivated by the overtly discriminatory purpose of repressing the African American vote in an effort to stifle African American political power and that successfully achieves that intended effect denies the African American population of "substantially equal voting power by diminishing or diluting their votes on the basis of [race]." *Harper v. Hall*, 380 N.C. 317, 378–79 (2022), *cert. granted sub nom. Moore v. Harper*, 142 S. Ct. 2901 (2022), *vacated*, *Harper v. Hall*, No. 413PA21-2 (N.C. Apr. 28, 2023).

Under article I, section 19, strict scrutiny applies when: (1) a "classification impermissibly interferes with the exercise of a fundamental right"; or (2) a statute "operates to the peculiar disadvantage of a suspect class." *Stephenson*, 355 N.C. at 377 (quoting *White v. Pate*, 308 N.C. 759, 766 (1983)). Thus, when the "fundamental right to vote on equal terms" is implicated, "strict scrutiny is the applicable standard." *Id.* at 378.

Section 13-1 cannot withstand this exacting review. "Under strict scrutiny, a challenged governmental action is unconstitutional if the State cannot establish that it is narrowly tailored to advance a compelling governmental interest." *Id.* at 377. To repeat the trial court's finding, "Defendants failed to introduce any evidence supporting a view that section 13-1's denial of the franchise to people on felony supervision serves any valid state interest today," let alone a compelling one. The interests that the state did attempt to assert were mere pretexts given their lack of logic and were certainly not narrowly tailored. In any case, there is very little in the way of a compelling government interest that could permit the legislature to deny an entire class of people the fundamental right to vote on otherwise unconstitutional grounds.

3. Wealth-based Classification

In concluding that N.C.G.S. § 13-1 imposes a wealth-based classification under the North Carolina constitution, the trial court explained that "by requiring an unconditional discharge that includes payments of all monetary obligations imposed by the court, N.C.G.S. § 13-1 creates a wealth classification that punishes felons who are genuinely unable to comply with the financial terms of their judgment more harshly than those who are able to comply." Put simply, N.C.G.S. § 13-1 "provides that individuals, otherwise similarly situated, may have their punishment alleviated or extended solely based on wealth." The trial court applied strict scrutiny because "when a wealth classification is used to restrict the right to vote or in the administration of justice, it is subject to heightened scrutiny," rather than rational basis review. It further concluded that N.C.G.S. § 13-1 cannot survive this exacting review.

In applying strict scrutiny, the trial court relied on the Supreme Court's decision in *M.L.B v. S.L.J.*, 519 U.S. 102 (1996), which applied heightened scrutiny to a termination of parental rights case. There, the Court "d[id] not question the general rule . . . that fee requirements ordinarily are examined only for rationality." *Id.* at 123. But it held that precedent "solidly establish[ed] two exceptions to that general rule." *Id.* at 124. "The basic right to participate in political processes as voters and candidates cannot be limited to those who can pay for a license. Nor may access to judicial processes in cases criminal or 'quasi criminal in nature' turn on ability to pay."[13] *Id.* (cleaned up). The *M.L.B.* Court explained that these types of sanctions "are wholly contingent on one's ability to pay, and thus 'visi[t] different consequences on two categories of persons,' they apply to all indigents and do not reach anyone outside that class." *Id.* at 127 (alteration in original) (citation omitted) (quoting *Williams v. Illinois*, 399 U.S. 235, 242 (1970)). *M.L.B.* extended certain prohibitions on fee requirements from the criminal context to cases involving termination of parental rights because "[f]ew consequences of judicial action are so grave as the severance of natural family ties." *Id.* at 119 (alteration in original) (quoting *Santosky v. Kramer*, 455 U.S. 745, 787 (1982)).

M.L.B. in turn relied on *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), the landmark United States Supreme Court case

13. The Court cited *Williams v. Illinois*, 399 U.S. 235 (1970), which struck down an Illinois law providing for the extended incarceration of an indigent offender who was unable to pay costs associated with his conviction. The Court explained that "the Illinois statute in operative effect exposes *only indigents* to the risk of imprisonment beyond the statutory maximum." *Id.* at 242.

that struck down as unconstitutional any law making "the affluence of the voter or payment of any fee an electoral standard." *Id.* at 666. The United States Supreme Court reasoned that, while the States are free to regulate certain voter qualifications, these valid qualifications "have no relation to wealth nor to paying or not paying this or any other tax." *Id.*

The principles of *M.L.B.* and *Harper* apply here. By conditioning restoration of the right to vote on the payment of fees that are prohibitive to many, N.C.G.S. § 13-1 "exposes only indigents to the risk of" being unable to reclaim their fundamental right to vote. *Williams*, 399 U.S. at 242. As in *M.L.B.*, N.C.G.S. § 13-1 " 'visi[ts] different consequences on two categories of persons,' [it] appl[ies] to all indigents and do[es] not reach anyone outside that class." *M.L.B.*, 519 U.S. at 127. But it should not matter "whether the citizen, otherwise qualified to vote, has $1.50 in his pocket or nothing at all, pays the fee or fails to pay it." *Harper*, 383 U.S. at 668. And in the same way that one's ability to pay a poll tax in order to vote is not a valid voter qualification, the ability to pay legal fees when all other aspects of a sentence have been completed is "not germane to one's ability to participate intelligently in the electoral process" and is therefore not an appropriate consideration in determining whether an individual is legally qualified to vote. *Id.* Section 13-1 is therefore not a permissible voter qualification but instead is an unconstitutional wealth-based classification.

The majority, however, applies rational basis review and holds that N.C.G.S. § 13-1 does not, in fact, impose an unconstitutional wealth classification because the law bears a reasonable connection to a legitimate government interest. Further, the majority quotes the Eleventh Circuit's decision in *Jones v. Governor of Florida*, 975 F.3d 1016, 1030 (2020), which rejected the idea that a similar disenfranchisement law created a wealth-based classification, reasoning that "[t]he only classification at issue is between felons who have completed all terms of their sentences, including financial terms, and those who have not."

The majority describes *Jones*'s reasoning as "persuasive." But as Plaintiffs point out, the framing of N.C.G.S. § 13-1's only distinction as "between felons who have completed the terms of their sentence, including financial terms, and those who have not," "is exactly the constitutional problem" because the law treats otherwise identically situated individuals differently based on their ability to pay. Further,

> [f]or people on felony probation in North Carolina, the median amounts owed are $573 in court costs, $340 in fees, and $1,400 in restitution. For people on parole or post-release supervision, the median

> amounts owed are $839 in court costs, $40 in fees, and $1,500 in restitution.

As Plaintiffs explain, these fees are "prohibitive" for many individuals, and therefore conditioning a felon's ability to regain the right to vote on payment "imposes a wealth-based classification that triggers strict scrutiny." For the reasons already explained, N.C.G.S. § 13-1 cannot withstand this exacting review.

It is also necessary to bring attention to the majority's conclusion that it is a legitimate government interest to prohibit felons who have not paid court costs and fines from voting because "the General Assembly could reasonably have believed . . . that felons who pay [such costs] are more likely than other felons to vote responsibly." This recognition is shocking in multiple respects. For one thing, it unintentionally admits what the Plaintiffs have argued all along: that N.C.G.S. § 13-1 is intended to inhibit certain individuals whom the General Assembly perceived as undesirable from voting. This is not a legitimate government interest, even for purposes of rational basis review. While the General Assembly can prescribe a variety of relevant voter qualifications, value judgments about whether certain categories of individuals vote in a way that the General Assembly perceives as morally correct is not one of them. It also recognizes that N.C.G.S. § 13-1 indeed imposes a wealth-based classification by determining that felons who are able to afford their fees "are more likely . . . to vote responsibly." Finally, it makes little sense. As already explained, the ability to pay these expenses "is not germane to one's ability to participate intelligently in the electoral process." *Harper*, 383 U.S. at 668. To be clear, "wealth or fee paying has . . . no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned." *Id.* at 670.

B. The Free Elections Clause

The majority also reverses the trial court's final judgment and order based on the trial court's conclusion that N.C.G.S. § 13-1 violates the North Carolina constitution's free elections clause.[14] The trial court explained that "North Carolina's elections do not faithfully ascertain the will of the people when such an enormous number of people living in communities across the State—over 56,000 individuals—are prohibited from voting."

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14. Article I, section 10 of the constitution states that "[a]ll elections shall be free." N.C. Const. art. I, § 10. This Court has held that a law violates this provision if it "prevents election outcomes from reflecting the will of the people." *Harper*, 380 N.C. at 376. Today, the majority abandons this established interpretation.

The free elections clause dates back to the 1776 Declaration of Rights, but its roots can be traced back even further to the 1689 English Bill of Rights. *Harper*, 380 N.C. at 373 (citing Bill of Rights 1689, 1 W. & M. Sess. 2, ch. 2 (Eng.)). "The English Bill of Rights arose in the aftermath of King James II's tyrannical abuse of authority to force the mostly Protestant nation to tolerate and recognize the Catholic religion." Bertrall L. Ross II, *Inequality, Anti-Republicanism, and Our Unique Second Amendment*, 135 Harv. L. Rev. F. 491, 496 (2022). The English Bill of Rights, which is the codification of the English Declaration of Rights, " 'was the statutory institution of conditional kingship[s] for the future' through its mandate for an independent Parliament through free elections." Bertrall L. Ross II, *Challenging the Crown: Legislative Independence and the Origins of the Free Elections Clause*, 73 Ala. L. Rev. 221, 289 (2021) (alteration in original) (quoting Betty Kemp, *King and Commons: 1660–1832*, at 30 (1st ed. 1957)). Among the civil and political right for which it provided, the English Bill of Right declared, "election of members of parliament ought to be free." Bill of Rights 1689, 1 W. & M. Sess. 2, ch. 2.

"North Carolina's free elections clause was enacted following the passage of similar clauses in other states, including Pennsylvania and Virginia." *Harper*, 380 N.C. at 373. As with the states that adopted similar provisions, the purpose of North Carolina's free elections clause was to prevent "the dilution of the right of the people of [the State] to select representatives to govern their affairs, and to codify an explicit provision to establish the protections of the right of the people to fair and equal representation in the governance of their affairs." *Id.* at 373–74 (cleaned up).

The clause's wording has undergone minor changes over time.[15] "[T]hough those in power during the early history of our state may have

15. As *Harper* explained, the free elections clause originally stated:

> '[E]lections of Members to serve as Representatives in General Assembly ought to be free.' In 1868, in concert with its adoption of the equality principle in section 1, the Reconstruction Convention amended the free elections clause to read '[a]ll elections ought to be free.' In 1971, the present version was adopted, changing 'ought to' to the command 'shall.' This change was intended to 'make it clear' that the free elections clause, along with other 'rights secured to the people by the Declaration of Rights[,] are commands and not mere admonitions to proper conduct on the part of government.'

380 N.C. at 375–76 (alterations in original) (quoting *N.C. State Bar v. DuMont*, 304 N.C. 627, 639 (1982)).

viewed the free elections clause as a mere 'admonition' to adhere to the principle of popular sovereignty through elections, a modern view acknowledges this is a constitutional requirement." *Harper*, 380 N.C. at 376. Today, the directive of the free elections clause is simple: "[a]ll elections shall be free." N.C. Const. art. I, § 10. Interpreting both the text and history of the clause, this Court has explained that "elections are not free" if they "do not serve to effectively ascertain the will of the people." *Harper*, 380 N.C. at 376.

At least 56,516 individuals in North Carolina are denied the franchise under N.C.G.S. § 13-1 because they are on probation, parole, or post-release supervision from a felony conviction in state or federal court. According to the trial court's order, "[i]n 2018 alone, there were 16 different county elections where the margin of victory in the election was less than the number of people denied the franchise due to felony supervision in that county." In fact, the number of people disenfranchised in various counties is up to seven or eight times the vote margin in those counties. "The number of African Americans denied the franchise due to being on felony supervision [also] exceeds the vote margin in some elections," including races for one county's board of commissioners, a sheriff's race, and a board of education race. "In addition to county-level elections, there are statewide races where the vote margin in the election was less than the number of people denied the franchise due to being on community supervision statewide." The 2016 Governor's race, for instance, was decided by far fewer votes than the over 56,000 people who are denied the franchise because of felony supervision.

It is challenging to see how North Carolina elections can reflect "the will of the people" when, as the trial court found, "the vote margin in both statewide and local elections is regularly less than the number of people disenfranchised in the relevant geographic area." Moreover, N.C.G.S. § 13-1 places a disproportionately heavy burden on African Americans, thereby suppressing the will of an entire voting demographic. There is little meaning to the words "[a]ll elections shall be free" when election outcomes can be manipulated by barring individuals on felony supervision from voting—individuals who live in our communities, share our concerns about the rules and regulations that govern us, and have the same stake in electing representatives who will represent their interests. These words mean even less when interpreted to permit the continued enforcement of a law that dilutes the efficacy of African Americans' political power. It is inherently inconsistent with the state constitution's command that "[a]ll elections shall be free."

The provision of N.C.G.S. § 13-1 that Plaintiffs challenge is nothing more than an electoral muzzle designed to silence a class of people

the legislature deemed unworthy of exercising the fundamental right to vote. But, as has been explained, N.C.G.S. § 13-1 is not defined solely by its sinister intent; in disproportionately disenfranchising African Americans, it has achieved its intended effect. When a statute burdens the fundamental right to vote, "it is the *effect* of the act, and not the *intention of the Legislature*, which renders it void." *People ex rel. Van Bokkelen v. Canaday*, 73 N.C. 198, 226 (1875). Thus, because N.C.G.S. § 13-1 violates the constitutional mandate of free elections, a requirement that is fundamental to the democratic governance of this state, strict scrutiny is the appropriate level of review. As explained, the law fails under such scrutiny.

In reversing the trial court's final judgment and order, the majority reasons that this reading of the free elections clause is too broad. In so holding, the majority relies on the illegitimate and erroneous interpretation of the free elections clause that it adopts today in a separate case, *Harper v. Hall*, No. 342PA19-3 (N.C. Apr. 28, 2023). This Court's stymied interpretation of the free elections clause as rewritten here fails for the same reasons it does in that case. *See Harper v. Hall*, No. 342PA19-3 (N.C. Apr. 28, 2023) (Earls, J., dissenting). Most importantly, this baselessly narrow interpretation fails to recognize that elections can be manipulated in a number of ways. It is not the manner of manipulation but the result that matters. As the majority recognizes, one way that the free elections clause is violated is if "a law prevents a voter from voting according to one's judgment." Another similarly obvious way to tamper with election outcomes is to bar a particular class of voters from exercising their right to vote because they are deemed less desirable than other members of society. As described throughout this dissent, this is precisely what N.C.G.S. § 13-1 was designed to do. An election conducted under such circumstances is no freer than an election in which voters are prevented "from voting according to [their] judgment."

C. The Ban on Property Qualifications

Finally, the majority reverses the trial court's determination that N.C.G.S. § 13-1 violates article I, section 11 of the North Carolina constitution, which provides that "[a]s political rights and privileges are not dependent upon or modified by property, no property qualification shall affect the right to vote or hold office." N.C. Const. art. I, § 11. The trial court concluded that N.C.G.S. § 13-1 violates this ban on property qualifications because "the ability for a person convicted of a felony to vote is conditioned on whether that person possesses, at minimum, a monetary amount equal to any fees, fines, and debts assessed as a result of that person's felony conviction."

The majority concludes that "[b]ecause felons whose citizenship rights have not been restored have no state constitutional right to vote, requiring them to fulfill the financial terms of their sentences as a condition of re-enfranchisement cannot be said to violate the Property Qualifications Clause." In the majority's view, the property qualifications clause refers only to real property, and "[i]nsisting that felons *pay* their court costs, fines, and restitution is not the same thing as mandating that they *own* real or personal property in particular amounts."

"Money, of course, is a form of property." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338 (1979). In fact, it is the specific form of property by which almost all other possessions, including real property, are acquired. By conditioning rights restoration upon the ability to pay a financial penalty, N.C.G.S. § 13-1 hinges the individual's ability to vote on his or her wealth. This result violates the plain text of the property qualifications clause, which directs that "political rights and privileges are not dependent upon or modified by property[,]"and "no property qualification shall affect the right to vote." N.C. Const. art. I, § 11.

The terms of this clause are expansive. It speaks simply in terms of property qualifications that *affect* the right to vote, regardless of whether that is through a direct property qualification on someone who already possesses the right or an indirect qualification on someone who must be restored of the right. Under these broad terms, when the only barrier to exercising the political right to vote is an individual's lack of wealth, the right to vote has been affected, and a constitutional violation has occurred.

Similarly, the clause instructs that political rights and privileges are not dependent on property. In so stating, the clause declares that property is not a valid voter qualification, meaning it is not a valid qualification for *any* potential voter, regardless of whether a person already possesses the right or must have the right restored. In other words, the property qualifications clause creates a broad prohibition on a type of voter qualification, and no individual can be barred from voting on that basis alone. As the trial court correctly explained, "when legislation is enacted that restores the right to vote, thereby establishing qualifications which certain persons must meet to exercise their right to vote, such legislation must not do so in a way that makes the ability to vote dependent on a property qualification." But this is exactly what N.C.G.S. § 13-1 does.

Indeed, the Defendants themselves appear to recognize that the state constitution's disenfranchisement provision does not give N.C.G.S.

§ 13-1 license to impose a requirement to rights restoration that violates the property qualifications clause. Defendants explain that "nothing in Section 13-1 requires a felon to possess any property." If N.C.G.S. § 13-1 must otherwise comply with the property qualifications clause, then the disagreement can be reduced to the opposing interpretations of the term "property"—a disagreement that is easily resolved by the plain text of the state constitution.

Finally, as has been explained, constitutional provisions "cannot be applied in isolation or in a manner that fails to comport with other requirements of the State Constitution[,]" *Stephenson*, 355 N.C. at 376, meaning that article VI, section 2's denial of the franchise to anyone "adjudged guilty of a felony against this State or the United States, or adjudged guilty of a felony in another state" cannot be read in such a way that would violate other provisions of the North Carolina constitution, including the property qualifications clause. Because the clause does not permit rights restoration to be conditioned upon wealth, article VI, section 2 cannot be construed to deny the franchise to individuals who have completed all other aspects of their sentences but have not paid their court costs, fines, or other related fees. The majority errs in holding otherwise.

The trial court got it right based on the evidence in the record, the extensive findings of fact, and the proper application of the *Arlington Heights* factors, as well as other controlling legal principles of constitutional interpretation. Having found that N.C.G.S. § 13-1 is discriminatory, the trial court clearly had the obligation to fashion a remedy that protects the fundamental state constitutional rights that are at issue here. This Court should affirm the final judgment and order of the trial court. Therefore, I dissent.

Justice MORGAN joins in this dissenting opinion.

DUKE ENERGY CAROLINAS, LLC
v.
MICHAEL L. KISER, ROBIN S. KISER, AND SUNSET KEYS, LLC
v.
THOMAS E. SCHMITT AND KAREN A. SCHMITT, ET AL.

No. 398PA21

Filed 28 April 2023

Easements—bodies of water—permits to third parties—scope of authority—plain and unambiguous language

Based on the plain and unambiguous language of an easement purchased decades ago by Duke Power Company (Duke) in order to create Lake Norman (by constructing a dam and flooding the land), including language granting Duke "absolute water rights" and the right to "treat [the land] in any manner deemed necessary or desirable by Duke Power Company," Duke acted within the scope of its broad authority and discretion when it granted permits to third-party homeowners to build lake access structures and to use the lake for recreational purposes. Further, the easement's language was consistent with Duke's federal licensing obligations regarding the lake and the authority granted to Duke was confirmed by the parties' practice over many years in seeking permission from Duke to build shoreline structures over and into the submerged property.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 280 N.C. App. 1 (2021), reversing an order and judgment entered on 2 January 2020 by Judge Nathaniel J. Poovey in Superior Court, Catawba County and remanding for further proceedings. Heard in the Supreme Court on 7 February 2023.

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Mark L. Childers and Kevin C. Donaldson for other third-party defendant-appellants.

No brief for third-party defendant-appellants Donald Reid Hankins, William Claypoole, Val Rhae Claypoole, Theodore H. Corriher, and Tommy L. Wallace.

NEWBY, Chief Justice.

This case requires us to determine Duke Energy Carolinas, LLC's[1] scope of authority under an easement it acquired in order to create Lake Norman. Specifically, we consider, once the lake is created, whether this easement grants Duke the right to allow third-party homeowners to build structures over and into the submerged easement property and to use the lake for recreational purposes. To answer this question, we first look to the language of the easement. The plain language of the easement grants Duke "absolute water rights" to "treat [the land] in any manner [it] deem[s] necessary or desirable." Because the easement's plain language is clear and unambiguous and Duke's actions are encompassed within the broad grant of authority, Duke properly allowed third-party homeowners to build structures over and into the submerged property and use the lake in a recreational manner. This expansive scope of authority evidenced by the easement's plain language is consistent with Duke's federal licensing obligations over Lake Norman and has been confirmed by the parties in practice. As such, we reverse the decision of the Court of Appeals.

On 4 August 1961, Duke purchased an easement from B. L. and Zula C. Kiser (the Kiser Grandparents) covering a 280.4-acre tract as part of what is now known as Lake Norman. At the time of the conveyance, much of the bed of Lake Norman was dry. Duke acquired the easement, as well as an interest in the surrounding lakebed property, in order to create the lake by constructing a dam pursuant to a federal license. Since 1958, Duke has maintained a license issued by the Federal Energy Regulatory Commission (FERC) to operate a long-term hydroelectric project involving Lake Norman and several surrounding lakes and dams and "to supervise and control the uses and occupancies [of Lake Norman] for which it grants permission."[2]

Accordingly, the Kiser Grandparents granted Duke, its successors, and assigns by deed an easement to create a lake with two distinct

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1. Duke Energy Carolinas, LLC is a subsidiary of Duke Energy Corporation (formerly Duke Power Company) and is herein referred to as "Duke."

2. FERC initially granted Duke a license for a 50-year term in 1958. Thereafter, the license was renewed annually for seven years. In 2015, FERC relicensed Duke for a 40-year term.

component parts: a component covering the anticipated lake level and a component covering the area subject to higher water. The first component part of the conveyance includes

> a permanent easement of water flowage, absolute water rights, and easement to back, to pond, to raise, to flood and to divert the waters of the Catawba River and its tributaries in, over, upon, through and away from the 280.4 acres, more or less, of land hereinafter described, together with the right to clear, and keep clear from said 280.4 acres, all timber, underbrush, vegetation, buildings and other structures or objects, and to grade and to treat said 280.4 acres, more or less, in any manner deemed necessary or desirable by Duke Power Company.

The first component (the Flowage Easement) references the 280.4 acres of land which would become submerged property resting below an elevation of 760 feet as part of the planned lake level. To cover the area subject to higher water, the Kiser Grandparents granted Duke, its successors, and assigns:

> a permanent flood easement, and the right, privilege and easement of backing, ponding, raising, flooding, or diverting the waters of the Catawba River and its tributaries, in, over, upon, through, or away from the land hereinafter described up to an elevation of 770 feet above mean sea level, U.S.G.S. datum, whenever and to whatever extent deemed necessary or desirable by the Power Company in connection with, as a part of, or incident to the construction, operation, maintenance, repair, altering, or replacing of a dam and hydroelectric power plant to be constructed at or near Cowan's Ford on the Catawba River . . . and otherwise use and treat said land up to said 770 feet elevation in any manner deemed necessary or desirable by the Power Company in connection with the construction, reconstruction, maintenance and operation of the dam and power plant above referred . . . and of the reservoir or lake created or to be created by same.[3]

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3. The language of the easement reflects a filed copy that immaterially differs from the original.

The second component of the easement described in the deed (the Flood Easement) references the land that would rest "up to . . . 770 feet above mean sea level" and thus would remain dry land, but subject to flooding, after the creation of Lake Norman.[4]

About two years later Duke flooded the land at issue. Upon the impoundment of Lake Norman, the Kiser Grandparents retained an area of land that became an island (Kiser Island) surrounded by the 280.4-acre submerged parcel subject to Duke's easement. Between 1964 and 2015, the Kiser Grandparents subdivided Kiser Island into residential waterfront lots and sold the lots to numerous third-party buyers (the third-party homeowners). The Kiser Grandparents retained at least one lot (the Kiser lot).

After the creation of Lake Norman and Kiser Island, Duke implemented the Shoreline Management Guidelines (the SMG) in accordance with its FERC license. The SMG are a "detailed set of procedures and criteria" that "regulate activities within [Lake Norman] pursuant to [Duke's] FERC obligation[ ]" to manage Lake Norman's shoreline, uses, and occupancies. Specifically, the SMG "regulate the construction and maintenance of lake access facilities" and similar dock structures through "permits or other agreements" that Duke issues. Thus, pursuant to the SMG and with Duke's permission, the third-party homeowners began building docks, piers, and other shoreline structures as early as 1964 that extend from their waterfront lots over and into the waters of Lake Norman. The Kiser family has also sought and received permission from Duke to build certain shoreline structures.[5] Accordingly, many of the structures built by the Kisers and the third-party homeowners touch or are anchored to the Kisers' submerged property subject to Duke's easement.

During a drought in 2015, the lake level receded. Michael L. Kiser, a grandson of the Kiser Grandparents, built a seventeen-and-a-half-foot retaining wall extending from the Kiser lot into the once submerged property. Mr. Kiser then backfilled the area behind the wall with dry materials to extend the shoreline and increase the size of the Kiser lot.

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4. The Flowage and Flood Easements are referred to collectively as "the easement."

5. At oral argument, when asked whether the Kisers have requested a permit from Duke to build a dock or similar structure in the past, counsel for the Kisers responded in the affirmative, stating that Duke has "the authority to grant permission to build" such structures. *See* Oral Argument at 29:58, *Duke Energy Carolinas, LLC v. Kiser* (No. 398PA21) (Feb. 7, 2023), https://www.youtube.com/watch?v=yh0mHp58byg (last visited Mar. 16, 2023).

As a result, the new construction encompassed nearly 2,449 square feet of land covered by Duke's easement which had previously been submerged. Mr. Kiser, however, did not apply for a permit or receive permission from Duke prior to building the retaining wall. In response to Mr. Kiser's actions, Duke issued a Stop-Work Directive, and the North Carolina Department of Environmental Quality (NCDEQ) notified Mr. Kiser that the unauthorized construction would affect the waters of Lake Norman. Despite multiple requests by both Duke and NCDEQ, Mr. Kiser did not remove the retaining wall or any of the fill material from the lakebed within the easement boundary.

On 27 January 2017, Duke filed suit against Mr. Kiser and his wife, Robin S. Kiser, together with their entity Sunset Keys, LLC[6] (the Kisers), alleging trespass and wrongful interference with the easement by building the retaining wall and backfilling the lakebed area subject to Duke's easement. Duke sought injunctive relief requiring the Kisers "to remove the retaining wall and fill material from the lake bed" and restore "the disturbed shoreline area." On 13 February 2017, the Kisers responded and asserted counterclaims against Duke. The Kisers challenged Duke's authority under the easement to demand removal of the retaining wall, to issue dock permits to third-party homeowners, and to allow recreational use of the waters. In addition, the Kisers brought trespass claims against the third-party homeowners for building structures on the Kisers' submerged property without their consent, joining the homeowners[7] as third-party defendants.

On 3 August 2018, Duke moved for partial summary judgment regarding its claims for wrongful interference and injunctive relief against the Kisers. The trial court held a hearing on 13 August 2018, heard oral argument from both parties, and considered the pleadings, affidavits, and briefs submitted to the court. On 27 August 2018, the trial court entered an order and judgment granting Duke's motion for partial summary judgment. The trial court found that Duke's rights under the easement entitled it to have the retaining wall cleared from the submerged property. Accordingly, the trial court ordered the Kisers to remove the retaining wall and clear the backfilled area from the lakebed.

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6. Upon the death of Michael Kiser's father in March of 2016, Michael Kiser and his two brothers became the owners of the land at issue. They subsequently conveyed the land to Sunset Keys, LLC, of which Michael Kiser and his two brothers are the members.

7. Several of the third-party homeowners to this appeal are represented by counsel while others are proceeding unrepresented.

On 25 October 2019, Duke moved for summary judgment on its remaining trespass claim and the Kisers' counterclaims. On 28 October 2019, the third-party homeowners moved for summary judgment on the Kisers' third-party trespass claims. After conducting a hearing in which the trial court heard oral argument and considered materials submitted by the parties, the trial court entered an order and judgment on 2 January 2020 granting summary judgment in favor of Duke and the third-party homeowners. The trial court recognized Duke's broad authority under the easement and determined that Duke "acted within the scope of [its] authority" by granting permits for docks and other structures on the submerged property and by allowing recreational use of the water above the submerged property. Furthermore, the trial court quieted title in the waterfront lots, structures, and waters to the third-party homeowners, finding that the Kisers' claims constituted a cloud upon the third-party homeowners' titles to their properties. The Kisers appealed.[8]

On appeal, the Kisers argued that Duke acted outside the scope of its authority under the easement by allowing third parties to use the 280.4 acres of Lake Norman without the Kisers' consent and that the trial court erred by quieting title in the waterfront structures to the third-party homeowners. *Duke Energy Carolinas, LLC v. Kiser*, 280 N.C. App. 1, 6, 867 S.E.2d 1, 7–8 (2021). The Court of Appeals reversed the trial court's 2 January 2020 order granting summary judgment to Duke and the third-party homeowners. *Id.* at 16, 867 S.E.2d at 14. First, the Court of Appeals recognized that the plain language of the Flowage Easement is unambiguous and broad enough to "virtually convey a fee simple interest" to Duke. *Id.* at 9, 867 S.E.2d at 9. The Court of Appeals, however, "decline[d] to read [the Flowage Easement] in such a way," deferring instead to its subjective view of the Kiser Grandparents' purported intent in retaining the fee title to the submerged property.[9] *Id.* at 9–10, 867 S.E.2d at 9–10.

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8. The Kisers filed and served a notice of appeal for both of the trial court's orders but certified only the 2 January 2020 order for review. Thus, the Court of Appeals limited its review to the 2 January 2020 order. Accordingly, we likewise limit our review to the 2 January 2020 order. The trial court's 27 August 2018 order remains undisturbed.

9. There are multiple reasons why the Kiser Grandparents may have conveyed an easement to Duke rather than title to the parcel in fee simple. It was error for the Court of Appeals to project its own subjective beliefs in attempting to discern the original parties' purported intent for granting the easement. When the language of an easement is clear and unambiguous, the court is to infer the intention of the parties from the words of the easement itself. *See State v. Philip Morris USA Inc.*, 359 N.C. 763, 773, 618 S.E.2d 219, 225 (2005).

Next, upon noting Duke's broad interest in the submerged property, the Court of Appeals considered whether an easement granting "virtually unlimited authority to 'treat' property 'in any manner' includes the power for the easement holder to permit strangers to the agreement to use the land for their own benefit." *Id.* at 10, 867 S.E.2d at 10. The Court of Appeals adopted a bright-line principle that

> unless an easement explicitly states otherwise, an easement holder may not permit strangers to the easement agreement to make use of the land, other than for the use and benefit of the easement holder, without the consent of the landowner where such use would constitute additional burdens upon the servient tenement.

Id.; *see Lovin v. Crisp*, 36 N.C. App. 185, 189, 243 S.E.2d 406, 409 (1978) (holding that under the terms of the easement at issue, because the easement holder's surrounding property was not mentioned in the easement, the nearby land could not benefit from the easement holder's interest). Therefore, according to the Court of Appeals, because the third-party homeowners here are not mentioned in the easement and did not have a property interest in the land when the easement was created, "Duke exceeded its scope of authority by permitting the [third-party homeowners] to construct and maintain structures over and into the Kisers' submerged land without the Kisers' consent." *Kiser*, 280 N.C. App. at 11, 867 S.E.2d at 10.

Duke filed a petition for discretionary review with this Court on 22 November 2021. On 2 December 2021, the third-party homeowners also filed a petition for discretionary review. This Court allowed the parties' petitions on 9 February 2022.

This Court reviews an appeal of a summary judgment order de novo. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Summary judgment is proper when "there is no genuine issue as to any material fact and . . . any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A–1, Rule 56(c) (2021). The moving party is entitled to summary judgment "when only a question of law arises based on undisputed facts." *Ussery v. Branch Banking & Tr. Co.*, 368 N.C. 325, 334, 777 S.E.2d 272, 278 (2015). "All facts asserted by the [nonmoving] party are taken as true and . . . viewed in the light most favorable to that party." *Id.* (alterations in original) (quoting *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000)).

In applying these well-established principles for summary judgment here, we consider whether an easement granted to establish a lake, which provides for "absolute water rights" to "treat" the servient estate "in any manner deemed necessary or desirable," allows the easement holder to permit third parties to use the land when the easement holder so deems it necessary or desirable. "An easement is an interest in land . . . generally created by deed." *Borders v. Yarbrough*, 237 N.C. 540, 542, 75 S.E.2d 541, 542 (1953). "An easement deed . . . is, of course, a contract." *Weyerhaeuser Co. v. Carolina Power & Light Co.*, 257 N.C. 717, 719, 127 S.E.2d 539, 541 (1962). As such, the ordinary rules of contract construction apply to construing an easement. *Id.*

Like contracts, interpreting an easement "requires the court to examine the language of the [easement] itself for indications of the parties' intent at the moment of execution." *State v. Philip Morris USA Inc.*, 359 N.C. 763, 773, 618 S.E.2d 219, 225 (2005) (citing *Lane v. Scarborough*, 284 N.C. 407, 409–10, 200 S.E.2d 622, 624 (1973)). In doing so, "[i]t must be presumed the parties intended what the language used clearly expresses, and the [easement] must be construed to mean what on its face it purports to mean." *Hartford Accident & Indem. Co. v. Hood*, 226 N.C. 706, 710, 40 S.E.2d 198, 201 (1946) (citation omitted). Accordingly, "[i]f the plain language of [the easement] is clear, the intention of the parties is inferred from the words of the [easement]," *Philip Morris USA Inc.*, 359 N.C. at 773, 618 S.E.2d at 225 (quoting *Walton v. City of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996)), and the "construction of the [easement] is a matter of law for the court," *Hagler v. Hagler*, 319 N.C. 287, 294, 354 S.E.2d 228, 234 (1987).

In addressing whether Duke has authority under the easement to allow the third-party homeowners to build shoreline structures over and into the submerged property and use the waters of Lake Norman, we first look to the plain language of the easement. In looking to the plain language, we do bear in mind that the original parties created the easement in order for Duke to form a lake. Here the Flowage Easement expressly provides that the Kiser Grandparents permanently granted Duke "absolute water rights" to "treat said 280.4 acres . . . in any manner [Duke] deem[s] necessary or desirable." The language of the Flowage Easement is clear, unambiguous, and broad in scope, plainly allowing Duke to treat the submerged property however Duke deems "necessary or desirable." Significantly, the easement's text does not limit how Duke may treat the submerged property, confine Duke's exercise of discretion, set conditions that Duke must satisfy before using the submerged property in a particular manner, or prohibit Duke from allowing third-party uses of the property without the Kisers' consent.

The Kisers, on the other hand, contend that because the easement is silent with respect to the third-party homeowners, the third parties have no right to use the waters recreationally, build shoreline structures into the submerged easement property, or otherwise benefit from the easement without the Kisers' consent. The Kisers, however, overlook Duke's expansive scope of authority evidenced by the Flowage Easement's broad, unambiguous language. Such an expansive reading is consistent with the original parties' understanding that the purpose of the easement was for Duke to create and maintain a lake. Accordingly, Duke may properly exercise its expansive rights under the Flowage Easement to benefit the third-party homeowners when it is necessary or desirable to Duke. Therefore, Duke acted within the scope of its authority under the Flowage Easement by allowing the third-party homeowners to build docks, piers, and other structures into the submerged property and to use the waters of Lake Norman for recreation.

The Court of Appeals, despite initially recognizing the Flowage Easement's unambiguous language and Duke's broad authority under the easement, deferred instead to the original parties' purported intent in construing the easement. *Kiser*, 280 N.C. App. at 9–10, 867 S.E.2d at 9–10. As a result, the Court of Appeals adopted a bright-line rule from *Lovin*—that easement rights may only benefit the easement holder unless third parties are also expressly named in the easement—which contradicts the Flowage Easement's plain language. *Id.* at 10, 867 S.E.2d at 10. *Lovin*, however, is readily distinguishable from the facts here, is not binding on this Court, and establishes a principle that narrows the Flowage Easement's broad and unambiguous language.

In *Lovin*, a landowner conveyed an easement by deed to his neighbor. *Lovin*, 36 N.C. App. at 188, 243 S.E.2d at 409. The language of the easement permitted the easement holder "to install and maintain a water line" on a specific tract of land. *Id.* Because the easement's language was narrowly confined to benefit one parcel of land and the surrounding property was not described in the easement, the court held that the easement holder could not install additional water lines to benefit neighboring lands. *Id.* at 189–90, 243 S.E.2d at 409–10. Here, however, unlike the limited easement in *Lovin* confining the use of the easement to a specific tract of land for a narrow purpose, the language of the Flowage Easement is broad and does not constrain how Duke may treat the easement property. There is a vast difference between intending to create and maintain a lake versus allowing a water line to cross a property. As such, under the Flowage Easement's broad language, Duke may permit third parties to use the easement property when such use is necessary

or desirable to Duke. Therefore, because the easement in *Lovin* and the Flowage Easement here serve different purposes and contain material differences, the Court of Appeals erred by relying on *Lovin* and applying a novel principle that contradicts and narrows the Flowage Easement's clear language.

The Flowage Easement's unambiguous language granting Duke broad authority over the submerged property is consistent with the purpose of Duke's federal licensing obligations over Lake Norman and has been confirmed by the parties in practice. When Duke obtained the FERC license in 1958, it likewise needed broad authority over the land at issue in order to flood the entire parcel and comply with its requirements under the license for developing and operating Lake Norman. As such, the Kiser Grandparents conveyed to Duke "permanent" and "absolute water rights" over the Kisers' parcel, which provided Duke with substantial discretion to manage the submerged parcel. Duke therefore created a permit plan for homeowners seeking to build lake access facilities in accordance with Duke's obligation to oversee Lake Norman's shoreline, uses, and occupancies. Duke's permit plan is encompassed within Duke's broad grant of authority under the Flowage Easement's plain language and likewise supports the purposes of Duke's FERC license. Ultimately, Duke's broad grant of authority under the Flowage Easement allows Duke to comply with its FERC license requirements.

Additionally, the parties' practices over the past sixty years have consistently confirmed that Duke has authority under the Flowage Easement to allow the third-party homeowners to build shoreline structures into the submerged property. Since the Kisers began subdividing and selling the waterfront lots on Kiser Island, the third-party homeowners have complied with Duke's permit plan and have received authorization from Duke, rather than the Kisers, to build docks, piers, and other shoreline structures on their lots and into the submerged easement property. Notably, the Kiser family has also sought and received permission from Duke to build shoreline structures extending from the Kiser lot and into the submerged property because Duke has "the authority to grant permission to build" such structures. *See* Oral Argument at 29:58, *Duke Energy Carolinas, LLC v. Kiser* (No. 398PA21) (Feb. 7, 2023), https://www.youtube.com/watch?v=yh0mHp58byg (last visited Mar. 16, 2023). Thus, not only have the third-party homeowners sought permission from Duke, rather than the Kisers, to build into the submerged land, but the Kisers have also requested and received similar authorization from Duke. As such, both the named and unnamed parties to the easement have repeatedly acted in a manner consistent with Duke's having authority under the Flowage Easement to permit homeowners

to build structures from their waterfront lots over and into the submerged property.

In summary, the plain language of the easement is unambiguous and grants Duke broad authority to treat the submerged easement property in any manner Duke deems necessary or desirable. Therefore, Duke acted within the scope of its broad authority under the easement by allowing the third-party homeowners to build docks, piers, and other structures over and into the submerged land without the Kisers' consent. The easement's plain language is consistent with Duke's federal licensing obligations and has been confirmed by the parties in practice. Accordingly, the decision of the Court of Appeals is reversed.

REVERSED.

MICHAEL R. GALLOWAY, AS TRUSTEE OF THE MELISSA GALLOWAY SNELL LIVING TRUST DATED MAY 1, 2018, AND AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF MELISSA GALLOWAY SNELL

v.

JEFFREY SNELL

No. 90A22

Filed 28 April 2023

Contracts—separation settlement agreement—terms—naming of insurance policy beneficiaries—no ambiguity

In a declaratory judgment action regarding a separation settlement agreement—the terms of which defendant interpreted as requiring the proceeds from his deceased ex-wife's life insurance policy to be paid to him and not to her trust (which had been established for the benefit of their four children)—the Court of Appeals erred when it determined that the settlement agreement's terms regarding the ex-wife's ability to change the beneficiary of her life insurance policies were ambiguous. The agreement's plain language was clear and unambiguous; therefore, the trial court properly awarded summary judgment in favor of the trust.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 282 N.C. App. 239 (2022), reversing an order entered on 19 August 2020 by Judge A. Graham Shirley II in Superior Court, Wake County, and remanding to the trial court for further proceedings. Heard in the Supreme Court on 15 March 2023.

Gregory S. Connor for plaintiff-appellant.

Smith Debnam Narron Drake Saintsing & Myers, LLP, by Bettie Kelley Sousa and Alicia Jurney, for defendant-appellee.

BARRINGER, Justice.

In this matter, we review the Court of Appeals' determination that provisions in a settlement agreement are ambiguous. Having reviewed the plain language of the settlement agreement and having determined it to be unambiguous, we conclude that the Court of Appeals erred.

I. Background

Defendant Jeffrey Snell and Melissa Galloway Snell (Melissa) married in March 2000 but subsequently separated in August 2017. Thereafter, on 8 February 2018, defendant and Melissa executed a Memorandum of Mediated Settlement Agreement (Settlement Agreement). On 28 December 2018, a judgment of divorce was granted to defendant and Melissa in District Court, Wake County. A few months later, Melissa passed away. At the time of her death, the life insurance policy on Melissa's life (Policy) listed the Melissa Galloway Snell Living Trust (Trust), dated 1 May 2018, as the Policy's beneficiary. Defendant and Melissa had four children, who are the beneficiaries of the Trust.

Defendant on his own and through counsel asserted that the proceeds from Melissa's Policy should be paid to defendant. As a result, the trustee of the Trust, plaintiff Michael Galloway, sued and sought a declaratory judgment that the Settlement Agreement permitted Melissa to lawfully name the Trust as the beneficiary of her Policy binding defendant.[1] Defendant asserted a counterclaim, seeking a declaration that the Settlement Agreement required payment of the death benefits from Melissa's Policy to defendant.

Plaintiff and defendant both moved for summary judgment on the declaratory judgment claim. The trial court concluded that the Settlement Agreement was not ambiguous and there was no genuine issue of material fact precluding the granting of summary judgment on plaintiff's declaratory judgment claim. The trial court granted plaintiff's motion for summary judgment as to his declaratory judgment claim and declared as follows:

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1. Plaintiff in his capacity as the personal representative of Melissa's estate also asserted a breach of contract claim. However, as this claim is not relevant to the appeal, we do not discuss it further in this opinion.

> I. The Settlement Agreement, subject to II below, required [Melissa Galloway] Snell to maintain life insurance naming [Defendant] the beneficiary with a death benefit of at least $1 Million until she no longer had an obligation to pay for college expenses;
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> II. The Settlement Agreement permitted Melissa Galloway Snell to change the beneficiary on insurance she owned to the children's trust in lieu of having the Defendant named as beneficiary, including changing the beneficiary on the two life insurance policies in which Defendant was named as the beneficiary, with death benefits totaling $1,000,000.00, to the Melissa Galloway Snell Living Trust as beneficiary;
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> III. That the Melissa Galloway Living Trust dated May 1, 2018 is the proper sole beneficiary of all of the life insurance policies owned by Melissa Galloway Snell at her death.

The trial court denied defendant's motion for summary judgment.

Thereafter, defendant appealed the trial court's order granting plaintiff's summary judgment motion and denying defendant's summary judgment motion as to the declaratory judgment claim to the Court of Appeals. A divided panel of the Court of Appeals concluded that the relevant language of the Settlement Agreement was ambiguous. *Galloway v. Snell*, 282 N.C. App. 239, 240 (2022). Thus, it reversed the trial court's order and remanded for further proceedings. *Id.* In contrast, the dissent concluded that the relevant language of the Settlement Agreement was unambiguous. *Id.* at 251 (Hampson, J., dissenting). The dissent took the position that the trial court properly granted summary judgment in favor of plaintiff. *Id.* at 253. Plaintiff appealed to this Court based on the dissent.

II. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573 (2008) (cleaned up).

III. Analysis

Written contracts "are to be construed and enforced according to their terms." *Gould Morris Elec. Co. v. Atl. Fire Ins. Co.*, 229 N.C. 518,

520 (1948). They "must receive a reasonable interpretation, according to the intention of the parties at the time of executing them, gathered from the language employed by them." *Lane v. Scarborough*, 284 N.C. 407, 411 (1973) (cleaned up). "When the language of a contract is clear and unambiguous, effect must be given to its terms," *Weyerhaeuser Co. v. Carolina Power & Light Co.*, 257 N.C. 717, 719 (1962), and "its terms may not be contradicted by parol or extrinsic evidence," *Root v. Allstate Ins. Co.*, 272 N.C. 580, 587 (1968).

Further, a contract's meaning and effect is a question of law for the court—not the jury—when the language of the contract is clear and unambiguous. *Lowe v. Jackson*, 263 N.C. 634, 636 (1965) ("It is well settled that where the language of a contract is plain and unambiguous, it is for the court and not the jury to declare its meaning and effect."); *Lane*, 284 N.C. at 410 ("When a contract is in writing and free from any ambiguity which would require resort to extrinsic evidence, or the consideration of disputed fact, the intention of the parties is a question of law."). And "[t]he terms of an unambiguous contract are to be taken and understood in their plain, ordinary and popular sense," *Weyerhaeuser*, 257 N.C. at 719–20, and "harmoniously construed" to give "every word and every provision" effect, *Singleton v. Haywood Elec. Membership Corp.*, 357 N.C. 623, 629 (2003) (quoting *Gaston Cnty. Dyeing Mach. Co. v. Northfield Ins. Co.*, 351 N.C. 293, 299 (2000)).

"An ambiguity exists in a contract when either the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations." *Register v. White*, 358 N.C. 691, 695 (2004). "An ambiguity can exist when, even though the words themselves appear clear, the specific facts of the case create more than one reasonable interpretation of the contractual provisions." *Id.* If a written contract is ambiguous, the contract's meaning and effect is a factual question for the jury and parol evidence may be introduced "not to contradict, but to show and make certain what was the real agreement between the parties." *Root*, 272 N.C. at 590 (quoting *Hite v. Aydlett*, 192 N.C. 166, 170 (1926)).

Given this well-established law concerning contract construction, we turn to the written contract, the Settlement Agreement, and its terms. The Settlement Agreement, as pertinent, provides as follows:

> Snell Mediated Settlement Agreement
>
> Equitable Distribution
>
> . . . .

- Non-ED Assets/Children's Assets:

  . . . .

  - The children's life insurance policies shall be kept intact. [Defendant] will be responsible for 90% of the premiums and Melissa shall be responsible for 10% of the premiums until the child is gainfully employed. The beneficiary shall be the children's trust (see details about trust below)

Custody- see the consent order for custody

Support- Child and Spousal

. . . .

- As long as [defendant] has support obligation[s] or is obligated to pay for children's college as outlined below, he shall maintain a life insurance policy naming Melissa is [sic] as the beneficiary with a death benefit of $2 Million.
- Until Melissa no longer has an obligation to pay for college expenses, she shall maintain a life insurance policy naming [defendant] the beneficiary with a death benefit of at least $1 Million. [Defendant] at his election may maintain (as owner) at his sole expense [words lined through] life insurance policy on Melissa's life totaling $1,000,000 in death benefit.
- Additional term: the parties currently have a health insurance policy with a deductible of $10K. Prior to Melissa's flu and hospitalization, Melissa had paid almost $1K. [Defendant] shall pay as non-taxable support the sum of up to $9,000.00 in the form of payments directly to medical providers as the bills come due for the 2018 policy term.
- Children's trust- each party shall, within 90 days, set up a trust for the benefit of the minor children so that the children can receive any insurance proceeds in lieu of the other party

> being named the beneficiary. [Defendant's] brother shall be named as trustee of the children's trust established by [defendant], and Melissa's brother shall be named as trustee of the children's trust established by Melissa.
>
> . . . .
>
> College
>
> - Each party shall contribute .05% percent of his/her annual gross income (per two years' ago tax return) per child to the children's 529 accounts. By way of example, each party's obligation for the 2018 year shall be calculated using each party's AGI for 2016. This can be contributed annually or monthly, but in any case the full amount for each child's 529 shall be put into the proper account no later than April 15 for that year.
> - In the event that any child's 529 account does not cover the costs for the child to attend college, each party shall be responsible as follows: Melissa 10%, [defendant] 90%. Each party's total obligation shall be limited to the cost for in-state tuition, books, fees, etc. at UNC-Chapel Hill, for up to 8 semesters per child.

Before the Court of Appeals, plaintiff argued that the Settlement Agreement "unambiguously provides that once a party sets up a trust for the benefit of the children, the party could change the beneficiary of any insurance policy such that 'the children can receive any insurance proceeds in lieu of the other party being named the beneficiary.' " *Galloway*, 282 N.C. App. at 249 (majority opinion). In contrast, defendant argued that the Settlement Agreement "unambiguously required Melissa to 'maintain a life insurance policy naming [defendant] the beneficiary with a death benefit of at least $1 Million' until 'Melissa no longer had an obligation to pay for college expenses,' and the children's trust was to be the beneficiary of proceeds from other policies—including each of the children's life insurance policies." *Id.* In the alternative, defendant argued the Settlement Agreement is ambiguous. *Id.* The Court of Appeals held that the Settlement Agreement is ambiguous. *Id.* at 250. The dissent disagreed, *id.* at 251 (Hampson, J., dissenting), and plaintiff appealed based on the dissent.

Like the dissent, we disagree with the holding of the Court of Appeals as a matter of law. The Settlement Agreement is unambiguous as to the controversy before this Court. When the Settlement Agreement is read as a whole and the language of the Settlement Agreement is accorded its plain and ordinary meaning, "the intent of the parties at the moment of its execution emerges clearly." *Preyer v. Parker*, 257 N.C. 440, 445 (1962). "Until Melissa no longer has an obligation to pay for college expenses, she shall maintain a life insurance policy naming [defendant] the beneficiary with a death benefit of at least $1 Million," provided that after setting up a trust for the benefit of the minor children, such trust for "the children can receive *any* insurance proceeds in lieu of the other party being named the beneficiary." (Emphasis added).

The foregoing statements are in bullet points under the subheading "Support-Child and Spousal" and are the only statements under the subheading "Support- Child and Spousal" that address insurance policies where the other party is named the beneficiary. Further, the trust for the benefit of the minor children is for "any insurance proceeds in lieu of the other party being named the beneficiary." (Emphasis added). We must apply the plain and ordinary meaning to the terms of the Settlement Agreement, including to the word "any," *see Weyerhaeuser*, 257 N.C. at 719–20, and must construe the Settlement Agreement to give every word and every provision effect, *Singleton*, 357 N.C. at 629.

When used as a determiner, like in the Settlement Agreement, the word "any" is "used to refer to one or some of a thing or number of things, no matter how much or many" and "whichever of a specified class might be chosen." *Any*, *New Oxford American Dictionary* (3rd ed. 2010); *see also Any*, *The American Heritage Dictionary* (5th ed. 2018) (defining "any" as "[o]ne, some, every, or all without specification"). Defendant's interpretation would not give the term "any" its plain and ordinary meaning, and it would not give effect to the language "the children can receive any insurance proceeds in lieu of the other party being named the beneficiary." Rather, defendant's interpretation would require us to read into the Settlement Agreement limiting language to the word any that is not there, which is contrary to the requirement that a "contract must be construed to mean what on its face it purports to mean." *Hagler v. Hagler*, 319 N.C. 287, 294 (1987) (quoting *Hartford Accident & Indem. Co. v. Hood*, 226 N.C. 706, 710 (1946)).

We hold that the Settlement Agreement as it relates to this controversy is unambiguous because neither "the meaning of words [n]or the effect of provisions is uncertain or capable of several reasonable interpretations." *Register*, 358 N.C. at 695. Given the lack of

ambiguity, construction is a question of law for the court. We agree with the Court of Appeals' dissent that the construction as a matter of law is as the trial court construed it—"Melissa was permitted to name the [T]rust she set up for the benefit of the children as the beneficiary of the insurance policies she maintained to secure her college expense obligations." *Galloway*, 282 N.C. App. at 253 (Hampson, J., dissenting). Thus, the Court of Appeals should have affirmed the trial court's order granting summary judgment in plaintiff's favor on the declaratory judgment claim.

IV. Conclusion

Having reviewed the plain language of the Settlement Agreement, we conclude that the Court of Appeals erred by holding that the Settlement Agreement is ambiguous. Accordingly, we reverse the Court of Appeals' decision.

REVERSED.

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; AND DAMON CIRCOSTA, IN HIS OFFICIAL CAPACITY

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC.; HENRY M. MICHAUX, JR.; DANDRIELLE LEWIS; TIMOTHY CHARTIER; TALIA FERNÓS; KATHERINE NEWHALL; R. JASON PARSLEY; EDNA SCOTT; ROBERTA SCOTT; YVETTE ROBERTS; JEREANN KING JOHNSON; REVEREND REGINALD WELLS; YARBROUGH WILLIAMS, JR.; REVEREND DELORIS L. JERMAN; VIOLA RYALS FIGUEROA; AND COSMOS GEORGE

v.

REPRESENTATIVE DESTIN HALL, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE HOUSE STANDING COMMITTEE ON REDISTRICTING; SENATOR WARREN DANIEL, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS;

HARPER v. HALL

[384 N.C. 292 (2023)]

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. 413PA21-2

Filed 28 April 2023

1. Elections—legislative redistricting—standard of review—presumption of constitutionality—political question doctrine

Legislation passed by the General Assembly, which serves as the "agent of the people for enacting laws," is presumed constitutional, and the judiciary may declare an act of the General Assembly in violation of the state constitution only when the act directly conflicts with an express provision of the constitution. Therefore, when considering the constitutionality of redistricting plans drawn by the General Assembly, the judiciary must presume the plans' constitutionality and ask whether the plans violate an express provision of the constitution beyond a reasonable doubt. When the judiciary cannot locate an express textual limitation on the legislature, the issue may present a political question that is inappropriate for resolution by the judiciary. To respect the separation of powers, courts must refrain from adjudicating a claim where there is: a textually demonstrable commitment of the matter to another branch of government, a lack of judicially discoverable and manageable standards, or the impossibility of deciding the case without making a policy determination of a kind clearly suited for nonjudicial discretion.

2. Elections—legislative redistricting—claims of partisan gerrymandering—political questions—nonjusticiable

Claims of partisan gerrymandering present political questions and therefore are nonjusticiable under the state constitution. Plaintiffs' claims of partisan gerrymandering were nonjusticiable

political questions because: The state constitution explicitly and exclusively commits redistricting authority to the General Assembly subject only to express limitations, leaving only a limited role for judicial review; the state constitution provides no judicially discernible or manageable standards for determining how much partisan gerrymandering is too much; and any attempt to adjudicate claims regarding partisan gerrymandering would require the judiciary to make numerous policy determinations for which the state constitution provides no guidance. Each factor on its own would be sufficient to render the claims nonjusticiable. Accordingly, the Supreme Court overruled *Harper v. Hall* (*Harper I*), 380 N.C. 317 (2022), withdrew *Harper v. Hall* (*Harper II*), 383 N.C. 89 (2022), and dismissed plaintiffs' claims with prejudice.

3. Elections—legislative redistricting—claims of partisan gerrymandering—free elections clause—not applicable

The free elections clause in the state constitution's Declaration of Rights—"All elections shall be free." (Article I, Section 10)—does not limit or prohibit partisan gerrymandering, or even address redistricting at all. Based on its plain meaning, its historical context, and our Supreme Court's precedent, the free elections clause means that voters are free to vote according to their consciences without interference or intimidation.

4. Elections—legislative redistricting—claims of partisan gerrymandering—equal protection clause—not applicable

Plaintiffs' claims that partisan gerrymandering will diminish the electoral power of members of a particular political party did not implicate the equal protection clause in the state constitution's Declaration of Rights (Article I, Section 19). Partisan gerrymandering has no impact upon the right to vote on equal terms under the one-person, one-vote standard; therefore, partisan gerrymandering claims do not trigger review under the state's equal protection clause.

5. Elections—legislative redistricting—claims of partisan gerrymandering—free speech and freedom of assembly clauses—not applicable

The free speech and freedom of assembly clauses in the state constitution's Declaration of Rights (Article I, Sections 12 and 14) do not limit the General Assembly's presumptively constitutional authority to engage in partisan gerrymandering. Nothing in the history of the clauses or the applicable case law supported plaintiffs' expanded interpretation of them.

6. Elections—legislative redistricting—claims of partisan gerrymandering—prior opinions overruled and withdrawn—racially polarized voting analysis

In a redistricting case, the Supreme Court overruled a prior opinion issued by a four-justice majority in *Harper v. Hall* (*Harper I*), 380 N.C. 317 (2022), and withdrew the same majority's subsequent opinion in *Harper v. Hall* (*Harper II)*, 383 N.C. 89 (2022). The Court also specifically overruled the holding from *Harper I* that required the General Assembly to perform a racially polarized voting (RPV) analysis before drawing any legislative districts.

7. Elections—legislative redistricting—claims of partisan gerrymandering—petition for rehearing—previous opinions overruled and withdrawn

It was proper for the Supreme Court to allow the legislative defendants' petition for rehearing pursuant to Appellate Procedure Rule 31 to revisit the issue of whether claims of partisan gerrymandering are justiciable under the state constitution, where the four-justice majority in *Harper v. Hall* (*Harper I*), 380 N.C. 317 (2022), expedited the consideration of the matter over the strong dissent of the other three justices, with no jurisprudential reason for doing so, and where *Harper I* and the same four-justice majority's opinion in *Harper v. Hall* (*Harper II*), 383 N.C. 89 (2022), were wrongly decided. Furthermore, *Harper I* did not meet any criteria for adhering to stare decisis. Upon rehearing, *Harper I* was overruled, and *Harper II* was withdrawn.

8. Elections—legislative redistricting—claims of partisan gerrymandering—prior opinions overruled and withdrawn—remedy

Upon rehearing a redistricting case and concluding that plaintiffs' claims of partisan gerrymandering were nonjusticiable—thus overruling and withdrawing prior opinions in the matter—the Supreme Court addressed the appropriate remedy. The Court granted the legislative defendants the opportunity to enact a new set of legislative and congressional redistricting plans, guided by federal law, the objective constraints in the state constitution located in Sections 3 and 5 of Article II, and this opinion. Neither the original redistricting plans nor the remedial plans, which were created during the course of the litigation and used in the 2022 election cycle, were "established" within the meaning of Article II, Sections 3(4) and 5(4), because both plans were a product of a misapprehension of North Carolina law, and the original plans were never used in an election.

Justice EARLS dissenting.

Justice MORGAN joins in this dissenting opinion.

On direct appeal pursuant to Rule 3 of the North Carolina Rules of Appellate Procedure from the unanimous decision of a three-judge panel entered on 23 February 2022 in the Superior Court, Wake County, approving Legislative Defendants' Remedial House Plan and Remedial Senate Plan, rejecting their Remedial Congressional Plan, and adopting an Interim Congressional Plan. Heard in the Historic 1767 Chowan County Courthouse in Edenton, North Carolina on 4 October 2022, and opinion filed on 16 December 2022. Subsequently, this Court allowed Legislative Defendants' petition for rehearing pursuant to Rule 31(a) of the North Carolina Rules of Appellate Procedure. Heard in the Supreme Court on 14 March 2023.

Patterson Harkavy LLP, by Burton Craige, Narendra K. Ghosh, and Paul E. Smith; Elias Law Group LLP, by Lalitha D. Madduri, Jacob D. Shelly, and Abha Khanna; and Arnold and Porter Kaye Scholer LLP, by Elisabeth S. Theodore, R. Stanton Jones, and Samuel F. Callahan, for Harper Plaintiffs.

Robinson, Bradshaw & Hinson, P.A., by John R. Wester, Adam K. Doerr, Stephen D. Feldman, and Erik R. Zimmerman; and Jenner & Block LLP, by Sam Hirsch, pro hac vice, and Jessica Ring Amunson, pro hac vice, for Plaintiff North Carolina League of Conservation Voters.

Southern Coalition for Social Justice, by Hilary H. Klein, Mitchell Brown, Katelin Kaiser, Jeffrey Loperfido, and Noor Taj; and Hogan Lovells US LLP, by J. Tom Boer, pro hac vice, and Olivia T. Molodanof, pro hac vice, for Plaintiff Common Cause.

Nelson Mullins Riley & Scarborough LLP, by Phillip J. Strach, Thomas A. Farr, John E. Branch, III, D. Martin Warf, Nathaniel J. Pencook, and Alyssa M. Riggins; and Baker Hostetler LLP, by Mark E. Braden, pro hac vice, Katherine McKnight, pro hac vice, and Richard Raile, pro hac vice, for Legislative Defendants.

North Carolina Department of Justice, by Amar Majmundar, Senior Deputy Attorney General, Terence Steed, Special Deputy

Attorney General, *Mary Carla Babb*, *Special Deputy Attorney General*, *and Stephanie Brennan*, *Special Deputy Attorney General*, *for State Defendants.*

NEWBY, Chief Justice.

"A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. Const. art. I, § 35. Since our founding in 1776 almost 250 years ago, this provision in our state constitution has reminded us of the critical importance of remembering fundamental principles. This case now invites us to return to those principles.

The constitution is our foundational social contract and an agreement among the people regarding fundamental principles. It is for everyone, not just lawyers and judges. The state constitution is different from the Federal Constitution: the Federal Constitution is a limited grant of power while the state constitution is a limitation on power. The state constitution declares that all political power resides in the people. N.C. Const. art. I, § 2. The people exercise that power through the legislative branch, which is closest to the people and most accountable through the most frequent elections. *See id.* art. I, § 9. In the constitutional text, the people have assigned specific tasks to, and expressly limited the powers of, each branch of government. The state constitution is detailed and specific. The people speak through the express language of their constitution, and only the people can amend it. *See id.* art. XIII.

The constitution is interpreted based on its plain language. The people used that plain language to express their intended meaning of the text when they adopted it. The historical context of our constitution confirms this plain meaning. As the courts apply the constitutional text, judicial interpretations of that text should consistently reflect what the people agreed the text meant when they adopted it. There are no hidden meanings or opaque understandings—the kind that can only be found by the most astute justice or academic. The constitution was written to be understood by everyone, not just a select few.

The state constitution establishes three branches of government: legislative, executive, and judicial. It assigns specific roles to each branch. Since its inception, the constitution has provided for separation of powers: in other words, each branch is directed to perform its assigned duties and avoid encroaching on the duties of another branch. Separation of powers protects individual freedoms. The will of

the people is achieved when each branch of government performs its assigned duties. When, however, one branch grasps a task of another, that action violates separation of powers.

The judicial branch is designed to resolve legal disputes and to ensure that the other branches do not violate the constitution. Our power of judicial review, however, is not unlimited. Since the first articulation of the doctrine of judicial review in *Bayard v. Singleton*, 1 N.C. (Mart.) 5 (1787), courts have refused to exercise that power if the constitution assigns the matter to another branch, or the constitution does not provide a judicially discoverable or manageable standard, or resolution of the matter involves policy choices. Such matters are deemed political questions and are nonjusticiable. The Supreme Court of the United States recognized these limitations in its seminal case, *Marbury v. Madison*, in which it first adopted the concept of judicial review:

> It is scarcely necessary for the court to disclaim all pretensions to [intermeddle with the prerogatives of another branch]. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to enquire how [other branches] perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to [another branch], can never be made in this court.

5 U.S. (1 Cranch) 137, 170 (1803).

Historically, North Carolina courts have respected their significant but restrained role of judicial review by adhering to a standard of review that sets the most demanding requirements for reviewing legislative action: courts presume that an act of the General Assembly is constitutional, and any challenge alleging that an act of the General Assembly is unconstitutional must identify an express provision of the constitution and demonstrate that the General Assembly violated the provision beyond a reasonable doubt.

Giving a fixed meaning to the constitution and using a deferential standard to review legislation ensures that courts will perform their assigned role, stay within their lane of authority, and refrain from becoming policymakers. Courts are not designed to be thrust into the midst of various political disputes. Such engagement in policy issues forces courts to take sides in political battles and undermines public trust and confidence in the judiciary. Choosing political winners and

losers creates a perception that courts are another political branch. The people did not intend their courts to serve as the public square for policy debates and political decisions. Instead, the people act and decide policy matters through their representatives in the General Assembly. We are designed to be a government of the people, not of the judges. At its heart, this case is about recognizing the proper limits of judicial power.

This matter is before this Court on rehearing. The North Carolina Rules of Appellate Procedure authorize rehearing a case when "the court has overlooked or misapprehended" a point "of fact or law." N.C. R. App. P. 31(a). In their petition for rehearing, Legislative Defendants ask the Court to revisit the crucial issue in this case: whether claims of partisan gerrymandering are justiciable under the state constitution. They assert that such claims are not justiciable. Legislative Defendants maintain that "[t]he *Harper* experiment" has failed: "*Harper II* failed . . . because *Harper I* set this Court up to fail." In support of this argument, Legislative Defendants argue that *Harper I* "fell short in concrete guidance" and "declined to disclose what standard applies." They assert that "*Harper II* reaffirms the non-justiciable and unprecedented standard set forth in *Harper I*" and, therefore, "a necessary consequence of correcting the errors in *Harper II* is to overrule *Harper I*." Legislative Defendants argue that their rehearing petition "gives this Court a much[-] needed opportunity to address the root of the problem: *Harper I* was based on profoundly flawed legal principles." Accordingly, they ask this Court to withdraw its *Harper II* opinion and overrule *Harper I*.

In this case plaintiffs claim that the General Assembly violated the state constitution by drawing legislative districts that unfairly benefited one political party at the expense of another, in other words, partisan gerrymandering.[1] Partisan gerrymandering is the practice of dividing a geographical or jurisdictional area into political units or election districts to give a particular political party or group "a special advantage." *See Gerrymandering*, Black's Law Dictionary (11th ed. 2019).

In the first opinion in this matter, four justices held that partisan gerrymandering presents a justiciable claim, *Harper v. Hall* (*Harper I*), 380 N.C. 317, 390, 868 S.E.2d 499, 551 (2022), and violates several provisions of the Declaration of Rights of our constitution, *id*. at 383, 868

1. In their complaints, plaintiffs allege that "partisan gerrymandering" violates the state constitution. Sometimes they modify this phrase with words like "extreme" or "severe." In *Rucho v. Common Cause*, the Supreme Court of the United States referred to this concept as "excessive partisan gerrymandering." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). In this opinion we will generally use the term "partisan gerrymandering" to refer to these claims.

S.E.2d at 546. The four justices then discussed certain political science tests that they claimed were judicially discoverable and manageable. *Id.* at 384–85, 868 S.E.2d at 547–48. They maintained that these political science tests could reliably identify unconstitutional partisan gerrymandering, *id.*, but they did not define how much partisan gerrymandering is too much, *id.* at 384, 868 S.E.2d at 547. In the most recent opinion in this matter, the same four members of this Court said that the General Assembly, three former jurists serving as Special Masters, the three-judge panel, and three members of this Court—in total, nine current and former jurists—all wrongly applied the approach set out in *Harper I*. *See Harper v. Hall* (*Harper II*), 383 N.C. 89, 94, 881 S.E.2d 156, 162 (2022). Thus, we must now reconsider whether a standard that only four justices know and understand, that is riddled with policy choices, and that is not mentioned in our constitution is truly judicially discoverable and manageable. That inquiry requires us to revisit the fundamental premises underlying the decisions in both *Harper II* and *Harper I*.

The issue presented in this case is whether the North Carolina Constitution prohibits partisan gerrymandering. Specifically, plaintiffs allege that legislative and congressional redistricting plans drawn by the General Assembly in 2021 and then again in 2022 on remand are partisan gerrymanders in violation of specific provisions of the constitution.

Our constitution expressly assigns the redistricting authority to the General Assembly subject to explicit limitations in the text. Those limitations do not address partisan gerrymandering. It is not within the authority of this Court to amend the constitution to create such limitations on a responsibility that is textually assigned to another branch. Furthermore, were this Court to create such a limitation, there is no judicially discoverable or manageable standard for adjudicating such claims. The constitution does not require or permit a standard known only to four justices. Finally, creating partisan redistricting standards is rife with policy decisions. Policy decisions belong to the legislative branch, not the judiciary.

Recently, the Supreme Court of the United States reviewed similar claims under the Federal Constitution and determined that "excessive" partisan gerrymandering claims involve nonjusticiable, political questions. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2491, 2507 (2019). We find the Supreme Court's analysis in *Rucho* insightful and persuasive.

For all these reasons, we hold that partisan gerrymandering claims present a political question that is nonjusticiable under the North Carolina Constitution. Accordingly, the decision of this Court in

Harper I is overruled. We affirm the three-judge panel's 11 January 2022 Judgment concluding, *inter alia*, that partisan gerrymandering claims are nonjusticiable, political questions and dismissing all of plaintiffs' claims with prejudice. This Court's opinion in *Harper II* is withdrawn and superseded by this opinion. The three-judge panel's 23 February 2022 order is vacated. Plaintiffs' claims are dismissed with prejudice.

I. Procedural History

A. Initial Litigation

As required by both our state constitution and the Federal Constitution, the General Assembly, following the 2020 census, enacted redistricting plans for the North Carolina Senate and House of Representatives and for the United States House of Representatives (2021 Plans).[2] The General Assembly enacted the 2021 Plans on 4 November 2021. The North Carolina League of Conservation Voters and a group of individual North Carolina voters (NCLCV plaintiffs), along with another group of individual North Carolina voters (Harper plaintiffs) each filed suit against the President Pro Tempore of the North Carolina Senate, the Speaker of the North Carolina House, and the Chairs of the House Standing Committee on Redistricting and the Senate Standing Committee on Redistricting and Elections (Legislative

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2. Before drawing any maps, the General Assembly's Senate Committee on Redistricting and Elections convened a Joint Meeting of the Senate Redistricting and Elections Committee and the House Redistricting Committee on 5 August 2021 to discuss the criteria that would govern the redistricting process. Following this initial meeting, a General Assembly staff member distributed to the joint committee members a list of the legislative redistricting criteria that had been previously mandated by a three-judge panel in *Common Cause v. Lewis*—a case decided just a few years earlier in 2019. *See Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584 (N.C. Super. Ct. Wake County Sept. 3, 2019).

One week after its first meeting, the Joint Redistricting Committee adopted final redistricting criteria that would govern its 2021 map drawing process (Adopted Criteria). In many respects, the Adopted Criteria were nearly identical to the criteria ordered by the court in *Common Cause v. Lewis* in 2019. Notably, just like the *Lewis* criteria, the Adopted Criteria mandated that no "[p]artisan considerations [or] election results data" would be used in drawing the 2021 Plans. It appears that the Joint Redistricting Committee incorporated the criteria from *Common Cause v. Lewis* into its Adopted Criteria for the 2021 redistricting process because it believed that compliance with the *Common Cause v. Lewis* criteria was necessary to create constitutionally compliant redistricting plans. *See* Legislative Defendants-Appellees' Brief at 20–21, *Harper v. Hall*, 380 N.C. 317 (2022) (No. 413PA21-1) ("To avoid violations identified in the 2010 [redistricting] cycle," including those identified in the *Lewis* order, the General Assembly included a prohibition on the consideration of partisan election data in its Adopted Criteria.).

Defendants).[3] NCLCV plaintiffs and Harper plaintiffs challenged the legality of these plans, arguing they were unconstitutional partisan gerrymanders. Additionally, NCLCV plaintiffs alleged that the 2021 Plans "engag[ed] in racial vote dilution" in violation of the free elections clause and the equal protection clause of the North Carolina Constitution and that the 2021 Plans violated the Whole County Provisions (WCP) of the North Carolina Constitution. *See* N.C. Const. art. I, §§ 10, 19, 14, 12; *id.* art. II, §§ 3(3), 5(3). Both groups of plaintiffs also sought a preliminary injunction to enjoin use of the 2021 Plans.

The NCLCV and Harper actions were assigned to a three-judge panel of the Superior Court in Wake County and then consolidated. On 3 December 2021, the three-judge panel denied both NCLCV plaintiffs' and Harper plaintiffs' motions for preliminary injunction. Both sets of plaintiffs filed a notice of appeal with the North Carolina Court of Appeals.

The Court of Appeals denied NCLCV plaintiffs' and Harper plaintiffs' requests for a temporary stay on 6 December 2021. NCLCV plaintiffs and Harper plaintiffs then filed several documents with this Court, including two petitions for discretionary review prior to determination by the Court of Appeals, a motion to suspend appellate rules to expedite a decision, and a motion to suspend appellate rules and expedite briefing and argument. On 8 December 2021, this Court allowed both petitions for discretionary review, granted a preliminary injunction, and temporarily stayed the candidate filing period for the 2022 election cycle until "a final judgment on the merits . . . including any appeals, is entered and a remedy, if any is required, has been ordered." In the same order, this Court expedited the matter, directing the three-judge panel to hold proceedings on the merits of plaintiffs' claims "and to provide a written ruling" on or before 11 January 2022.

Subsequently, Common Cause moved to intervene as a plaintiff in the consolidated proceedings, and the three-judge panel granted the motion on 15 December 2021. Like the NCLCV and Harper plaintiffs, Common Cause filed a complaint alleging that the 2021 Plans were unconstitutional partisan gerrymanders in violation of the free elections clause, the equal protection clause, and the free speech and freedom of assembly clauses of the North Carolina Constitution. Common Cause also

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3. NCLCV plaintiffs and Harper plaintiffs also collectively named the State of North Carolina, the North Carolina State Board of Elections, and the Chairman, Secretary, and Members of the State Board of Elections. These defendants took "no position on the merits" of this case. State Defendants' Brief at 2, *Harper v. Hall*, 380 N.C. 317 (2022) (No. 413PA21-1).

alleged that the 2021 Plans violated North Carolina's equal protection clause by "purposefully discriminat[ing] against" African American voters through "intentional destruction of functioning crossover districts." Finally, Common Cause brought a declaratory judgment claim asking the three-judge panel to declare that the North Carolina Constitution requires the General Assembly to undertake a racially polarized voting (RPV) analysis prior to drawing any legislative districts. Hereinafter, NCLCV plaintiffs, Harper plaintiffs, and Common Cause are collectively referred to as "plaintiffs."

Legislative Defendants filed their answers on 17 December 2021, and the parties then engaged in an "expedited" two-and-one-half-week discovery period culminating in rulings on over ten discovery-related motions, designation of ten expert witnesses, and submission of over 1000 pages of expert reports and rebuttal materials. After the discovery period closed on 31 December 2021, the three-judge panel commenced a three-and-one-half-day trial on 3 January 2022 during which it received approximately 1000 exhibits into evidence and testimony from numerous fact and expert witnesses.

On 11 January 2022, the three-judge panel entered a judgment (11 January 2022 Judgment) concluding that plaintiffs' partisan gerrymandering claims presented nonjusticiable, political questions because redistricting "is one of the purest political questions which the legislature alone is allowed to answer." The three-judge panel reached this conclusion because "satisfactory and manageable criteria or standards do not exist for judicial determination" of partisan gerrymandering claims. Specifically, the three-judge panel noted that this Court already addressed the justiciability of similar claims based on North Carolina's Declaration of Rights in *Dickson v. Rucho* and concluded there was no manageable standard to assess such claims:

> Finally, plaintiffs argue that the enacted plans violate the "Good of the Whole" clause found in Article I, Section 2 of the Constitution of North Carolina. We do not doubt that plaintiffs' proffered maps represent their good faith understanding of a plan that they believe best for our State as a whole. However, the maps enacted by the duly elected General Assembly also represent an equally legitimate understanding of legislative districts that will function for the good of the whole. *Because plaintiffs' argument is not based upon a justiciable standard*, and because acts of the General Assembly enjoy "a strong presumption

> of constitutionality," *Pope v. Easley*, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001) (per curiam) (citation omitted), plaintiffs' claims fail.

(Quoting *Dickson v. Rucho* (*Dickson I*), 367 N.C. 542, 575, 766 S.E.2d 238, 260 (2014), *vacated on federal grounds*, 137 S. Ct. 2186 (2017) (mem.) (emphasis added).) As a result, the three-judge panel concluded that "[w]ere we as a [c]ourt to insert ourselves in the manner requested, we would be usurping the political power and prerogatives of an equal branch of government. Once we embark on that slippery slope, there would be no corner of legislative or executive power that we could not reach."

Additionally, the three-judge panel concluded that the 2021 Plans did not violate the North Carolina Declaration of Rights because "[t]he objective constitutional constraints that the people of North Carolina have imposed on legislative redistricting are found in Article II, Sections 3 and 5 of the 1971 Constitution and not in the Free Elections, Equal Protection, Freedom of Speech or Freedom of Assembly Clauses found in Article I of the 1971 Constitution." Finally, the three-judge panel considered NCLCV plaintiffs' and Common Cause's additional claims of racial vote dilution, racial discrimination, violation of the WCP, and request for a declaratory judgment. Specifically, the three-judge panel concluded that NCLCV plaintiffs and Common Cause "failed to satisfy" their burdens for both the racial vote dilution and racial discrimination claims under the equal protection clause and that the free elections clause is "inapplicable" to vote dilution claims. The three judge-panel then concluded that the evidence did not support NCLCV's WCP claim and that the North Carolina Constitution does not, as Common Cause alleged, require the General Assembly to undertake an RPV analysis prior to drawing legislative districts. Accordingly, the three-judge panel dismissed plaintiffs' claims with prejudice.

Pursuant to this Court's 8 December 2021 order certifying the case for review prior to determination by the Court of Appeals, all plaintiffs filed notices of appeal to this Court from the three-judge panel's 11 January 2022 Judgment. The case was argued before this Court on 2 February 2022. On 4 February 2022, in a four-to-three decision, this Court entered an order (Remedial Order) adopting the findings of fact from the 11 January 2022 Judgment but concluding that the 2021 Plans were "unconstitutional beyond a reasonable doubt under the free elections clause, the equal protection clause, the free speech clause, and the freedom of assembly clause of the North Carolina Constitution." The Remedial Order specifically enjoined the use of the 2021 Plans "in

any future elections." The Remedial Order also required that, in drawing new redistricting plans, the General Assembly must first conduct an RPV analysis. The Remedial Order remanded the matter to the three-judge panel for remedial proceedings and noted that a full opinion would follow. Three justices dissented to the Remedial Order.

B. *Harper I*

Ten days later, the four-justice majority issued its full opinion. *See Harper I*, 380 N.C. at 317, 404, 868 S.E.2d at 499, 558–60. The *Harper I* opinion first held that "partisan gerrymandering claims are justiciable in North Carolina courts under the . . . [North Carolina] Declaration of Rights" because the right to aggregate votes based on partisan affiliation is a fundamental right and there are "several manageable standards for evaluating the extent to which districting plans dilute votes on the basis of partisan affiliation." *Id.* at 390, 868 S.E.2d at 551. Specifically, the majority determined that various political science metrics could serve as a sufficient standard. *See id.* at 384–85, 868 S.E.2d at 547–48. It indicated that two tests in particular—the Mean-Median Difference and the Efficiency Gap—could demonstrate whether a redistricting map "is presumptively constitutional."[4] *See id.* at 386, 868 S.E.2d at 548. According to the *Harper I* majority, a 1% or less Mean-Median Difference score and a 7% or less Efficiency Gap score could serve as thresholds of constitutionality. *See id.*

Nevertheless, the *Harper I* majority refused to delineate a precise standard. *Id.* at 384, 868 S.E.2d at 547 ("We do not believe it prudent or necessary to, at this time, identify an exhaustive set of metrics or precise mathematical thresholds which conclusively demonstrate or disprove the existence of an unconstitutional partisan gerrymander."). Instead, the majority insisted that the three-judge panel—and future trial courts adjudicating redistricting cases—would "work out more concrete and specific standards for evaluating state legislative apportionment schemes in the context of actual litigation." *Id.* at 384, 868 S.E.2d at 547 (quoting *Reynolds v. Sims*, 377 U.S. 533, 578, 84 S. Ct. 1362, 1390 (1964)).

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4. The Mean-Median Difference and Efficiency Gap tests are statistical metrics that purport to forecast partisan success under a particular redistricting plan in hypothetical, future elections. *See id.* at 385–87, 868 S.E.2d at 548–49. The Mean-Median Difference compares a party's mean vote share with its median vote share in each district and assumes that if the mean and median are equal, then the map contains no partisan skew. *See id.* at 386, 868 S.E.2d at 548. As explained in the filings before the three-judge panel, the Efficiency Gap purports to compare each political parties' "wasted votes." According to *Harper I*, a 7% Efficiency Gap score serves as a "workable . . . threshold" of constitutionality. *Id.*

The *Harper I* majority held that "[p]artisan gerrymandering of legislative and congressional districts violates the free elections clause, the equal protection clause, the free speech clause, and the freedom of assembly clause" of the North Carolina Constitution. *Id.* at 383, 868 S.E.2d at 546. Specifically, the majority reasoned that these provisions reflect "the principle of political equality," *id.* at 382, 868 S.E.2d at 546, which in turn requires that "the channeling of 'political power' from the people to their representatives in government through the democratic processes . . . must be done on equal terms," *id.* at 382, 868 S.E.2d at 546. Accordingly, the majority concluded that to comport with these provisions in the Declaration of Rights, "the General Assembly must not diminish or dilute on the basis of partisan affiliation any individual's vote" because "[t]he fundamental right to vote includes the right to enjoy 'substantially equal voting power and substantially equal legislative representation.' " *Id.* at 383, 868 S.E.2d at 546 (quoting *Stephenson v. Bartlett* (*Stephenson I*), 355 N.C. 354, 382, 562 S.E.2d 377, 396 (2002)). In turn, the majority concluded that "[t]he right to equal voting power encompasses the opportunity to aggregate one's vote with likeminded citizens to elect a governing majority of elected officials who reflect those citizens' views." *Id.* Thus, ironically, the *Harper I* majority held that the constitution requires consideration of partisanship to remedy the perceived use of partisanship.

The majority determined that because "[t]he right to vote on equal terms is a fundamental right in this state," strict scrutiny must apply once a party demonstrates that a redistricting plan "infringes upon his or her fundamental right to substantially equal voting power" based on partisan affiliation. *Id.* at 392–93, 868 S.E.2d at 553. The majority held that to trigger strict scrutiny a party must demonstrate that a redistricting plan "makes it systematically more difficult for a voter to aggregate his or her vote with other likeminded voters." *Id.* at 392, 868 S.E.2d at 552. A party may make this demonstration using a variety of political science-based tests such as

> median-mean difference analysis; efficiency gap analysis; close-votes-close seats analysis[;] partisan symmetry analysis; comparing the number of representatives that a group of voters of one partisan affiliation can plausibly elect with the number of representatives that a group of voters of the same size of another partisan affiliation can plausibly elect; and comparing the relative chances of groups of voters of equal size who support each party of electing a

> supermajority or majority of representatives under various possible electoral conditions. Evidence that traditional neutral redistricting criteria were subordinated to considerations of partisan advantage may be particularly salient in demonstrating an infringement of this right.

Id. at 392, 868 S.E.2d at 552–53. Once a party makes this initial demonstration, the challenged redistricting plan is "unconstitutional [unless] the State [can] establish that it is narrowly tailored to advance a compelling governmental interest." *Id.* at 393, 868 S.E.2d at 553 (quoting *Stephenson I*, 355 N.C. at 377, 562 S.E.2d at 393). The majority opined that "compliance with traditional neutral districting principles, including those enumerated in [the WCP] of the North Carolina Constitution," might "constitute a compelling governmental interest" that would overcome strict scrutiny, but "[p]artisan advantage" does not. *Id.* at 393, 868 S.E.2d at 553.

The majority then applied these ideas to the three-judge panel's factual findings and determined that the evidence at trial demonstrated that all of the 2021 Plans were partisan gerrymanders. *Id.* at 391–92, 868 S.E.2d at 552. The majority then applied strict scrutiny to each map and concluded that the 2021 Plans were not "carefully calibrated toward advancing some compelling neutral priority." *Id.* at 396, 398, 401, 868 S.E.2d at 555, 556, 558.

The three dissenting justices concluded that plaintiffs' claims were non-justiciable. *See id.* at 413–34, 868 S.E.2d at 566–78 (Newby, C.J., dissenting). The dissent noted that our state constitution expressly assigns the redistricting responsibility to the General Assembly and that the majority failed to identify a judicially discernable, manageable standard by which to adjudicate the partisan gerrymandering claims at issue. *Id.* at 424, 868 S.E.2d at 572.

C. Remedial Process

1. Three-Judge Panel's Initial Orders

On remand, this Court's 4 February 2022 Remedial Order required the General Assembly to submit new congressional and state legislative redistricting plans "that satisfy all provisions of the North Carolina Constitution" by 18 February 2022. The Remedial Order also permitted plaintiffs to submit proposed remedial districting plans by the same deadline and allowed all parties to file comments on any of the submitted plans by 21 February 2022. The Remedial Order mandated that the

three-judge panel "approve or adopt compliant congressional and state legislative districting plans no later than noon on 23 February 2022."

In an 8 February 2022 order, the three-judge panel informed the parties of its intent to appoint Special Masters to assist in reviewing the parties' proposed remedial plans and, if needed, in developing alternative remedial plans. Pursuant to the three-judge panel's order, each party submitted suggested individuals to serve as Special Masters, but the three-judge panel appointed three other individuals of its own choosing—former jurists Robert F. Orr, Robert H. Edmunds, Jr., and Thomas W. Ross.

The three-judge panel authorized the Special Masters to hire advisors "reasonably necessary to facilitate their work." The Special Masters hired four advisors to assist in evaluating the General Assembly's new remedial redistricting plans: Dr. Bernard Grofman, Dr. Tyler Jarvis, Dr. Eric McGhee, and Dr. Samuel Wang.

2. The General Assembly's Remedial Process

The General Assembly understood *Harper I* as requiring it "to intentionally create more Democratic districts in the [Remedial Plans]." To accomplish this task, the General Assembly started with a blank slate and followed the same process to create each map. Each redistricting committee kept the county groupings used for the 2021 Plans as base maps. Accordingly, any single district county groupings from each of the 2021 Plans were carried over to the Remedial Plans, but otherwise, each map was entirely new.

Next, each redistricting committee "dr[e]w new districts and ma[d]e adjustments tailored to legitimate criteria." To do so, the General Assembly chose to utilize Caliper's Maptitude redistricting software, a "widely accepted districting program." Although expressly prohibited by its previous redistricting criteria and the court-ordered criteria from *Common Cause v. Lewis*, the General Assembly "used partisan election data as directed by the Supreme Court's Remedial Order" to achieve its goal of "intentionally creat[ing] more Democratic districts." Specifically, the General Assembly chose to utilize partisan data from the set of twelve statewide elections that plaintiffs' expert, Dr. Mattingly, used to analyze the 2021 Plans (Mattingly Election Set).

After Maptitude produced an initial set of House, Senate, and congressional maps, the General Assembly analyzed the partisan fairness of each map using two political science metrics—the Mean-Median Difference and the Efficiency Gap. The General Assembly chose these

two metrics because "they have been peer-reviewed in numerous articles by numerous scholars, and because there is some (but not uniform) agreement among scholars regarding thresholds for measuring partisanship." Additionally, the General Assembly selected these metrics because the *Harper I* majority identified them as two of the "multiple reliable ways of demonstrating the existence of an unconstitutional partisan gerrymander." *Harper I*, 380 N.C. at 384, 868 S.E.2d at 547 (majority opinion). For each of these metrics, the General Assembly selected threshold scores that, if achieved, would indicate that the relevant map contained an acceptable level of partisan fairness under *Harper I*. Specifically, the General Assembly selected a 1% threshold score for the Mean-Median Difference metric and a 7% threshold score for the Efficiency Gap metric.

The General Assembly selected these threshold scores based on general agreement among political scientists that a redistricting plan with a Mean-Median Difference less than 1% and an Efficiency Gap less than 7% is "presumptively constitutional." Additionally, the General Assembly selected these threshold scores because the *Harper I* majority opined that they were "possible bright-line standards" that could indicate a presumptively constitutional level of partisanship:

> [U]sing the actual mean-median difference measure, from 1972 to 2016 the average mean-median difference in North Carolina's congressional redistricting plans was 1%. *Common Cause* [*v. Rucho*], 318 F. Supp. 3d [777,] 893 [(M.D.N.C. 2018)]. That measure instead could be a threshold standard such that any plan with a mean-median difference of 1% or less when analyzed using a representative sample of past elections is presumptively constitutional.
>
> With regard to the efficiency gap measure, courts have found "that an efficiency gap above 7% in any districting plan's first election year will continue to favor that party for the life of the plan." *Whitford v. Gill*, 218 F. Supp. 3d 837, 905 (W.D. Wis. 2016), *rev'd on other grounds*, 138 S. Ct. 1916 (2018). It is entirely workable to consider the seven percent efficiency gap threshold as a presumption of constitutionality, such that absent other evidence, any plan falling within that limit is presumptively constitutional.

Id. at 385, 386, 868 S.E.2d at 548.

After selecting its political science metrics and corresponding threshold scores, the General Assembly then adjusted each of the Remedial Plans until their Mean-Median Difference and Efficiency Gap scores were at or below the selected thresholds. Along with prioritizing the creation of more "purportedly Democratic leaning districts" and ensuring the Remedial Plans scored well on the selected metrics, the General Assembly also focused on the "neutral and traditional redistricting criteria" used in creating the 2021 Plans unless those criteria conflicted with *Harper I*.

After drawing their respective plans, each chamber presented its plan to the relevant redistricting committee. The General Assembly enacted the Remedial Plans on 17 February 2022 and submitted them to the three-judge panel on 18 February 2022. Plaintiffs then offered comments and objections to the Remedial Plans. The Special Masters transmitted a report on the Remedial Plans that was based primarily on four reports written by the advisors. Notably, in crafting their reports, none of the advisors used the General Assembly's chosen redistricting program, Maptitude, nor did they use the General Assembly's chosen Mattingly Election Set. Instead, each advisor used his own preferred data and methods.

The Special Masters' Report found that the Remedial House Plan (RHP) and Remedial Senate Plan (RSP) met the requirements of *Harper I*, but that the Remedial Congressional Plan (RCP) did not. Because the Special Masters concluded that the RCP was unconstitutional, they developed and submitted an alternative plan (Interim Congressional Plan) in consultation with one of the advisors, Dr. Bernard Grofman, for the three-judge panel to consider.

In reviewing the Remedial Plans, the three-judge panel "adopt[ed] in full the findings of the Special Masters." Like the Special Masters, the three-judge panel concluded that the RHP and RSP complied with the requirements of *Harper I* but that the RCP was "not presumptively constitutional," was "subject to strict scrutiny," and was not "narrowly tailored to a compelling governmental interest." Accordingly, the three-judge panel concluded that the RCP was unconstitutional. To support its conclusion, the three-judge panel relied primarily on "the analysis performed by the Special Masters and their advisors" and its conclusion that the RHP and RSP scored below the relevant thresholds for the Mean-Median Difference and Efficiency Gap metrics, but the RCP did not. The three-judge panel did not point to any other evidence regarding the purported level of partisan bias in the Remedial Plans. Finally, because the three-judge panel rejected the General Assembly's

RCP, it adopted the Interim Congressional Plan recommended by the Special Masters.

Following the three-judge panel's remedial order, all parties appealed to this Court. The parties petitioned this Court to stay the three-judge panel's remedial ruling, but this Court denied those petitions. Accordingly, the RSP, RHP, and Interim Congressional Plan were used in the 2022 elections.

D. *Harper II*

In June 2022, Common Cause filed a motion for expedited hearing and consideration of the three-judge panel's remedial order. On 13 July 2022, Legislative Defendants moved to dismiss their appeal of the three-judge panel's rejection of the RCP because the Interim Congressional Plan "ordered by [the three-judge panel] is only applicable to the 2022 election, and that map will apply to the 2022 election regardless of" this Court's holding on the three-judge panel's remedial order. Legislative Defs.' Mot. to Dismiss Appeal 3, *Harper v. Hall*, 380 N.C. 317 (2022) (No. 413PA21-1). Accordingly, Legislative Defendants sought to dismiss their appeal "in an effort to avoid further cost and confusion to the taxpayers and voters of North Carolina." *Id.*

In July 2022, the same four-justice majority from *Harper I* granted Common Cause's motion for expedited hearing and consideration and set oral argument for October 2022. *Harper v. Hall*, 382 N.C. 314, 315–16, 874 S.E.2d 902, 904 (2022) (order allowing motion to expedite hearing and consideration). Notably, in the same order, the Court expressly declined to address Legislative Defendants' motion to dismiss their appeal. *Id.* at 316, 874 S.E.2d at 904. The three dissenting justices from *Harper I* dissented from this order. *Id.* at 317–24, 874 S.E.2d at 904–09 (Barringer, J., dissenting) (noting that no jurisprudential reason existed to expedite consideration of the appeal).

Ultimately, the same four-justice majority from *Harper I* affirmed the three-judge panel's rejection of the RCP and its approval of the RHP and reversed the three-judge panel's approval of the RSP.[5] *Harper II*, 383 N.C. at 94, 881 S.E.2d at 162. First, the majority attempted "to clarify and reaffirm" its "constitutional standard" from *Harper I*. *Id.* at 114, 881 S.E.2d at 174. In *Harper I* the majority stated that "some combination" of political science metrics could demonstrate that "there is a significant

5. The four-justice majority issued its *Harper II* opinion on 16 December 2022 when it knew that two members of its majority would complete their terms on this Court just fifteen days later.

likelihood" that a redistricting plan "is presumptively constitutional." 380 N.C. at 384–85, 868 S.E.2d at 547–48. Specifically, the majority opined that a 1% Mean-Median Difference and a 7% Efficiency Gap could serve as "possible bright-line standards" for identifying a plan that "will give the voters of all political parties substantially equal opportunity to translate votes into seats." *Id.* at 385, 868 S.E.2d at 548.

In *Harper II*, however, the same majority reversed course and declared that no combination of political science tests or analysis could adequately identify a redistricting plan that meets their standard:

> Constitutional compliance is not grounded in narrow statistical measures, but in broad fundamental rights. Therefore, a trial court reviewing the constitutionality of a challenged proposed districting plan must assess whether that plan upholds the fundamental right of the people to vote on equal terms and to substantially equal voting power. This fundamental right "encompasses the opportunity to aggregate one's vote with likeminded citizens to elect a governing majority of elected officials who reflect those citizens' views." Put differently, it requires that "voters of all political parties [have] substantially equal opportunity to translate votes into seats.". . .
>
> Although *Harper* [*I*] mentions several potential datapoints that may be used in assessing the constitutionality of a proposed districting plan, those measures are not substitutes for the ultimate constitutional standard noted above. That is, a trial court may not simply find that a districting plan meets certain factual, statistical measures and therefore dispositively, legally conclude *based on those measures alone* that the plan is constitutionally compliant. Constitutional compliance has no magic number. Rather, the trial court may consider certain datapoints within its wider consideration of the ultimate legal conclusion: whether the plan upholds the fundamental right of the people to vote on equal terms and to substantially equal voting power.

Harper II, 383 N.C. at 114, 881 S.E.2d at 174 (first alteration in original) (citations omitted). The majority insisted that it could not delineate a particular set of metrics that would identify a constitutional redistricting

map "because our constitution speaks in broad foundational principles, not narrow statistical calculations." *Id.* at 115, 881 S.E.2d at 174.

As a result, the majority implied that the three-judge panel relied too heavily on its findings regarding the Mean-Median Difference and Efficiency Gap in reaching its ultimate legal conclusions and then "encourage[d] future trial courts . . . to specify how the evidence does or does not support the plan's alignment with the broader constitutional standard of upholding the fundamental right to vote on equal terms." *Id.* at 116, 881 S.E.2d at 175. The majority, however, provided no guidance regarding what sorts of concrete evidence might assist future trial courts in this endeavor, nor did the majority explain how to recognize and weigh it.

The *Harper II* majority then reviewed the three-judge panel's findings of fact and conclusions of law for each of the Remedial Plans. First, the majority affirmed the three-judge panel's rejection of the RCP and adoption of the Interim Congressional Plan, holding that the three-judge panel's conclusions of law were supported by the relevant findings of fact, which were in turn supported by competent evidence. *Id.* at 116–19, 881 S.E.2d at 175–77. Similarly, the majority then affirmed the three-judge panel's approval of the RHP, determining that the panel's conclusions of law were supported by the relevant findings of fact, which were in turn supported by competent evidence. *Id.* at 119–20, 881 S.E.2d at 177–78.

Lastly, the majority reversed the three-judge panel's approval of the RSP because, "unlike for the RHP," the pertinent conclusions of law were not supported by the relevant findings of fact, and some "findings of fact regarding the RSP . . . [we]re unsupported by competent evidence." *Id.* at 120–21, 881 S.E.2d at 178. As the dissent noted, however, this result was puzzling because on remand, the General Assembly "made the exact same policy choices and followed the exact same redrawing process for the RSP as it did for the RHP"; "the Special Masters made almost identical findings regarding the RHP and the RSP"; and the three-judge-panel made "specific findings regarding the RSP and RHP [that] were nearly identical." *Id.* at 150, 881 S.E.2d at 195–96 (Newby, C.J., dissenting). The dissent highlighted how this conflicting result, along with other contradictions throughout the *Harper II* opinion, demonstrated that the *Harper I* principles are not grounded in a judicially discoverable and manageable standard. *See id.* at 169–70, 881 S.E.2d at 208. The dissent concluded that in both *Harper I* and *Harper II*, the majority "intentionally stat[ed] vague standards" so that it could remain entrenched in the General Assembly's redistricting process and enthrone itself as the final

authority over which plans will be used in North Carolina elections. *Id.* at 128, 881 S.E.2d at 183.

E. Legislative Defendants' Petition for Rehearing

This Court filed its *Harper II* opinion on 16 December 2022, and the mandate issued on 5 January 2023. On 20 January 2023, Legislative Defendants timely filed a petition for rehearing under Rule 31 of the North Carolina Rules of Appellate Procedure. Legislative Defs.' Pet. for Reh'g, *Harper v. Hall*, 383 N.C. 89 (2022) (No. 413PA21). Specifically, Legislative Defendants asked this Court to rehear *Harper II* because it confirms, *inter alia*, that the standards set forth in both *Harper I* and *Harper II* are unmanageable. As a result, Legislative Defendants requested that this Court, in rehearing *Harper II* also revisit *Harper I* and the issue of whether partisan gerrymandering claims are justiciable under the North Carolina Constitution. This Court granted the petition for rehearing on 3 February 2023. *Harper v. Hall*, 384 N.C. 1, 2–4, 882 S.E.2d 548, 549–50 (2023) (order granting Legislative Defendants' petition for rehearing).

II. *Rucho v. Common Cause*

We begin our analysis with the Supreme Court of the United States' insightful and persuasive opinion in *Rucho v. Common Cause*. In that case the Supreme Court considered claims that "excessive" partisan gerrymandering violated various provisions of the Federal Constitution. *Rucho*, 139 S. Ct. at 2491. There some of the same plaintiffs in this case challenged North Carolina's congressional redistricting map and brought similar claims to those presented here. Specifically, the *Rucho* plaintiffs alleged that the challenged plan violated the Equal Protection Clause of the Fourteenth Amendment by "intentionally diluting the electoral strength of Democratic voters," violated their rights to free speech and freedom of association guaranteed under the First Amendment, exceeded the state legislature's delegated authority to prescribe the "Times, Places and Manner of holding Elections," U.S. Const. art. I, § 4, cl. 1, and "usurped the right of 'the People' to elect their preferred candidates for Congress, in violation of the requirement in Article I, § 2, of the Constitution that Members of the House of Representatives be chosen 'by the People of the several States.' "[6] *Id.* at 2492. Accordingly,

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6. In this case plaintiffs make very similar claims under parallel provisions of our state constitution—Article I, Section 19 (equal protection), Article I, Section 12 (freedom of assembly), Article I, Section 14 (freedom of speech), and Article I, Section 10 (free elections). *Harper I*, 380 N.C. at 329–31, 868 S.E.2d at 513–14. Common Cause, for example, asserts that partisan gerrymandering violates our equal protection clause by

the Supreme Court was tasked with deciding whether partisan gerrymandering claims are " 'justiciable'—that is, properly suited for resolution by the federal courts." *Id.* at 2491. Ultimately, the Supreme Court held that partisan gerrymandering claims present nonjusticiable, political questions. *Id.* at 2506–07.

The Supreme Court first considered the historical background of partisan gerrymandering during the formation of our country. *Id.* at 2494–96. The Supreme Court noted that partisan gerrymandering existed at the time of our nation's founding and that the framers of our Constitution affirmatively considered how to address it. *Id.* at 2494. The framers "settled on a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress." *Id.* at 2496. Specifically, the framers "addressed the election of Representatives to Congress in the Elections Clause," which "assigns to state legislatures the power to prescribe the 'Times, Places and Manner of holding Elections' for Members of Congress, while giving Congress the power to 'make or alter' any such regulations." *Id.* at 2495. "At no point was there a suggestion that the federal courts had a role to play. Nor was there any indication that the Framers had ever heard of courts doing such a thing." *Id.* at 2496. The framers could have limited partisan gerrymandering in the Constitution or assigned federal courts a role in policing it, but they did not. As a result, the Supreme Court reasoned that "[t]o hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities," that is, to state legislatures and to Congress. *Id.* at 2497.

The Supreme Court distinguished partisan gerrymandering claims from other types of redistricting claims that courts have historically adjudicated: "In two areas—one-person, one-vote and racial gerrymandering—our cases have held that there is a role for the courts with respect to at least some issues that could arise from a State's drawing of congressional districts." *Id.* at 2495–96. The Court noted, however, that "[p]artisan gerrymandering claims have proved far more difficult to adjudicate" than other types of redistricting issues because "while it is illegal for a jurisdiction to depart from the one-person, one-vote rule,

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"diminish[ing] the electoral power" of members of the Democratic Party, violates Article I, Sections 12 and 14 by burdening Democratic voters' rights to freedom of speech and freedom to "associate effectively" with the Democratic Party, and violates the free elections clause by preventing elections from reflecting the "will of the people." *See* Verified Compl. for Declaratory J. and Injunctive Relief ¶¶ 189, 200, 180, 184, *Harper v. Hall*, No. 21 CVS 015426, 2021 WL 6884973 (N.C. Super. Ct. Wake County Dec. 16, 2021).

or to engage in racial discrimination in districting, 'a jurisdiction may engage in constitutional political gerrymandering.' " *Id.* at 2497 (quoting *Hunt v. Cromartie*,[7] 526 U.S. 541, 551, 119 S. Ct. 1545, 1551 (1999)). Because some level of partisan gerrymandering is constitutional, "[t]he 'central problem' " with such claims is not determining whether a jurisdiction has engaged in any partisan gerrymandering, which is a simple, yes-or-no delineation. *Id.* (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 296, 124 S. Ct. 1769, 1787 (2004) (plurality opinion)). Rather, the problem with partisan gerrymandering claims is "determining when political gerrymandering has gone too far." *Id.* (quoting *Vieth*, 541 U.S. at 296, 124 S. Ct. at 1787). That sort of question requires more than a yes-or-no answer. Instead, it requires "a standard for deciding how much partisan dominance is too much." *Id.* at 2498 (quoting *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 420, 126 S. Ct. 2594, 2611 (2006) (opinion of Kennedy, J.)).

Because of this inherent difficulty, the Supreme Court stressed that if a standard for resolving such claims exists, it "must be grounded in a 'limited and precise rationale' and be 'clear, manageable, and politically neutral.' " *Id.* (quoting *Vieth*, 541 U.S. at 306–08, 124 S. Ct. at 1793 (Kennedy, J., concurring in the judgment)). Precise constraints on judicial review of partisan gerrymandering claims are necessary because

> "[t]he opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States." [*Davis v.*] *Bandemer*, 478 U.S. [109,] 145, 106 S.Ct. 2797 [(1986)] (opinion of O'Connor, J.). *See Gaffney* [*v. Cummings*], 412 U.S. [735,] 749, 93 S.Ct. 2321 [(1973)] (observing that districting implicates "fundamental 'choices about the nature of representation' " (quoting *Burns v. Richardson*, 384 U.S. 73, 92, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966))). An expansive standard requiring "the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process," *Vieth*, 541 U.S. at 306, 124 S.Ct. 1769 (opinion of Kennedy, J.).

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7. In *Hunt v. Cromartie*, the Supreme Court addressed a redistricting challenge arising from North Carolina. *See Cromartie*, 526 U.S. at 543, 119 S. Ct. at 1547.

Id. (first alteration in original). Accordingly, the Supreme Court concluded that federal courts could "inject [themselves] into [such] heated partisan issues" only if a standard existed "that c[ould] reliably differentiate unconstitutional from 'constitutional political gerrymandering.' " *Id.* at 2499 (first quoting *Bandemer*, 478 U.S. at 145, 106 S. Ct. at 2817 (O'Connor, J., concurring in the judgment); and then quoting *Cromartie*, 526 U.S. at 551, 119 S. Ct. at 1551).

The Supreme Court then examined whether it could locate such a standard in the Federal Constitution. The Court explained that partisan gerrymandering claims are effectively requests for courts to allocate political power to achieve proportional representation, something that the Federal Constitution does not require:

> Partisan gerrymandering claims invariably sound in a desire for proportional representation. As Justice O'Connor put it, such claims are based on "a conviction that the greater the departure from proportionality, the more suspect an apportionment plan becomes." [*Bandemer*, 478 U.S. at 159, 106 S. Ct. 2797.] "Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be." *Id.*, at 130, 106 S.Ct. 2797 (plurality opinion). *See Mobile v. Bolden*, 446 U.S. 55, 75–76, 100 S.Ct. 1490, 1504, 64 L.Ed.2d 47 (1980) (plurality opinion) ("The Equal Protection Clause of the Fourteenth Amendment does not require proportional representation as an imperative of political organization.").

Id. at 2499. Accordingly, partisan gerrymandering claims do not seek to redress a violation of any particular constitutional provisions; rather, such claims "ask the courts to make *their own political judgment* about how much representation particular political parties *deserve*—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end." *Id.* (first emphasis added). Essentially, partisan gerrymandering claims ask courts to "apportion political power as a matter of fairness." *Id.* This judgment call is a policy choice. It is not the kind of "clear, manageable, and politically neutral" standard required for justiciable issues. *Id.* at 2498 (quoting *Vieth*, 541 U.S. at 306–08, 124 S. Ct. at 1793 (Kennedy, J., concurring in the judgment)); *see also Vieth*, 541 U.S.

at 291, 124 S. Ct. at 1784 (plurality opinion) (" 'Fairness' does not seem to us a judicially manageable standard. . . . Some criterion more solid and more demonstrably met than that seems to us necessary to enable the state legislatures to discern the limits of their districting discretion, to meaningfully constrain the discretion of the courts, and to win public acceptance for the courts' intrusion into a process that is the very foundation of democratic decisionmaking.").

The Court elaborated that settling on a clear, manageable, and politically neutral test for "fairness" is extremely difficult because "it is not even clear what fairness looks like in this context." *Rucho*, 139 S. Ct. at 2500. Fairness could mean increasing the number of competitive districts, in which case the appropriate test would need to accurately identify and "undo packing and cracking so that supporters of the disadvantaged party have a better shot at electing their preferred candidates." *Id.* This definition of fairness, however, could backfire because "[i]f all or most of the districts are competitive . . . even a narrow statewide preference for either party would produce an overwhelming majority for the winning party in the state legislature." *Id.* (alterations in original) (quoting *Bandemer*, 478 U.S. at 130, 106 S. Ct. at 2809).

Alternatively, fairness might be measured by the number of "safe seats" each party receives, in which case the appropriate test would actually require packing and cracking in the redistricting process to ensure each party wins "its 'appropriate' share of 'safe' seats." *Id.* (citing *Bandemer*, 478 U.S. at 130–31, 106 S. Ct. at 2809). This approach, however, reduces the number of competitive districts and produces what would seem to be an "unfair" result for "individuals in districts allocated to the opposing party." *Id.*

Thus, the Supreme Court concluded that

> [d]eciding among just these different visions of fairness . . . poses basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral. Any judicial decision on what is "fair" in this context would be an "unmoored determination" of the sort characteristic of a political question beyond the competence of the federal courts.

Id. (quoting *Zivotofsky v. Clinton*, 566 U.S. 189, 196, 132 S. Ct. 1421, 1427 (2012)).

Next, the Supreme Court concluded that, unlike one-person, one-vote claims, the Federal Constitution is also devoid of any objective, mathematical metric for measuring political fairness:

> the one-person, one-vote rule is relatively easy to administer as a matter of math. The same cannot be said of partisan gerrymandering claims, because the Constitution supplies no objective measure for assessing whether a districting map treats a political party fairly. It hardly follows from the principle that each person must have an equal say in the election of representatives that a person is entitled to have his political party achieve representation in some way commensurate to its share of statewide support.

Id. at 2051.

The Court noted that it is possible for a constitution to provide the explicit guidance necessary to adjudicate partisan gerrymandering claims and pointed to several state constitutions and state statutes that expressly do so. *Id.* at 2507–08. By contrast, the Federal Constitution contains no such provision.

Finding no manageable standard in the Federal Constitution, the Supreme Court then turned to the political science-based tests proposed by the *Rucho* plaintiffs. *Id.* at 2503–04. The Supreme Court found these were insufficient as well because they are not effective at predicting future election results:

> The [plaintiff]s assure us that "the persistence of a party's advantage may be shown through sensitivity testing: probing how a plan would perform under other plausible electoral conditions." Experience proves that accurately predicting electoral outcomes is not so simple, either because the plans are based on flawed assumptions about voter preferences and behavior or because demographics and priorities change over time. In our two leading partisan gerrymandering cases themselves, the predictions of durability proved to be dramatically wrong. In 1981, Republicans controlled both houses of the Indiana Legislature as well as the governorship. Democrats challenged the state legislature districting map enacted by the Republicans. This Court in *Bandemer* rejected that challenge, and just months later the

> Democrats increased their share of House seats in the 1986 elections. Two years later the House was split 50–50 between Democrats and Republicans, and the Democrats took control of the chamber in 1990. Democrats also challenged the Pennsylvania congressional districting plan at issue in *Vieth*. Two years after that challenge failed, they gained four seats in the delegation, going from a 12–7 minority to an 11–8 majority. At the next election, they flipped another Republican seat.
>
> Even the most sophisticated districting maps cannot reliably account for some of the reasons voters prefer one candidate over another, or why their preferences may change. Voters elect individual candidates in individual districts, and their selections depend on the issues that matter to them, the quality of the candidates, the tone of the candidates' campaigns, the performance of an incumbent, national events or local issues that drive voter turnout, and other considerations. Many voters split their tickets. Others never register with a political party, and vote for candidates from both major parties at different points during their lifetimes. For all of those reasons, asking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise.

Id. (citations omitted).

In conclusion, the Supreme Court held that partisan gerrymandering claims are nonjusticiable because there is "no plausible grant of authority in the Constitution and no legal standards to limit and direct [courts'] decisions." *Id.* at 2507. In the final words of the opinion, the Supreme Court warned that adjudication of partisan gerrymandering claims would constitute "an unprecedented expansion of judicial power," adding that:

> We have never struck down a partisan gerrymander as unconstitutional—despite various requests over the past 45 years. The expansion of judicial authority would not be into just any area of controversy, but into one of the most intensely partisan aspects of American political life. That intervention would be

> unlimited in scope and duration—it would recur over and over again around the country with each new round of districting, for state as well as federal representatives. Consideration of the impact of today's ruling on democratic principles cannot ignore the effect of the unelected and politically unaccountable branch of the Federal Government assuming such an extraordinary and unprecedented role.

Id.

In *Rucho* the Supreme Court considered partisan gerrymandering claims under the Federal Constitution, but the arguments it addressed are similar to those raised here. While the current claims allege that partisan gerrymandering violates our state constitution, we find the reasoning of the Supreme Court in *Rucho* persuasive because the same arguments, concerns, and predictions have arisen here. Thus, we now turn our analysis to reviewing the applicable fundamental principles under our state constitution.

III. Fundamental Principles

A. Separation of Powers

The separation-of-powers clause is located within the Declaration of Rights of Article I of our constitution. The Declaration of Rights is an expressive yet non-exhaustive list of protections afforded to citizens against government intrusion, along with "the ideological premises that underlie the structure of government." John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 46 (2d ed. 2013) [hereinafter *State Constitution*]. "The abstractness of the Declaration of Rights has allowed most of it to survive" in our current constitution. *Id.* at 6. The placement of the separation-of-powers clause in the Declaration of Rights suggests that keeping each branch within its described spheres protects the people by limiting overall governmental power. The clause does not establish the various powers but simply states that the powers of the branches are "separate and distinct." N.C. Const. art. I, § 6. The constitutional text develops the nature of those powers. *State Constitution* 46 ("Basic principles, such as popular sovereignty and separation of powers, are first set out in general terms, to be given specific application in later articles."). Thus, the separation-of-powers clause "is to be considered as a general statement of a broad, albeit fundamental, constitutional principle," *State v. Furmage*, 250 N.C. 616, 627, 109 S.E.2d 563, 571 (1959), and must be considered with the related, more specific provisions of the constitution that outline the practical workings for

governance, *see* N.C. Const. art. II (providing the framework for legislative power); *id.* art. III (providing the framework for executive power); *id.* art. IV (providing the framework for judicial power). "Nowhere was it stated that the three powers or branches had to be equal. In fact, although the balance occasionally shifted, the preponderant power has always rested with the legislature." *State Constitution* 50.

Given that "a constitution cannot violate itself," *Leandro v. State*, 346 N.C. 336, 352, 488 S.E.2d 249, 258 (1997), a branch's exercise of its express authority by definition comports with separation of powers. A violation of separation of powers only occurs when one branch of government exercises, or prevents the exercise of, a power reserved for another branch of government. *State ex rel. McCrory v. Berger*, 368 N.C. 633, 660, 781 S.E.2d 248, 265 (2016) (Newby, J., concurring in part and dissenting in part). Understanding the prescribed powers of each branch, as divided between the branches historically and by the text itself, is the basis for stability, accountability, and cooperation within state government. *See State v. Emery*, 224 N.C. 581, 584, 31 S.E.2d 858, 861 (1944) ("[Constitutions] should receive a consistent and uniform construction . . . even though circumstances may have so changed as to render a different construction desirable.").

Since 1776, our constitutions have recognized that all political power resides in the people, N.C. Const. art. I, § 2; N.C. Const. of 1868, art. I, § 2; N.C. Const. of 1776, Declaration of Rights, § I, and is exercised through their elected officials in the General Assembly, N.C. Const. art. II, § 1; N.C. Const. of 1868, art. II, § 1; N.C. Const. of 1776, § I; *State ex rel. Ewart v. Jones*, 116 N.C. 570, 570, 21 S.E. 787, 787 (1895). "The legislative power is vested in the General Assembly, so called because all the people are present there in the persons of their representatives." *State Constitution* 95. Accordingly, the General Assembly possesses plenary power as well as the responsibilities explicitly recognized in the text of the state constitution. *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891–92 (1961). The structure of the bicameral legislative branch itself diffuses its power, *see Berger*, 368 N.C. at 653, 781 S.E.2d at 260–61 (Newby, J., concurring in part and dissenting in part), and the people themselves limit legislative power by express constitutional restrictions, *see Baker v. Martin*, 330 N.C. 331, 338–39, 410 S.E.2d 887, 891–92 (1991).

Most accountable to the people, *see* N.C. Const. art. II, §§ 3, 5, through the most frequent elections, *id.* art. II, §§ 2, 4, "[t]he legislative branch of government is without question 'the policy-making agency of our government. . . .' 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," *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169, 594 S.E.2d 1, 8 (2004) (quoting *McMichael v. Proctor*, 243 N.C. 479, 483, 91 S.E.2d 231, 234 (1956)); *see also Berger*, 368 N.C. at 653, 781 S.E.2d at 261 (Newby, J., concurring in part and dissenting in part) ("The diversity within the [legislative] branch . . . ensures healthy review and significant debate of each proposed statute, the enactment of which frequently reaches final form through compromise."). The constitutional text provides various express checks on legislative power. *See, e.g.*, N.C. Const. art. II, § 11 ("Neither house shall proceed upon public business unless a majority of all of its members are actually present."); *id.* art. II, § 22 (providing that, with certain exceptions, all bills shall be subject to the Governor's veto); *id.* art. II, § 24 (prohibiting the General Assembly from enacting various types of "local, private, or special act[s] or resolution[s]").

B. Standard of Review

[1] Unlike the United States Constitution, the North Carolina Constitution "is in no matter a grant of power." *McIntyre*, 254 N.C. at 515, 119 S.E.2d at 891 (quoting *Lassiter v. Northampton Cnty. Bd. of Elections*, 248 N.C. 102, 112, 102 S.E.2d 853, 861 (1958), *aff'd*, 360 U.S. 45, 79 S. Ct. 985 (1959)). Rather, "[a]ll power which is not limited by the Constitution inheres in the people." *Id.* at 515, 119 S.E.2d at 891 (quoting *Lassiter*, 248 N.C. at 112, 102 S.E.2d at 861). Because the General Assembly serves as "the agent of the people for enacting laws," it has the presumptive power to act, *State ex rel. Martin v. Preston*, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989), and possesses plenary power along with the responsibilities explicitly recognized in the constitution, *McIntyre*, 254 N.C. at 515, 119 S.E.2d at 891–92. The General Assembly's textual and plenary power is limited only by the express text of the constitution. *Baker*, 330 N.C. at 338–39, 410 S.E.2d at 891–92.

Therefore, the idea of the judiciary "preventing . . . the legislature, through which the people act, from exercising its power is the most serious of judicial considerations." *Berger*, 368 N.C. at 650, 781 S.E.2d at 259 (Newby, J., concurring in part and dissenting in part). Accordingly, this Court presumes that legislation is constitutional. *Id.* at 639, 781 S.E.2d at 252 (majority opinion). A constitutional limitation upon the General Assembly must be explicit and a violation of that limitation must be proved beyond a reasonable doubt. *Id.* at 639, 781 S.E.2d at 252. A statute cannot abrogate an express provision of the constitution because the constitution represents the fundamental law and the express will of the people. *Bayard*, 1 N.C. (Mart.) at 7. The judiciary performs this

role of judicial review by determining whether a law conflicts with an express provision of the constitution. *See id.* at 6.

When this Court looks for constitutional limitations on the General Assembly's authority, it looks to the plain text of the constitution just as it would look to the plain text of a statute. *State v. Webb*, 358 N.C. 92, 97, 591 S.E.2d 505, 510 (2004). Thus, a claim that a law is unconstitutional must surmount the high bar imposed by the presumption of constitutionality and meet the highest quantum of proof, a showing that the statute is unconstitutional beyond a reasonable doubt.[8] *Baker*, 330 N.C. at 334–37, 410 S.E.2d at 889–90.

A proper application of this standard of review is illustrated by the landmark case of *Bayard v. Singleton*, the first reported case of judicial review in the nation. *Bayard* involved judicial review of a statute that conflicted with an express provision of the 1776 Declaration of Rights. 1 N.C. (Mart.) at 5. In 1785 the General Assembly enacted a law that abolished the right to a trial by jury for certain property disputes. *Id.* At that time, however, the Declaration of Rights expressly provided for a right to a trial by jury "in all Controversies at Law respecting property." N.C. Const. of 1776, Declaration of Rights, § XIV.

The Court in *Bayard* held that the act was unequivocally unconstitutional and void because it directly conflicted with a clear and express provision of the constitution. *Bayard*, 1 N.C. (Mart.) at 7. The Court reasoned that the General Assembly could not "repeal or alter" an express provision of the constitution by statute because the constitution represents the fundamental law and the express will of the people. *Id.* If the General Assembly could violate the constitution in this manner, it could defy the express will of the people who are the source of all political power. *Id.*; *see* N.C. Const. art. I, § 2. Thus, this Court declared the statute at issue unconstitutional. *Bayard*, 1 N.C. (Mart.) at 7.

This Court, however, did not lightly take on the role of declaring an act of the General Assembly unconstitutional. The Court noted that it felt "great reluctance" in involving itself "in a dispute with the Legislature" and took "every reasonable endeavor" to avoid "a disagreeable difference between" the two branches. *Id.* at 6. But in this instance, the Court determined that it had to declare the act void because the constitution

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8. The majority in *Harper I* and *Harper II* and the dissent here largely ignore the well-established standard of review that our courts apply when reviewing the constitutionality of a statute. Notably, courts apply different standards of review when adjudicating other matters that do not involve the constitutionality of a statute.

was explicit: "That by the Constitution every citizen had undoubtedly a right to a decision of his property by a trial by jury." *Id.* at 7. Accordingly, the holding of *Bayard* is clear: the judiciary performs the role of judicial review, but it only declares an act of the General Assembly void when it directly conflicts with an express provision of the constitution.

Thus, plainly stated and as applied to this case, the standard of review asks whether the redistricting plans drawn by the General Assembly, which are presumed constitutional, violate an express provision of the constitution beyond a reasonable doubt. When we cannot locate an express, textual limitation on the legislature, the issue at hand may involve a political question that is better suited for resolution by the policymaking branch. As "essentially a function of the separation of powers," the political question doctrine operates to check the judiciary and prevent its encroaching on the other branches' authority. *Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691, 710 (1962). Under this doctrine, courts must refuse to review political questions, that is, issues that are better suited for the political branches. Such issues are considered nonjusticiable.

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217, 82 S. Ct. at 710; *see also Bacon v. Lee*, 353 N.C. 696, 716–17, 549 S.E.2d 840, 854 (2001). Accordingly, out of respect for separation of powers, a court must refrain from adjudicating a claim when any one of the following is present: (1) a textually demonstrable commitment of the matter to another branch; (2) a lack of judicially discoverable and manageable standards; or (3) the impossibility of deciding a case without making a policy determination of a kind clearly suited for nonjudicial discretion. All three of these factors are present here.

IV. Political Question

[2] The claims and arguments at issue in this case are the same as those in *Rucho*, only this time they arise under the state constitution instead of the Federal Constitution. The Declaration of Rights provisions invoked by plaintiffs in this case—the free elections clause, the equal protection clause, and the freedom of speech and assembly clauses, N.C. Const. art. I, §§ 10, 12, 14, 19,—are our state constitution's counterparts to the Federal Constitutional provisions invoked in *Rucho*—Article I, Section 4 (Elections Clause); Article I, Section 2 (composition of the U.S. House of Representatives); the Equal Protection Clause of the Fourteenth Amendment; and the First Amendment, which protects the rights to free speech and freedom of association, *see Rucho*, 139 S. Ct. at 2491. The dissent in *Harper I* explained in great detail that, due to the striking similarities between this case and *Rucho*, we should have followed the Supreme Court's guidance and declared plaintiffs' claims nonjusticiable. *See Harper I*, 380 N.C. at 414–24, 868 S.E.2d at 566–72 (Newby, C.J., dissenting). The dissent in *Harper II* reiterated that *Rucho* was persuasive precedent from our nation's highest court and illustrated how all of the justiciability pitfalls warned of in *Rucho* permeated the remedial proceedings in this case. *See Harper II*, 383 N.C. at 166–70, 881 S.E.2d at 206–08 (Newby, C.J., dissenting).

Four justices on this Court "misapprehended" the *Rucho* analysis in *Harper I*. *See* N.C. R. App. P. 31(a). The remedial proceedings at issue in *Harper II* confirm that those four justices were wrong to condemn *Rucho* as inapplicable to the case at hand. *See Harper II*, 383 N.C. at 144–66, 881 S.E.2d at 193–206; *Harper I*, 380 N.C. at 356–62, 868 S.E.2d at 529–33 (majority opinion). Today we correct that error. Under the North Carolina Constitution, redistricting is explicitly and exclusively committed to the General Assembly by the text of the constitution. The executive branch has no role in the redistricting process, and the role of the judicial branch is limited by the principles of judicial review. Moreover, like the Federal Constitution, our constitution does not provide any judicially discernible or manageable standards for determining how much partisan gerrymandering is too much. *See Rucho*, 139 S. Ct. at 2500. Any attempt to adjudicate such claims forces this Court to make numerous policy determinations for which there is no constitutional guidance. We are not authorized or equipped to make these determinations. For all of these reasons, we hold that claims of partisan gerrymandering are nonjusticiable, political questions under the North Carolina Constitution.

A. Textual Commitment

One prominent characteristic of a political question is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Bacon*, 353 N.C. at 717, 549 S.E.2d at 854 (quoting *Baker*, 369 U.S. at 217, 82 S. Ct. at 710). The text of our state constitution, as well as that of the Federal Constitution, expressly assigns the task of redistricting[9] to the General Assembly. Reviewing the historical context of our redistricting and elections process is necessary to properly understand that our state constitution has committed the issue of redistricting to the General Assembly for hundreds of years.

North Carolina has had some form of elected, representative body since 1665. As early as 1663, the Lords Proprietors could enact laws in consultation with the freemen settled in their province. Charter Granted by Charles II, King of England to the Lords Proprietors of Carolina (Mar. 24, 1663), in 1 *Colonial and State Records of North Carolina* 20–23 (William L. Sanders ed., 1886) [hereinafter 1 *Colonial and State Records*]. In 1665 certain "concessions" by the Lords Proprietors allowed for the formation of the predecessor to the General Assembly and the election of freemen representatives. Concessions and Agreement Between the Lords Proprietors of Carolina and William Yeamans, et al. (Jan. 7, 1665), in 1 *Colonial and State Records* 79–81. The 1669 Fundamental Constitutions of Carolina apportioned those representatives into counties and the counties into precincts. The Fundamental Constitutions of Carolina (Mar. 1, 1669), in 1 *Colonial and State Records* 188. The assembly met and stood for election every two years. *Id.* at 199–200. Thus, long before the 1776 constitution, the qualified voters in Carolina were electing their representatives in districts.

Leading up to the enactment of the 1776 constitution, in 1774 the delegates of the First Provincial Congress were elected by geographic location, either by town, which were also known as boroughs, or by county. *See* Henry G. Connor & Joseph B. Cheshire, Jr., *The Constitution of North Carolina Annotated* xii–xiv (1911). The text of the 1776 constitution established the General Assembly, a gathering of the people through their elected representatives, as the Senate and the House of Commons. N.C. Const. of 1776, § I. Senators were elected annually by county without regard to the population size of that county. *Id.* § II. Representatives in the House of Commons were also elected annually, but each county received two representatives and certain enumerated

9. "Districting" and "redistricting" are sometimes referred to as "apportionment" and "reapportionment."

towns received one as well. *Id.* § III. Only six towns were initially given separate representation in the House of Commons, *id.*, but other towns were later added. The 1776 constitution did not contain a specific provision regarding redistricting. Nonetheless, redistricting occurred through the creation of new counties—as part of its plenary power, the General Assembly established the boundaries of the counties from which Senators and Representatives were elected. *See, e.g.*, Act of Apr. 8, 1777, An Act for dividing Rowan County, and other Purposes therein mentioned, ch. XIX, 1777 N.C. Sess. Laws 33 (dividing Rowan County to carve out a new Burke County). Notably, the 1776 Declaration of Rights contained the free elections and freedom of assembly clauses. N.C. Const. of 1776, Declaration of Rights, §§ VI, XVIII.

Through the years, the population of the state shifted radically from the east to the piedmont and west. John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. Rev. 1759, 1770–71 (1992) [hereinafter *Constitutional History*]. Nonetheless, the eastern region received additional representation through the strategic creation and division of counties. *Id.* at 1770. The General Assembly created smaller counties in the east and larger ones in the piedmont and west, keeping the distribution of representatives in favor of the east despite population growth trends in other areas. *Id.* This county-town approach, combined with the power of the General Assembly to divide existing counties to create new ones, resulted in superior political power in the east. *See id.* This malapportionment led to civil unrest and a crisis that culminated with the 1835 constitutional convention. *State Constitution* 3, 13. During that time, no one argued that the provisions of the Declaration of Rights or the 1776 constitution made the legislative apportionment acts unconstitutional. Rather, North Carolinians ultimately recognized the need to amend the text itself to address the apportionment problem.

In 1835 a constitutional convention met to, among other things, change the representative system to better address differences in population. *See id.* That convention resulted in amendments that provided for a total of fifty senators and required senatorial districts to be drawn by the General Assembly based on the taxes paid by each county. N.C. Const. of 1776, amends. of 1835, art. I, § 1. These amendments also included the predecessor of the WCP, *see* N.C. Const. art. II, § 3(3), that prohibited a county from being divided to create the senatorial districts, N.C. Const. of 1776, amends. of 1835, art. I, § 1.

The 1835 amendments provided for 120 House seats. *Id.* art. I, § 2. These amendments eliminated representation for the borough towns, *see generally id.*, instead allotting all 120 House seats to counties based

roughly on population, *id*. This framework allowed the more populated counties to have additional representatives, but each county was entitled to at least one representative. *Id*. These amendments alleviated the problem of disproportionate representation in the eastern counties. The General Assembly was instructed to reconsider the apportionment of the counties every twenty years and to base reapportionment on population according to the census taken by order of Congress. *Id*. art. I, § 3. Likewise, the convention implemented other changes to representation such as lengthening legislative terms from one year to two years, *id*. art. I, §§ 1–2, and allowing the voters to elect the governor, *id*. art. II, § 1.

Following the constitutional convention of 1868, the Senate became apportioned by population. N.C. Const. of 1868, art. II, § 5. Along with the express limitation imposed by the WCP, the 1868 amendments required senatorial districts to be contiguous and to be redrawn in connection with the decennial census. *Id*. Apportionment of House seats remained the same—allotted to counties based on population with each county given at least one representative. *Id*. art. II, § 6. The convention lengthened the term of the governor to four years, *id*. art. III, § 1, and constitutionally created a separate judicial branch, *see id*. art. IV, with judges being elected by the voters for eight-year terms, *id*. art. IV, § 26. Previously, the General Assembly elected judges, N.C. Const. of 1776, § XIII, but now judges in North Carolina became directly accountable to the people through elections, N.C. Const. of 1868, art. IV, § 26.

For almost one hundred years, apportionment remained unchanged until the 1960s. At that time, the Speaker of the House received the authority to apportion House districts. N.C. Const. of 1868, amends. of 1961, art. II, § 5. Then, to comply with the federal decision in *Baker v. Carr*, the constitution was amended in 1968 to reflect the one-person, one-vote requirement. *State Constitution* 31. This change affected the structure of the House of Representatives in particular. *Id*. Significantly, the number of House members remained at 120, but the representatives were no longer apportioned by county; instead, the 120 representatives were allotted among districts now drawn based on equal population. N.C. Const. of 1868, amends. of 1967, art. II, § 5. By the end of the 1960s, the same criteria for proper districts—equal population, contiguous territory, the WCP, and reapportionment in conjunction with the decennial census—applied to both Senate and House districts. *See id*. art. II, §§ 4, 6.

The current version of our constitution, ratified by the people at the ballot box in 1970, took effect in 1971 and came about as a "good government measure." *State Constitution* 32. This 1971 constitution represented an attempt to modernize the 1868 constitution and its subsequent

amendments with editorial and organizational revisions and amendment proposals. *See*, *e.g.*, N.C. State Const. Study Comm'n, *Report of the North Carolina State Constitution Study Commission* 8–12 (1968). Today our constitution expressly assigns the legislative redistricting authority to the General Assembly subject to specific enumerated restraints:

> The Senators shall be elected from districts. The 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 districts and the apportionment of Senators among those districts, subject to the following requirements:
>
> (1) Each Senator shall represent, as nearly as may be, an equal number of inhabitants, the number of inhabitants that each Senator represents being determined for this purpose by dividing the population of the district that he represents by the number of Senators apportioned to that district;
>
> (2) Each senate district shall at all times consist of contiguous territory;
>
> (3) No county shall be divided in the formation of a senate district;
>
> (4) When established, the senate districts and the apportionment of Senators shall remain unaltered until the return of another decennial census of population taken by order of Congress.

N.C. Const. art. II, § 3. Article II, Section 5 establishes the same grant of authority and limitations for the state House of Representatives. Thus, while the constitution commits the redistricting responsibility to the General Assembly, it does not leave the General Assembly completely unrestrained. The constitution expressly requires that any redistricting plan conform to its explicit criteria.

Notably, there is no provision in the state constitution regarding redistricting of congressional districts. The Federal Constitution, however, commits drawing of congressional districts to the state legislatures subject to oversight by the Congress of the United States. "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such

Regulations, except as to the Places of chusing Senators." U.S. Const. art. I, § 4, cl. 1. This provision makes clear that the redistricting power is expressly committed to the state legislative branch.

Additionally, both our constitution and the General Statutes expressly insulate the redistricting power from intrusion by the executive and judicial branches. The governor has no role in the redistricting process because the constitution explicitly exempts redistricting legislation from the governor's veto power.[10] N.C. Const. art. II, § 22(5)(b)–(d). Moreover, the General Statutes provide a limited role of judicial review for courts in reviewing redistricting plans. *See* N.C.G.S. §§ 120-2.3 to -2.4 (2021). The General Assembly enacted these statutory provisions in 2003 to clarify and codify the existing process by which courts already had been reviewing redistricting plans. Act of Nov. 25, 2003, An Act to Establish House Districts, Establish Senatorial Districts, and Make Changes to the Election Laws and to Other Laws Related to Redistricting, S.L. 2003-434, §§ 7–9, 2003 N.C. Sess. Laws (1st Extra Sess. 2003) 1313, 1415–16. The General Assembly drafted these statutes in response to this Court's decisions in *Stephenson I*, 355 N.C. 354, 562 S.E.2d 377, and *Stephenson v. Bartlett* (*Stephenson II*), 357 N.C. 301, 582 S.E.2d 247 (2003). This Court unanimously upheld these statutory provisions as proper limitations on the judiciary's role in the redistricting process in *Stephenson v. Bartlett* (*Stephenson III*), 358 N.C. 219, 230, 595 S.E.2d 112, 119–20 (2004) ("[R]edistricting is a legislative responsibility . . . . Not only do these statutes allow the General Assembly to exercise its proper responsibilities, they decrease the risk that the courts will encroach upon the responsibilities of the legislative branch.").

Section 1-267.1 requires that a three-judge panel hear challenges to redistricting plans. N.C.G.S. § 1-267.1 (2021). Specifically, under Section 120-2.3, courts may review challenges regarding whether a redistricting plan is "unconstitutional or otherwise invalid." *Id.* § 120-2.3. If a court finds a redistricting plan is unconstitutional, it must specify the precise defects and give the General Assembly an opportunity to remedy any identified defect by enacting a new redistricting plan. *Id.* § 120-2.4(a). By

10. The North Carolina governor did not gain the veto power until the people approved an amendment to the North Carolina Constitution in 1996—over two hundred years after the adoption of our first constitution in 1776. *See* Act of Mar. 8, 1995, An Act to Provide For A Referendum to Amend the Constitution to Provide for a Gubernatorial Veto, ch. 5, 1995 N.C. Sess. Laws 6. At that time, the people of North Carolina extended to the governor the authority to veto many types of legislative enactments but specifically withheld the authority to veto redistricting legislation. *Id.* That provision remains unchanged today.

statute, a court may not impose a remedial redistricting plan of its own unless "the General Assembly does not act to remedy" those defects. *Id.* § 120-2.4(a1). Even then, a court-imposed redistricting plan may differ from the General Assembly's enacted plan "only to the extent necessary to remedy" the defects identified by the court and will only be used for the next general election. *Id.* After the next general election, the General Assembly will replace the court-imposed map with a new, legislatively enacted map. A court-imposed map is only used for one election cycle because it is not "established" as that term is used in Article II, Sections 3(4) and 5(4). *See* N.C. Const. art. II, §§ 3(4), 5(4) ("When established, the senate [and representative] districts and the apportionment of Senators [and Representatives] shall remain unaltered until the return of another decennial census of population taken by order of Congress."). This limited role of judicial review comports with the fact that our constitution expressly assigns the redistricting authority to the General Assembly. *See Stephenson III*, 358 N.C. at 230, 595 S.E.2d at 119.

Article II, Sections 3 and 5 commit the redistricting authority to the General Assembly and set express limitations on that authority. In the landmark case *Stephenson I*, this Court considered the express limitations on redistricting in Article II, Sections 3 and 5, and applied them in conformity with federal law. *See Stephenson I*, 355 N.C. at 358, 562 S.E.2d at 381. That case dealt with the interplay between the objective restraints contained in the state constitution and federal redistricting authorities—namely, Section 2 of the Voting Rights Act (VRA) and the one-person, one-vote principle.[11] *See id.* at 359, 562 S.E.2d at 382.

The plaintiffs challenged the 2001 state legislative redistricting plans (2001 Plans) as unconstitutional in violation of the WCP of Article II, Sections 3 and 5. *Id.* at 358, 562 S.E.2d at 381; N.C. Const. art. II, §§ 3, 5 ("No county shall be divided in the formation of a senate [or representative] district."). The defendants argued that these constitutional provisions were "wholly unenforceable because of the requirements of the [VRA]." *Stephenson I*, 355 N.C. at 361, 562 S.E.2d at 383–84. Thus, before addressing whether the 2001 redistricting plans violated the WCP, this Court first had to address "whether the WCP is now entirely unenforceable, as [the] defendants contend, or, alternatively, whether the WCP

11. "Section 2 of the VRA generally provides that states or their political subdivisions may not impose any voting qualification or prerequisite that impairs or dilutes, on account of race or color, a citizen's opportunity to participate in the political process and to elect representatives of his or her choice." *Id.* at 363, 562 S.E.2d at 385. The one-person, one-vote principle simply requires that districts, to the extent practicable, contain an equal number of voters. *Brown v. Thomson*, 462 U.S. 835, 841, 103 S. Ct. 2690, 2695 (1983).

remains enforceable throughout the State to the extent not preempted or otherwise superseded by federal law." *Id.* at 369, 562 S.E.2d at 388. In doing so, we explained that

> an inflexible application of the WCP is no longer attainable because of the operation of the provisions of the VRA and the federal "one-person, one-vote" standard, as incorporated within the State Constitution. This does not mean, however, that the WCP is rendered a legal nullity if its beneficial purposes can be preserved consistent with federal law and reconciled with other state constitutional guarantees.
>
> . . . The General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions, *see Gaffney v. Cummings*, 412 U.S. 735, [93 S. Ct. 2321,] 37 L. Ed. 2d 298 (1973), but it must do so in conformity with the State Constitution. To hold otherwise would abrogate the constitutional limitations or "objective constraints" that the people of North Carolina have imposed on legislative redistricting and reapportionment in the State Constitution.

Id. at 371–72, 562 S.E.2d at 389–90. In other words, we recognized that the WCP is one of the clear and express limitations or "objective constraints" on legislative redistricting in our constitution. *Id.* at 371, 562 S.E.2d at 390. We concluded that the WCP was enforceable to the extent it did not conflict with the one-person, one-vote principle or the VRA because "the people of North Carolina" expressly chose to limit the General Assembly in this way. *Id.* at 371, 374–75, 562 S.E.2d at 390, 391–92; *id.* at 372–74, 562 S.E.2d at 390–91 ("[T]he WCP remains valid and binding upon the General Assembly during the redistricting and reapportionment process . . . except to the extent superseded by federal law. . . . Where . . . the primary purpose of the WCP can be effected to a large degree without conflict with federal law, it should be adhered to by the General Assembly to the maximum extent possible.").

Notably, we stated that "[t]he General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions." *Id.* at 371, 562 S.E.2d at 390. We supported this statement with a citation to the Supreme Court's decision in *Gaffney v. Cummings*, 412 U.S. 735, 93 S. Ct. 2321 (1973). In that case the Supreme Court observed that

> [i]t would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it. Our cases indicate quite the contrary. The very essence of districting is to produce a different—a more "politically fair"—result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats. *Politics and political considerations are inseparable from districting and apportionment.*

Id. at 752–53, 93 S. Ct. at 2331 (emphasis added) (citations omitted). Thus, in *Stephenson I* we recognized that partisan considerations are inherently a part of the redistricting process in our state. We then expressed that the discretionary consideration of partisan advantage and incumbency protection must be done "in conformity with the State Constitution." *Stephenson I*, 355 N.C. at 371, 562 S.E.2d at 390. In other words, the General Assembly's discretionary considerations are constrained by the express limitations found in Article II, Sections 3 and 5. "To hold otherwise," we explained, "would abrogate the constitutional limitations or 'objective constraints' that the people of North Carolina have imposed on legislative redistricting and reapportionment in the State Constitution." *Id.* at 371–72, 562 S.E.2d at 390. By "constitutional limitations," we meant the specific constraints in Article II, Sections 3 and 5.

Having held that the WCP remained enforceable to the extent not preempted by or otherwise superseded by federal law, we then held that the 2001 Plans violated the WCP by unduly dividing numerous counties. *Id.* at 371, 562 S.E.2d at 389–90. Specifically, the 2001 Plans divided fifty-one of the State's one hundred counties in the Senate plan and seventy of the one hundred counties in the House plan. *Id.* at 360, 562 S.E.2d at 383. We were able to make this determination because the standard provided by the WCP is express, clear, and easily applied.

Once we found that the 2001 Plans violated the still-valid WCP, we then crafted detailed criteria harmonizing the WCP and the other express constraints in Article II, Sections 3 and 5, with the VRA and the federal one-person, one-vote principle. These standards were clear and manageable because they were based on the express provisions found in our constitution or in federal law. For example, one of the *Stephenson I* criteria required that

> [i]n counties having a non-VRA population pool which cannot support at least one legislative district

> at or within plus or minus five percent of the ideal population for a legislative district or, alternatively, counties having a non-VRA population pool which, if divided into districts, would not comply with the at or within plus or minus five percent "one-person, one-vote" standard, the requirements of the WCP are met by *combining or grouping the minimum number of whole, contiguous counties* necessary to comply with the at or within plus or minus five-percent "one-person, one vote" standard.

Id. at 383–84, 562 S.E.2d at 397 (emphasis added). The requirement that the General Assembly group "whole, contiguous" counties together when necessary to create a district that meets the ideal population requirement is a function of the WCP and the requirement that "[e]ach [legislative] district shall at all times consist of contiguous territory." N.C. Const. art. II, §§ 3(3), 5(3), 3(2), 5(2). Similarly, this Court recognized that when the General Assembly must group counties together in this way, the resulting districts in that county grouping might cross over the "interior county lines"—that is, the county lines that do not create the exterior boundaries of the county grouping. *See Stephenson I*, 355 N.C. at 384, 562 S.E.2d at 397. Such crossovers would violate the WCP but may be necessary to comply with the one-person, one-vote principle. Thus, in order to enforce "[t]he intent underlying the WCP . . . to the maximum extent possible," *Stephenson I* required that districts in multi-county groupings be "compact" and account for "communities of interest."[12] *Id.* at 384, 562 S.E.2d at 397. Compactness and communities of interest are also important factors under the VRA. *See Thornburg v. Gingles*, 478 U.S. 30, 50–51, 106 S. Ct. 2752, 2766 (1986).

Stephenson I also required that "[i]n forming new legislative districts, any deviation from the ideal population for a legislative district shall be at or within plus or minus five percent for purposes of compliance with

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12. The Court in *Stephenson I* recognized that the "impetus" underlying the WCP was a long-standing respect for counties as "political subdivisions" that "provide essential services" and " 'effectuate the political organization and civil administration of the state' " at the local level. *Id.* at 365–66, 562 S.E.2d at 385–86 (quoting *White v. Comm'rs of Chowan Cnty.*, 90 N.C. 437, 438 (1884)). Accordingly, counties were kept whole because they naturally promote a "clear identity and common interests" among county residents. *Id.* at 366, 562 S.E.2d at 386. Recognizing that some counties would need to be divided or grouped together to comply with federal redistricting requirements, and in order to comply with the underlying intent of the WCP "to the maximum extent possible," *id.* at 384, 562 S.E.2d at 397, *Stephenson I* required the General Assembly to consider compactness and communities of interest whenever it had to group multiple counties together.

federal 'one-person, one-vote' requirements." 355 N.C. at 383, 562 S.E.2d at 397. This requirement is "relatively easy to administer as a matter of math."[13] *Rucho*, 139 S. Ct. at 2501. This requirement also ensures compliance with Article II, Sections 3(1) and 5(1), which provide that each senator and representative "shall represent, as nearly as may be, an equal number of inhabitants." N.C. Const. art. II, §§ 3(1), 5(1).

Although this Court was very detailed in stating its *Stephenson I* criteria, each criterion clearly reflects the fact that the constitution textually commits the redistricting authority to the General Assembly and only limits that authority in the ways enumerated in federal law and in Article II, Sections 3 and 5. This Court harmonized federal redistricting requirements and the directives of our state constitution, but it did not place any limitations on redistricting that were not derived from those two sources of law.

In sum, throughout our history our constitutions have invariably committed redistricting authority to our General Assembly. The General Assembly exercises that authority subject to the express limitations in our constitution and in federal law. When the General Assembly acts within the scope of these express limitations, it is performing its constitutionally assigned role. When the General Assembly properly performs its constitutionally assigned role, its discretionary decisions present a political question that is nonjusticiable. Ultimately, the role of our courts is limited to identifying a redistricting plan that violates those express limitations and requiring the General Assembly to remedy the specified defects.

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13. *Stephenson I*'s plus or minus five percent standard is derived directly from Supreme Court precedent holding that a population deviation range of ten percent (plus or minus five percent) generally satisfies the federal one-person, one-vote requirement. *See Brown*, 462 U.S. at 842, 103 S. Ct. at 2696 (" '[M]inor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment . . . .' Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations." (internal citations omitted) (quoting *Gaffney*, 412 U.S. at 745, 93 S. Ct. at 2327)); *see also Harris v. Ariz. Indep. Redistricting Comm'n*, 578 U.S. 253, 259, 136 S. Ct. 1301, 1307 (2016) ("We have further made clear that 'minor deviations from mathematical equality' do not, by themselves, 'make out a prima facie case of invidious discrimination under the Fourteenth Amendment . . . .' We have defined as 'minor deviations' those in 'an apportionment plan with a maximum population deviation under 10%.' " (internal citations omitted) (first quoting *Gaffney*, 412 U.S. at 745, 93 S. Ct. at 2327; and then quoting *Brown*, 462 U.S. at 842, 103 S. Ct. at 2696)); *Evenwel v. Abbott*, 578 U.S. 54, 59–60, 136 S. Ct. 1120, 1124 (2016) (same); *Voinovich v. Quilter*, 507 U.S. 146, 160–61, 113 S. Ct. 1149, 1159 (1993) (same); *Connor v. Finch*, 431 U.S. 407, 418, 97 S. Ct. 1828, 1835 (1977) (same).

B. Judicially Discoverable and Manageable Standards

Another factor that indicates the presence of a political question is the lack of a judicially discoverable and manageable standard for assessing the matter at hand. Like the Federal Constitution, our constitution does not provide judicially discernible or manageable standards for adjudicating partisan gerrymandering claims. The North Carolina Constitution could contain a provision that expressly prohibits or limits partisan gerrymandering, and perhaps then our courts could be "armed with a standard that can reliably differentiate" between constitutional and unconstitutional partisan gerrymandering. *See Rucho*, 139 S. Ct. at 2499. Our constitution, however, contains no such provision.

Almost one hundred years ago, this Court's opinion in *Leonard v. Maxwell* indicated that courts should cautiously consider redistricting claims. 216 N.C. 89, 99, 3 S.E.2d 316, 324 (1939). In that case the plaintiff argued that the General Assembly was malapportioned because it had not reapportioned itself at the first session after the 1930 census, as required by the constitution. *Id.* at 98, 3 S.E.2d at 324. As a result, the plaintiff argued that the 1937 General Assembly was powerless to act including, "it [wa]s suggested," to reapportion itself. *Id.* This Court rejected that argument, observing that "[t]he question is a political one, and there is nothing the courts can do about it. [Courts] do not cruise in nonjusticiable waters." *Id.* at 99, 3 S.E.2d at 324 (internal citation omitted).

Moreover, this Court has previously recognized that the Declaration of Rights generally does not provide judicially manageable standards for claims related to gerrymandering. In *Dickson I* a group of North Carolina voters challenged redistricting plans passed by the General Assembly in 2011 (2011 Plans) under both federal and state law. *Dickson I*, 367 N.C. at 546, 766 S.E.2d at 242, *vacated and remanded on federal grounds*, 575 U.S. 959 (2015) (mem.). Among other claims, the plaintiffs argued that the 2011 Plans violated the " 'Good of the Whole' clause found in Article I, Section 2" of the North Carolina Constitution's Declaration of Rights. *Id.* at 575, 766 S.E.2d at 260. Article I, Section 2 states:

> All political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.

N.C. Const. art. I, § 2. The plaintiffs argued that the last clause of this provision constitutes "a specific limitation on the powers of the General Assembly with regard to redistricting" because the General Assembly " 'institutes' a new form of government" when it reapportions the legislative

districts after every decennial census. Pl.-Appellants' Br. at 178–79, *Dickson I*, No. 201PA12-2, 2013 5669654 (N.C. Sup. Ct. Oct. 11, 2013).

This Court rejected that claim as nonjusticiable, however, determining that Article I, Section 2 of the Declaration of Rights did not provide a judicially manageable standard:

> We do not doubt that plaintiffs' proffered maps represent their good faith understanding of a plan that they believe best for our State as a whole. However, the maps enacted by the duly elected General Assembly also represent an equally legitimate understanding of legislative districts that will function for the good of the whole. Because plaintiffs' argument is not based upon a justiciable standard, and because acts of the General Assembly enjoy "a strong presumption of constitutionality," *Pope v. Easley*, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001) (per curiam) (citation omitted), plaintiffs' claims fail.

Dickson I, 367 N.C. at 575, 766 S.E.2d at 260. We affirmed the trial court's conclusion that "the General Assembly applied traditional and permissible redistricting principles to achieve partisan advantage and that no constitutional violations resulted." *Id.* at 546, 766 S.E.2d at 242. Notably, the trial court in that case specifically stated that partisan gerrymandering is nonjusticiable:

> Redistricting in North Carolina is an inherently political and intensely partisan process that results in political winners and, of course, political losers. . . .
>
> Political losses and partisan disadvantage are not the proper subject for judicial review, and those whose power or influence is stripped away by shifting political winds cannot seek a remedy from courts of law, but they must find relief from courts of public opinion in future elections. Our North Carolina Supreme Court has observed that "[w]e do not believe the political process is enhanced if the power of the courts is consistently invoked to second-guess the General Assembly's redistricting decisions."

Dickson v. Rucho, Nos. 11 CVS 16896, 11 CVS 16940, 2013 WL 3376658, at *1–2 (N.C. Super. Ct. Wake County July 8, 2013) (quoting *Pender County v. Bartlett*, 361 N.C. 491, 506, 649 S.E.2d 364, 373 (2007),

aff'd sub nom. Bartlett v. Strickland, 556 U.S. 1, 129 S. Ct. 1231 (2009)). We affirmed the trial court's analysis. *See Dickson I*, 367 N.C. at 575, 766 S.E.2d at 260; *see also Dickson v. Rucho* (*Dickson II*), 368 N.C. 481, 534, 781 S.E.2d 404, 440–41 (2015) (reiterating our prior holding that Article I, Section 2 of the North Carolina Declaration of Rights does not provide a justiciable standard).

The four-justice majority in *Harper I* should have followed the analysis in *Dickson I*. Nevertheless, the *Harper I* majority departed from this precedent and insisted that our Declaration of Rights plainly provides a standard for identifying partisan gerrymandering. Even within that opinion, however, the majority could not consistently enunciate what that standard supposedly is. The Court described a "constitutional right[ ] of the people to vote on equal terms and to substantially equal voting power," as well as an "individual right[ ] of voters to cast votes that matter equally." *Harper I*, 380 N.C. at 323–24, 868 S.E.2d at 510. The *Harper I* majority also stated that the constitution protects "the opportunity to aggregate one's vote with likeminded citizens to elect a governing majority of elected officials who reflect those citizens' views." *Id.* at 378, 868 S.E.2d at 544. In another part of the *Harper I* opinion, the majority noted a districting plan violates the constitution when it "systematically makes it harder for one group of voters to elect a governing majority than another group of voters of equal size." *Id.* at 379, 868 S.E.2d at 544. In other parts of *Harper I*, however, the majority characterized the standard as a right to aggregate votes "on the basis of partisan affiliation." *Id.* at 390, 392, 868 S.E.2d at 551, 552.

These vague and inconsistent standards are not derived from any express provision in the constitution. Instead, these standards seem to be grounded in a desire for some form of proportionality and reflect a judicially created notion of how much representation is "fair" without explaining what fairness is or how to manage it. The Supreme Court reached the same conclusion regarding the claims in *Rucho*:

> Partisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence. Explicitly or implicitly, a districting map is alleged to be unconstitutional because it makes it too difficult for one party to translate statewide support into seats in the legislature. . . .
>
> Partisan gerrymandering claims invariably sound in a desire for proportional representation. As Justice

> O'Connor put it, such claims are based on "a conviction that the greater the departure from proportionality, the more suspect an apportionment plan becomes."

Rucho, 139 S. Ct. at 2499 (quoting *Bandemer*, 478 U.S. at 159, 106 S. Ct. at 2824 (O'Connor, J., concurring in the judgment)). These vague notions of fairness do not answer how to measure whether groups of voters are treated "fairly" or how to predict the results an election would produce. Moreover, as forewarned by the Supreme Court in *Rucho*, these vague notions of fairness did not produce a discernable or workable standard during the remedial proceedings in this case. *See id.* at 2499–500 (" 'Fairness' does not seem to us a judicially manageable standard . . . . Some criterion more solid and more demonstrably met than that seems to us necessary to enable the state legislatures to discern the limits of their districting discretion [and] to meaningfully constrain the discretion of the courts . . . ."(first alteration in original) (quoting *Vieth*, 541 U.S. at 291, 124 S. Ct. at 1784 (plurality opinion))).

In the remedial phase, the General Assembly attempted to apply the *Harper I* standard in drawing the Remedial House Plan (RHP), Remedial Senate Plan (RSP), and Remedial Congressional Plan (RCP). The General Assembly followed the same process in enacting each plan, yet the Special Masters recommended, and the three-judge panel concluded, that only the RHP and RSP met the *Harper I* standard. Accordingly, the three-judge panel struck the RCP. On appeal, however, the same four justices from *Harper I* also struck the RSP as unconstitutional, *see Harper II*, 383 N.C. at 94, 881 S.E.2d at 162, indicating that neither the General Assembly, the three-judge panel, the three Special Masters, nor three justices of this Court could properly understand and apply their standard set forth in *Harper I*. Constitutional compliance should not be so difficult. *See Rucho*, 139 S. Ct. at 2499 (noting that courts can only adjudicate partisan gerrymandering claims if they are "armed with a standard that can reliably differentiate unconstitutional from 'constitutional political gerrymandering.' " (quoting *Cromartie*, 526 U.S. at 551, 119 S. Ct. 1545)).

The four-justice majority in *Harper I* did not explain what its standard means or how it could be reliably met because it could not answer basic questions like how much partisan gerrymandering is too much and how can courts consistently and reliably measure partisanship in a redistricting plan. *See Harper I*, 380 N.C. at 384, 868 S.E.2d at 547 ("We do not believe it prudent or necessary to, at this time, identify an exhaustive set of metrics or precise mathematical thresholds which conclusively demonstrate or disprove the existence of an unconstitutional partisan

gerrymander."). Nevertheless, just as the plaintiffs in *Rucho* argued, *see Rucho*, 139 S. Ct. at 2503, the *Harper I* majority indicated that political science metrics could serve as "possible bright-line standards" for measuring partisan fairness. 380 N.C. at 385–86, 868 S.E.2d at 548 (stating that "a [M]ean-[M]edian [D]ifference of 1% or less when analyzed using a representative sample of past elections is presumptively constitutional" and "[i]t is entirely workable to consider the seven percent [E]fficiency [G]ap threshold as a presumption of constitutionality").

Although the *Harper I* majority insisted that "[l]ower courts can and assuredly will work out more concrete and specific standards," *id.* at 384, 868 S.E.2d at 547 (alteration in original) (quoting *Reynolds*, 377 U.S. at 578, 84 S. Ct. at 1390), on remand, the selected tests and corresponding scores—as predicted—proved insufficient as a clear and manageable standard. The General Assembly and the three-judge panel attempted to use the Mean-Median Difference and Efficiency Gap metrics to review the General Assembly's Remedial Plans. But the majority's application of these two seemingly straightforward tests led to inconsistent results.

For example, because the *Harper I* majority indicated that a 1% Mean-Median Difference and a 7% Efficiency Gap could serve as "possible bright-line standards" for measuring partisan fairness, *id.* at 385, 868 S.E.2d at 548, the three-judge panel relied heavily on the advisors' findings regarding each plan's Mean-Median Difference and Efficiency Gap scores in making its findings of fact on remand. Four out of seven advisors and experts calculated a Mean-Median Difference of less than 1% for both the RHP and the RSP, and all seven advisors and experts calculated an Efficiency Gap of less than 7% for both plans. *Harper II*, 383 N.C. at 153, 881 S.E.2d at 198 (Newby, C.J., dissenting). Accordingly, the three-judge panel held that both plans were "satisfactorily within the statistical ranges set forth in [*Harper I*]."

Similarly to the RSP and RHP, five out of eight advisors and experts found that the RCP had a Mean-Median Difference of less than 1% and an Efficiency Gap of less than 7%. *Id.* at 158, 881 S.E.2d at 201. The three-judge panel, however, concluded without explanation that the RCP was "not satisfactorily within the statistical ranges set forth in [*Harper I*]." A majority of advisors and experts found that all three plans fell within the thresholds set by the *Harper I* majority, yet for some reason—a reason that the three-judge panel did not articulate—only the RCP was unconstitutional. Why was this range of data acceptable for the RSP and RHP, but not for the RCP? The three-judge panel could not explain its inconsistent results because these tests do not provide a clear, judicially manageable standard. Instead, as cautioned by *Rucho*, these tests

"ask[ ] judges to predict how a particular districting map will perform in future elections [which] risks basing constitutional holdings on unstable grounds outside judicial expertise." *Rucho*, 139 S. Ct. at 2503–04.

Just like the three-judge panel, the same four-justice majority from *Harper I* found their own standard unmanageable when they tried to apply it in *Harper II*. For example, in declaring the RSP unconstitutional, the *Harper II* majority believed that "all but one [a]dvisor" calculated the RSP's Mean-Median Difference score as greater than 1%. *Harper II*, 383 N.C. at 121, 881 S.E.2d at 178.[14] According to those four justices, this evidence supported a conclusion that the RSP did not meet the statistical thresholds identified in *Harper I*. *Id.* The same number of advisors, however, found that the RHP scored above the 1% Mean-Median Difference threshold as well. Inexplicably, the four-justice majority in *Harper II* concluded that this fact weighed against a finding that the RSP was constitutional but supported a finding that the RHP was constitutional. Those justices did not say why the same evidence supported contrary conclusions for two different maps.

Similarly, the *Harper II* majority believed that the RHP was constitutional because, collectively, "[t]he [ ] [a]dvisors determined that the RHP yields an average [E]fficiency [G]ap of about 2.88%, [and] an average [M]ean-[M]edian [D]ifference of about 1.27%." *Id.* at 119–20, 881 S.E.2d at 177. The advisors' average scores for the RSP were very close to their averages for the RHP. For the RSP, the average of the advisors' Efficiency Gap scores was 3.81% and the average of their Mean-Median Difference scores was 1.29%. Thus, both plans had an average Efficiency Gap score that was well below the 7% threshold identified in *Harper I* as presumptively constitutional. *Harper I*, 380 N.C. at 386, 868 S.E.2d at 548. Moreover, the average Mean-Median Difference scores for the RSP and RHP were within two-one-hundredths of a percentage point of each other. The *Harper II* majority did not say why an average Mean-Median Difference of 1.27% weighed in favor of the RHP's constitutionality but an average Mean-Median Difference of 1.29% weighed against the RSP's constitutionality. If there was something significant about that minute difference, the *Harper II* majority did not or could not explain it.[15]

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14. This statement that "all but one [a]dvisor" calculated a Mean-Median Difference greater than 1% is inaccurate. Half of the advisors, not one, calculated the RSP's Mean-Median Difference score as less than 1%.

15. Both the RHP and RSP were used during the 2022 election cycle. Significantly, under the RHP approved by the four-justice majority in *Harper II*, Republican candidates won 59% of the house races while receiving about 58% of the aggregate statewide vote. *See* North Carolina State Board of Elections, https://er.ncsbe.gov/?election_dt=11/08/2022&

This standard is not "clear" or "judicially manageable" because, during the remedial phase of this case, no one—not even the four justices who created it—could apply it to achieve consistent results. *Rucho*, 139 S. Ct. at 2500, 2499 (internal citations and quotations omitted). A constitutional standard must be clear and easily applied by the branch assigned the duty in question. The approach created by the four justices in *Harper I* is neither. *See id.* at 2498, 2499 (noting that a justiciable issue has a "clear, manageable, and politically neutral" standard that can "reliably differentiate" an unconstitutional from a constitutional action (quoting *Vieth*, 541 U.S. at 306–08, 124 S. Ct. at 1793 (Kennedy, J., concurring in the judgment))). The remedial proceedings in this case demonstrate that neither the criteria created in *Harper I* nor our constitution provide a judicially discoverable or manageable standard to address claims of partisan gerrymandering.

The dissent argues that a court's reviewing a legislatively enacted redistricting statute for claims of partisan gerrymandering is similar to a court's examining a speedy trial claim under the constitution or determining a motion to dismiss criminal charges. This approach, however, contains a fundamental error: it fails to recognize that the constitution assigns the responsibility of redistricting to the General Assembly, not to the courts. It forgets this Court's time-honored standard of review for legislation. The dissent seems to ignore that the General Assembly fulfills its redistricting responsibility by enacting laws. Such legislation is entitled to a presumption of constitutionality and requires a showing that the legislation violates an express provision of the constitution beyond a reasonable doubt. A court's applying a constitutional provision to particular facts or evaluating the quality of certain evidence is fundamentally different than assessing the constitutionality of a statute through judicial review.

Perhaps the dissent's analogies reveal a more fundamental misunderstanding of a court's role in the redistricting process. The majority in *Harper I* and the dissent here seem to imagine a future where redistricting is a court-managed process: a future where courts endlessly supervise the redistricting process and impose their own standards in the same way that courts assess which criminal trials are speedy enough. As previously explained, however, our framers chose a different approach.

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county_id=0&office=NCS&contest=0 (last visited Apr. 13, 2023) . Under the RSP, which the *Harper II* majority found unconstitutional, Republican candidates won 60% of the Senate races while receiving about 59% of the aggregate statewide vote. *Id.* It is unclear why this small difference of approximately one percentage point rendered the RHP constitutional and the RSP unconstitutional.

They committed redistricting decisions to the wisdom and judgment of the legislative branch. In short, the dissent's analogies further reinforce that there is no judicially discoverable and manageable standard.

A judicially discoverable and manageable standard is necessary for resolving a redistricting issue because such a standard "meaningfully constrain[s] the discretion of the courts[ ] and [ ] win[s] public acceptance for the courts' intrusion into a process that is the very foundation of democratic decisionmaking." *Rucho*, 139 S. Ct. at 2500 (first quoting *Vieth*, 541 U.S. at 306–08, 124 S. Ct. at 1793 (Kennedy, J., concurring in the judgment); and then quoting *id.* at 291, 124 S. Ct. at 1784 (plurality opinion)). Here the standard set forth in *Harper I* does not constrain the discretion of our courts at all. Instead, it invites limitless judicial involvement because it is so difficult to apply and leads to inconsistent results. Only the four justices who enunciated the *Harper I* standard can say for certain whether their standard has been met. Accordingly, under the *Harper I* framework, every redistricting decision the General Assembly makes would be subject to judicial oversight. This framework does not constrain judicial discretion; rather, it requires that judicial decisionmaking dominate the entire redistricting process.

The approach mandated by *Harper I* would not simply apply to statewide redistricting decisions. At oral argument, counsel for plaintiffs stated that the *Harper I* principles would apply to "all elections" throughout the State because "it stems from a constitutional principle that speaks to all elections." *See* Oral Argument at 49:35, *Harper v. Hall*, (413PA21-2) (Mar. 14, 2023), https://www.youtube.com/watch?v=cpzlPxuu2I (last visited Apr. 20, 2023). This result would embroil the judiciary in every local election in every county, city, and district across the state.[16] Municipalities, counties, local boards of education, and special districts frequently hold hundreds, if not thousands, of local elections. Under the *Harper I* standard, our courts would need to ensure that each of these elections provides each member of the relevant local electorate a sufficient "opportunity to aggregate [his or her] vote with likeminded citizens to elect a governing majority of elected officials who reflect those citizens' views." 380 N.C. at 383, 868 S.E.2d at 546. This process would involve endless litigation that would task our judges with ensuring that the political makeup of every city council, county commission,

16. North Carolina has 100 counties, 552 municipalities, numerous "special districts," such as sewer and water districts, and many local boards of education. *See How NC Cities Work*, N.C. League of Municipalities, https://www.nclm.org/advocacy/how-nc-cities-work (last visited Apr. 20, 2023).

or local board of education adequately reflected the distribution of Republicans and Democrats in the corresponding locality.

In addition to involving our courts in countless redistricting lawsuits, the *Harper I* standard does not provide any guidance for several potential issues that could arise in these cases. Where the standard does not provide guidance, our courts would have to utilize their own policy preferences. For example, the *Harper I* standard does not tell courts how to account for voters who are affiliated with a political party other than Republican or Democrat or who are not affiliated with a party at all. Our judges would have to address these concerns without any "clear, manageable, [or] politically neutral" guidance. *Rucho*, 139 S. Ct. at 2498 (quoting *Vieth*, 541 U.S. at 306–08, 124 S. Ct. at 1793 (Kennedy, J., concurring in the judgment)). *Harper I* provides no guidance to courts on these issues. Instead, it requires courts to use their discretion to "work out" these questions in future litigation. *Harper I*, 380 N.C. at 384, 868 S.E.2d at 547. This type of unmoored discretion is a quintessential characteristic of an unmanageable standard and a nonjusticiable, political question. As the Supreme Court has noted:

> Nor is the goal of fair and effective representation furthered by making the standards of reapportionment so difficult to satisfy that the reapportionment task is recurringly removed from legislative hands and performed by [ ] courts which themselves must make the political decisions necessary to formulate a plan or accept those made by reapportionment plaintiffs who may have wholly different goals from those embodied in the official plan. From the very outset, we recognized that the apportionment task, dealing as it must with fundamental "choices about the nature of representation," *Burns v. Richardson*, 384 U.S. [87,] 92, [1965], is primarily a political and legislative process.

Gaffney, 412 U.S. at 749, 93 S. Ct. at 2329.

C. Policy Decisions

Along with failing to provide a discernible and manageable standard, the approaches created in *Harper I* and *Harper II* involve a host of "policy determination[s] of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217, 82 S. Ct. at 710. Initially, since the state constitution does not mention partisan gerrymandering, the four justices in *Harper I* first had to make a policy decision that the state constitution

prohibits a certain level of partisan gerrymandering. Tellingly, the majority was unable to articulate how much partisan gerrymandering is too much. Essentially, the majority chose to insert into our constitution a requirement for some type of statewide proportionality based on their view of political "fairness." Like the Federal Constitution, however, our constitution does not contain a proportionality requirement. *See Rucho*, 139 S. Ct. at 2499. Instead, the creation of this proportionality requirement was a monumental policy determination made by the *Harper I* majority on its own initiative and equated to a judicial amendment to our constitution.

Then, those four justices determined that our constitution mandates the use of certain political science tests as a measure of this newly created constitutional requirement. As the Supreme Court noted in *Rucho*, however, the definition of "fairness" and how to measure it "poses basic questions that are political, not legal." *Id.* at 2500. For example, the *Harper I* majority stated that political science tests could identify an unconstitutional redistricting plan when "using a representative sample of past elections." 380 N.C. at 386, 868 S.E.2d at 548. In doing so, the four-justice majority in *Harper I* unilaterally determined that past election results can accurately predict how individual voters will vote in the future. But there is no reason to presume this is true because individual voters may vote inconsistently at different times in their life for a variety of reasons. As the Supreme Court noted in *Rucho*, voters select candidates based on "the issues that matter to them, the quality of the candidates, the tone of the candidates' campaigns, the performance of an incumbent, national events or local issues that drive voter turnout, and other considerations." 139 S. Ct. at 2503. Each of these factors is different for each election, and it is not clear how past election results can possibly predict how each of these factors may affect individual voters in future elections. The decision to use certain political science tests, which tests to use, which scores are required, and which past election results are most predictive of future electoral behavior involve policy choices that are untethered to the law.

Additionally, in determining that past election results should be used to calculate political science metrics, the *Harper I* majority made the policy determination that past elections are a "better" source of partisan election data than other potential sources. The *Harper I* majority even preferred certain past elections over others. Some might argue, however, that data from past elections does not measure the distribution of voters among various political groups, but that instead, it measures the rate of voter turnout. Instead of using past election results,

the *Harper I* majority might have required partisan data from current voter registration information. In theory this data set might be a more accurate representation of how voters might vote in an upcoming election because it reflects current party affiliation statistics instead of past voter turnout. Selecting between past elections, current voter registration information, or some other data as the "best" source for garnering partisan election data, however, is exactly the sort of non-judicial policy determination warned of in *Rucho*. *See Rucho*, 139 S. Ct. at 2500 ("Deciding among just these different visions of fairness (you can imagine many others) poses basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral.").

Moreover, simply the decision to use these political science metrics at all requires policy determinations that are not grounded in any constitutional guidance. Because these tests purport to measure "partisan fairness," use of these tests assumes that the chosen past election results are the most relevant factor for predicting future election results and assumes that voters will continue to vote for the same party that they have in the past. This is not true since many other considerations influence a voter's selection of a candidate. For example, representative government is grounded in the concept of geographic representation. Though partisanship may influence a representative's attention to certain political issues, the representative is likely to attend to numerous other issues important to the shared community interests that affect his or her constituents. Indeed there are countless policy issues, and voters and representatives of the same political party may be likeminded on some issues but not others. The constitution cannot guarantee that a representative will have identical political objectives as a given constituent because that is an impossible requirement. Representatives are individuals with their own beliefs and who pursue their own motivations, often in opposition to other members of their own party. Partisan fairness metrics do not—and cannot—measure or quantify these intangible characteristics. The decision to use these "partisan fairness" tests is a policy determination because it presumes that a voter's or a candidate's partisan affiliation—over all other factors—is the most relevant factor in predicting future election outcomes.

After making the policy decision that political science tests must be used to measure partisan fairness, the *Harper I* majority made yet another policy choice by selecting two particular political science tests—the Mean-Median Difference and Efficiency Gap metrics—to serve as its

"bright-line standards." *See Harper I*, 380 N.C. at 385, 868 S.E.2d at 548. The *Harper I* majority was aware of numerous other potential tests; yet it chose these two as the best measures of its definition of fairness. *See id.* at 384, 868 S.E.2d at 547 (recognizing "close-votes, close-seats analysis" and "partisan asymmetry analysis" as other potential fairness metrics).

Furthermore, utilization of these two tests—Mean-Median Difference and Efficiency Gap—requires a host of policy determinations. During the remedial process, the General Assembly and each of the four advisors calculated a Mean-Median Difference and Efficiency Gap score for each of the Remedial Plans. Each calculated slightly different scores, however, because each utilized different redistricting software, partisan election data, and calculation methods. The General Assembly, for example, calculated their scores using Maptitude, a "widely accepted" redistricting software, and a set of twelve statewide elections selected by plaintiffs' expert, Dr. Mattingly (Mattingly Election Set). Notably, neither the Special Masters, the three-judge panel, nor the *Harper II* majority gave any deference to the General Assembly's approach. Each of the advisors selected different redistricting software and elections sets from those chosen by the General Assembly and by each other. In turn, the three-judge panel had to weigh each combination of redistricting software, partisan election data, and calculation methods and determine which was "best." Each of these choices constitutes a policy determination that courts are not equipped to make.

For example, each of the advisors used different redistricting software from the others, and none chose to use Maptitude, as had the General Assembly. Dr. Grofman used Dave's Redistricting App to calculate the Remedial Plans' Mean-Median Difference and Efficiency Gap scores, and Dr. McGhee used a web-based redistricting software called PlanScore. It is not clear from Dr. Grofman's or Dr. McGhee's reports how these technologies calculate the relevant metrics or whether they do so differently from Maptitude.

Likewise, each of the advisors used different sets of elections as their sources of partisan data to measure the Remedial Plans. Once again, none chose the same set of elections as each other or as the General Assembly. The General Assembly used the Mattingly Election Set, which consisted of twelve statewide elections from 2016 and 2020 chosen by one of plaintiffs' experts. Alternatively, Dr. Jarvis pulled partisan election data from eleven statewide elections. Nine of these elections matched the General Assembly's Mattingly Election Set, but two others did not. Dr. Grofman used "major statewide races [in] 2016–2020" but did not specify how many elections or which ones. Dr. Wang, on the

other hand, varied the vote totals in each of these elections "above and below an average [vote total]" in order to "evaluat[e] a range of future [vote total] scenarios that may arise in the coming decade." Dr. Wang also created a composite of vote totals by averaging together three data points: (1) the average two-party vote share of the 2016 and 2020 presidential elections; (2) the average two-party vote share of the 2016 and 2020 United States Senate elections; and (3) the average two-party vote share of the 2020 elections for Governor and Attorney General.

Additionally, Dr. McGhee took a very "different approach" to calculating the Mean-Median Difference and Efficiency Gap scores. Instead of analyzing which party's candidate would win a proposed new district under prior election contests, Dr. McGhee used PlanScore to "predict" potential partisan outcomes in the future. Dr. McGhee did not explain which elections PlanScore applied to predict future election results, nor did he explain the criteria used by PlanScore to make such predictions. Dr. McGhee also calculated two sets of Mean-Median Difference and Efficiency Gap scores. He calculated one set from a simulated election that assumed that no incumbents ran for reelection and another set from a simulated election that assumed that all incumbents ran for reelection in the proposed district containing their residence. He did not explain why he made these unrealistic assumptions.

As a result, the General Assembly and each advisor calculated different scores for the Remedial Plans, even though they all used the same tests. These varying results prove that the use of two seemingly straightforward fairness metrics actually involves a multitude of policy choices—the kind of policy choices the Supreme Court warned of in *Rucho*. *Rucho*, 139 S. Ct. at 2503–04 ("For all of those reasons, asking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise."). Because there are "no legal standards discernible in the [c]onstitution" that describe statewide proportionality or that instruct which tests to use or how to calculate them, each party and expert simply calculated his scores in whatever way he saw fit. *Id.* at 2500. Each of these differences illustrates the numerous policy choices that are inherent in applying the metrics selected in *Harper I*.

The standard set forth in *Harper I* is clearly rife with policy determinations that our courts are not equipped to make. *See Baker*, 369 U.S. at 217, 82 S. Ct. at 710. Accordingly, the claims at issue—partisan gerrymandering claims—are nonjusticiable. Moreover, when a court engages in policy determinations like these, it ignores our long-standing standard of review that presumes that acts of the General Assembly are

constitutional. *See Berger*, 368 N.C. at 639, 781 S.E.2d at 252. In part, the existence of policy choices indicates that a given issue may be nonjusticiable because the legislative branch—not the judicial branch—is "without question 'the policy-making agency of our government.' " *Rhyne*, 358 N.C. at 169, 594 S.E.2d at 8 (quoting *McMichael*, 243 N.C. at 483, 91 S.E.2d at 234). If a court engages in policy questions that are better suited for the legislative branch, that court usurps the role of the legislature by deferring to its own preferences instead of the discretion of the people's chosen representatives. For this reason, and to protect against this result, the proper starting point in cases challenging an act of the General Assembly is to assume the General Assembly's policy choices are constitutional unless proved otherwise "beyond any reasonable doubt." *Jenkins v. State Bd. of Elections*, 180 N.C. 169, 172, 104 S.E. 346, 348 (1920).

Thus, all the policy choices made by the four-justice majority in *Harper I* and *Harper II* demonstrate how that majority utterly ignored the well-established presumption of constitutionality. By making these policy choices, the majority replaced the General Assembly's discretionary policymaking authority with its own.[17] This approach flipped the presumption of constitutionality on its head and usurped the role of the General Assembly—the policymaking branch of government.

In sum, a matter is nonjusticiable if the constitution expressly assigns responsibility to one branch of government, or there is not a judicially discoverable or manageable standard by which to decide it, or it requires courts to make policy determinations that are better suited for the policymaking branch of government. All three elements are present in the claims at issue in this case. In addition to the legislature's plenary power, the constitution expressly assigns the General Assembly redistricting authority subject only to express limitations. The decision to implement a proportionality or political fairness requirement in the constitution without explicit direction from the text inherently requires policy choices and value determinations and does not result in a neutral, manageable standard. Accordingly, plaintiffs' claims of partisan gerrymandering are nonjusticiable, political questions that are "beyond the reach of" our courts. *Rucho*, 139 S. Ct. at 2506.

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17. As illustrated here, reliance on the tests set forth in *Harper I* invariably results in redistricting by a judicial redistricting commission made up of court-appointed special masters and advisors, which is not authorized anywhere in the constitution. Notably, the only North Carolina races that did not reflect the statewide voting trends in the 2022 election cycle were North Carolina's congressional races held under the Interim Congressional Plan drawn by the Special Masters and Dr. Grofman.

V. Declaration of Rights

Like the plaintiffs in *Rucho*, plaintiffs here allege that various constitutional provisions prohibit partisan gerrymandering. In place of the Federal Constitutional provisions invoked in *Rucho*, plaintiffs instead argue that comparable state constitutional provisions expressly limit partisan considerations in redistricting. Plaintiffs are mistaken; these state constitutional provisions do not expressly limit the General Assembly's redistricting authority or address partisan gerrymandering in any way. Where there is no express limitation on the General Assembly's authority in the text of the constitution, this Court presumes an act of the General Assembly is constitutional. *Berger*, 368 N.C. at 639, 781 S.E.2d at 252. As previously stated, courts determine the meaning of a constitutional provision by discerning the intent of its drafters when they adopted it. Courts look first to the plain language of the text, keeping in mind the historical context of the text's adoption.

Our Declaration of Rights first appeared in the 1776 constitution and provides "a statement of general and abstract principles." *State Constitution* 6. The "abstractness" of the Declaration of Rights has "allowed most of it to survive." *Id.* "Because of their abstractness," many provisions of the Declaration of Rights do not give rise to "justiciable rights." *Id.* at 48; *see*, *e.g.*, *Dickson I*, 367 N.C. at 575, 766 S.E.2d at 260 (stating that the "Good of the Whole" clause in Article I, Section 2 of the constitution does not provide a "justiciable standard"). Rather, the Declaration of Rights sets out "[b]asic principles" in "general terms," and these basic terms are "given specific application in later articles." *State Constitution* 46. Here two of the provisions cited by plaintiffs—the free elections clause and the freedom of assembly clause—are from our 1776 Declaration of Rights. The other two—the equal protection clause and free speech clause—first appeared in our 1971 constitution.

A. Free Elections Clause

[3] Article I, Section 10 states that "[a]ll elections shall be free." N.C. Const. art. I, § 10. The clause first appeared in the 1776 constitution, which stated that the "Elections of Members, to serve as Representatives in [the] General Assembly, ought to be free." N.C. Const. of 1776, Declaration of Rights, § VI. The 1868 constitution restated the free elections clause as "[a]ll elections ought to be free." N.C. Const. of 1868, art. I, § 10. In the 1971 constitution, the provision became "[a]ll elections shall be free," N.C. Const. of 1971, art. I, § 10, the form that it retains today. *See* N.C. Const. art. I, § 10. Even though the word "ought" in both the 1776 and 1868 constitutions was changed to "shall" in the 1971

constitution, this change was not a substantive revision to the free elections clause. *See Report of the North Carolina State Constitution Study Commission* 73–75; *see also Smith v. Campbell*, 10 N.C. (3 Hawks) 590, 598 (1825) (declaring that "ought" is synonymous with "shall" and noting that "the word *ought*, in this and other sections of the [1776 constitution], should be understood imperatively").

"Free" means having political and legal rights of a personal nature or enjoying personal freedom, a "free citizen," or having "free will" or choice, as opposed to compulsion, force, constraint, or restraint. *See Free*, Black's Law Dictionary (11th ed. 2019). As a verb, "free" means to liberate or remove a constraint or burden. *Id.* Therefore, giving the provision its plain meaning, "free" means "free from interference or intimidation." *State Constitution* 56.

As with all "[b]asic principles" contained within the Declaration of Rights, we must consider the free elections clause in the context of later articles that give more specific application to Article I, Section 10. *Id.* at 46. The terms "elections" and "free," N.C. Const. art. I, § 10, must be read, for example, in the context of Article VI, entitled "Suffrage and Eligibility to Office," *see id.* art. VI. The first five sections of Article VI address the right to vote, and the last five sections concern eligibility to hold office. *See id.* Even though "elections shall be free," they are nonetheless restricted in many ways by Article VI. *See, e.g.*, N.C. Const. art. VI, § 1 (requiring a North Carolina voter to be a citizen of the United States and at least 18 years old); *id.* art. VI, § 2(1)–(2) (placing residency requirements on voters); *id.* art. VI, § 2(3) (placing restrictions on felons' voting rights); *id.* art. VI, § 3 (allowing for conditions on voter registration as prescribed by statute); *id.* art. VI, § 5 (requiring that votes by the people be by ballot); *id.* art. VI, § 7 (requiring public officials to take an oath before assuming office); *id.* art. VI, § 8 (outlining certain disqualifications from holding public office); id. art. VI, § 9 (prohibiting dual office holding); *id.* art. VI, § 10 (allowing an incumbent to continue in office until a successor is chosen and qualified).

Likewise, even though our 1776 constitution stated that elections were "free," N.C. Const. of 1776, Declaration of Rights, § VI, other provisions limited the scope of that phrase. Notably, "free elections" did not mean that everyone could vote, N.C. Const. of 1776, § VII (limiting the right to vote for senators to "freemen" who were at least twenty-one years old, lived in their county of residence for at least one year, and owned at least fifty acres of land in the same county for the preceding six months); *id.* § VIII (limiting the right to vote for Representatives in the House of Commons to "freemen" who were twenty-one years old,

lived in their county of residence for at least one year, and paid public taxes); that anyone could run for office, *id.* § V (only men who lived in their county of residence for one year and owned at least three hundred acres of land in fee for one year could serve in the Senate); *id.* § VI (only men who lived in their county for at least one year and owned at least one hundred acres of land in fee or for life for at least six months could serve in the House of Representatives); that the people were free to vote for all governmental officers, *see id.* § XIII (empowering the General Assembly to elect Judges of the Supreme Court and the Attorney General); *see also id.* § XV (empowering the General Assembly to elect the Governor); or that the General Assembly was restricted from apportioning itself by dividing existing counties, *id.* §§ II, III (providing each county one senator and two representatives with no limitations on the General Assembly's discretion to create new counties). Clearly, when our framers intended to limit or clarify the scope of "free elections," they did so with express provisions in the text. They did not, however, add anything to our 1776 constitution about partisan gerrymandering.

With respect to the history of the clause, its original intent and inclusion was to protect against abuses of executive power. Our free elections clause was not intended to protect the people from their representatives who frequently face election by the people. Under colonial rule, the English crown appointed the governor for an indefinite period of time. Charles Lee Raper, *North Carolina: A Study in English Colonial Government* 27 (1904). As a result, the governor "was very naturally disposed," *id.* at 186, to indulge the interests of the crown as opposed to those of "the people whose affairs he was to administer," *id.* at 27.

Additionally, the governor exercised broad executive, judicial, and legislative functions. *See id.* at 28–32. The governor was the "head of the whole administrative machinery of the province," *id.* at 29, and could issue land grants that were legal "even against the king himself," *id.* at 28. He also possessed the authority to create and establish the colony's judicial system with any courts of law and equity that he saw fit and could remove any judge or justice for "sufficient reason." *Id.* at 37. In the legislative realm, the governor possessed a veto power as no law "could be passed without his assent." *Id.* at 35. The governor could call the General Assembly whenever "occasion demanded it," *id.* at 34, and could dissolve it if he saw fit, *id.* at 35. Additionally, as the three-judge panel found, the Royal Governor "could require counties and towns to obtain charters of incorporation prior to being able to elect representatives to the legislature," a power which inserted the governor squarely into the issue of apportionment. Moreover, North Carolina colonists were also

accustomed to the English king exercising broad and oppressive executive powers as well. *See Our First Revolution: The Remarkable British Upheaval that Inspired America's Founding Fathers* 167 (2007) [hereinafter *Our First Revolution*].

For these reasons, there were tensions between North Carolina's House of Burgesses and the governor between 1729 and 1776. The two clashed over representation in the General Assembly, *id.* at 90–91, the creation of counties, *id.* at 89–90, 217, the number of members needed to constitute a quorum in the General Assembly, *id.* at 216–18, the appointment of agents to England, *id.* at 206–08, and the appointment of judges, *id.* at 207–09, among other issues. Accordingly, by 1776 North Carolinians were inclined to replace "[o]verbearing colonial governors" with a much weaker executive officer. *Constitutional History* 1764. As the three-judge panel found in its 11 January 2022 Judgment,

> [i]t was the experience of the people of the State of North Carolina that was the most important source for the creation of the 1776 Constitution. By far, the greatest change in the structure of North Carolina's government, other than elimination of the parliament and the Crown, was the vast reduction in the powers of the Governor and the substantial increase in the powers of the General Assembly. These changes were made to make "the governor that figurehead in law which in fact the colonial legislature had long sought to make him."

(Quoting Earle H. Ketcham, *The Sources of the North Carolina Constitution of 1776*, 6 N.C. Hist. Rev. 215, 230 (1929).) Thus, under the 1776 constitution, the General Assembly, not the people, chose the governor, N.C. Const. of 1776, § XV, the members of the council of state, *id.* § XVI, the state treasurer, *id.* § XXII, the state secretary, *id.* § XXIV, the attorney general, *id.* § XIII, and all judges, *id.* The governor had no veto power under the 1776 constitution, *see id.* §§ XVII–XX, and "he took no formal role in legislation" because "bills became laws when passed by both houses and signed by the speakers," *Constitutional History* 1764. Additionally, representation in both the Senate and House of Commons was by county. N.C. Const. of 1776, § II (granting each county one senator); *id.* § III (granting each county two representatives and the borough towns of Edenton, New Bern, Wilmington, Salisbury, Hillsborough, and Halifax one representative each). Because the General Assembly had the power to create counties, it also had the power to determine how

much representation each portion of the State received. *See, e.g.*, Act of Apr. 8, 1777, An Act for dividing Rowan County, and other Purposes therein mentioned, ch. XIX, 1777 N.C. Sess. Laws 33 (splitting off part of Rowan County to create Burke County).

Our free elections clause was placed in the 1776 Declaration of Rights at the same time as other constitutional provisions that both limited executive power and increased legislative power. Accordingly, any argument that the people added the free elections clause to the 1776 constitution for the purpose of limiting the General Assembly's apportionment authority is inconsistent with this historical context. Instead, the free elections clause was intended to address abuses of executive power and to protect against interference and intimidation in the voting process. The historical context occurring in England less than one hundred years earlier confirms this meaning of the free elections clause.

Our 1776 Declaration of Rights was modeled in part after the English Bill of Rights, a product of the Glorious Revolution in England in 1688. *See* Hugh Talmage Lefler & Albert Ray Newsome, *The History of a Southern State: North Carolina* 221 (3d ed. 1973). "Today everyone in Britain and the United States is in a sense a residuary beneficiary of the [Glorious] Revolution, although we can at present take this for granted since the issues involved now form the accepted bases of our institutions and societies." J.R. Jones, *The Revolution of 1688 in England* 8 (Jack P. Greene 1972) [hereinafter *Revolution of 1688*].

In the 1670s and 1680s, numerous European countries, including England, were moving towards absolutist monarchies. This trend "seemed the way of the future" throughout the continent. *Our First Revolution* 7. In England, however, conflict swelled between King James II and Parliament as the king took various actions beyond the limits of his authority in order to achieve his legislative agenda.[18] King James II also sought to strengthen the crown by increasing the size of the standing army and continuing regiments that had been raised temporarily for the purpose of opposing rebellions. *Revolution of 1688* 61. James hoped to achieve these goals by creating a compliant Parliament; but by 1685, he realized he could not do so "without first changing the local officials . . . who conducted and effectively controlled the elections,

18. In the modern American context, we might refer to such encroachments as a separation-of-powers violation. *See Berger*, 368 N.C. at 660, 781 S.E.2d at 265 (Newby, J., concurring in part and dissenting in part) ("A violation of separation of powers occurs when one branch of government exercises the power reserved for another branch of government.").

and without changing the franchise in many boroughs."[19] *Our First Revolution* 109–10. King James shifted local authority by adjusting a county's or borough's charter to embed the king's agents and ensure a favorable outcome for the king in the 1685 election. R. H. George, A.M., Ph.D., Fellow of the Royal Hist. Soc'y, Parliamentary Elections and Electioneering in 1685 176–78 (Oct. 8, 1935). In some instances, these adjustments altered who could vote in order to limit the franchise to those most likely to support the king's preferred candidates. *See id.* at 176. In other cases, the adjustments secured for the king's agents the most powerful political offices and gave them "complete control of the situation." *Id.* at 177. Once in power, the agents fully and immediately exercised their influence on behalf of the king. *See id.* at 177, 182, 194–95.

The king's agents used various tactics to manipulate and intimidate local officials, would-be parliamentarians, and local business leaders into supporting the king's plans. *See id.* at 168, 188. They intimidated locals through physical scuffles, threats, demonstrations of force, and beatings, *id.* at 173–75, and coerced businesses to support King James's preferred candidates, some altogether foreign to the locale, by promising gifts, bribes, or patronage in exchange for compliance or by threatening to revoke their license to operate, *id.* at 176–78, 184, 188–90. When the time for election came, local agents of the king who conducted the polling used devious polling practices to open, close, and reopen polling to ensure a certain electoral outcome. *Id.* at 182, 185, 188.

After the elections of 1685, the resulting Parliament was "agreeable" to King James at first, *id.* at 168, but once James presented his legislative agenda, many parliamentary representatives interpreted his goals "as a danger to constitution and liberties," *Revolution of 1688* 62. Accordingly, King James met with opposition and, as a result, he discontinued the session of Parliament in November 1685 so he could unilaterally act to achieve his legislative agenda. *See id.* at 64–66. Once

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19. The process for selecting members of Parliament varied greatly among counties and boroughs during this time. Some counties elected two members and others, one. *Our First Revolution* 55. Some boroughs elected as many as four members, while others only selected two or one. *Id.* There was also disparity between the localities regarding who could vote. "In some, the right to vote was attached to the ownership of certain pieces of property; in some it was limited to officers of the borough corporation; in many, all freemen, that is adult males not bound to service, could vote." *Id.* at 56. Moreover, in the boroughs, the size of the electorate varied widely. *Id.* at 57. Local officials and large landowners "exerted great influence over local elections" in both the counties and boroughs. *Id.* These local differences "were the result of ancient practice" that had "grown up in response to the demands of particular communities and private interests" and "reflected a bewildering variety of local customs." *Id.* at 58.

he discontinued the session of Parliament, he immediately put that agenda into motion. *See id.* at 65–74. He repeatedly postponed the next Parliamentary session in an effort to convince representatives to support his legislative objectives. *See id.* When those efforts proved unsuccessful, *id.*, however, he dissolved Parliament in July 1687 and began a second "campaign to pack" it with members that would support his legislative agenda, *id.* at 128, 131, 151; *see also Our First Revolution* 109. The king's campaign "represented a move to make this power complete, total, and permanent," *Revolution of 1688* 151, and was seen as "an attempt to move England toward 'some form of absolutism,' " *Our First Revolution* 109 (quoting *Revolution of 1688* 11–12).

King James once again set about intimidating and manipulating local officials. *Id.* at 109–10. He sent agents to canvass justices of the peace and other local officials to ascertain whether they would support the king's legislative goals. *Id.* The king used their responses to create his short list of "approved parliamentary candidates," *Revolution of 1688* 135, and to purge local officials who did not agree to support his plans, *see id.* at 132–33. King James dismissed thousands of county and borough officials who gave "unsatisfactory" responses. *Our First Revolution* 110. Additionally, the king's agents ensured that local sheriffs attended borough and county elections to intimidate candidates who were hostile to royal policies. *Revolution of 1688* 147.

King James's tactics of commandeering his subjects' support to ensure an obedient Parliament were entirely unfamiliar to the English people and their representatives.

> Contemporaries were well aware that James was ruling in a new way, a new way heavily modeled on the methods and practices of Louis XIV [of France]. Both James's enemies and his friends marveled at the rapid increase in royal power. James II's "power swelled so fast," recalled the Whig critic Lord Delamere, "that he quickly makes all people to feel the intolerable burden of an unbounded prerogative." Barillon agreed that "the royal authority increases everyday by means of the firm conduct of the King of England." James, all concurred, took his measures from Louis XIV. "The French precedent was too exactly followed," lamented one pamphleteer in 1688. "Our King in imitation of his brother of France," wrote another pamphleteer drawing a similar parallel, "strives to bring all the offices and magistracy of the kingdom,

> that were legally of the people's choice, to be solely and immediately depending on his absolute will for their being."

Steve Pincus, *1688*: *The First Modern Revolution* 160–62 (2009). Ultimately, however, King James II's absolutism did not prevail in England. *Our First Revolution* 7. Instead, through the Glorious Revolution and the English Bill of Rights, Englishmen chose an "alternative . . . constitutional monarchy with limits on government[and] guaranteed rights." *Id.*

The drafters of the English Bill of Rights very clearly intended to address King James's overreaches of executive power and to return authority to Parliament. In the eyes of the drafters, King James had, among other wrongdoings, subverted "the laws and liberties of th[e] kingdom" by "assuming and exercising [the] power of dispensing with and suspending of laws, and the execution of laws, without consent of [P]arliament." Bill of Rights 1689, 1 W. & M. Sess. 2 c. 2 (Eng.). King James had exercised "pretended power[s]" beyond the limits of his executive authority by levying taxes for "the use of the crown" without the permission of Parliament, "raising and keeping a standing army . . . without the consent of [P]arliament," "violating the freedom of election of members to serve in [P]arliament," prosecuting crimes that were within Parliament's jurisdiction in the "court of King's bench" instead, requiring "excessive bail" to "elude . . . laws made for the liberty of the subjects," and imposing "excessive fines" and "cruel and unusual punishments." *Id.* The drafters of the English Bill of Rights characterized James's actions as "utterly and directly contrary to the known laws and statutes, and freedom of this realm." *Id.*

Accordingly, after James fled England, the people selected new representatives, as was their "right," and the new representatives met "in a full and free representative of th[e] nation." Bill of Rights 1689, 1 W. & M. Sess. 2 c. 2 (Eng.). These new representatives drafted the English Bill of Rights to ensure that their "religion, laws, and liberties" would no longer "be in danger of being subverted" and to "vindicat[e] and assert[ ] their ancient rights and liberties." *Id.* In many instances, they expressly prohibited the king from acting under "pretended power"—that is, power he never in fact possessed—without the consent of Parliament.[20]

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20. Specifically, the English Bill of Rights clarified that the king could not "suspend [ ]" or "dispens[e] with" laws, levy money for his own use, or raise a standing army in times of peace without the consent of Parliament. *Id.* The king also could not require excessive bail, impose excessive fines, or inflict cruel and unusual punishments. *Id.*

The drafters of the English Bill of Rights not only clarified the limits on the king's executive power; they also memorialized their "ancient rights and liberties"— rights that King James had violated and that, the drafters declared, would no longer be subverted:

> [I]t is the right of the subjects to petition the King, and all commitments and prosecutions for such petitioning are illegal.
>
> . . . .
>
> [E]lection of members of parliament ought to be free.
>
> [T]he freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament.
>
> . . . .
>
> [F]or the redress of all grievances, and for the amending, strengthening, and preserving of the laws, parliaments ought to be held frequently.

Id. Each of these declarations responded to a specific behavior of King James. The enumeration of the right to petition the king "direct[ly] rebuke[d]" King James's violations of that right. *Our First Revolution* 192. Under King James, many who attempted to petition for exemption from certain laws were instead met with prosecution. *Id.* The demand for frequent meetings of Parliament responded to "James's practice of ruling during most of the 1680s without a Parliament." *Id.* The declaration that elections of Parliamentary members ought to be free had been the "central tenet" and rallying cry of King James II's political opponent, William of Orange, *id.* at 193:

> [A]ccording to the ancient constitution of the English government and immemorial custom, all elections of Parliament men ought to be made with an entire liberty, without any sort of force, or requiring the electors to choose such persons as shall be named unto them, and the persons, thus freely elected, ought to give their opinions freely upon all matters that are brought before them, having the good of the nation ever before their eyes, and following in all things, the dictates of their conscience . . . .

William Henry, Prince of Orange, Declaration of the Prince of Orange (Oct. 10, 1688), *reprinted* in *Our First Revolution* 265. By this declaration, the drafters of the English Bill of Rights sought to secure a "free [P]arliament," a Parliament where the electors could vote for candidates of their choice, and the members, once elected, could legislate according to their own consciences without threat of intimidation or coercion from the monarch.[21] *Our First Revolution* 230. The Glorious Revolution ensured that Parliamentary elections would be frequent and free from threat and intimidation. For English citizens, the promises of the English Bill of Rights were fulfilled immediately and continuously: British Parliament has met every year since 1689. *Id.* at 231.

In the years leading up to the Glorious Revolution, King James II also sought to strengthen his control in the American colonies by using tactics similar to those he used in England, including the elimination of colonial representative assemblies. *Id.* The Glorious Revolution set the stage for similar conflicts in Carolina. After the Glorious Revolution, all colonies reinstated their representative assemblies but still endured authoritative royal governors. *Id.* This dynamic catalyzed the American Revolution because the British colonists saw themselves as Englishmen. They understood that the English Bill of Rights protected them from overreaches of executive power and secured for them a right to representative government and free elections. *Id.* at 231–32.

Accordingly, Carolina colonists saw their Royal Governors' abuses of executive power as exercises of the same "pretended power," Bill of Rights 1689, 1 W. & M. Sess. 2 c. 2 (Eng.), that "had been stripped from" the king in the English Bill of Rights, *Our First Revolution* 232. Thus, when the colonists rebelled and our framers drafted the 1776 Declaration of Rights, "they were seeking to preserve in their own states

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21. The historical context of the English Bill of Rights indicates that the English free elections clause was in no way intended to address gerrymandering in apportionment. Rotten Boroughs—boroughs containing very few residents that elected the same number of parliamentary members as heavily populated boroughs—existed in England for at least one hundred years prior to the framing of our constitution. Rotten Boroughs were prevalent in England before, during, and well after the Glorious Revolution and the signing of the English Bill of Rights in 1689. At that time, the English people added a free elections clause to their English Bill of Rights to address threats, coercion, and intimidation in their elections: "Th[e] election of members of Parliament ought to be free." Bill of Rights 1689, 1 W. & M. Sess. 2 c. 2 (Eng.). Nevertheless, the Rotten Boroughs continued to exist in England until at least 1832. As the three-judge panel found, the continued existence of these Rotten Boroughs at the time of the signing of the English Bill of Rights and their continued use thereafter suggests that the English people did not intend to address apportionment issues with their free elections clause.

what they believed the [Glorious] Revolution had established."[22] *See id.* This historical context produced our free elections clause and freedom of assembly clause.

Given the historical context of the English Bill of Rights, our framers did not intend the adoption of the free elections clause to limit the General Assembly's redistricting authority or to address apportionment at all. As previously noted, North Carolina experienced issues with apportionment both before and well after the drafters first placed the free elections clause in the 1776 Declaration of Rights. These early issues continued until 1835 when the people held a constitutional convention to, among other things, address the apportionment issues. *State Constitution* 13. At that time, they made various changes to their system of representation, *see generally* N.C. Const. of 1776, amends. of 1835, but they did not alter the free elections clause, *see id.* Thus, the historical context of our free elections clause—both colonial and English—indicates that "free elections" refers to elections free from interference and intimidation.

Although the free elections clause has been a part of our constitution since 1776, this Court has rarely been called upon to interpret this provision because its language is plain: it protects voters from interference and intimidation in the voting process. We addressed the merits of a free election claim in *Clark v. Meyland*, 261 N.C. 140, 134 S.E.2d 168 (1964). The plaintiff in *Clark* challenged a statute that required voters wishing to change their party affiliation to first take an oath that

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22. *Compare* Bill of Rights 1689, 1 W. & M., 2d sess., c. 2 ("That the pretended power of suspending of [and dispensing with] the laws, or the execution of laws, by regal authority, without consent of parliament, is illegal."), *and id.* ("That levying money for or to the use of the crown . . . without grant of parliament . . . is illegal."), *and id.* ("That the subjects which are protestants, may have arms for their defence suitable to their conditions, and as allowed by law."), *and id.* ("That election of members of parliament ought to be free."), *and id.* ("That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted."), *and id.* ("And that for redress of all grievances, and for the amending, strengthening, and preserving of the laws, parliaments ought to be held frequently."), *with* N.C. Const. of 1776, Declaration of Rights, § V ("That all Powers of Suspending Laws, or the Execution of Laws, by any Authority, without Consent of the Representatives of the People, is injurious to their rights, and ought not to be exercised."), *and id.* § XVI ("That the People of this State ought not to be taxed . . . without the Consent of themselves, or their Representatives in General Assembly, freely given."), *and id.* § XVII ("That the People have a right to bear Arms, for the Defence of the State . . . ."), *and id.* § VI ("That Elections of Members, to serve as Representatives in General Assembly, ought to be free."), *and id.* § X ("That excessive Bail should not be required, nor excessive Fines imposed, nor cruel or unusual punishments inflicted."), *and id.* § XX ("That, for redress of Grievances, and for amending and strengthening the Laws, Elections ought to be often held.").

included the following language: "I will support the nominees of [the] party to which I am now changing my affiliation in the next election and the said party nominees thereafter until I shall, in good faith, change my party affiliation in the manner provided by law . . . ." *Id.* at 141, 134 S.E.2d at 169. We held that a portion of the statute requiring certain provisions of the oath was invalid, explaining that:

> Any elector who offers sufficient proof of his intent, in good faith, to change his party affiliation cannot be required to bind himself by an oath, the violation of which, if not sufficient to brand him as a felon, would certainly be sufficient to operate as a *deterrant* [sic] *to his exercising a free choice among available candidates at the election*—even by casting a write-in ballot. His membership in his party and his right to participate in its primary may not be denied because he refuses to take an oath to vote in a manner which violates the constitutional provision that elections shall be free. Article I, Sec. 10, Constitution of North Carolina.
>
> When a member of either party desires to change his party affiliation, the good faith of the change is a proper subject of inquiry and challenge. Without the objectionable part of the oath, ample provision is made by which the officials may strike from the registration books the names of those who are not in good faith members of the party. The oath to support future candidates violates the principle of *freedom of conscience*. It denies a free ballot—*one that is cast according to the dictates of the voter's judgment*. We must hold that the Legislature is without power to shackle a voter's conscience by requiring the objectionable part of the oath as a price to pay for his right to participate in his party's primary.

Id. at 142–43, 134 S.E.2d at 170 (emphases added) (citing N.C. Const. of 1868, art. I, § 10). Thus, we interpreted "free" to mean freedom to vote one's conscience without restriction by prior commitment. Nonetheless, an inquiry into the sincerity of one's desire to change parties did not violate the clause.

We also considered the free elections clause in *State ex rel. Swaringen v. Poplin*, 211 N.C. 700, 191 S.E. 746 (1937), in which the

plaintiff, a candidate who ostensibly lost an election for the office of county commissioner of Wilkes County, brought a quo warranto action, alleging that the Wilkes County Board of Elections fraudulently deprived him of the office by altering the vote count. *Id.* at 700–01, 191 S.E. at 746. In response, the defendant argued the plaintiff's complaint failed to state facts sufficient to constitute a cause of action. *Id.* at 701, 191 S.E. at 746. After the trial court rejected the defendant's argument, the defendant appealed, arguing that it was the sole duty of the County Board of Elections, rather than the judiciary, "to judicially determine the result of the election from the report and tabulation made by the precinct officials." *Id.* at 701, 191 S.E. at 747. In affirming the trial court's decision, we provided the following rationale:

> One of the chief purposes of *quo warranto* or an information in the nature of *quo warranto* is to try the title to an office. This is the method prescribed for settling a controversy between rival claimants when one is in possession of the office under a claim of right and in the exercise of official functions or the performance of official duties; and the jurisdiction of the Superior Court in this behalf has never been abdicated in favor of the board of county canvassers or other officers of an election.
>
> In the present case fraud is alleged. The courts are open to decide this issue in the present action. In Art. I, sec. 10, of the Const. of North Carolina, we find it written: "All elections ought to be free." Our government is founded on the consent of the governed. A free ballot and a fair count must be held inviolable to preserve our democracy. In some countries the bullet settles disputes, in our country the ballot.

Id. at 702, 191 S.E. at 747 (internal citations omitted) (quoting N.C. Const. of 1868, art. I, § 10). We interpreted "free," therefore, to mean the right to vote according to one's conscience and to have that vote accurately counted.

Based upon its plain meaning as confirmed by its history and by this Court's precedent, the free elections clause means a voter is deprived of a "free" election if (1) a law prevents a voter from voting according to one's judgment, *see Clark*, 261 N.C. at 142, 134 S.E.2d at 170, or (2) the votes are not accurately counted, *see Poplin*, 211 N.C. at 702, 191 S.E. at 747. Thus, we hold that the meaning of the free elections clause, based

on its plain language, historical context, and this Court's precedent, is that voters are free to vote according to their consciences without interference or intimidation. Plaintiffs' partisan gerrymandering claims do not implicate this provision.

B. Equal Protection Clause

[4] Article I, Section 19 provides, in relevant part, that "[n]o person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin." N.C. Const. art. I, § 19. The equal protection clause was added as part of the ratification of the 1971 constitution. *State Constitution* 68. The addition of the equal protection clause, while a substantive change, was not meant to "bring about any fundamental change" to the power of the General Assembly. *Report of the North Carolina State Constitution Study Commission* 10.

Our understanding of the equal protection clause has been informed by federal case law interpreting the Federal Equal Protection Clause. *See Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 10–11, 269 S.E.2d 142, 149 (1980) (relying almost entirely on Federal Equal Protection jurisprudence in analyzing a claim under Article I, Section 19).

Here plaintiffs present the same arguments under our equal protection clause as were made under the Federal Equal Protection Clause in *Rucho*. *Compare* Verified Compl. for Declaratory J. and Injunctive Relief ¶ 189, *Harper I*, No. 21 CVS 015426, 2021 WL 6884973 (N.C. Super. Ct. Wake County Dec. 16, 2021) ("Partisan gerrymandering violates the State's obligation to provide all persons with equal protection of the law . . . by seeking to diminish the electoral power of supporters of a disfavored party."), *with Rucho*, 139 S. Ct. at 2492 ("[Plaintiffs] alleged that the Plan violated the Equal Protection Clause of the Fourteenth Amendment by intentionally diluting the electoral strength of Democratic voters."). In *Rucho* the Supreme Court determined that the plaintiffs' partisan gerrymandering claims did not implicate the Federal Equal Protection Clause. *See* 139 S. Ct. at 2502–04. As the Supreme Court observed, "judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions." *Id.* at 2507. We find this analysis persuasive. Under our constitution, a claim of vote dilution allegedly based on one's affiliation with a political party does not raise a claim under our equal protection clause.

This Court has previously explained that "[t]he right to vote *on equal terms* is a fundamental right." *Northampton Cnty. Drainage Dist. No.*

One v. Bailey, 326 N.C. 742, 747, 392 S.E.2d 352, 356 (1990) (emphasis added) (citations omitted). Several of our cases indicate that the fundamental right to vote on equal terms simply means that each vote must have the same weight. This historic understanding of equal voting power is stated in Article II, Sections 3(1) and 5(1), requiring that legislators "represent, as nearly as may be, an equal number of inhabitants." N.C. Const. art. II, §§ 3(1), 5(1). This is a simple mathematical calculation. *See Rucho*, 139 S. Ct. at 2501. Party affiliation, however, is not mentioned in Article II, Sections 3 or 5.

Early on in its history, North Carolina moved towards representation roughly based on population, first in the House, *see* N.C. Const. of 1776, amends. of 1835, art. I, § 2, and later in the Senate, *see* N.C. Const. of 1868, art. II, § 5. It was not until after *Baker v. Carr* instituted the one-person, one-vote requirement based on the Federal Equal Protection Clause, *see Baker*, 369 U.S. at 210, 82 S. Ct. at 706, however, that apportionment became a strictly population-based system in North Carolina, *see* N.C. Const. of 1868, amends. of 1967, art. II, § 5. The 1971 North Carolina Constitution incorporated these concepts into the text of Article II, *see* N.C. Const. of 1971, art. II, §§ 3(1), 5(1), and our courts have applied these concepts in interpretating our equal protection clause in the context of apportionment, *see* N.C. Const. art. II, § 19. Several cases arising after this chronological progression are helpful when reviewing equal protection claims arising in the context of apportionment.

This Court's decision in *Northampton County* illustrates the concept of numerically equal voting strength. In that case, a certain drainage district lay partly in Northampton County and partly in Hertford County. 326 N.C. at 744, 392 S.E.2d at 354. By statute, the Clerk of Superior Court in Northampton County—who was elected only by Northampton County residents—appointed all the drainage district commissioners. *Id.* at 744, 392 S.E.2d at 354. In a suit brought by the drainage district to recover assessments made against the landowners in Hertford County, this Court held that the electoral scheme of this drainage district violated the equal protection clause of Article I, Section 19 because the Hertford County landowners could not vote for the elected official who appointed all the commissioners, but the landowners in Northampton County could. *Id.* at 746, 392 S.E.2d at 355. This arrangement infringed on the Hertford County landowners' fundamental right "to vote on equal terms" because some members of the district could vote for their elected official, and some could not. *See id.* at 746, 392 S.E.2d at 355.

Likewise, in *Blankenship v. Bartlett*, the plaintiffs demonstrated a "gross disparity in voting power between similarly situated residents of Wake County" by making the following showing:

> In Superior Court District 10A, the voters elect one judge for every 32,199 residents, while the voters of the other districts in Wake County, 10B, 10C, and 10D, elect one judge per every 140,747 residents, 158,812 residents, and 123,143 residents, respectively. Thus, residents of District 10A have a voting power roughly five times greater than residents of District 10C, four and a half times greater than residents of District 10B, and four times greater than residents of District 10D.

363 N.C. 518, 527, 681 S.E.2d 759, 766 (2009). We explained that the above showing implicated the fundamental "right to vote on equal terms in representative elections—a one-person, one-vote standard," *id.* at 522, 681 S.E.2d at 762–63, and we thus employed a heightened scrutiny analysis, *id.* at 523, 681 S.E.2d at 763.

Similarly, in *Stephenson I* this Court addressed what the fundamental right to vote on equal terms means when considering the use of multi-member and single-member districts. *See* 355 N.C. at 378, 562 S.E.2d at 393. In that case we first found that the challenged legislative plans—the 2001 Plans—violated the WCP. *Id.* at 371, 562 S.E.2d at 389–90. Out of respect for the legislative branch, we then sought to give the General Assembly detailed criteria for fashioning remedial maps. The plaintiffs "contend[ed] that remedial compliance with the WCP requires the formation of multi-member legislative districts in which all legislators would be elected 'at-large.' " *Id.* at 376, 562 S.E.2d at 392. As such, we "turn[ed] to address the constitutional propriety of such districts." *Id.* at 377, 562 S.E.2d at 393. In doing so, we noted that "[t]he classification of voters into both single-member and multi-member districts . . . necessarily implicates the fundamental right to vote on equal terms." *Id.* at 378, 562 S.E.2d at 393. We explained that

> voters in single-member legislative districts, surrounded by multi-member districts, suffer electoral disadvantage because, at a minimum, *they are not permitted to vote for the same number of legislators* and may not enjoy the same representational influence or "clout" as voters represented by a slate of legislators within a multi-member district.

Id. at 377, 562 S.E.2d at 393 (emphasis added). Thus, we concluded that the "use of both single-member and multi-member districts within the same redistricting plan" infringes upon "the fundamental right of each North Carolinian to substantially equal voting power." *Id.* at 379, 562 S.E.2d at 394–95. In other words, "substantially equal voting power"

meant that each legislator should represent a similar number of constituents, which was impossible when using both single-member and multi-member districts in the same map. This is an application of the one-person, one-vote concept.

In *Harper I*, however, four justices expanded the scope of "substantially equal voting power" from mathematically equal representation under the one-person, one-vote concept and misconstrued it to create an "opportunity to aggregate one's vote with likeminded citizens" based on partisan affiliation. 380 N.C. at 378, 868 S.E.2d at 544. This idea is not supported by our precedent.

Stephenson I recognized that partisan considerations are permitted in the redistricting process. 355 N.C. at 371, 562 S.E.2d at 390 ("The General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions, but it must do so in conformity with the State Constitution." (internal citation omitted)); *Rucho*, 139 S. Ct. at 2497 (recognizing that legislators must be permitted to take some "partisan interests into account when drawing district lines"). The ultimate holding of our *Stephenson I* decision was that the WCP of Article II, Sections 3 and 5 must be enforced to the extent compatible with the VRA and one-person, one-vote principles. Thus, when understanding *Stephenson I* in context, it becomes clear that the Court's statement—that the General Assembly's practice of partisan gerrymandering must still conform with the constitution—refers to the express objective limitations present in Article II, Sections 3 and 5, not to a prohibition or limitation on partisan considerations.

Unlike the classifications in *Northampton County*, *Blankenship*, and *Stephenson I*, partisan gerrymandering has no impact upon the right to vote on equal terms under the one-person, one-vote standard. In other words, an effort to gerrymander districts to favor a political party does not alter individual *voting power* so long as each voter is permitted to (1) vote for the same number of representatives as voters in other districts, and (2) vote as part of a constituency that is similar in size to that of the other districts. Therefore, following the guidance of the Supreme Court in *Rucho*, we hold that a partisan gerrymandering claim does not trigger review under our equal protection clause. *See Gaffney*, 412 U.S. at 745 (holding that certain claims were "insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State"). Claims that a redistricting plan diminishes the electoral power of members of a particular political party do not violate Article I, Section 19 of our constitution.

C. Free Speech and Freedom of Assembly Clauses

[5] The freedom of assembly and free speech clauses are found in Article I, Section 12 and Article I, Section 14 respectively. These sections provide as follows:

> **Sec. 12. Right of assembly and petition.**
>
> The people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances; but secret political societies are dangerous to the liberties of a free people and shall not be tolerated.
>
> **Sec. 14. Freedom of speech and press.**
>
> Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse.

N.C. Const. art. I, §§ 12, 14. Like the equal protection clause, the free speech clause was added to our Declaration of Rights as part of the 1971 constitution. N.C. Const. of 1971, art. I, § 14. The addition of the free speech clause, while a substantive change, was not meant to "bring about any fundamental change" to the power of the General Assembly. *Report of the North Carolina State Constitution Study Commission* 10. Our understanding of the free speech clause is informed by federal interpretation of the similar provision in the First Amendment to the Federal Constitution. *See State v. Petersilie*, 334 N.C. 169, 183, 432 S.E.2d 832, 840 (1993) (adopting "doctrines developed by the United States Supreme Court in interpreting the Free Speech Clause of the United States Constitution . . . for purposes of applying the Free Speech Clause of the North Carolina Constitution").

The freedom of assembly clause first appeared in the 1776 Declaration of Rights and provided "that the People have a right to assemble together, to consult for their common good, to instruct their Representatives, and to apply to the Legislature, for Redress of Grievances." N.C. Const. of 1776, Declaration of Rights, § XVIII. The freedom of assembly clause was modified by the 1868 constitution by deleting "that," the first word of the clause. N.C. Const. of 1868, art. I, § 25. In the 1971 constitution, the freedom of assembly clause was re-written to the form it has today. N.C. Const. of 1971, art. I, § 12. As with the 1971 changes to the free speech clause, the most recent change to the freedom of assembly clause was

not meant as a substantive change, nor was it meant to "bring about any fundamental change" to the power of the General Assembly. *Report of the North Carolina State Constitution Study Commission* 10.

The right to free speech is violated when "restrictions are placed on the espousal of a particular viewpoint," *Petersilie*, 334 N.C. at 183, 432 S.E.2d at 840, or where retaliation motivated by the content of an individual's speech would deter a person of reasonable firmness from engaging in speech or association, *Toomer v. Garrett*, 155 N.C. App. 462, 478, 574 S.E.2d 76, 89 (2002) (explaining that a viable retaliation claim requires a showing "that the plaintiff . . . suffer[ed] an injury that would likely chill a person of ordinary firmness from continuing to engage" in a "constitutionally protected activity," including First Amendment activities), *appeal dismissed and disc. rev. denied*, 357 N.C. 66, 579 S.E.2d 576 (2003); *see Evans v. Cowan*, 132 N.C. App. 1, 11, 510 S.E.2d 170, 177 (1999) (determining "there was no forecast of evidence" to support a retaliation claim).

It is apparent that a person of ordinary firmness would not refrain from expressing a political view out of fear that the General Assembly will place his residence in a district that will likely elect a member of the opposing party. *See Toomer*, 155 N.C. App. at 477–78, 574 S.E.2d at 89. It is plausible that an individual may be less inclined to voice his political opinions if he is unable to find someone who will listen. Article I, Sections 12 and 14, however, guarantee the rights to speak and assemble without government intervention, rather than the right to be provided a receptive audience. *See Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 286, 104 S. Ct. 1058, 1066 (1984) (stating that individuals "have no constitutional right as members of the public to a government audience for their policy views"); *Johnson v. Wisc. Elections Comm'n*, 967 N.W.2d 469, 487 (Wis. 2021) ("Associational rights guarantee the freedom to *participate in* the political process; they do not guarantee a favorable outcome." (emphasis added)).

Partisan gerrymandering plainly does not place any restriction upon the espousal of a particular viewpoint. Rather, redistricting enactments in North Carolina are subject to the typical policymaking customs of open debate and compromise. *See Berger*, 368 N.C. at 653, 781 S.E.2d at 261 (Newby, J., concurring in part and dissenting in part). As such, opponents of a redistricting plan are free to voice their opposition.

Article I, Sections 12 and 14 do not limit the General Assembly's presumptively constitutional authority to engage in partisan gerrymandering. As with the prior Declaration of Rights clauses, there is nothing

in the history of the clauses or the applicable case law that supports plaintiffs' expanded interpretation of them. This Court and the Court of Appeals have interpreted speech and assembly rights in alignment with federal case law under the First Amendment. *See Petersilie*, 334 N.C. at 184, 432 S.E.2d at 841; *Feltman v. City of Wilson*, 238 N.C. App. 246, 252–53, 767 S.E.2d 615, 620 (2014); *State v. Shackelford*, 264 N.C. App. 542, 552, 825 S.E.2d 689, 696 (2019). As discussed at length in *Rucho*, the Supreme Court of the United States found no manageable standards for assessing partisan considerations in redistricting despite the existence of similar express protections for speech and assembly rights in the Federal Constitution. *Rucho*, 139 S. Ct. at 2505–07.

In summary, none of the constitutional provisions cited by plaintiffs prohibit the practice of partisan gerrymandering. Each provision must be read in harmony with the more specific provisions that outline the practical workings for governance. Notably, Article II, Sections 3 and 5 outline the practical workings of the General Assembly's redistricting authority. These provisions contain four express limitations on the General Assembly's otherwise explicit redistricting authority, none of which address partisan gerrymandering.

VI. *Stephenson I* and the VRA

[6] Because we are overturning *Harper I*, we must briefly revisit another of Common Cause's claims that was based on a holding in that opinion. In its 11 January 2022 Judgment, the three-judge panel concluded that although *Stephenson I* requires the General Assembly to draw VRA districts prior to non-VRA districts, it does not require the General Assembly to conduct an RPV analysis "prior to making a decision as to whether VRA districts are necessary." Accordingly, the three-judge panel dismissed this claim with prejudice. In *Harper I* the four-justice majority reversed this portion of the 11 January 2022 Judgment and held that our constitution and *Stephenson I* require the General Assembly to conduct an RPV analysis before drawing any legislative districts. *See Harper I*, 380 N.C. at 401, 868 S.E.2d at 558. Accordingly, on remand, the General Assembly performed an RPV analysis, and the three-judge panel found that this analysis satisfied this Court's directive from *Harper I*. Common Cause challenged this finding of fact in its appeal from the three-judge panel's remedial order.

The holding from *Harper I* that required the General Assembly to perform an RPV analysis before drawing any legislative districts was based on an inaccurate reading of *Stephenson I*. In *Stephenson I* we explained that "Section 2 of the VRA generally provides that states or their political

subdivisions may not impose any voting qualification or prerequisite that impairs or dilutes, on account of race or color, a citizen's opportunity to participate in the political process and to elect representatives of his or her choice." 355 N.C. at 363, 562 S.E.2d at 385 (first citing 42 U.S.C. §§ 1973a, 1973b (1994); and then citing *Gingles*, 478 U.S. at 43, 106 S. Ct. at 2762). We then stated that "[o]n remand, to ensure full compliance with federal law, legislative districts required by the VRA shall be formed prior to creation of non-VRA districts." *Id.* at 383, 562 S.E.2d at 396–97. We provided this approach to alleviate the tension between the WCP and the VRA because the legislative defendants in *Stephenson I* argued that "the constitutional provisions mandating that counties not be divided are wholly unenforceable because of the requirements of the [VRA]." *Id.* at 361, 562 S.E.2d at 383–84. Thus, the Court in *Stephenson I* was not forcing the legislative defendants to conduct an RPV analysis. Rather, the Court was merely stating that if Section 2 requires VRA districts, those districts must be drawn first so that the remaining non-VRA districts can be drawn in compliance with the WCP.

Because the North Carolina Constitution does not require the General Assembly to conduct an RPV analysis before enacting a redistricting plan, Common Cause's arguments regarding the General Assembly's RPV analysis are inapposite. Plaintiffs essentially ask this Court to "impose a judicially-mandated preclearance requirement" where no such requirement exists in our constitution. If Common Cause believed that the General Assembly was incorrect that no VRA districts were required, it could have brought a claim under Section 2 of the VRA. Common Cause did not bring such a claim in this case. Accordingly, the holding in *Harper I* that required the General Assembly to undertake an RPV analysis is overruled, and the portion of the 11 January 2022 Judgment dismissing Common Cause's declaratory judgment claim with prejudice is affirmed.[23]

VII. Petitions for Rehearing Under Rule 31 and Stare Decisis

[7] Rule 31 of the North Carolina Rules of Appellate Procedure states that

> [a] petition for rehearing may be filed in a civil action within fifteen days after the mandate of the court has

23. While we do not specifically address the issue of standing here, we note this Court has addressed the test for standing in *Community Success Initiative v. Moore*, 384 N.C. 194, 866 S.E.2d 16 (2023), issued concurrently with this opinion. We overrule the analysis of standing set forth in *Harper I* to the extent it conflicts with the decision in Community Success. *See Harper I*, 380 N.C. at 353–55, 868 S.E.2d at 528–29.

> been issued. The petition shall state with particularity the points of fact or law that, in the opinion of the petitioner, the court has overlooked or misapprehended and shall contain such argument in support of the petition as petitioner desires to present.

N.C. R. App. P. 31(a). This rule contemplates that, at times, this Court may need to revisit a recent decision to correct a mistake. We have never hesitated to rehear a case when it is clear that the Court "overlooked or misapprehended" the law. *See, e.g.*, *Jones v. City of Durham*, 360 N.C. 367, 367, 629 S.E.2d 611, 611 (2006) (order granting rehearing); *Smith Chapel Baptist Church v. City of Durham* (*Smith Chapel I*), 349 N.C. 242, 242, 514 S.E.2d 272, 272 (1998) (same); *Whitford v. Gaskill*, 345 N.C. 762, 762, 489 S.E.2d 177, 178 (1997) (same); *Clay v. Emp. Sec. Comm'n*, 340 N.C. 83, 87, 458 S.E.2d 198, 199 (1995) (same); *Alford v. Shaw*, 318 N.C. 703, 703, 351 S.E.2d 738, 738 (1987) (same); *Lowe v. Tarble*, 313 N.C. 176, 176, 326 S.E.2d 32, 32 (1985) (same); *Hous., Inc. v. Weaver*, 304 N.C. 588, 588, 289 S.E.2d 832, 832 (1981) (same). Several of these rehearings resulted in new opinions that differed substantially from the Court's initial opinion in the case. *See, e.g.*, *Jones v. City of Durham*, 361 N.C. 144, 146, 638 S.E.2d 202, 202 (2006) (per curiam); *Smith Chapel Baptist Church v. City of Durham* (*Smith Chapel II*), 350 N.C. 805, 806, 517 S.E.2d 874, 876 (1999); *Clay v. Emp. Sec. Comm'n*, 340 N.C. 83–84, 457 S.E.2d 725, 726 (1995); *Alford v. Shaw*, 320 N.C. 465, 467, 358 S.E.2d 323, 324 (1987) (on rehearing, withdrawing the Court's original opinion and reviewing the case "de novo"). It is not uncommon that rehearing of a case coincides with a change in personnel on the Court who provide a fresh legal perspective. *See, e.g.*, *Smith Chapel II*, 350 N.C. at 807, 821, 517 S.E.2d at 876, 883–84. Our decision today simply adheres to these principles. *See Sidney Spitzer & Co. v. Comm'rs of Franklin Cnty.*, 188 N.C. 30, 32, 123 S.E. 636, 638 (1924) ("There should be no blind adherence to a precedent which, if it is wrong, should be corrected at the first practical moment." (internal citations omitted)). A petition for rehearing is particularly appropriate here because the four-justice majority in *Harper I* expedited the consideration of this matter over the strong dissent of the other three justices on this Court. *See Harper v. Hall*, 382 N.C. 314, 316, 874 S.E.2d 902, 904–05 (2022) (order granting motion to expedite hearing and consideration). There was no "jurisprudential reason" to force an expedited consideration of this case. *Id.* at 317, 874 S.E.2d at 904 (Barringer, J., dissenting) ("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.").

The "doctrine of *stare decisis* . . . 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, 51 S.E.2d 731, 733 (1949) (internal citations omitted). This doctrine reflects the idea that "the law must be characterized by stability," and courts should not change the law to reach particular results. *Id.* at 767, 51 S.E.2d at 733. When adhering to the doctrine would "perpetuate error," however, this Court has never hesitated to refuse to apply it. *Sidney Spitzer & Co.*, 188 N.C. at 32, 123 S.E. at 638 ("There is no virtue in sinning against light or in persisting in palpable error, for nothing is settled until it is settled right."); *see also Mial v. Ellington*, 134 N.C. 131, 139, 46 S.E. 961, 964 (1903) (noting the necessity of overturning a prior decision of this Court where it stood "without support in reason" and was "opposed to the uniform, unbroken current of authority" in the state); *Ballance*, 229 N.C. at 767, 51 S.E.2d at 733 ("[*S*]*tare decisis* will not be applied in any event to preserve and perpetuate error and grievous wrong."); *Rabon v. Rowan Mem'l Hosp., Inc.*, 269 N.C. 1, 29, 152 S.E.2d 485, 502 (1967) (Lake, J., dissenting) (conceding that "a proper exercise of [judicial] power . . . is the result of its determination that its former decision was an erroneous statement of the law when the decision was rendered"); *Wiles v. Welparnel Constr. Co.*, 295 N.C. 81, 85, 243 S.E.2d 756, 758 (1978) ("[*S*]*tare decisis* will not be applied when it results in perpetuation of error or grievous wrong, since the compulsion of the doctrine is . . . moral and intellectual, rather than arbitrary and inflexible." (internal citation omitted)).

Sometimes this Court explicitly overrules prior decisions. *See, e.g.*, *State v. Elder*, 383 N.C. 578, 603, 881 S.E.2d 227, 245 (2022) (overruling a portion of this Court's prior decision in *State v. Hall*, 305 N.C. 77, 286 S.E.2d 552 (1982)); *Cedarbrook Residential Ctr., Inc. v. N.C. DHHS*, 383 N.C. 31, 56–57, 881 S.E.2d 558, 576–77 (2022) (overruling *Nanny's Korner Day Care Ctr., Inc. v. N.C. DHHS*, 264 N.C. App. 71, 825 S.E.2d 34 (2019)); *State v. Kelliher*, 381 N.C. 558, 581–83, 873 S.E.2d 366, 383–84 (2022) (abrogating *State v. Green*, 348 N.C. 588, 502 S.E.2d 819 (1998)); *Connette ex rel. Gullatte v. Charlotte-Mecklenburg Hosp. Auth.*, 382 N.C. 57, 71–72, 876 S.E.2d 420, 430–31 (2022) (reversing, with three votes, which is less than a majority of this Court, the ninety-year-old opinion in *Byrd v. Marion Gen. Hosp.*, 202 N.C. 337, 162 S.E. 738 (1932)). Other times this Court overrules prior decisions by implication. *See, e.g.*, *McAuley v. N.C. A&T State Univ.*, 383 N.C. 343, 355, 881 S.E.2d 141, 149 (2022) (Barringer, J., dissenting) (noting that the majority opinion "refuse[d] to follow . . . [ninety] years of this Court's precedent established in *Wray v. Carolina Cotton & Woolen Mills Co.*, 205 N.C. 782,

783, 172 S.E. 487, 488 (1934)); *State v. Styles*, 362 N.C. 412, 415–16, 665 S.E.2d 438, 440–41 (2008) (effectively abrogating *State v. Ivey*, 360 N.C. 562, 633 S.E.2d 459 (2006)).

As demonstrated, this Court has not hesitated to revisit and overrule prior decisions that are erroneous. Regardless, *Harper I* does not meet any criteria for adhering to *stare decisis*—it is neither long-standing nor has it been relied upon in other cases. *See Ballance*, 229 N.C. at 767, 51 S.E.2d at 733. *Harper I* was wrongly decided and, as a result, *Harper II* was also wrongly decided. Legislative Defendants filed a timely petition under Rule 31 of the Rules of Appellate Procedure, and *Harper II* was properly reheard. *Harper I* is overruled, and *Harper II* is withdrawn and superseded by this opinion.

VIII. Remedy

[8] In their petition for rehearing, Legislative Defendants asked that if this Court concludes that plaintiffs' partisan gerrymandering claims are nonjusticiable, that the Court also address the appropriate remedy—in other words, what set of maps, if any, were constitutionally "established" and, therefore, must be used. Article II, Sections 3(4) and 5(4) provide that "[*w*]*hen established*, the senate [and representative] districts shall . . . remain unaltered" until the next federal census. N.C. Const. art. II, §§ 3(4), 5(4) (emphasis added). Because "a constitution cannot violate itself," *Leandro*, 346 N.C. at 352, 488 S.E.2d at 258, we must construe the meaning of the phrase "[w]hen established," N.C. Const. art. II, §§ 3(4), 5(4), in harmony with the rest of the constitution.

Looking first to the plain meaning, to "establish" means "[t]o settle, make, or fix firmly; to enact permanently." *Establish*, Black's Law Dictionary (11th ed. 2019). This meaning connotes something more than the passage of a redistricting act by the General Assembly. The General Assembly could certainly amend a redistricting act up until the time it is used. Once passed and used in the next election, however, the districts are "established" until the next decennial census unless a court finds them constitutionally infirm. This understanding of "[w]hen established" is consistent with our precedent that allows the General Assembly an opportunity to redraw districts when necessary to remedy court-identified infirmities. *See*, *e.g.*, *Pender County*, 361 N.C. at 510, 649 S.E.2d at 376 ("leav[ing] to the General Assembly the decision" of how to redraw a district that was held to be constitutionally infirm and declining "to specify the exact configuration" of how the districts should be redrawn). Accordingly, "[w]hen established" refers to establishment consistent with the constitution. *See* N.C. Const. art. II, §§ 3, 5 (providing

textual limitations); N.C.G.S. §§ 120-2.3 to -2.4 (providing for limited judicial review); *see also* N.C. Const. art. II, §§ 22(5)(b)-(d) (exempting restricting legislation from gubernatorial veto).

In our order granting Legislative Defendants' petition for rehearing, we specifically asked for briefing on appropriate remedies. *See Harper*, 384 N.C. at 4, 881 S.E.2d at 550 (order granting Legislative Defendants' petition for rehearing). As we did in *Stephenson I*, "we must now consider the practical consequences of our holding and address any required remedial measures." *Stephenson I*, 355 N.C. at 375, 562 S.E.2d at 392; *see also Scott v. Germano*, 381 U.S. 407, 409, 85 S. Ct. 1525, 1527 (1965) ("The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged."). Legislative Defendants maintain that neither the remedial 2022 Plans nor the original 2021 Plans were "established" as intended in Article II, Sections 3(4) and 5(4). We agree.

In *Harper I* four members of this Court wrongly held that partisan gerrymandering claims are justiciable and violate provisions of the Declaration of Rights in the North Carolina Constitution. This Court then also erroneously declared that the 2021 Plans were unconstitutional partisan gerrymanders and "enjoin[ed] the use of [the 2021 Plans] in any future elections." The 2021 Plans should not have been enjoined, and this Court should not have ordered the General Assembly to draw remedial plans using the erroneous standards set forth in *Harper I*. Nonetheless, this Court's *Harper I* decision forced redistricting criteria upon the General Assembly that our constitution does not require. Accordingly, the 2022 Plans are a product of a misapprehension of the law and of *Harper I*'s violation of separation of powers.

Because *Harper I*'s misapprehension of our constitutional law generated the 2022 Plans, they were never "established" as that word is used in Article II, Sections 3(4) and 5(4). Additionally, by statute the General Assembly is not required to utilize the 2022 Plans for future elections. *See also* N.C.G.S. § 120-2.4(a1) (providing that a court-imposed remedial map may only be used in the next general election).

Thus, if the 2022 Plans are no longer in force, the question arises whether the original 2021 Plans are reinstated. In their petition for rehearing and supplemental brief, Legislative Defendants argued that the 2021 Plans were likewise never "established" pursuant to Article II, Sections 3(4) and 5(4). Legislative Defendants point out that the 2021 Plans lasted just over a month before this Court enjoined their use in the

remedial order in *Harper I* and that the 2021 Plans were never used in an election. As a direct result of the *Harper I* decision, the 2022 Plans were drawn, elections were held based on those remedial districts, and new legislators took their seats in the General Assembly. Legislative Defendants point out that because the 2022 Plans were used in the 2022 election cycle, use of the 2021 Plans for the next election cycle would "double-bunk" many legislators.[24] Legislative Defendants point to the long history of our cases directing that, when necessary, the General Assembly must be given the opportunity to redraw constitutionally compliant districts. *See*, *e.g.*, *Stephenson II*, 357 N.C. at 303, 582 S.E.2d at 248–49; *Stephenson I*, 355 N.C. at 385, 562 S.E.2d at 398. We agree with Legislative Defendants' analysis.

Moreover, when reviewing the history behind the General Assembly's adoption of the first set of redistricting plans challenged in this case (2021 Plans), it becomes clear that these plans are also a product of a misapprehension of North Carolina law. In 2018, just a few years before the enactment of the 2021 Plans, the North Carolina Democratic Party and a group of North Carolina voters brought a state court action challenging remedial legislative redistricting plans drawn by the General Assembly the previous year (2017 Plans).[25] *See generally* Compl., *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584 (N.C. Super. Ct. Wake County Sept. 3, 2019). The plaintiffs in that case brought the exact claims that are at issue in this case—they argued that the 2017 Plans were partisan gerrymanders in violation of the free elections clause, the equal protection clause, and the freedom of speech and assembly clauses of North Carolina's Declaration of Rights. *Id.* at 60–68.

Despite having the benefit of the Supreme Court's decision in *Rucho*, the three-judge panel in *Common Cause v. Lewis* agreed with the plaintiffs that these Declaration of Rights provisions prohibit partisan gerrymandering, *Lewis*, 2019 WL 4569584, at *3, *108–24, *129, and that the General Assembly's use of partisan election data to assign voters to districts violated these provisions. *See id.* at *121. The panel in *Lewis* concluded that partisan gerrymandering claims are justiciable

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24. The dissent concedes that incumbency protection—that is, avoiding the double-bunking of incumbent legislators, is a permissible, neutral redistricting criteria.

25. The General Assembly enacted the 2017 Plans after a federal district court found that several of the legislative districts in the 2011 Plans were racially gerrymandered. *See Covington v. North Carolina*, 283 F. Supp. 3d 410, 413 (M.D.N.C. 2018), *aff'd in part and rev'd in part*, 138 S. Ct. 2548 (2018) (per curiam).

under the North Carolina Declaration of Rights.[26] *Id.* at *126. The *Lewis* order clearly represents a mistaken understanding of the North Carolina Constitution—the same mistaken understanding made by four members of this Court in *Harper I* and corrected by this Court today.

The panel in *Lewis* ordered the General Assembly to redraw the 2017 Plans using specific redistricting criteria and methods enumerated in the *Lewis* order. *Id.* at *136. Many of the required or prohibited criteria in the *Lewis* order are not derived from the express language of the constitution. Notably, to prevent partisan gerrymandering, the *Lewis* panel explicitly prohibited the General Assembly from considering any partisan election data in its remedial process.[27] *Id.* As demonstrated by our opinion today, however, this proscription on the use of partisan data constituted judicial error because our constitution does not address the use of partisan data in the redistricting process.

Nevertheless, to comply with the *Lewis* order the General Assembly proceeded under the assumption that it could not consider any partisan election data in its redistricting process without risking a constitutional violation. In 2021, when the General Assembly first began drawing the 2021 Plans, it convened a Joint Meeting of the Senate Redistricting and Elections Committee and the House Redistricting Committee. For purposes of discussing the criteria that would govern the 2021 redistricting process, each Committee member received a copy of the criteria mandated by the *Lewis* panel in 2019. One week later, the Joint Redistricting Committee adopted finalized criteria for its 2021 map drawing process (Adopted Criteria). The Adopted Criteria were nearly identical to the criteria mandated by the *Lewis* panel. Specifically, the Adopted Criteria, just like the criteria from *Lewis*, included a prohibition on consideration of partisan election data. Legislative Defendants suggest that the Joint Redistricting Committee incorporated this requirement into its Adopted Criteria because it believed that requirement was necessary to create constitutionally compliant redistricting plans. *See* Legislative

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26. The *Lewis* panel reached these conclusions even though it had the benefit of the Supreme Court's *Rucho* opinion, which was issued slightly over two months before the *Lewis* order. These conclusions also conflicted with this Court's holdings in *Dickson I* and *Dickson II* that suggested that the Declaration of Rights generally does not provide judicially manageable standards for claims related to gerrymandering. *See Dickson I*, 367 N.C. at 575, 766 S.E.2d at 260; *Dickson II*, 368 N.C. at 534, 781 S.E.2d at 440–41. Of note, the three-judge panel in *Lewis* and the three-judge panel in *Dickson I* consisted of the same three superior court judges.

27. Ironically, the *Harper I* majority struck the 2021 Plans and then required the General Assembly to use partisan data in redrawing the plans.

Defendants-Appellees' Brief at 20–21, *Harper v. Hall*, 380 N.C. 317 (2022) (No. 413PA21-1) (noting that "[t]o avoid violations identified in the 2010 [redistricting] cycle," including those identified in the *Lewis* order, the General Assembly included prohibition on the consideration of partisan election data in its Adopted Criteria).

As demonstrated by today's opinion, however, that prohibition does not exist. Our constitution does not speak to partisan considerations—or any other considerations not explicitly addressed in the text of our constitution or federal law—in the redistricting process. Just as this Court's *Harper I* decision forced the General Assembly to draw the 2022 Plans under a mistaken interpretation of our constitution, the *Lewis* order forced the General Assembly to draw the 2021 Plans under the same mistaken interpretation of our constitution. Accordingly, the districts were not constitutionally "established." To hold otherwise would perpetuate the same violation of separation of powers that we have attempted to cure today. Thus, the 2021 Plans are not "established," as that phrase is used in Article II, Sections 3(4) and 5(4).

The General Assembly shall have the opportunity to enact a new set of legislative and congressional redistricting plans, guided by federal law, the objective constraints in Article II, Sections 3 and 5, and this opinion. "When established" in accordance with a proper understanding of the North Carolina Constitution, the new legislative plans "shall remain unaltered until the return of" the next decennial census. N.C. Const. art. II, §§ 3(4), 5(4).

IX. Conclusion

For 200 years our Supreme Court has faithfully sought to implement the intent of the drafters of our state constitution by interpreting that foundational document based on its plain language and the historical context in which each provision arose. Recently, this Court has strayed from this historic method of interpretation to one where the majority of justices insert their own opinions and effectively rewrite the constitution. Today we return to the text of the state constitution, correct our course, and come back to the proper understanding and application of our fundamental constitutional principles. Apportionment is textually committed to the General Assembly, and apportionment legislation is entitled to our long-standing standard of review—a presumption of constitutionality and a required showing that the legislation is unconstitutional beyond a reasonable doubt. There is no judicially manageable standard by which to adjudicate partisan gerrymandering claims. Courts are not intended to meddle in policy matters. In its decision

today, the Court returns to its tradition of honoring the constitutional roles assigned to each branch.

This case is not about partisan politics but rather about realigning the proper roles of the judicial and legislative branches. Today we begin to correct course, returning the judiciary to its designated lane.

> The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.

Baker, 369 U.S. at 267, 82 S. Ct. at 737–38 (Frankfurter, J., dissenting).

We have recognized that our constitution allows the General Assembly to enact laws unless expressly prohibited by the constitutional text. This Court will no longer change the time-honored meaning of various portions of our constitution by interpreting the text with the singular aim of reaching a desired outcome. As explicitly stated in our constitution, the people have the authority to alter their foundational document, not this Court. The people alone have the final say.

This Court's opinion in *Harper I* is overruled. We affirm the three-judge panel's 11 January 2022 Judgment concluding, *inter alia*, that claims of partisan gerrymandering present nonjusticiable, political questions and dismissing all of plaintiffs' claims with prejudice. This Court's opinion in *Harper II* is withdrawn and superseded by this opinion. The three-judge panel's 23 February 2022 order addressing the Remedial Plans is vacated. Plaintiffs' claims are dismissed with prejudice.

VACATED.

Justice EARLS dissenting.

Following the 2010 census and prior to the United States Supreme Court's decision in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), one of the Republican co-chairs of the General Assembly's redistricting committee, Representative David Lewis, explained his rationale in presenting redistricting plans that disproportionately favored Republicans: "I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country." *Id.* at 2491.

Though jarring in its irreverence to democracy, Representative Lewis simply admitted what all of the evidence subsequently showed about redistricting maps enacted by the North Carolina General Assembly in recent years: They stifle the will of North Carolina voters by rigging the system against one party in favor of another. Representative Lewis's views carried the day. The General Assembly adopted a "partisan advantage" redistricting criterion that required the districts to maintain a ten to three Republican/Democrat congressional delegation. *See Common Cause v. Rucho*, 318 F. Supp. 3d 777, 807 (M.D.N.C. 2018), *overruled by Rucho*, 139 S. Ct. 2484. Those maps were ultimately held to be unconstitutional under the North Carolina Constitution in a ruling that was never appealed to this Court. *See Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *2 (N.C. Super. Ct. Sept. 3, 2019) (holding that, when these maps were created, "partisan intent predominated over all other redistricting criteria resulting in extreme partisan gerrymander[s]").

When the General Assembly attempted to enact a new extreme partisan gerrymander just a few years later following the release of 2020 census data, this Court rejected the idea that the voters of this state must be hostage to the partisan objectives of the ruling party in the General Assembly. And for a brief window in time, the power of deciding who is elected to office was given to the people, as required by the state constitution. *See Harper v. Hall* (*Harper I*), 380 N.C. 317, 339, *cert. granted sub nom. Moore v. Harper*, 142 S. Ct. 2901 (2022), *vacated*, *Harper v. Hall*, No. 413PA21-2 (N.C. Apr. 28, 2023); *Harper v. Hall* (*Harper II*), 383 N.C. 89 (2022), *vacated*, *Harper v. Hall*, No. 413PA21-2 (N.C. Apr. 28, 2023). In *Harper I*, this Court ensured that all North Carolinians, regardless of political party, were not denied their "fundamental right to vote on equal terms." *Harper I*, 380 N.C. at 378 (cleaned up).

Today, the majority strips the people of this right; it tells North Carolinians that the state constitution and the courts cannot protect their basic human right to self-governance and self-determination. In so doing, the majority ignores the uncontested truths about the intentions behind partisan gerrymandering and erects an unconvincing façade that only parrots democratic values in an attempt to defend its decision. Despite its lofty prose about the need for principled adherence to the state constitution, the majority follows none of these principles today. Nor does the majority even pay passing reference to the anti-democratic nature of extreme partisan gerrymandering. These efforts to downplay the practice do not erase its consequences and the public will not be gaslighted. Our constitution provides that "[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." N.C. Const. art. I, § 2. But when Republican lawmakers are free to gerrymander redistricting plans without constitutional guardrails to ensure their party's indefinite political domination, this constitutional requirement is abandoned.

Unchecked partisan gerrymandering allows the controlling party of the General Assembly to draw legislative redistricting plans in a way that dilutes the voting power of voters in the disfavored party. In so doing, those who hold political power can guarantee that they remain in office for decades, making them impervious to the popular will. Thus, rather than allowing "the people . . . [to] choose whom they please to govern them," as Alexander Hamilton once described as "the true principle of a republic," 2 Debates on the Constitution 257 (J. Elliot ed. 1891), members of the General Assembly make this choice for the people, favoring Republicans because they believe that electing Republicans is better for the country. This is not how democracy should function.

What is more, the majority abolishes the fundamental right to vote on equal terms regardless of political party through a process driven by partisan influence and greed for power. Let there be no illusions about what motivates the majority's decision to rewrite this Court's precedent. Today's result was preordained on 8 November 2022, when two new members of this Court were elected to establish this Court's conservative majority. To the Court's new majority, the parties' briefing after rehearing was granted did not matter.[1] The oral argument held after rehearing was granted did not matter. The merits of Plaintiffs' arguments do not matter. For at stake in this case is the majority's own political agenda. Today, the Court shows that its own will is more powerful than the voices of North Carolina's voters.

To be clear, this is not a situation in which a Democrat-controlled Court preferred Democrat-leaning districts and a Republican-controlled Court now prefers Republican-leaning districts. Here, a Democratic-controlled Court carried out its sworn duty to uphold the state constitution's guarantee of free elections, fair to all voters of both parties. This decision is now vacated by a Republican-controlled Court seeking

1. Exhibiting its disregard for the merits of the arguments like those presented by Plaintiffs, the Court denied two parties' motions for leave to file amicus curie briefs in support of Plaintiffs. *See Harper v. Hall*, 2022-NCSC-121 (March 9, 2023) (order on motion of Governor Roy Cooper and Attorney General Joshua H. Stein for leave to file amicus brief in support of plaintiffs-appellants); *Harper v. Hall*, 2022-NCSC-121 (March 9, 2023) (order on motion of the Brennan Center for Justice at N.Y.U. School of Law for leave to file amicus curiae brief in support of plaintiffs-appellants on rehearing). I would have allowed the motions.

to ensure that extreme partisan gerrymanders favoring Republicans are established.[2]

In a single blow, the majority strips millions of voters of this state of their fundamental, constitutional rights and delivers on the threat that "our decisions are fleeting, and our precedent is only as enduring as the terms of the justices who sit on the bench." *See Harper v. Hall*, No. 413PA21, 2023 WL 1516190 (N.C. Feb. 3, 2022) (order allowing motion for rehearing) (Earls, J., dissenting) [hereinafter *Harper Order*].

I. Background

Though the majority explains the history of this case in depth, it neglects to make any mention of the practical effect of the maps that sparked and perpetuated this litigation. In the cases that the majority vacates and overturns today, *Harper I* and *Harper II*, the Court explained at great length the severity of the partisan gerrymanders that the General Assembly crafted. *See Harper I*, 380 N.C. at 333–46; *Harper II*, 383 N.C. at 100–111, 114–23. I therefore summarize only briefly where this litigation began.

Following the 2020 Decennial Census, the North Carolina General Assembly enacted new redistricting plans for the North Carolina House of Representatives, the North Carolina Senate, and the U.S. House of Representatives (2021 Plans). In November 2021, North Carolina League of Conservation Voters, Inc. (NCLCV) and Harper Plaintiffs challenged the plans as unconstitutional partisan gerrymanders in separate suits that were assigned to the same three-judge panel and consolidated in December 2021. That same month, Plaintiff Common Cause moved to intervene in the litigation, and the three-judge panel granted the motion.

In a 258-page opinion issued in January 2022, the three-judge panel unanimously found that the 2021 Plans constituted extreme partisan gerrymanders. Specifically, the trial court found that the 2021 Congressional Plan was an "intentional, and effective, pro-Republican partisan redistricting" that all but guaranteed Republicans ten out of fourteen seats in the U.S. House of Representatives. The trial court further found

2. For instance, the majority in *Harper I* recognized that "our responsibility is to determine whether challenged apportionment maps encumber the constitutional rights of the people to vote on equal terms and to substantially equal voting power." *Harper I*, 380 N.C. at 323. By contrast, today's majority believes that its responsibility is to protect the plans that the trial court found to be "egregious and intentional partisan gerrymanders, designed to enhance Republican performance, and thereby give a greater voice to those voters than to any others." *Id.* at 324.

that "the enacted congressional map is more carefully crafted to favor Republicans than at least 99.9999% of all possible maps" using nonpartisan redistricting criteria. *Harper I*, 380 N.C. at 339. These results were no accident, the trial court concluded. Instead, "the 2021 Congressional Plan is a partisan outlier intentionally and carefully designed to maximize Republican advantage in North Carolina's Congressional delegation." The trial court further explained that "Legislative Defendants offered no defense of the 2021 Congressional Plan. No expert witness opined that it was not the product of an intentional partisan redistricting."

The state legislative districts fared no better. For example, the trial court found that the enacted State Senate Plan

> effectuate[d] the same sort of partisan advantage as the Enacted Congressional Plan. The Enacted Senate Plan consistently creates Republican majorities and precludes Democrats from winning a majority in the Senate even when Democrats win more votes. Even in an essentially tied election or a close Democratic victory, the Enacted Senate Plan gives Republicans a Senate majority, and sometimes even a veto-proof 30-seat majority. And that result holds even when Democrats win by larger margins.

Harper I, 380 N.C. at 341.

Similarly, the trial court concluded that "the Enacted House Plan is also designed to systematically prevent Democrats from gaining a tie or a majority in the House. In close elections, the Enacted House Plan always gives Republicans a substantial House majority. That Republican majority . . . persists even when voters clearly express a preference for Democratic candidates." *Id.* The trial court also concluded that "[t]he 2021 House Plan's partisan bias creates firewalls protecting the Republican supermajority and majority in the House."

So, this is where we started. And when confronted with three different legislative redistricting plans that were all found to have been intentional attempts to consolidate Republican power and suppress the will of the voters, this Court chose to protect the democratic ideals enshrined in our state constitution and the voters themselves over the political and partisan motivations of a select few in the General Assembly. Today, the Court reverses course and chooses the latter. Even beyond this particular decision, the majority has already repeatedly revealed itself to be on a mission to pursue the agenda of this select few in the legislature. *See Holmes v. Moore*, No. 342PA19-3 (N.C. Apr. 28, 2023); *Cmty. Success*

Initiative v. Moore, No. 331PA21 (N.C. Apr. 28, 2023). Its allegiances need no further explanation.

II. Analysis

A. Remedy

Though it may seem out of order, I begin by addressing the remedy the majority provides Legislative Defendants today as it is a primer for the lawlessness that recurs throughout this opinion. The majority makes repeated declarations that "[t]he constitution is interpreted based on its plain language"—that "[t]he constitution was written to be understood by everyone, not just a select few." But the majority also consistently struggles to apply those principles itself. Nowhere is this more evident than in the remedy the majority awards Legislative Defendants.

What Legislative Defendants want is a do over—a chance to go back in time and draw even more egregiously gerrymandered maps than they did before this litigation began. Because of the majority's decision today, they now have the assurance that they will get away with it. And as they correctly predicted, what Legislative Defendants want, the majority will provide. The majority's self-congratulatory exercise of judicial restraint suddenly vanishes when Legislative Defendants seek a remedy that the state constitution expressly prohibits. Though the constitutional text may be an inconvenience to the majority's desire to carry out Legislative Defendants' political agenda, it is not something that can be so easily disregarded at will.

There is a strict constitutional limitation on the General Assembly's power to draw state legislative districts. Article II, sections 3 and 5 expressly provide 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 the representative] districts and the apportionment of [senators and representatives] among those districts." N.C. Const. art. II, §§ 3, 5 (emphasis added). But these sections further provide that, "[w]hen established," both the apportionment of members of the state senate and house of representatives and their districts "shall remain unaltered until the return of another decennial census of population taken by order of Congress." N.C. Const. art. II, §§ 3(4), 5(4). The meaning of this requirement is simple: Once the districts have been established, or passed, by the General Assembly, the districts and apportionment of members of the General Assembly are fixed until the next census.

This Court has applied the provisions strictly. Shortly after the provisions were ratified in their original form, this Court held that they prohibited the mid-decade redrawing of the border between Franklin County and Granville County, even though the border as drawn violated another constitutional provision requiring that "no county shall be divided in the formation of a Senate district." N.C. Const. of 1868, art. II, § 5; *Comm'rs of Granville Cnty. v. Ballard*, 69 N.C. 18, 20–21 (1873). But the plain text of article II, sections 3(4) and 5(4) and the history of these provisions simply will not do for the majority.

Step one in the majority's scheme is therefore to do away with the remedial maps (2022 Plans) that *Harper I* ordered the General Assembly to draw. To that end, the majority must first redefine what the word "established" means. The majority relies on Black's Law dictionary to define the term "established" as "[t]o settle, make, or fix firmly; to enact permanently." *Establish*, Black's Law Dictionary (11th ed. 2019). The majority reasons that, using this definition, the 2022 Plans were not "established" for purposes of article II, sections 3(4) and 5(4) because this definition "connotes something more than the passage of a redistricting act by the General Assembly" because the General Assembly was free to amend the maps until they were used in an election.

But this definition creates a problem for the majority. Not only were the 2022 Plans validly enacted by the General Assembly during its first regular session following the 2020 Census, they were also *used* in the 2022 primaries and general election. That means that the 2022 Plans fall squarely within the majority's own definition of the word "established" as used in article II, sections 3(4) and 5(4). Thus, the majority must create an exception to its definition of the term "established" that lacks any basis in the constitutional text. Specifically, the majority reasons that, because the 2022 plans were based on a misapprehension of law, "they were never 'established' as that word is used in article II, sections 3(4) and 5(4)."

Interestingly, nowhere in the majority's definition of the term "established" is there an exception for such a misapprehension of law—the majority itself holds that a redistricting plan is established when, as here, it is enacted by the General Assembly and used in an election. The majority does not provide any legal support for the idea that a change in the law justifies the redistricting redo that Legislative Defendants seek, nor that such a permission is consistent with the text, purpose, or history of the state constitution's mid-decade redistricting prohibition.

That is because there is no legal basis for throwing out the 2022 Plans in the middle of the decade.[3]

But the majority does not stop there. Cue step two in the majority's efforts to carry out Legislative Defendants' bidding. The majority concludes that, not only must the 2022 Plans be thrown out, so too must the 2021 Plans that the General Assembly enacted following the 2020 census *before* this litigation ever began. Its reasoning is stunning—the 2021 Plans must be thrown out, it explains, because both because using the 2021 maps would not sufficiently protect seats for incumbent candidates and because these plans were allegedly based on a misapprehension of law from a *different* case decided years earlier. *See Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584 (N.C. Super. Ct. Sept. 3, 2019). As to the first point, that incumbents could be better protected through a different map is not a basis for ignoring the constitutional mandate against mid-decade redistricting. The state constitution does not authorize legislative districts to be redrawn in the middle of a decade simply to allow the General Assembly to better account for a particular redistricting criteria and certainly not for the dubious purpose of better protecting incumbent legislators.

With the respect to the majority's latter point that the 2021 maps were based on a misapprehension of law, it relies on a superior court decision that was never heard by a North Carolina appellate court. *Lewis*, 2019 WL 4569584 at *2–3. In *Lewis*, the plaintiffs brought similar partisan gerrymandering claims against different legislative maps. *Id.* The trial court held that the maps were extreme partisan gerrymanders and violated the state constitution. *Id.* at 3. But according to the majority, because of that decision, which is unrelated to this litigation, unrelated to the 2021 Plans, and was not decided by this Court, when Legislative Defendants enacted the 2021 Plans over a year later, they were enacted under "a mistaken understanding of the North Carolina Constitution." Somehow this mistaken understanding equates to a failure to establish

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3. The majority also makes the false assertion that "by statute[,] the General Assembly is not required to utilize the 2022 Plans for future elections." *See* N.C.G.S. § 120-2.4(a1). This is a blatant mischaracterization of the statute. N.C.G.S. § 120-2.4(a1) provides that, when the legislature is required to enact a remedial map but fails to "act to remedy any identified defects" within the timeframe that has been prescribed by a court, the court may impose an interim plan that will be used in the next election only. N.C.G.S. § 120-2.4(a1). The court-imposed plan is only "interim" if the General Assembly fails to enact a remedial map on its own accord. That is not what happened here, as the General Assembly itself passed the remedial 2022 Plans during its first regular legislative session. Its enacted remedial plans have the same force and effect as any other redistricting plans that it validly enacts, and they are treated the same.

the legislative plans. In other words, the majority believes that because it might be possible to enact an even more extreme partisan gerrymander than was enacted in 2021, the General Assembly should be allowed to do so, despite the prohibition on mid-decade redistricting of state legislative districts.

The majority points to the fact that in 2021, when the General Assembly started the map drawing process after census data was first released, among the districting criteria that the General Assembly adopted was the requirement that partisan election data not be considered in defining legislative districts. The majority credits Legislative Defendants assertion to this Court in *Harper I* that the General Assembly adopted "this requirement . . . because it believed that requirement was necessary to create constitutionally compliant redistricting plans." Notably, Legislative Defendants' single, vague assertion that the majority hinges its conclusion on does not argue that the 2021 maps were free of intentional partisan bias. Such a claim would have been untrue. But the majority refuses to examine any of the evidence in the record that demonstrates the role partisan considerations played in the creation of the 2021 Plans and proves that this this criterion was adopted in name only. This is not surprising—recognizing as much would require the majority to acknowledge that the General Assembly already took advantage of the opportunity to enact maps containing extreme partisan gerrymanders.

As has been discussed, almost every shred of evidence in the record shows that the 2021 maps were extreme partisan gerrymanders, which is why the trial court specifically found as much. But not only did the 2021 Plans themselves evince that they were drawn to disproportionately favor Republicans, so too did the events leading to their enactment. For example, Legislative Defendants claimed that potential maps must be drawn and submitted in committee hearing rooms using software that did not account for partisan election data. Defendant Representative Destin Hall, the Chair of the House Redistricting Committees assured his colleagues that the "House as a whole" would "only consider maps that are drawn in this committee room, on one of the four stations" located in the committee room.

Contrary to these assurances, however, legislators and their staff were able to use partisan data to draw gerrymandered maps on unofficial devices both inside and outside of the committee rooms. Evidence at trial revealed that Representative Hall repeatedly met with members of his staff to review "concept maps" that were created on unofficial computers using unknown redistricting software and data. Representative

Hall testified that he would then rely on these concept maps when drawing proposed maps on the committee room computers. In fact, on several occasions, when drawing maps on the official terminals in the committee rooms, Representative Hall even brought along a smartphone containing images of the concept maps so that he could copy the concept map into the public terminal.

Legislative Defendants denied that they used any non-public materials as part of their map-drawing activities at first, but they were eventually forced to admit that this was false. The trial court ordered Legislative Defendants to produce the "concept maps" and related materials. Legislative Defendants failed to do so, and instead claimed that "the concept maps that were created were not saved, are currently lost and no longer exist." Based on this history as well as the extremity of the maps themselves, the majority's suggestion that the 2021 Plans were based on the "incorrect" notion that partisan gerrymandering violates the state constitution is plainly false.

Even if it were true that the General Assembly did not consider partisan data in drawing the 2021 Plans, it would not matter. As already explained, the constitution proscribes mid-decade redistricting after districts are *established*. There is no constitutional caveat providing that a district might become "un-established" if a change in the law means the districts could have been drawn differently the first time around. If this were true, legislative redistricting plans would never officially be established for purposes of article II, sections 3 and 5. The potential for a future hypothetical change in the law would permanently leave every redistricting plan enacted by the General Assembly in a state of limbo. The state constitution does not afford Legislative Defendants a do-over simply because they believe that they can do a better job of manipulating election outcomes this time around.

Finally, the General Assembly has already expressed its intent that the 2021 Plans should take effect if the 2022 Plans were to be thrown out. Specifically, the 2022 enactments establishing the 2022 Plans (*i.e.*, the remedial plans) for both the North Carolina Senate and House of Representatives explained that should the Court's decision in *Harper I* be "made inoperable . . . or ineffective," the 2021 Plans would, by operation of law, become "again effective." An Act to Realign the North Carolina Senate Districts Pursuant to the Order of the North Carolina Supreme Court in Harper v. Hall, S.L. 2022-2, § 2, 2022 N.C. Sess. Laws 14, 19 (Senate plan); An Act to Realign North Carolina House of Representatives Districts Pursuant to Order of the North Carolina Supreme Court in Harper v. Hall, S.L. 2022-4, § 2, 2022 N.C. Sess. Laws

30, 43 (House plan). Thus, this Court need not speculate about what the General Assembly intended if, for some reason, the 2022 Plans became "ineffective." By ordering that the 2021 Plans be disregarded, this Court violates the intent of the General Assembly expressed by the body as a whole through formal legislation, rather than a few of its members involved in this litigation.

None of this matters to the majority. Reason, common sense, and the rule of law are lost on those who do not care about interpreting the constitution in good faith. This holding is not a mere error in legal interpretation—I do not think that even the majority believes itself to be complying with the constitutional text where this remedy is concerned, as demonstrated by its lack of effort in attempting to support its radical decision. The remedy afforded here demonstrates how divorced from the law the majority's decision is in its entirety. It shatters the notion that the majority is applying the constitution "based on its plain language" or that "[t]his case is not about partisan politics." Put simply, the majority today instructs the General Assembly to violate the North Carolina constitution. In so doing, it puts on display just how far this Court has fallen.

B. Partisan Gerrymandering Violates the State Constitution

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Blankenship v. Bartlett*, 363 N.C. 518, 522 (2009) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)). As James Madison explained in the Federalist Papers, "[R]epublican liberty" requires "not only that all power should be derived from the people; but that those entrusted with it should be kept in dependence on the people." *Rucho*, 139 S. Ct. at 2512 (Kagan, J., dissenting) (quoting The Federalist No. 37, at 4 (James Madison) (J. & A. McLean ed., 1788)). This principle applies not just to the federal government but to our state as well, for it "is the foundation of democratic governance." *Id.* at 2511–12. Indeed, this very principle is enshrined in our state constitution, which commands that "[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.

The extreme partisan gerrymanders that this Court addressed in *Harper I* and *Harper II* made a mockery of those principles and "enabled politicians to entrench themselves in office as against voters' preferences. They promoted partisanship above respect for the popular will. They encouraged a politics of polarization and dysfunction." *Rucho*, 139 S. Ct. at 2509 (Kagan, J., dissenting). In so doing, these

partisan gerrymanders "deprived citizens of the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives." *Id.* By violating these rights, the plans at issue and the politicians who manipulated them "debased and dishonored our democracy, turning upside-down the core American idea that all governmental power derives from the people." *Id.* With the practice now condoned by this Court's current majority, the select few in the General Assembly who crafted the plans, themselves elected under gerrymandered maps, will make every attempt to entrench their party in the General Assembly indefinitely, regardless of what North Carolinians have to say about it. *See, e.g.*, *Lewis*, 2019 WL 4569584, at *8–9, *14–18.

Not only does the majority fail to recognize the anti-democratic nature of these realities. It goes a step further than any opinion of the full U.S. Supreme Court has gone before and concludes that, not only is partisan gerrymandering nonjusticiable, it is actually *permitted* by the state constitution. As James Madison once cautioned, the majority misplaces political power "in the Government over the people." 4 Annals of Cong. 934 (1794).

Harper I painstakingly laid out the history, requirements, and guarantees of the constitutional rights that are implicated here—the free elections clause, the equal protection clause, the free speech clause, and the freedom of assembly clause. I do not here repeat *Harper I*'s correct interpretation of these rights, as the principles and history that *Harper I* articulated are far more enduring than the majority's monopoly on the judicial power. I do, however, address the butchered and curtailed definition of the free elections clause the majority adopts today and share a few additional observations about the state's equal protection clause.

1. The Free Elections Clause

The majority proclaims that "[t]he constitution is interpreted based on its plain language" and that "[t]he constitution was written to be understood by everyone, not just a select few." It appears that the majority and I agree on at least two points, in principle at least; we just disagree about what these concepts look like in practice. The majority's interpretation of the free elections clause highlights the point. Article I, section 10 of the North Carolina constitution, known as the free elections clause, states very simply that "[a]ll elections shall be free." N.C. Const. art. I, § 10. That is all. While this clause may seem easy enough for "everyone" to make sense of, not so in the majority's view. It takes the Court over twenty pages of convoluted legal reasoning to explain

why the word "free" does not actually mean what one might think it does. This does not mean that brevity begets accuracy. But neither does the majority's odyssey to redefine a simple and explicit requirement in the North Carolina constitution.

I begin where the majority does: with the dictionary definition of the word "free." Moreover, I use the same dictionary definition as does the majority, as the Court omits a few notable considerations. Black's Law Dictionary defines the term "free" as, among other things, "[h]aving legal and political rights; enjoying political and civil liberty"; "[n]ot subject to the constraint or domination of another; enjoying personal freedom; emancipated"; "[*c*]*haracterized by choice*, rather than by compulsion *or* constraint." *Free*, Black's Law Dictionary (11th ed. 2019) (emphases added). Merriam Webster's provides additional guidance, encapsulating the definitions identified above but adding that "free" means "not determined by anything beyond its own nature or being: choosing or capable of choosing for itself." *Free*, Merriam-Webster's Collegiate Dictionary (11th ed. 2022).

With this in mind, we can explore what the free elections clause demands on its face. In violation of the concept of "free" elections, partisan gerrymandering is a form of vote dilution—"the devaluation of one citizen's vote as compared to others," *Rucho*, 139 S. Ct. at 2513 (Kagan, J., dissenting)—that imposes a "constraint" on a voter's will. *See Free*, Black's Law Dictionary. Justice Kagan explained this process succinctly in her dissent in *Rucho*:

> A mapmaker draws district lines to "pack" and "crack" voters likely to support the disfavored party. He packs supermajorities of those voters into a relatively few districts, in numbers far greater than needed for their preferred candidates to prevail. Then he cracks the rest across many more districts, spreading them so thin that their candidates will not be able to win. Whether the person is packed or cracked, his vote carries less weight—has less consequence—than it would under a neutrally drawn (non-partisan) map. In short, the mapmaker has made some votes count for less, because they are likely to go for the other party.

Id. at 2513–14 (citations omitted). And when done properly, which modern technology all but assures, it puts representatives, like Legislative Defendants here, in the business of "rigging elections." *Vieth v. Jubelirer*, 541 U.S. 267, 317 (2004) (Kennedy, J., concurring in the judgment).

A rigged election is not, in any sense of the word, a free election. Nor is an election in which a voter's voice is worthless because the election's results have been preordained by whoever wields political power in the General Assembly. The majority itself acknowledges that the free elections clause was inspired by the English Bill of Rights, which in turn sought to respond to practices that attempted "to ensure a certain electoral outcome." Though the modes of "ensur[ing]" certain electoral outcomes may have improved with the advent of technology, an election in which the result is determined by advanced and manipulative map drawing is not, "[c]haracterized by choice," as the term "free" requires, but by "constraints" that are contrived by the legislature alone. *See Free*, Black's Law Dictionary.

The majority next turns to the history of the free elections clause. Notably, the majority does not challenge much of the history surrounding the clause as recounted in *Harper I*. In fact, it reiterates much of what *Harper I* already explained. Instead, it disagrees with some of the conclusions that *Harper I* drew from that history. Because *Harper I* already successfully completed the task of explaining the historical underpinnings of the free elections clause, I do not rehash these events here. *See Harper I*, 380 N.C. at 373–76. I note only that history cannot be retroactively modified by the majority.

The majority's historical analysis warrants a brief comment, however. Specifically, in analyzing the roots of the free elections clause, the majority examines a narrow political issue that preceded the clause and the 1776 Declaration of Rights, namely the tension between North Carolina's governor and the House of Burgesses from 1729 until 1776. According to the majority, the free elections clause "was placed in the 1776 Declaration of Rights at the same time as other constitutional provisions that both limited executive power and increased legislative power." As a result of these contemporaneous provisions, the majority concludes that "any argument that the people added the free elections clause to the 1776 constitution for the purpose of limiting the General Assembly's apportionment authority is inconsistent with this historical context."

This conclusion presents two glaring problems. First, it ignores that the free elections clause, when first adopted, spoke to the elections of members to the General Assembly specifically; it did not concern the various disputes that the majority describes between the governor and the House of Burgesses. Any provisions adopted to address the balance of power between the governor and the legislative body are distinct from a provision that demanded the free "election[ ] of members . . . to [the] General Assembly." N.C. Const. of 1776, Declaration of Rights, § 6.

Second, and relatedly, was this ongoing feud really the only historically relevant event that happened in the years leading up to 1776? Can the majority truly not conceive of *anything* else that may have driven the people of North Carolina to embrace the words "election[ ] of members to serve as Representatives in the General Assembly, ought to be free," as the clause provided in 1776? N.C. Const. of 1776. Moreover, might other historical events have inspired an evolved understanding of the clause as it as well as other constitutional provisions were modified and added throughout the state's history, including in 1868? *See Harper I*, 380 N.C. at 369 ("North Carolina's Declaration of Rights as it exists today in article I was forged not only out of the revolutionary spirit of 1776 but also the reconstruction spirit of 1868.").

History can, when used properly and appropriately, be useful in giving context to a constitution. But the majority demonstrates how historical analysis can be weaponized to paint a distorted picture of a constitution's historical understanding. In this way, "it is a magnificent disguise. The judge can do the wildest things, all the while presenting himself as the passive agent of the sainted Founders—don't argue with me, argue with Them." Richard A. Posner, *Bork and Beethoven*, 42 Stan. L. Rev. 1365, 1379 (1990). But "bad originalism" has never been a legitimate means of constitutional interpretation. *See id.* at 1378.

Finally, the majority attempts to use precedent to support its constrained view of the free elections clause. As the majority notes, there are few cases that have interpreted the clause. First, there was *Clark v. Meyland*, 261 N.C. 140 (1964). There, the plaintiff sought to change his party affiliation in order to vote in the Republican primary. *Id.* at 141. But in order to do so, he was required by statute to take an oath pledging his allegiance to the new party, including by supporting the nominees from that party in the subsequent election. *Id.* Any individual who took the oath falsely was guilty of a felony. *Id.* This Court struck down the part of the oath that required an individual to support the party's nominees in the future because it "violate[d] the principle of freedom of conscience. It denies a free ballot—one that is cast according to the dictates of the voter's judgment." *Id.* at 142. The Court concluded that "the Legislature is without power to shackle a voter's conscience by requiring the objectionable part of the oath as a price to pay for his right to participate in his party's primary." *Id.*

Next, the majority cites *State ex rel. Swaringen v. Poplin*, 211 N.C. 700 (1937), in which the plaintiff—a candidate for office—claimed that the Wilkes County Board of Elections fraudulently altered the vote count, leading to the plaintiff's defeat. *Id.* at 700–01. Citing the free elections

clause and rejecting the Board of Elections's argument that it had the sole authority to determine the result of an election, this Court held that judicial intervention was appropriate and explained that "[a] free ballot and a fair count must be held inviolable to preserve our democracy." *Id.* at 702.

Based on these two cases alone, the majority somehow concludes the free elections clause encompasses only the right to vote "according to one's conscience and to have that vote accurately counted." This interpretation is confounding. Neither of these cases in any way limits the free elections clause to the two situations identified by the majority. The cases that have happened to rule on a specific and limited issue do not, without more, define the entire scope of a constitutional provision. In attempting to justify its interpretation of the free elections clause with such an elementary error in interpreting this Court's precedent, the majority only emphasizes how baseless its decision today is. In fact, these errors are so egregious that they hardly need be explained—they are so glaring that the majority accomplishes the task on its own.

What is more, if the majority is correct that these cases limit the free elections clause to only these two scenarios, then these cases would conflict with the majority's own historical analysis of the clause. Again, the majority explains that the Declaration of Rights was modeled after the English Bill of Rights, which was in turn an effort to respond to various abuses committed by King James II. But many of the abuses that the English Bill of Rights sought to address, and therefore the Declaration of Rights contemplates, do not fit in to the majority's cabined interpretation of the free elections clause. For example, the majority explained that, under King James II, "[w]hen the time for [an] election came, local agents of the king who conducted the polling used devious polling practices to open, close, and reopen polling places" to manipulate election outcomes. Under the majority's newly minted interpretation of the free elections clause, such a practice would not be proscribed, and it is certainly not addressed by any other provision in the Declaration of Rights.

2. The Equal Protection Clause

Not only does partisan gerrymandering obstruct the constitution's promise of free elections, it also deprives individuals of the "fundamental right to vote on equal terms," which is derived from North Carolina's equal protection clause.[4] *Stephenson v. Bartlett* (*Stephenson I)*, 355 N.C. 354, 378 (2002). That right "can be denied by a debasement or

4. North Carolina's equal protection clause states that:

> [n]o person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled,

dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). The majority correctly notes that this Court has stepped in to prevent this consequence through its one-person, one-vote cases. *See Stephenson I*, 355 N.C. 354; *Blankenship v. Bartlett*, 363 N.C. 518 (2009); *Northampton Cnty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742 (1990). These cases recognize that "[e]qual protection 'requires that all persons similarly situated be treated alike.' " *Blankenship*, 363 N.C. at 521. Malapportionment—the practice of inequitably apportioning representatives, allowing certain voters to wield more influence than others—violates this principle because it deprives individuals of "substantially equal voting power." *Stephenson I*, 355 N.C. at 379.

The majority attempts to convince us that this principle of protecting "substantially equal voting power" is limited to the one-person, one-vote context because the state constitution specifically contemplates this requirement in article II, sections 3(1) and 5(1). These sections state that each state senator and each state representative "shall represent, as nearly as may be, an equal number of inhabitants, the number of inhabitants that each [senator or representative] represents being determined for this purpose by dividing the population of the district that he represents by the number of Senators apportioned to that district." N.C. Const. art. II, §§ 3(1), 5(1). The majority asserts that "[p]arty affiliation . . . is not mentioned in Article II, Sections 3 or 5."

Interestingly, however, article II, sections 3(1) and 5(1) apply *only* to state senators and members of the North Carolina House of Representatives. Neither of these provisions nor any other constitutional provision requires that other statewide offices represent similarly sized constituencies. Even so, in *Blankenship*, this Court held that "the right to vote in superior court elections on substantially equal terms" is protected by North Carolina's equal protection clause. *Blankenship*, 363 N.C. at 526. Moreover, this Court reached this interpretation under the state equal protection clause even though "federal courts [had] articulated that the 'one-person, one-vote' standard [was] inapplicable to judicial elections." *Id.* at 522. Thus, this Court in *Blankenship* found that North Carolina's equal protection clause prohibits a certain practice

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> or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

N.C. Const. art. I, § 19.

that was neither mentioned in the state constitution explicitly nor prohibited by the Federal Constitution.[5]

Putting the majority's weak attempt at line drawing aside, partisan gerrymandering is, in effect, indistinguishable from malapportionment. The only practical difference is that, rather than diluting votes based on "where [a voter] happen[s] to reside," *see Reynolds*, 377 U.S. at 563, partisan gerrymandering dilutes votes based on whom an individual happens to vote for. Thus, as with malapportionment, partisan gerrymandering deprives voters of "substantially equal voting power" and violates the North Carolina constitution's equal protection clause.

The majority's equal protection analysis warrants one final correction. In particular, the majority implies that the U.S. Supreme Court in *Rucho* concluded that partisan gerrymandering does not implicate the federal Equal Protection Clause. This it did not do, and the majority's characterization is incorrect. The Supreme Court's decision in *Rucho* was limited to the question of justiciability. *Rucho* specifically held that, despite the fact that "such gerrymandering is incompatible with democratic principles . . . partisan gerrymandering claims present political questions beyond the reach of the federal courts." *Rucho*, 139 S. Ct. at 2506–07 (cleaned up).[6] The majority may wish to downplay its legal extremism by analogizing its action today to that of the nation's highest court. But it may not accomplish this task by plainly misstating what the U.S. Supreme Court held.

C. Partisan Gerrymandering is Justiciable

"It has long been understood that it is the duty of the courts to determine the meaning of the requirements of our Constitution." *Leandro v. State*, 346 N.C. 336, 345 (1997). This duty holds true where partisan gerrymandering claims are concerned. The majority, however, invokes

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5. What is more, article II, sections 3(1) and 5(1)—the provisions on which the majority relies—also textually contemplate the use of single-member and multi-member districts within the same redistricting plans. *See* N.C. Const. art. II, §§ 3(1), 5(1). But as discussed in depth, *see* Section II.C.3, in *Stephenson I*, this Court held that the use of multi-member districts violates the state constitution's equal protection clause "unless it is established that inclusion of multi-member districts advances a compelling state interest." *Stephenson I*, 355 N.C. at 381. Thus, *Stephenson I* further demonstrates that this Court has relied on the state constitution's equal protection clause previously in cabining a power that the state constitution explicitly assigns to the General Assembly.

6. In fact, the dissent in *Rucho* criticized the majority's refusal to address the claims at issue in light of the constitutional rights that were implicated by partisan gerrymandering. *See Rucho*, 139 S. Ct. at 2509 ("For the first time ever, this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities.").

the political question doctrine to conclude that partisan gerrymanders are nonjusticiable political questions. The majority errs in applying the doctrine to such claims. Indeed, "[t]he doctrine of which we treat is one of 'political questions,' not one of 'political cases.' The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority." *Baker v. Carr*, 369 U.S. 186, 217 (1962). The majority's conclusion otherwise was wrong when it was first drawn by the dissent in *Harper I*, and it is wrong today.

1. A Brief History of Partisan Gerrymandering Jurisprudence

Though the justiciability of partisan gerrymandering claims in the federal courts has long been debated, a majority of the U.S. Supreme Court only recently decided that such claims are nonjusticiable. In fact, for several decades, the opposite view prevailed, and partisan gerrymandering claims were considered justiciable. *See, e.g.*, *Vieth*, 541 U.S. at 317 (Stevens, J., dissenting) ("[F]ive Members of the Court . . . share the view that . . . it would be contrary to precedent and profoundly unwise to foreclose all judicial review of [partisan gerrymandering] claims that might be advanced in the future."); *Davis v. Bandemer*, 478 U.S. 109, 143 (1986) (plurality opinion) (holding that "political gerrymandering claims are properly justiciable under the Equal Protection Clause"), *abrogated by Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). Then, in 2019, the U.S. Supreme Court changed course. In *Rucho*, the Court held "that partisan gerrymandering claims present political questions beyond the reach of the federal courts." 139 S. Ct. at 2506–07.

The evolution of the U.S. Supreme Court's partisan gerrymandering jurisprudence is not, of course, biding on this Court. *Rucho* itself was clear that "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply." *Id.* at 2507. But these cases demonstrate that for decades, U.S. Supreme Court Justices from both sides of the ideological spectrum agreed that "severe partisan gerrymanders [are incompatible] with democratic principles," *Vieth*, 541 U.S. at 292, and further that their "legislative classifications 'reflec[t] *no* policy, but simply arbitrary and capricious action[,]" *id.* at 316 (Kennedy, J., concurring in the judgment); *see id.* at 312 (Kennedy, J., concurring in the judgment) (recognizing that "the rapid evolution of technologies in the apportionment field suggests yet unexplored possibilities" with respect to the standards that may emerge to govern partisan gerrymandering claims).

Times have changed, however, and it is no secret that "ideology in Supreme Court appointments" has become increasingly important,

ushering in a new era of political polarization on the nation's highest court. *See*, *e.g.*, Neal Devins and Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 Sup. Ct. Rev. 301, 319–20 (2017) (explaining that "it appears that Republican-appointed Justices are more strongly conservative than the Court's Democratic-appointed Justices are liberal" and highlighting that, as of 2016, legal scholars had "rank[ed] four Roberts Court Republican-appointed Justices as among the most conservative Justices ever to sit on the Court"). In light of this increased polarization, it is unsurprising that the previous understanding regarding partisan gerrymandering's justiciability became a position of the past by the time *Rucho* was decided.

But the U.S. Supreme Court is not the only institution in the country that has become collateral damage in increasingly partisan battles surrounding voting rights. Indeed, the decision today demonstrates that this Court has met the same fate. Just as *Rucho* followed closely on the heels of a shift in the U.S. Supreme Court's makeup, the Court's decision here follows a midterm election that altered its political composition. Notably, this Court's decision to vacate *Harper I* and *Harper II* is not based on a change in or misunderstanding of the controlling law or facts. Instead, the Court, now armed with the influence of a conservative majority, has an intellectual disagreement with *Harper I*'s interpretation of the law. Not only is such a disagreement not an appropriate basis to vacate a prior decision under these circumstances, the Court's decision, which was designed to protect the power of partisan legislators rather than North Carolina's voters, stamps a seal of approval on flagrant violations of the state constitution.

2. Judicially Manageable Standards

The majority reasons that "our constitution does not provide judicially discernable or manageable standards for adjudicating partisan gerrymandering claims" as part of its conclusion that such claims are nonjusticiable political questions. The majority's reasoning is largely cribbed from the U.S. Supreme Court decision in *Rucho*. Given the majority's reliance on *Rucho*, I address the line of reasoning that was first adopted by the U.S. Supreme Court and is now echoed by this Court as to why political gerrymandering claims lack judicially manageable standards. Condensed to its simplest form, the reasoning proceeds as follows.

First, the thinking goes that the Framers of the state and federal constitutions were aware of the concept of gerrymandering, but neither

constitution expressly prohibited the practice. *See Rucho*, 139 S. Ct. at 2494–96; *Harper I*, 380 N.C. at 417 (Newby, J., dissenting). Second, based on this historical practice, some amount of partisan gerrymandering must be constitutionally permissible, meaning that strict proportionality is not required by the state or federal constitution. *See Rucho*, 139 S. Ct. at 2499; *Harper I*, 380 N.C. at 417 (Newby, C.J., dissenting). Third, neither constitution prescribes the *exact* amount of partisan gerrymandering that is unconstitutional. *See Rucho*, 139 S. Ct. at 2501, 2506; *Harper I*, 380 N.C. at 421 (Newby, C.J., dissenting). This final point coupled with the notion that the "political science tests" that have been developed to expose partisan gerrymandering are insufficient yield the conclusion that there is no standard a trial court can reliably apply to determine whether a partisan gerrymander is unconstitutional. This line of reasoning can be reduced to a common refrain: "At what point does permissible partisanship become unconstitutional," or more simply, "[h]ow much is too much?" *Rucho*, 139 S. Ct. at 2501. This question, the majority thinks, is simply too hard to answer.

Even if the question is too challenging for this Court's current majority to fully grapple with—this particular issue is addressed in more detail below—courts both in North Carolina and around the country that have successfully confronted this question as well similar questions in analogous contexts, demonstrating that the manufactured conundrum is not as mystifying as the majority would have us believe.

The majority attempts to obfuscate the standard laid out in *Harper I* by repeatedly asserting that *Harper I* simply requires a proportionality standard. *Harper I* was clear that "the fact that one party commands fifty-nine percent of the statewide vote share in a given election does not entitle the voters of that party to have representatives of its party comprise fifty-nine percent of the North Carolina House, North Carolina Senate, or North Carolina congressional delegation." *Harper I*, 380 N.C. at 387 (majority opinion). To clarify any confusion amongst the members of the majority, this means that *Harper I* acknowledged that proportionality is not the constitutional baseline.

Instead, *Harper I* explained that the state constitution provides that

> voters are entitled to have substantially the same opportunity to electing a supermajority or majority of representatives as the voters of the opposing party would be afforded if they comprised fifty-nine percent of the statewide vote share in that same election. What matters here, as in the one-person, one-vote

> context, is that each voter's vote carries roughly the same weight when drawing a redistricting plan that translates votes into seats in a legislative body.

Id. To crystalize the point, when the voting strength of a particular group of voters is artificially diluted based purely on their political preferences, they are deprived of their "fundamental right to vote on equal terms," *Stephenson I*, 355 N.C. at 378, among other constitutional rights. When such constitutional violations are alleged, the state constitution requires an inquiry into whether maps enacted by the General Assembly systematically prevent a political party whose candidates receive a majority of the statewide votes from having a realistic opportunity to win at least half of the representative seats that are up for election. That does not mean that the party *must* win half of the seats. It simply means the party must not be deprived of the opportunity to do so though maps that are intended to suppress a particular kind of voter's voting power.

There are various empirical and statistical analyses that demonstrate whether unconstitutional partisan vote dilution has occurred. Relevant here, *Harper I* clearly outlined "multiple reliable ways of demonstrating the existence of an unconstitutional partisan gerrymander," including the mean-median difference analysis; the efficiency gap analysis; the close-votes, close seats analysis; and the partisan symmetry analysis. *Harper I*, 380 N.C. at 384. Through these analyses, "the same technologies and data that today facilitate extreme partisan gerrymanders also enable courts to discover them, by exposing just how much they dilute votes." *Rucho*, 139 S. Ct. at 2517 (Kagan, J., dissenting).[7]

"Once a plaintiff shows that a map infringes on their [constitutional rights]" through impermissible vote dilution, the legislature may still be able to justify the apparent anomalies by reference to constitutionally acceptable redistricting criteria, which amount to compelling governmental interests. *See Harper I*, 380 N.C. at 387. "[C]ompelling governmental interests in the redistricting context include the traditional neutral districting criteria expressed in article II, sections 3 and 5 of the North Carolina Constitution." *Id.* at 388. Additionally, incumbency, so long as "it is applied evenhandedly, is not perpetuating a prior unconstitutional

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7. *Harper I* was careful in declining to "identify an exhaustive set of metrics or precise mathematical thresholds which conclusively demonstrate or disprove the existence of an unconstitutional partisan gerrymander." *Harper I*, 380 N.C. at 384. As explained later, this approach exemplifies the understanding that a single case presenting an issue of first impression for the Court would be insufficient to establish all of the circumstances in which unconstitutional partisan gerrymandering might occur.

redistricting plan, and is consistent with the equal voting power requirements of the state constitution," as well as other "widely recognized traditional neutral redistricting criteria, such as compactness of districts and respect for other political subdivisions, may also be compelling governmental interests."[8] *Id.*

The majority seems to have two primary objections to the standard laid out in *Harper I*. First, the majority is unsatisfied because, while outlining a number of "political science tests" whose results can evidence an unconstitutional partisan gerrymander, *Harper I* and *Harper II* did not define a single numeric threshold at which point a metaphoric line can be drawn and a court can conclude that a map enacted by the General Assembly is unconstitutional because it denies certain voters of "substantially equal voting power." This position ignores that "the law is 'full of instances' where a judge's decision rests on 'estimating rightly . . . some matter of degree.' " *Rucho*, 139 S. Ct. at 2522 (Kagan, J., dissenting) (alteration in original) (quoting *Johnson v. United States*, 576 U.S. 591, 604 (2015). And in these contexts, "[t]o the extent additional guidance has developed over the years . . . , courts themselves have been its author." *Id.*

Reviewing redistricting plans to determine whether certain voters have been deprived of "substantially equal voting power" is no different. Indeed, "courts all the time make judgments about the substantiality of harm without reducing them to particular percentages. If courts are no longer competent to do so, they will have to relinquish, well, substantial portions of their docket." *Id.* Countless claims require a court to determine when a harm is sufficiently substantial to constitute a constitutional violation. We need look no further than the Sixth Amendment of the U.S. Constitution for an example of this point.

The Sixth Amendment instructs that an "accused shall enjoy the right to a speedy and public trial," but what does that mean exactly? U.S. Const. amend. VI. The U.S. Constitution certainly does not elaborate, presenting problems that resemble the majority's concern about partisan gerrymandering claims. Indeed, as this Court has explained, "it is impossible to determine precisely when the right [to a speedy trial]

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8. "[W]hile adherence to neutral districting criteria primarily goes to whether the map is justified by a compelling governmental interest, the disregarding of neutral criteria such as compactness, contiguity, and respect for political subdivisions, particularly when the effect of the map subordinates those criteria to pursuit of partisan advantage, may also be some evidence a map burdens the fundamental right to equal voting power." *Harper I*, 380 N.C. 384 n.15.

has been denied; it cannot be said precisely how long a delay is too long; [and] there is no fixed point when the accused is put to a choice of either exercising or waiving his right to a speedy trial." *State v. McKoy*, 294 N.C. 134, 140 (1978). But the constitutional text's omission of these details was not cause for the courts to eventually determine that they were helpless when faced with a claim that an individual had been denied the right to a speedy trial. I hope the majority would agree that such a decision would have been a baseless abdication of the judicial function that would itself defy the judiciary's role as contemplated by the Constitution.

Instead of abandoning this duty, a "difficult and sensitive balancing" of four factors has emerged to determine whether a violation has occurred. *State v. Farmer*, 376 N.C. 407, 414 (2020) (quoting *Barker v. Wingo*, 407 U.S. 514, 533 (1972)). This balancing test has developed over time and still provides no precise point at which the right has been violated. Even so, engaging in this "difficult and highly fact-specific evaluation" is a mandatory judicial function. *Id.* at 411. Just as neither the Sixth Amendment nor its corresponding four-part test define exactly "how long [of] a delay is too long" for purposes of the right to a speedy trial, *McKoy*, 294 N.C. at 140, the North Carolina constitution and the standard that was illuminated by *Harper I* do not answer precisely "how much partisan gerrymandering is too much." This was never thought to be a justiciability issue in the Sixth Amendment context, and it is not a justiciability issue here.

The majority's only attempt to distinguish this example is based on the notion that, unlike the Sixth Amendment, "the constitution assigns the responsibility of redistricting to the General Assembly, not to the courts." This argument bears on the separate issue of whether the courts have a constitutionally contemplated role in presiding over partisan gerrymandering claims. In other words, it is a textual commitment argument, which is a distinct issue with respect to justiciability. This argument is not responsive to the point the Sixth Amendment example proves: judicially manageable standards have been adopted in the face of other constitutional questions that raise the same "how much is too much" question. The concern that the majority raises is discussed in full in Section II.C.3. For now, it is enough to respond that, contrary to the majority's assertion that "*Harper I* and the dissent . . . seem to imagine a future where redistricting is a court-managed process[,]" rather than exclusively in the hands of the General Assembly, "*Harper I* and the dissent" imagine only a future in which the constitutional guarantees of free elections and equal protection of the laws are enforced—a future in which this Court does not abdicate the judicial role for its own partisan ends.

With the majority's irrelevant argument aside, I turn to the capacity of the courts to interpret the constitutional mandate that voters be afforded "substantially equal voting power." Though this mandate is not defined purely in mathematical terms, the requirement is grounded in language that courts are accustomed to interpreting. Most importantly, this Court gave the phrase meaning in the one-person, one-vote context in *Stephenson I*. 355 N.C. at 380, 383 (holding that, the right to "substantially equal voting power" as guaranteed by the state constitution's equal protection clause requires that, with respect to legislative apportionment, "any deviation from the ideal population for a legislative district shall be at or within plus or minus five percent for purposes of compliance with federal 'one-person, one-vote' requirements.")

The majority attempts to distinguish this example from partisan gerrymandering claims on the basis that the one-person, one-vote principle is "relatively easy to administer as a matter of math." Though lawyers and judges may not be widely renowned for their mathematical prowess, courts cannot abdicate the judicial function simply because a legal issue involves a detailed analysis. Both the state and federal constitutions "forbid[ ] 'sophisticated as well as simple-minded modes of discrimination.' " *Reynolds*, 377 U.S. at 563 (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939)). When faced with the one-person, one-vote issue in *Reynolds*, the U.S. Supreme Court opined:

> We are told that the matter of apportioning representation in a state legislature is a complex and many-faceted one. We are advised that States can rationally consider factors other than population in apportioning legislative representation. We are admonished not to restrict the power of the States to impose differing views as to political philosophy on their citizens. We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us.

Id. at 566. As Justices on this state's highest court, our oath, our office, and the North Carolina electorate demanded the same. Today, a majority of this Court turns its back on those duties.

Similar language as that found in *Harper I*'s standard has been given meaning in other contexts as well. For example, when a criminal defendant seeks to have charges against him dismissed for insufficient evidence, a trial court ruling on the motion "need determine only

whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Call*, 349 N.C. 382, 417 (1998).

In defining this standard, this Court has explained that "[s]ubstantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Mann*, 355 N.C. 294, 301 (2002). And how much evidence is that exactly? Over time, the Court has come to recognize that it is something more than "suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator." *State v. Malloy*, 309 N.C. 176, 179 (1983). The standard is imprecise—reasonable minds regularly disagree about what constitutes substantial evidence. But one would be hard-pressed to find any member of the legal community who would insist that the judiciary identify a quantifiable amount of evidence that meets the standard in all future cases. Such an undertaking would likely be impossible—criminal evidence comes in countless forms that serve different purposes and indicate guilt to varying degrees—and profoundly unwise. Instead of creating a definition with mathematical precision, over time, both this Court and lower courts have clarified what constitutes "substantial evidence" in a way that allows a court to consider the quantity and quality of evidence that might come before it in a particular case.

That is all that was required here. Unconstitutional partisan gerrymandering can be demonstrated or disproved through various forms of evidence, including the tests identified in *Harper I*, and each allegation involves unique facts that bear on whether a voter has been deprived of "substantially equal voting power." That *Harper I* allowed future cases to mete out the boundaries of unconstitutional partisan gerrymandering was not an infirmity indicating that this state's courts are incapable of determining what constitutes unconstitutional partisan gerrymandering. Rather, *Harper I* described a standard using terminology to which this Court has given meaning before—even if not with mathematical or scientific exactitude—and demonstrated the foresight that a single decision could not anticipate every future scenario in which a constitutional violation has occurred.

The majority takes great issue with *Harper I*'s promise that "[l]ower courts can and assuredly will work out more concrete and specific standards in the future." *Harper I*, 380 N.C. at 384 (alteration in original). Despite the majority's complaints, this forward-looking approach is not unique to *Harper I*. Though courts around the country regularly decide cases based on standards that lack precise numerical thresholds, these thresholds may also develop over time. If such flexibility were not permitted and courts were forced to announce precise

constitutional thresholds in the first instance, many important constitutional claims would have never been resolved. The one-person, one-vote principle provides an important example.

In *Baker v. Carr*, 369 U.S. 186, 209 (1962), the U.S. Supreme Court held that legislative apportionment claims under the Fourteenth Amendment of the U.S. Constitution were justiciable but did not provide any standard for resolving them. This decision paved the way for the one-person, one-vote principle itself, which was developed in broad terms two years later in *Reynolds v. Sims*. 377 U.S. 533, 578 (1964). *Reynolds* held that "the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." *Id.* at 577. But recognizing that "[m]athematical exactness or precision is hardly a workable constitutional requirement," *id.*, the Court "deem[ed] it expedient not to attempt to spell out any precise constitutional tests[,]" *id.* at 578.

Instead, *Reynolds* allowed lower courts leeway to determine those tests, explaining that "[l]ower courts can and assuredly will work out more concrete and specific standards for evaluating state legislative apportionment schemes in the context of actual litigation." *Id.* As the U.S. Supreme Court predicted, the one-person, one-vote principle took additional form in the years following *Reynolds*. *See*, *e.g.*, *Brown v. Thomson*, 462 U.S. 835, 842 (1983) (holding that "an apportionment plan with a maximum population deviation under 10% falls within th[e] category" of "minor deviations . . . from mathematical equality among state legislative districts [that] are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment"); *see also Karcher v. Daggett*, 462 U.S. 725 (1983); *White v. Weiser*, 412 U.S. 783 (1973); *Mahan v. Howell*, 410 U.S. 315 (1973); *Avery v. Midland Cnty.*, 390 U.S. 474 (1968). As the majority recognizes, in *Stephenson I*, this Court eventually adopted the same threshold that the U.S. Supreme Court developed over time in its one-person, one-vote cases to analyze whether multi-member districts are constitutionally compliant. 355 N.C. at 383.

The second issue the majority appears to raise with the standard laid out in *Harper I* is that it permits reliance on "political science tests" that are not found within the text of the constitution itself. But the majority seems to misunderstand the difference between a constitutional right and the tests that determine whether such a right has been breached. The former is a cognizable guarantee that must be contained in the constitution itself whereas the latter is a means by which the courts assess whether a constitutional violation has occurred. Such tests are almost always

created and adopted by the courts and are rarely found within the constitutional text.

Among the constitutional rights and principles that *Harper I* determined had been violated by the 2021 Plans were the free elections clause's promise that "[a]ll elections shall be free," N.C. Const. art I, § 10; *see Clark v. Meyland*, 261 N.C. 140, 143 (1964); and the guarantee that North Carolina citizens have "substantially equal voting power," "legislative representation," and "representational influence," *Stephenson I*, 355 N.C. at 377, 379; *see also* N.C. Const. art. I, § 19. Those principles are satisfied and the rights of North Carolinians are protected when a plan gives the party that wins a majority of the statewide vote a substantially equal opportunity as the opposing party to secure a majority of the open representative seats. The tests *Harper I* identified as "reliable ways of demonstrating the existence of an unconstitutional partisan gerrymander," namely the mean-median difference analysis; the efficiency gap analysis; the close-votes, close seats analysis; and the partisan symmetry analysis, provide credible *evidence* as to whether legislative apportionment plans violate those identified constitutional rights. 380 N.C. at 384.

Examples of courts relying on empirical, statistical, and social science analyses to resolve constitutional issues, despite the absence of these analyses from the text of the state and federal constitutions, are too numerous to count.[9] The majority criticizes the analyses adopted in *Harper I*, however, because they "are not grounded in any constitutional guidance." But if this state's courts were only permitted to act when the state (or federal) constitution provided a specific and explicit test for determining when a constitutional violation has occurred, courts would

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9. *See*, *e.g.*, *Cooper v. Harris*, 581 U.S. 285 (2017) (relying on expert statistical analysis finding that the General Assembly predominately relied on race in drawing 2011 redistricting plan because the plan disproportionately moved black voters into racially gerrymandered districts even when controlling for party registration to conclude that the plan constituted an unconstitutional racial gerrymander); *Brown v. Thomson*, 462 U.S. 835, 842–43 (1983) (holding that "an apportionment plan with a maximum population deviation under 10% falls within th[e] category" of "minor deviations . . . from mathematical equality among state legislative districts [that] are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment," even though the Constitution does not reference any such threshold); *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960) (relying on statistical and social science evidence to conclude that, if the allegations at issue were uncontradicted at trial, "the conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration, that the [challenged] legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote"); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (relying on academic studies of the psychological impact of segregation on youth *as evidence* that racially segregated educational facilities violate the Equal Protection Clause).

lack the authority to hear cases involving countless constitutional claims, meaning the courts would be prohibited from engaging in one of their core constitutional duties.

Finally, the majority attempts to seal the point that *Harper I* failed to provide a judicially manageable standard by pointing out that the Court in *Harper II* was forced to strike down one of the 2022 Plans that the trial court approved during the remedial phase because the trial court failed to properly apply *Harper I*'s standard. In relying on *Harper II* as evidence that *Harper I* failed to define a judicially manageable standard, the majority does not make the point it believes it does. In fact, just the opposite.

First, the majority claims that, after *Harper I* and during the remedial phase,

> the General Assembly attempted to apply the *Harper I* standard in drawing the Remedial House Plan (RHP), Remedial Senate Plan (RSP), and Remedial Congressional Plan (RCP). The General Assembly followed the same process in enacting each plan, yet the Special Masters recommended, and the three-judge panel concluded, that only the RHP and RSP met the *Harper I* standard.

The majority goes on to complain that, not only did the three-judge panel strike down the RCP, the Court in *Harper II* struck down the RSP as well. What the majority declines to mention, however, is the blatantly partisan result of the maps that the General Assembly produced during the remedial phase. Since the majority has neglected to take on that task, distorting the evidence of partisan gerrymandering that was before both this Court and the trial court, I do so here.

First, take the RCP. One of the advisors to the Special Masters who were appointed to assess the constitutional compliance of the remedial 2022 Plans, Dr. Bernard Grofman, concluded in his report that the Plan "creates a distribution of voting strength across districts that is very lopsidedly Republican." *Harper II*, 383 N.C. at 101. He determined that "[b]ecause they all point in the same direction, the political effects statistical indicators of partisan gerrymandering strongly suggest the conclusion that this congressional map should be viewed as a pro-Republican gerrymander." *Id.* (alteration in original). Despite recognizing that "the RCP yielded an efficiency gap of 6.37%," he noted that that this was "not . . . proof that there is no vote dilution" because, applying the other measures identified in *Harper I*, "legislative map drawers have apparently

sought to draw a congressional map that just narrowly pass[es] a supposed threshold test for partisan gerrymandering." *Id.* (alterations in original).

Another advisor, Dr. Eric McGhee:

> determined that the RCP yielded an efficiency gap of 6.4%, a mean-median difference of 1.1%, a partisan asymmetry of 4.9%, and a declination metric of 0.14, all favoring Republicans. He noted that "[t]he values with incumbency factored in all lean more Republican . . . , and this incumbency effect is greater than it was in the [2021] enacted plan." Relatively, he noted that while the RCP shows improvement from the 2021 enacted plan on several measures of partisan symmetry, it is "clearly worse" than the remedial congressional plans proposed by Plaintiffs.

Id. (alterations in original).

Likewise, a third advisor, Dr. Samuel Wang, concluded that the RCP has "an average efficiency gap of 6.8% and an average mean-median difference of 1.2%, both favoring Republicans." *Id.* In nine out of ten sample elections, he found that the RCP would allow Republicans to win more seats than Democrats with the same vote share. *Id.* "Averaging across all 10 elections, the advantage was 1.7 more seats for Republicans, or 12% of the 14-seat Congressional delegation." *Id.*

Finally, a fourth advisor, Dr. Tyler Jarvis, "determined that the RCP 'consistently favors Republicans' across all applicable measures. He determined that the RCP yields an efficiency gap of 8.8%, a mean-median difference of 0.9%, a partisan bias of 5.2%, and a declination metric of 11.6%, all favoring Republicans." *Id.*

Though a less severe partisan gerrymander than the RCP, the RSP was also largely inconsistent with *Harper I*'s mandate. *Harper II* described these findings in depth:

> Dr. Grofman determined that the RSP "creates a distribution of voting strength across districts that is very lopsidedly Republican." He determined the RSP's vote bias indicates "a substantial pro-Republican bias" in which a statewide majority of Republican voters would be able to win a majority of the seats while "only a win by considerably more than 50% of the statewide vote can yield the Democrats a majority

of the seats." He determined that "[b]ecause they all point in the same direction, the political effects statistical indicators of partisan gerrymandering argue for the conclusion that th[e] [RSP] should be viewed as a pro-Republican gerrymander." He concluded that "the dilutive effects of th[e] RSP] . . . are still . . . quite substantial."

Dr. McGhee determined that the RSP "still favors Republicans when all seats are open." He concluded that the RSP yields an efficiency gap of 4.8%, a mean-median difference of 2.2%, a partisan asymmetry of 4.8%, and a declination metric of 0.20, all favoring Republicans. He observed that "[t]he [efficiency gap] value now clearly falls below the commonly identified threshold of 7%, though the [mean-median difference] value falls well above the 1% number cited by Legislative Defendants." He determined that "[a]ll the metric values for both the open seat and incumbency scenarios are more than 50% likely to favor Republicans throughout the decade." He concluded that the [mean-median difference] and [partisan symmetry] metrics, which are more relevant for a state legislative plan because they connect directly to control of the chamber, suggest that in a tied election Republicans would still hold 27 or 28 [of 50 total] seats, and that Democrats would need to win as much as 53 percent of the vote to claim 25 seats. The odds are about three to one that Republicans would maintain this advantage throughout the decade.

Relatively, Dr. McGhee observed that the Republican advantage within Plaintiffs' proposed RSP "is often less than half the size of the same advantage in the Legislative Defendants' [RSP]." "This suggests that there is nothing foreordained about the advantages in the Legislative Defendants' plan."

Dr. Wang determined that the RSP favors Republicans in all six metrics evaluated: seat partisan asymmetry, mean-median difference, partisan bias, lopsided wins, declination angle, and efficiency gap. Specifically, he determined that the RSP yields an efficiency gap of 2.2%, a mean-median difference of 0.8%,

> and an average partisan asymmetry of 2.1 seats, all favoring Republicans.
>
> Finally, Dr. Jarvis determined that analysis of the RSP reveals that it "is often a significant outlier in favor of the Republicans." He determined that the RSP yields an efficiency gap of 4.0%, a mean-median difference of 1.4%, an average partisan bias of 4.0%, and a declination metric of 7.0%.

Id. at 103–04 (alterations in original).

By contrast, the advisors to the Special Masters made the following conclusions about the RHP:

> Dr. Grofman determined that although the RHP "creates a distribution of voting strength across districts that is very lopsidedly Republican," it "is genuinely far more competitive than either of the other two legislatively proposed maps." He observed that under the RHP, "unlike the other maps, the Democrats do not have to win all of the competitive seats to win a majority in the House. Moreover, unlike the [RCP and RSP], . . . the competitive seats [in the RHP] are substantially Democrat in directionality." He further noted that: "quit[e] important in judging the constitutionality of this map in the full context are the facts that: (a) the Harper plaintiffs have not chosen to offer an alternative [RHP] but are apparently content to see the legislative map implemented by the Court, (b) the map was passed by a clear bipartisan consensus in the legislature, including members of the legislature who belong to particular minority communities, and (c) that while it still is further from being non-dilutive than the NCLCV [RHP] alternative, it is far closer to Plaintiffs' map than it is to the rejected [2021] enacted NC House map."
>
> He determined that while the RHP's efficiency gap "remains in a pro-Republican direction," it is "at the low level of 2.72[%]." In considering "the totality of the circumstances . . . and recognizing that this map is still not ideal (nor need it be)," he concluded that the RHP "simply lacks the same clear indicia of egregious

> bias found in the previously rejected maps and still found . . . in the [RCP] and [RSP]."
>
> Dr. McGhee likewise determined that the RHP "still favors Republicans when all seats are open, but substantially less [than the 2021 congressional map]." He determined that the RHP yields an efficiency gap of 3.0%, a mean-median difference of 1.4%, a partisan asymmetry of 2.9%, and a declination metric of 0.16, all favoring Republicans. Dr. McGhee concluded that the RHP "still favors Republicans: the party would likely hold about 64 of 120 seats with half the vote, and it would take the Democrats somewhere close to 52% of the vote to bring that number down to 60." Relatively, he determined that the RHP "is very similar to" NCLCV Plaintiffs' proposed remedial house map on metrics of partisan symmetry, that it "do[es] a reasonably good job of respecting traditional geographic principles," and that it reflects "very similar compactness" as Plaintiffs' proposed remedial House map. He concluded that the RHP's partisan symmetry is "closer [to NCLCV's proposed remedial plan] than was the case for either the [RSP] or the [RCP]," noting that the NCLCV Plaintiffs' plan is only "a little better." He concluded that this "relatively marginal improvement hints that it may be difficult to do better while still abiding by other constraints."
>
> Dr. Wang determined that the RHP favors Republicans in all six metrics evaluated: seat partisan asymmetry, mean-median difference, partisan bias, lopsided wins, declination angle, and efficiency gap. Specifically, he determined that the RHP yielded an efficiency gap of 3.1%, a mean-median difference of 0.9%, a partisan asymmetry of 7.2 seats, and a declination angle of 4.5 degrees.
>
> Finally, Dr. Jarvis determined that the RHP "appear[s] to be mostly typical in terms of the number of seats won." He determined that the RHP yields an efficiency gap of 2.7%, a mean-median difference of 1.5%, an average partisan bias of 2.7%, and a declination metric of 5.7%.

Id. at 102–03 (alterations in original).

Two observations follow from this evidence. First, contrary to the majority's suggestion that *Harper I* simply required a proportionality standard, the Court in *Harper II* approved the RHP, even though three of the four advisors to the Special Masters determined that the RHP maintained a pro-Republican bias. Though the majority appears to believe that there is no basis for *Harper II*'s decision to accept the RHP but reject the RSP, this conclusion rests solely on the majority's failure to consider the totality of the evidence presented for both plans, as discussed below.

Second, as to the RCP, the General Assembly's refusal to make a legitimate effort in applying *Harper I*'s mandate is not evidence that *Harper I* failed to delineate a manageable standard. The RCP was rejected by both the three-judge panel and this Court due to the General Assembly's own plain and intentional manipulation of the statistical data. As the Special Masters concluded, "there is substantial evidence from the findings of the advisors that the proposed congressional plan has an efficiency gap above 7% and a mean-median difference of greater than 1%." *Id.* at 105–106. More specifically, "none of the Special Masters' Advisors determined that the RCP yielded both an efficiency gap below 7% and a mean-median difference below 1%." *Id.* at 117. But this was not all. The evidence demonstrated that the RCP " 'consistently favor[ed] Republicans' across all applicable measures." *Id.* at 117.

Despite the strong evidence across metrics that the RCP represented an unconstitutional partisan gerrymander, the majority chastises the three-judge panel for applying this Court's precedent and concluding that the RCP was "not satisfactorily within the statistical ranges set forth in [*Harper I*]." According to the majority "[a] majority of advisors and experts found that all three plans fell within the thresholds set by the *Harper I* majority, yet for some reason . . . only the RCP was unconstitutional." As an initial matter, this statement plainly misstates the advisors' findings, which are summarized above. Further, it commits the same error that *Harper I* and *Harper II* prohibited by relying exclusively on two of the empirical tests in isolation, rather than analyzing the evidence in its entirety. *See Harper II*, 383 N.C. at 93 (explaining that in *Harper I*, the Court expressly declined to "identify an exhaustive set of metrics or precise mathematical thresholds which conclusively demonstrate or disprove the existence of an unconstitutional partisan gerrymander.") (quoting *Harper I*, 380 N.C. at 384).

Harper II was clear that "[c]onstitutional compliance has no magic number." 383 N.C. at 114. Nor should it for the reasons already explained. Moreover, "[a]n individual statistical measure standing alone,

though helpful, is not dispositive of constitutional compliance," *id.* at 93, because "individual datapoints are vulnerable to manipulation[,]" *id.* at 115. The majority proves this point. The majority concludes that *Harper I*'s standard must have been applied inconsistently because the Defendants' RCP was rejected, even though some of the advisors' results yielded *either* an efficiency gap value *or* a mean-median difference value within an acceptable—yet still pro-Republican—range, similarly to the RSP and RHP. In so concluding, the majority conveniently forgets to acknowledge the substantial amount of evidence showing "a very lopsidedly Republican" gerrymander. *See id.* at 117. The majority's analysis shows exactly why *Harper II* explained that cherry picking individual tests as proof of constitutional compliance is not sufficient.[10]

That the trial court was required to evaluate a variety of evidence to determine whether the RCP as well as the other two maps violated the state constitution does not demonstrate that *Harper I*'s standard is judicially unmanageable. The obligation to weigh the totality of the evidence is a basic evidentiary issue. When overwhelming and varying evidence in the record points to the same conclusion, a court simply has a stronger foundation from which to render the correct decision. In fact, that there is a range of evidence that must be evaluated to reach the correct result does not bear on the constitutional standard delineated by *Harper I* in any respect. In the criminal context, for example, judges and juries must evaluate many different kinds of evidence, and in assessing guilt or innocence, *all* of the relevant evidence before the finder of fact should be considered and afforded the appropriate weight. So too here. The majority's refusal to engage in this analysis is not a shortcoming of *Harper I*—the failure belongs to the majority alone.[11]

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10. The majority similarly ignores the totality of the evidence demonstrating that the RSP was an extreme partisan gerrymander. For example, the majority takes umbrage with the fact that "[t]he *Harper II* majority did not say why an average Mean-Median Difference of 1.27% weighed in favor of the RHP's constitutionality but an average Mean-Median Difference of 1.29% weighed against the RSP's constitutionality." Actually, the majority did address this issue—several times. To repeat, a single data point such as the average mean-median calculation among the Advisors to the Special Masters is not dispositive of a plan's constitutionality. *Harper II*, 383 N.C. 89, 123 (2022) (explaining that, with respect to the RSP, "none of these datapoints are individually dispositive."). As a result, *Harper II*'s rejection of the RSP did not turn on the average of the mean-median values alone.

11. This Court's decision in *Stephenson v. Bartlett*, 357 N.C. 301 (2003) (*Stephenson II)* further illustrates the point. In *Stephenson II*, a majority of this Court affirmed a trial court ruling that districts 6, 10, 11, 14, 16, 21, 26 36 and 44 in the remedial Senate redistricting plan drawn after the Court invalidated the General Assembly's first plan in *Stephenson I* were unconstitutional under the state constitution as interpreted in *Stephenson I* because they were "not compact." *Id.* at 314. This Court did not specify what metric determined a district's compactness for constitutional purposes even though the software programs

As a final comment, a footnote buried in the majority's dissent demonstrates the majority's continued attempts to mischaracterize what is at stake in this case. In this footnote, the majority opines:

> Both the RHP and RSP were used during the 2022 election cycle. Significantly, under the RHP approved by the four-justice majority in *Harper II*, Republican candidates won 59% of the House races while receiving about 58% of the aggregate statewide vote. Under the RSP, which the *Harper II* majority found unconstitutional, Republican candidates won 60% of the Senate races while receiving about 59% of the aggregate statewide vote. It is unclear why this small difference of approximately one percentage point rendered the RHP constitutional and the RSP unconstitutional.

(Citations omitted). As an initial matter, this data appears nowhere in the record, and it is inappropriate for an appellate court to reach to outside sources for statistical data. More importantly, however, the majority's representation is highly misleading. In considering Republican House and Senate candidates' aggregate share of the statewide vote, the majority takes advantage of the fact that there are many districts in which there was no Democratic candidate. Specifically, using the data cited by the majority, 25% of House districts did not have a Democrat on the ballot, compared to the 7.5% of districts in which there was no Republican on the ballot. In the Senate, 28% of districts lacked a Democratic candidate, whereas only a single district, which represents 2% of Senate districts, lacked a Republican candidate. Considering only the aggregate statewide vote is therefore misleading because it suggests that Republicans beat more Democrats, entitling them to more seats, than is true in reality. That the majority has no reservations about engaging in this kind of statistical manipulation is telling.

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used at the time calculated geographic compactness in nine different ways and did not delineate how non-compact is too non-compact. There was no objection that the compactness standard must not be administrable because the General Assembly didn't comply with it when drawing remedial districts; no holding that the State Constitution cannot be interpreted to require geographically compact districts because the word compactness does not appear in the Constitution; no objection that the court was taking over the function of the legislature by substituting its own notions of what might be sufficiently geographically compact. It is impossible to reconcile the *Stephenson II* opinion with the majority's decision in this case, and its failure to apply the same principles here illustrates the majority's intellectual dishonesty. The only consistency is that the result of both opinions is to impose on the voters of this state districting plans that benefit Republican legislators.

When considering races that included only Republican and Democratic candidates, the results paint a much different story. With respect to the State House race, though Republicans won 59% of the seats, they only won approximately 53% of the statewide vote, meaning Democrats won approximately 47% of the statewide vote. Without the RHP, Republicans likely would have won a supermajority in the House, despite that, in races in which members of both parties were actually competing, both parties won a very close share of the statewide vote. As to the State Senate race, Republicans won 60% of the seats—a supermajority in the Senate—by receiving only 51% of the statewide vote, compared to Democrats' 49%. Though the RSP was used in the 2022 election cycle, allowing Republicans to win a supermajority of seats when barely able to win a majority of the statewide votes, *Harper II* eventually struck it down while retaining the RHP. To clarify any confusion for the majority, the "small difference" between Republicans winning 59% of the seats with 53% of the vote in the House versus 60% of seats in the Senate with only 51% of the statewide vote is the Senate's veto-proof supermajority.

3. Textual Commitment

Almost sixteen years before the U.S. Supreme Court decided *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), this Court explained that:

> the obligation of [judges'] oaths and the duty of their office require[s] them . . . to give their opinion on that important and momentous subject; and . . . notwithstanding the great reluctance they might feel against involving themselves in a dispute with the Legislature of the State, yet no object of concern or respect could come in competition or authorize them to dispense with the duty they owe[ ] the public, in consequence of the trust they were invested with under the solemnity of their oaths.

Bayard v. Singleton, 1 N.C. (Mart.) 5–6 (1787). Since then, "[i]t has long been understood that it is the duty of the courts to determine the meaning of the requirements of our Constitution." *Leandro v. State*, 346 N.C. 336, 345 (1997).

Though the majority is correct that the state constitution assigns the redistricting authority to the legislature, it does not give the General Assembly license to "dictate electoral outcomes." *Cook v. Gralike*, 531 U.S. 510, 523 (2001). Recognizing this limitation on the General Assembly's redistricting authority, this Court long ago established that "within the context of state redistricting and reapportionment disputes, it

is well within the 'power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan.' " *Stephenson I*, 355 N.C. at 362 (quoting *Scott v. Germano*, 381 U.S. 407, 409 (1965) (per curiam)); *see also Blankenship*, 363 N.C. at 522–28; *State ex rel. Martin v. Preston*, 325 N.C. 438 (1989).

There is no exception to this principle for redistricting cases, and for good reason. "Indeed, the need for judicial review is at its most urgent in these cases. For here, politicians' incentives conflict with voters' interests, leaving citizens without any political remedy for their constitutional harms." *Gill v. Whitford*, 138 S. Ct. 1916, 1941 (2018) (Kagan, J., concurring). But the majority lets none of this stand in its way in carving out its own partisan gerrymandering exception. In so holding, the majority violates the established principle that "the 'judicial power' under the North Carolina Constitution is plenary, and '[e]xcept as expressly limited by the constitution, the inherent power of the judicial branch of government continues.' " *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 607 (2021) (quoting *Beard v. N.C. State Bar*, 320 N.C. 126, 129 (1987)). No express limitation on the judicial power exists with respect to the General Assembly's redistricting authority, and judicial oversight in such cases, including partisan gerrymandering cases, is mandatory.

The majority's conclusion that partisan gerrymandering claims are not reviewable by this state's courts largely turns on the existence of two specific provisions in the state constitution that restrict the legislature's redistricting authority. In particular, the majority points to article II, sections 3 and 5 of the North Carolina constitution. Article II, section 3 provides:

> The Senators shall be elected from districts. The 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 districts and the apportionment of Senators among those districts, subject to the following requirements:
>
> (1) Each Senator shall represent, as nearly as may be, an equal number of inhabitants, the number of inhabitants that each Senator represents being determined for this purpose by dividing the population of the district that he represents by the number of Senators apportioned to that district;

(2) Each senate district shall at all times consist of contiguous territory;

(3) No county shall be divided in the formation of a senate district;

(4) When established, the senate districts and the apportionment of Senators shall remain unaltered until the return of another decennial census of population taken by order of Congress.

N.C. Const. art. II, § 3. Article 2, section 5 prescribes the same guidelines and restrictions for the North Carolina House of Representatives. N.C. Const. art. II, § 5. Together, the third limitations in both sections are known as the Whole County Provisions (WCP). In the majority's view, article II, sections 3 and 5 are effectively the only limitations in the state constitution that restrict the General Assembly's redistricting powers. Accordingly, the majority believes that "the role of our courts is limited to identifying a redistricting plan that violates those express limitations."

This reasoning, of course, ignores that *Harper I* identified multiple constitutional protections that prohibit partisan gerrymandering, rendering such an express provision redundant. That the rights and principles upon which *Harper I*'s holding is based are more encompassing than those found in article II, sections 3 and 5 is of no moment. As the majority itself explains, the North Carolina Declaration of Rights, which contains all of the rights protected by *Harper I*, speaks in "abstract" terms. The majority admits that this quality is what has allowed the Declaration of Rights to survive. To maintain this "abstractness," the Declaration of Rights necessarily does not explicitly define every type of conduct or act that constitutes a constitutional violation.

Whether through narrow and explicit provisions, like article II, sections 3 and 5, or those that are broad and less indefinite, like the free elections clause, the state constitution protects the rights that are fundamental to our state and upon which our democracy was founded. It is the duty of the courts to interpret precisely what conduct these provisions proscribe. This duty is not to be abandoned simply because a constitutional provision is not sufficiently "explicit."[12] All of this aside,

12. For this reason, the majority's reliance on *Stephenson I* as an appropriate example of judicial oversight with respect to a redistricting dispute as compared to *Harper I* is unavailing. Just as the Court in *Stephenson I* properly reviewed and ruled unconstitutional malapportioned maps that violated article II, sections 3 and 5, 355 N.C. at 371, *Harper I* properly reviewed and ruled unconstitutional maps that violated the free elections clause, the equal protection clause, the free speech clause, and the freedom of assembly clause.

the majority's reasoning also fails to acknowledge that the restrictions articulated in article II, sections 3 and 5 of the North Carolina constitution were first recognized in principle by this Court before they were ever added to the state constitution.

In *People ex rel. Van Bokkelen v. Canaday*, 73 N.C. 198, 220 (1875), this Court struck down an act of the General Assembly that divided Wilmington, North Carolina into three wards from which nine members—three members from each ward—of the Board of Alderman would be elected. The first and second ward consisted of approximately 400 voters, whereas the third ward had approximately 2,800 voters. *Id.* at 225. The Court struck down the malapportioned map as a "plain violation of fundamental principles, the apportionment of representation." *Id.* The Court further explained that "[o]ur government is founded on the will of the people. Their will is expressed by the ballot." *Id.* at 220.

The principle *Van Bokkelen* recognized, however, was not expressly contained in the text of the North Carolina constitution—article II, sections 3 and 5 were not added until much later—and the U.S. Supreme Court's one-person, one-vote principle was not recognized for almost another ninety years. Thus, *Van Bokkelen* recognized that, with respect to city representatives, "representation shall be *apportioned* to the popular vote *as near as may be*" nearly one hundred years before express constitutional provisions requiring the same were adopted. 73 N.C. at 224. This point is absent from the majority's extensive musings about the requirement that there be an "express" limitation on the General Assembly's reapportionment power in order for courts to exercise judicial review.

Finally, the majority exalts this Court's decision in *Stephenson I* as an example of the proper exercise of judicial review over a dispute arising from legislative redistricting maps. But its reliance on *Stephenson I* is misplaced.

Stephenson I concerned state House of Representative and Senate maps that divided counties throughout the state into multiple districts in violation of the WCP, which "prohibit[ ] the General Assembly from dividing counties into separate Senate and House districts." 355 N.C. at 359. The defendants "contend[ed] that the constitutional provisions mandating that counties not be divided are wholly unenforceable because of the requirements of the Voting Rights Act." *Id.* at 361. The Court rejected this argument, holding that "the WCP remain[ ] valid and binding upon the General Assembly during the redistricting and reapportionment process . . . except to the extent superseded by federal law." *Id.* at 372.

The majority recognizes that "[o]nce [the Court] found that the 2001 Plans violated the still-valid WCP, [it] then crafted detailed criteria harmonizing the WCP . . . with the [Voting Rights Act] and the federal one-person, one-vote principle." But the *Stephenson I* Court did not *only* "harmonize" the WCP with federal law. It also went on to ensure that the legislative maps complied with the state constitution's equal protection clause. The Court specifically explained, "the WCP cannot be applied in isolation or in a manner that fails to comport with other requirements of the State Constitution." *Id.* at 376. The particular issue the Court was tasked with resolving at this stage was "[p]laintiffs['] conten[tion] that remedial compliance with the WCP require[d] the formation of multi-member legislative districts" in addition to single-member districts within the same plan. *Id.* And so, the Court went on to evaluate whether such a plan would comply with the requirements of North Carolina's equal protection clause *in addition* to other constraints imposed by federal law.

As part of its state equal protection analysis, the Court explained that "[i]t is well settled in this State that 'the right to vote on equal terms is a fundamental right.' " *Id.* at 378 (quoting *Northampton Cnty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 746 (1990)). With this in mind, "[t]he classification of voters into both single-member and multi-member district within plaintiffs' proposed remedial plans necessarily implicates the fundamental right to vote on equal terms," making strict scrutiny the appropriate standard of review. *Id.*

The Court was faced with a problem, however, in that article II, sections 3(1) and 5(1)

> arguably contemplate multi-member districts by stating that, for apportionment purposes, each member of the General Assembly from such a district represents a fraction of the voters in that district. The principle of 'one-person, one-vote' is preserved because the number of voters in each member's fraction of the multi-member district is the same as the number of voters in a single-member district.

Id. at 379. This point is worth emphasizing. Though the state constitution does not expressly permit partisan gerrymandering, there is an express provision that permits use of single-member and multi-member districts together.

Were we to accept the Court's rationale today, this fact would have been the end of the Court's inquiry in *Stephenson I*: enacting maps

that use single and multi-member districts in tandem is a power that is expressly granted to the General Assembly, and there is no express limitation on this power (as it involves a clause other than the WCP), so the courts are unable to oversee the General Assembly's exercise of this authority. This, of course, is not what *Stephenson I* did.

Instead, *Stephenson I* analyzed the practical effects of the combined use of single and multi-member districts in light "of the fundamental right of each North Carolinian to substantially equal voting power" under the state equal protection clause. *Id.* at 379. The Court concluded that such maps violate this fundamental right. *Id.* at 384. As such, based on the principle that "a constitution cannot be in violation of itself," the Court determined that article II, sections 3(1) and 5(1) cannot, as their text suggests, be construed as "affirmative constitutional mandates and do not authorize use of both single-member and multi-member districts in a manner" that violates the fundamental right to substantially equal voting power. *Id.* at 378–79.

This is all that *Harper I* did. Where *Stephenson I* analyzed the General Assembly's apportionment powers under article II, sections 3(1) and 5(1) in light of the equal protection clause, *Harper I* analyzed the General Assembly's redistricting powers under article II, sections 3 and 5 and the federal Constitution in light of the state equal protection clause, the free elections clause, the free speech clause, and the freedom of assembly clause. The majority might disagree about whether partisan gerrymandering actually violates any of these constitutional provisions. But as *Stephenson I* demonstrates, it is simply inaccurate to characterize this issue as committed solely to the province of the General Assembly.

In sum, the majority's textual commitment analysis does not establish that this state's courts lack a constitutionally contemplated role in ensuring that the General Assembly respects the will of the voters through constitutionally complaint maps.

4. Policy Decisions

The majority's final effort to establish that partisan gerrymandering claims are nonjusticiable is based on its conclusion that such claims involve "a host of 'policy determination[s] of a kind clearly for nonjudicial discretion[,]' " quoting *Baker*, 369 U.S. at 217 (alteration in original). I have already addressed many of the arguments the majority raises here, and I will not repeat why those arguments fail. A few additional points are warranted, however.

First, the majority argues that the "political science tests"—or the empirical analyses—that *Harper I* identified as means of determining

whether a legislative redistricting plan constitutes an unconstitutional partisan gerrymander are insufficient because they use data from past elections to predict how "voters will vote in the future." Such data will not provide accurate results, the majority posits, because "individual voters may vote inconsistently at different times in their life for a variety of reasons."

This argument is smoke in mirrors. These tests do not simply permit courts to "gaze into crystal balls, as the majority tries to suggest." *Rucho*, 139 S. Ct. at 2519 (Kagan, J., dissenting). Using these reliable analyses that courts around the country have successfully employed, courts can make "findings about . . . gerrymanders' effects on voters—both in the past and predictably in the future—[that are] evidence-based, data-based, statistics-based." *Id.* In other words, these tests use *the same data* and analyses that the General Assembly uses in attempting to create egregious partisan gerrymanders in the first place.[13] When the General Assembly uses advanced technological tools and similar analyses in drawing legislative plans, it does not simply cross its fingers and hope that it is making a close guess about election outcomes. It knows with near certainty what the outcomes are going to be. The same is true when trial courts use this data to determine whether the maps as drawn by the General Assembly have been gerrymandered on a partisan

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13. The dissent in *Rucho* explained clearly why the argument raised by the majority is not a legitimate concern, particularly in light of the constitutional rights that are at stake:

> Mapmakers now have access to more granular data about party preference and voting behavior than ever before. County-level voting data has given way to precinct-level or city-block-level data; and increasingly, mapmakers avail themselves of data sets providing wide-ranging information about even individual voters. . . . Just as important, advancements in computing technology have enabled mapmakers to put that information to use with unprecedented efficiency and precision. . . . While bygone mapmakers may have drafted three or four alternative districting plans, today's mapmakers can generate thousands of possibilities at the touch of a key—and then choose the one giving their party maximum advantage (usually while still meeting traditional districting requirements). The effect is to make gerrymanders far more effective and durable than before, insulating politicians against all but the most titanic shifts in the political tides. These are not your grandfather's—let alone the Framers'—gerrymanders.

Rucho, 139 S. Ct. at 2513 (Kagan, J., dissenting).

basis. In acknowledging the purpose and capabilities of such analyses, the Court in *Harper I* "refused to content [itself] with unsupported and out-of-date musings about the unpredictability of the American voter. . . . They did not bet [North Carolina's] future—as today the majority does—on the idea that maps constructed with so much expertise and care to make electoral outcomes impervious to voting would somehow or other come apart." *Id.*

The majority goes on to criticize *Harper I* for making policy judgments about a number of issues that, as explained previously, are nothing more than evidentiary questions. Though I will not repeat this explanation in depth, it is necessary to clarify what the majority is doing here. As an initial matter, determining how to discriminate against a certain kind of voter most effectively "reflects *no* policy, but simply arbitrary and capricious action." *Baker*, 369 U.S. at 226. This issue aside, rather than pointing out genuine policy disputes, the majority uses the term as a misnomer for what are really just evidentiary judgments.A quick exercise illuminates the point. Every time the majority uses the term "policy question" or "policy determination," replace it with the term "evidentiary judgments."[14] The latter term is the accurate way to describe the different decisions that the majority explores and that come before a court analyzing partisan gerrymandering issues. Repeatedly declaring that these considerations are policy judgments does not make them so.

For example, contrary to the majority's conclusion "[s]electing between past elections, current voter registration information, or some other data as the 'best' source for garnering partisan election data" is not a "non-judicial policy determination," but an evidentiary judgment that a court must resolve in determining which data yields the most accurate results. This is the kind of judgment that courts must frequently make in other contexts, and the use of experts in the particular field can help provide guidance on making the right decision. How this is a policy question in any respect is unclear.

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14. Note that there is one particular claim in the majority's analysis where this comparison will not work. Specifically, the majority states that using "these political science metrics at all requires policy determinations that are not grounded in any constitutional guidance." As explained in depth, this argument simply advances the incorrect notion that the tests for proving a constitutional violation must be found within the state constitution itself. Apparently, if a court itself prescribes a test that is sufficient to prove a constitutional violation, this is a "policy decision." Many members of the legal community will be surprised to learn this.

The majority also takes aim at the fact that a single test, such as the mean-median difference analysis or the efficiency gap analysis, can yield different results. This is simply another way of expressing the concern addressed above because it takes issue with the variety of data, as well as "software" and "calculation methods" that a single analysis can utilize. But when these analyses, despite their different methods and data, yield results that point in substantially the same direction as consistently happened in both *Harper I* and *Harper II*, there is only greater confidence that the results are accurate. For example, as the three-judge panel found in *Harper I* with respect to the Congressional Plan, "[e]ven though [Plaintiffs'] experts employed different methodologies, each expert found that the enacted plan is an outlier that could only have resulted from an intentional effort to secure Republican advantage." Further, the trial court explained that "Legislative Defendants offered no defense of the 2021 Congressional Plan. No expert witness opined that it was not the product of an intentional partisan redistricting." In this way, a variety of analyses that employ different methods only support that the trial court's conclusion was correct.

D. The Issues Presented Here Have Already Been Decided by this Court

Finally, the majority attempts to convince us that today's decision—a decision that used raw partisan power to overturn two of this Court's precedents—is nothing out of the ordinary. "We have never hesitated," the majority explains "to rehear a case when it is clear that the Court 'overlooked or misapprehended' the law." What the majority has done today is anything but ordinary. It is an extreme departure from 205 years of practice. "Indeed, data from the Supreme Court's electronic filing system indicate that, since January 1993, a total of 214 petitions for rehearing have been filed, but rehearing has been allowed in only two cases." *Harper Order* at 550 (Earls, J., dissenting).

Nothing has changed since *Harper I* and *Harper II* were decided. "The legal issues are the same; the evidence is the same; and the controlling law is the same. The only thing that has changed is the political composition of the Court." *Id.* at 550–51. Now emboldened by its sheer political might, it takes the extraordinary step of overturning not just the two cases at issue here, but also a *third* voting rights case that this Court decided just months ago. *See Holmes v. Moore*, 383 N.C. 171 (2022), *rev'd*, No. 342PA19-3 (N.C. Apr. 28, 2023).

Rehearing in this case never should have been granted. The cases that the majority cites to justify its conduct confirm this. For example,

the majority cites only two cases in which rehearing was granted in this millennium. The scarcity of such instances speaks for itself.[15]

The cases that the Court cites in which rehearing was granted over twenty years ago offer no more support for its mischaracterization of the remedy. For example, in *Whitford v. Gaskill*, 345 N.C. 762 (1997), rehearing was granted for the sole and limited purpose of modifying the final clause of the last paragraph on the last page of an opinion. Specifically, a party sought to have this clause changed from stating "for entry of judgment consistent with this opinion," to "for further proceedings not inconsistent with this opinion." *Id.* at 762. Thus, rehearing was not granted to overturn the result of a previous case, but rather to provide more accurate instructions to the trial court regarding the proper way to proceed in the litigation. In *Alford v. Shaw*, 320 N.C. 465 (1987), the Court granted rehearing because it originally misunderstood the pertinent legal issue. In other words, it did not originally address the question the case presented. In *Lowe v. Tarble*, rehearing was granted without explanation, but the Court did not overturn its previous decision on rehearing, explaining that "the question [at issue] is no longer debatable; it has been resolved against defendants." 313 N.C. 460, 462 (1985). And in *Housing, Inc. v. Weaver*, 304 N.C. 588 (1981), the Court granted rehearing for the limited purpose of rescinding a previous order that denied a party's petition for a writ of certiorari and allowed the petition instead. The case had not even been argued, let alone decided (and affirmed by a separate case). *Id.*

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15. These cases need not be distinguished: That they were the only two cases that were granted rehearing in the last twenty-three years proves that rehearing is granted in exceedingly rare instances. Even so, as explained in my dissent to the Court's order granted rehearing:

> The Court most recently granted rehearing in *Jones v. City of Durham*, 361 N.C. 144 (2006). There, the Court granted rehearing for the limited purpose of reconsidering specific evidence in a negligence action that involved a single plaintiff, rather than to consider abolishing a constitutional right that belongs to millions of voters. There was no dissent to the per curiam final opinion of the Court, indicating the absence of any partisan divide over the issue. The other case in which the Court permitted rehearing was *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805 (1999). That case similarly did not involve a fundamental issue central to the structure of our democracy and had no impact whatsoever on elections.

Harper Order at 550 n.1 (Earls, J., dissenting).

These cases "demonstrate that rehearing in this Court is used cautiously; it is rarely permitted, and when allowed, it is limited in scope." *Harper Order* at 552 (Earls, J., dissenting). By contrast, the majority has used rehearing in this case to "upend the constitutional guarantee that voters in the State will enjoy 'substantially equal voting power,' regardless of their political affiliations." *Id.* "Such a change . . . fundamentally alter[s] the political rights of every voter in North Carolina." *Id.* (quoting *Harper I*, 380 N.C. at 376).

The Court cites only one case in which the outcome changed on rehearing after an adjustment in the Court's composition. *See Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805 (1999). This case did not involve voting rights or redistricting. Nevertheless, even if it were analogous, a politically motivated decision in a single case over twenty years ago does not excuse or justify such conduct going forward. Instead, it highlights the fact that, despite ideological differences, this Court has historically abided by its own precedent out of "[r]espect for the institution and the integrity of its processes." *Harper Order* at 550 (Earls, J., dissenting).

III. Conclusion

Following decisions such as this, we must remember that, though the path forward might seem long and unyielding, an injustice that is so glaring, so lawless, and such a betrayal to the democratic values upon which our constitution is based will not stand forever. As *Harper II* explained, the rights that prohibit partisan gerrymandering in this state "are . . . the enduring bedrock of our sacred system of democratic governance, and may be neither subordinated nor subverted for the sake of passing political expediency." *Harper II*, 383 N.C. at 95.

I dissent from this Court's majority opinion and its shameful manipulation of fundamental principles of our democracy and the rule of law. I look forward to the day when commitment to the constitutional principles of free elections and equal protection of the laws are upheld and the abuses committed by the majority are recognized for what they are, permanently relegating them to the annals of this Court's darkest moments. I have no doubt that day will come.

Justice MORGAN joins in this dissenting opinion.

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

No. 342PA19-3

Filed 28 April 2023

1. Constitutional Law—North Carolina—equal protection—facial challenge to state law—analytical framework

A facial challenge to a state law under the Equal Protection Clause of the state constitution will overcome the presumptive validity of an act of the General Assembly only upon proof beyond a reasonable doubt that the legislature enacted the law with discriminatory intent and that the law actually produces a meaningful disparate impact along racial lines.

2. Constitutional Law—North Carolina—equal protection—voter ID law—presumption of legislative good faith

In a facial challenge to a voter ID law, the trial court erred by concluding that the law was unconstitutional on the basis that it was enacted with discriminatory intent and that it therefore violated the Equal Protection Clause of the state constitution, and by permanently enjoining implementation of the law. Although the trial court applied the federal framework set forth in *Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977), which is not binding on state courts interpreting the constitutionality of a state law under a state constitution, plaintiffs' claim failed under even this analysis because the trial court relied too heavily on past discrimination in the historical record and its own speculation regarding additional measures the legislature could have taken during the legislative process rather than on the presumption of legislative good faith, and thus improperly shifted the burden of proving constitutional validity to the General Assembly.

3. Constitutional Law—North Carolina—equal protection—voter ID law—discriminatory intent—disparate impact

On rehearing of a facial challenge to a voter ID law, the trial court abused its discretion when it acted under a misapprehension of the law—by using an incorrect legal standard and improperly shifting the burden of proof of constitutional validity to the legislature—to conclude that the voter ID law was unconstitutional in that it violated the Equal Protection Clause of the state constitution. Under the proper framework for evaluating a facial challenge under the state constitution, plaintiffs did not provide sufficient evidence to meet their burden of proving beyond a reasonable doubt that the legislature enacted the law with discriminatory intent and that the law actually provides disparate impact along racial lines by disproportionately impeding black voters from voting; therefore, plaintiffs failed to overcome the presumption of validity that attaches to legislative acts. The prior opinion issued in this case was withdrawn, the trial court's order was reversed, and the matter was remanded for entry of an order dismissing plaintiffs' claim with prejudice.

Justice MORGAN dissenting.

Justice EARLS joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 from the judgment entered on 17 September 2021 by a divided three-judge panel of the Superior Court, Wake County, holding that S.B. 824 violates Article I, Section 19 of the North Carolina Constitution and permanently enjoining that law. On 16 December 2022, this Court affirmed the judgment, and that mandate was issued on 5 January 2023. On 3 February 2023, this Court allowed a petition for rehearing pursuant to N.C. R. App. P. 31. Heard in the Supreme Court on 15 March 2023.

Southern Coalition for Social Justice, *by Jeffrey Loperfido and Hillary Harris Klein; and Jane O'Brien*, *pro hac vice*, *Paul D. Brachman*, *pro hac vice*, *and Andrew J. Ehrlich*, *pro hac vice*, *for plaintiff-appellees.*

Nicole J. Moss, *David H. Thompson*, *pro hac vice*, *Peter A. Patterson*, *pro hac vice*, *Joseph O. Masterman*, *pro hac vice*, *John W. Tienken*, *pro hac vice*, *Nicholas A. Varone*, *pro hac vice*, *and Nathan A. Huff*, *for legislative defendant-appellants.*

Joshua H. Stein, *Attorney General*, *by Terence Steed*, *Special Deputy Attorney General*, *Laura McHenry*, *Special Deputy*

Attorney General, and Mary Carla Babb, Special Deputy Attorney General, for defendant-appellants State of North Carolina and North Carolina State Board of Elections.

BERGER, Justice.

There is no legal recourse available for vindication of political interests, but this Court is yet again confronted with "a partisan legislative disagreement that has spilled out . . . into the courts." *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 783 (S.D. Ind. 2006), *aff'd sub nom. Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949 (7th Cir. 2007), *aff'd*, 553 U.S. 181, 128 S. Ct. 1610 (2008). This Court once again stands as a bulwark against that spillover, so that even in the most divisive cases, we reassure the public that our state's courts follow the law, not the political winds of the day.

It is well settled that the proper exercise of judicial power requires great deference to acts of the General Assembly, as the legislature's enactment of the law is the sacrosanct fulfillment of the people's will. *See Pope v. Easley*, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001) ("[T]he General Assembly . . . functions as the arm of the electorate."). With that basic principle in mind, we are confronted here with a simple question: does S.B. 824 violate the meaningful protections set forth in Article I, Section 19 of the North Carolina Constitution? Because it does not, we reverse and remand to the trial court for dismissal of this action with prejudice.

I. Background

In November 2018, the people of North Carolina amended our Constitution to require that "[v]oters offering to vote in person shall present photographic identification before voting." N.C. Const. art. VI, § 2(4). The people commanded "[t]he General Assembly [to] enact general laws governing the requirements of such photographic identification, which may include exceptions." *Id.* The General Assembly thereafter complied by passing S.B. 824, now codified in Chapter 163 of our General Statutes. *See* An Act to Implement the Constitutional Amendment Requiring Photographic Identification to Vote, S.L. 2018-144, 2019 N.C. Sess. Laws 72.

Pursuant to S.B. 824, registered voters are required to present one of a multitude of acceptable forms of identification prior to casting a ballot. These include a valid, unexpired: (1) North Carolina driver's license; (2) North Carolina nonoperator's identification; (3) United

States passport; (4) North Carolina voter identification card; (5) student identification card issued by any statutorily-defined eligible institution; (6) employee identification card issued by a state or local government entity; or (7) out-of-state driver's license or nonoperator's identification, provided that the voter's registration was within ninety days of the election. N.C.G.S. § 163-166.16(a)(1) (2021). These forms of identification are acceptable even if expired, so long as they have been expired for one year or less. *Id.*

In addition, if voters lack one of the aforementioned identifications, they may also present any of the following identifications regardless of their expiry: (1) a military identification issued by the United States government; (2) a veterans identification card issued by the United States Department of Veterans Affairs; (3) a tribal enrollment card issued by a State or federally recognized tribe; or (4) an identification card issued by a department, agency, or entity of the United States or North Carolina for a government public assistance program. N.C.G.S. § 163-166.16(a)(2) (2021). Registered voters over the age of sixty-five may present *any* of the aforementioned identifications listed in sections (a)(1) and (2) regardless of expiry, so long as the identification was unexpired on the date of the registered voter's sixty-fifth birthday. N.C.G.S. § 163-166.16(a)(3) (2021).

If a registered voter lacks one of the various types of acceptable identifications, the law also requires that "[t]he county board of elections . . . issue without charge voter photo identification cards upon request to registered voters." N.C.G.S. § 163-82.8A(a) (2021). To receive a free photo identification card, a registered voter need only provide "the registered voter's name, the registered voter's date of birth, and the last four digits of the voter's social security number." N.C.G.S. § 163-82.8A(d)(1) (2021). These free identification cards are valid for ten years, which, when coupled with the one-year expiration exception provided by N.C.G.S. § 163-166.16(a)(1), means a voter can use a free photo identification card for a period of eleven years. N.C.G.S. § 163-82.8A(a).[1]

The law further provides a host of exceptions for any registered voter who, despite the wide range of acceptable identifications, and despite the availability of freely issued identification cards, nevertheless "does not produce an acceptable form of identification." N.C.G.S. § 163-166.16(d) (2021). First, if a registered voter cannot produce

1. The trial court entered an erroneous finding of fact that the free identification cards expire after one year. In its previous opinion in this case, the majority of this Court repeated this erroneous finding. *Holmes v. Moore*, 383 N.C. 171, 199, 881 S.E.2d 486, 507 (2022) ("[F]ree NC Voter IDs had a one-year expiration date.").

acceptable identification, he or she "may cast a provisional ballot" that will be counted "if the registered voter brings an acceptable form of photograph identification . . . to the county board of elections no later than the end of business on the business day prior to the canvass by the county board of elections as provided in G.S. 163-182.5." N.C.G.S. § 163-166.16(c) (2021). In addition, a registered voter is not required to present any acceptable form of photo identification if that failure is due to: (1) "a religious objection to being photographed;" (2) "a reasonable impediment that prevents the registered voter from presenting a photograph identification;" or (3) "being a victim of a natural disaster occurring within 100 days before election day that resulted in a disaster declaration by the President of the United States or the Governor of this State." N.C.G.S. § 163-166.16(d)(1)–(3).

The "reasonable impediment" exception allows the registered voter to cast a provisional ballot so long as they complete a reasonable impediment declaration affidavit. N.C.G.S. § 163-166.16(d)(2). The law mandates that the State Board of Elections implement a reasonable impediment declaration form that, at a *minimum*, allows voters to identify any of the following as their reasonable impediment to presenting an acceptable ID:

> (1) Inability to obtain photo identification due to:
>
> a. Lack of transportation.
>
> b. Disability or illness.
>
> c. Lack of birth certificate or other underlying documents required.
>
> d. Work schedule.
>
> e. Family responsibilities.
>
> (2) Lost or stolen photo identification.
>
> (3) Photo identification applied for but not yet received by the registered voter voting in person.
>
> (4) Other reasonable impediment. If the registered voter checks the "other reasonable impediment" box, a further brief written identification of the reasonable impediment shall be required, including the option to indicate that State or federal law prohibits listing the impediment.

N.C.G.S. § 163-166.16(e) (2021).

Any provisional ballot cast by a registered voter who fails to present an acceptable form of identification, but who nevertheless submits a reasonable impediment affidavit, must be counted as a valid ballot "unless the county board [of elections] has grounds to believe the affidavit is false." N.C.G.S. § 163-166.16(f) (2021).

This law is one of the least restrictive voter identification laws in the United States. *See N.C. State Conf. of the NAACP v. Raymond*, 981 F.3d 295, 310 (4th Cir. 2020) ("Indeed, the 2018 [North Carolina] Voter-ID Law is more protective of the right to vote than other states' voter-ID laws that courts have approved."); *see also Greater Birmingham Ministries v. Sec'y of State for Alabama*, 992 F.3d 1299 (11th Cir. 2021) (upholding a more restrictive voter identification law); *Lee v. Va. State Bd. of Elections*, 843 F.3d 592 (4th Cir. 2016) (same); *South Carolina v. United States*, 898 F. Supp. 2d. 30 (D.D.C. 2012) (same).

In sum, S.B. 824 permits registered voters to present a multitude of acceptable identifications, including expired identifications, and requires the State to provide free voter identification cards to any registered voter. If a registered voter leaves their identification at home or otherwise fails to present it on voting day, he or she can cast a provisional ballot which will be counted if the identification is later presented to the county board of elections. Even if a registered voter still somehow fails to obtain or otherwise possess an acceptable form of identification, the law permits him or her to cast a provisional ballot that will be counted so long as they do not provide false information in the reasonable impediment affidavit. Essentially, North Carolina's photo identification statute does not require that an individual present a photo identification to vote.

Nevertheless, shortly after passage of S.B. 824, plaintiffs filed a facial challenge to the legislation in Wake County Superior Court, alleging that the law violates numerous provisions of the North Carolina Constitution. Specifically, plaintiffs alleged the law: (1) violates Article I, Section 19 because it was enacted with discriminatory intent; (2) violates Article I, Section 19 because it unjustifiably and significantly burdens the fundamental right to vote; (3) violates Article I, Section 19 because it creates different classes of voters who will be treated disparately in their access to their fundamental right to vote; (4) violates Article I, Section 10 because it infringes on the right to participate in free elections; (5) violates Article I, Section 10 because it conditions the fundamental right to vote on the possession of property; and (6) violates Article I, Sections 12 and 14 because it infringes upon the rights of assembly, petition, and freedom of speech.

Plaintiffs moved for a preliminary injunction to enjoin implementation and enforcement of S.B. 824. Defendants moved to dismiss plaintiffs' claims, and the three-judge panel assigned to the case entered an order denying plaintiffs' motion for a preliminary injunction and dismissing all but the first of plaintiffs' claims.[2] Plaintiffs appealed the trial court's denial of the preliminary injunction and the Court of Appeals reversed the panel's decision. *Holmes v. Moore*, 270 N.C. App. 7, 36, 840 S.E.2d 244, 266–67 (2020).

Thereafter, the panel issued the preliminary injunction and held a trial on the merits of plaintiffs' equal protection claim. A majority of the three-judge panel decided in plaintiffs' favor, holding that S.B. 824 violates Article I, Section 19 of the North Carolina Constitution because it was enacted with discriminatory intent. The panel then issued an injunction permanently enjoining implementation of the law.

One judge on the panel dissented, concluding that plaintiffs had failed to meet their burden of proving the law was enacted with discriminatory intent. Defendants timely appealed to the Court of Appeals—however, after briefing began, but before the Court of Appeals could consider the case, this Court granted plaintiffs' petition for expedited review prior to a determination by the Court of Appeals.

As is relevant to our consideration of this case, a separate group of plaintiffs challenged S.B. 824 in federal court prior to the present matter reaching this Court. Plaintiffs there made nearly identical arguments, asserting that the voter identification law violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because it was enacted with discriminatory intent. On the plaintiffs' motion, the district court granted a preliminary injunction because it found that the plaintiffs were likely to succeed on the merits of their constitutional claim. *N.C. State Conf. of the NAACP v. Cooper*, 430 F. Supp. 3d. 15, 54 (M.D.N.C. 2019).

The defendants appealed in that federal case, and the Fourth Circuit, in a lengthy and detailed opinion, held that *this very law* was not enacted with discriminatory intent and reversed the district court's decision to invalidate S.B. 824 because of "fundamental legal errors that permeate[d]" the district court's order. *Raymond*, 981 F.3d at 310–11. Most remarkably, the Fourth Circuit concluded that "the district court improperly reversed the burden of proof and disregarded the

2. As plaintiffs did not appeal the dismissal of these claims, plaintiffs' only remaining argument is their discriminatory intent claim under Article I, Section 19.

presumption of legislative good faith," and that when the correct legal principles were applied to the plaintiffs' arguments, "the remaining evidence in the record fails to meet the Challengers' burden." *Id.* at 311.

On appeal to this Court in the present matter, defendants argued that the panel erred in finding the law was enacted with discriminatory intent because the panel improperly reversed the burden of proof and disregarded the presumption of legislative good faith. Defendants further contended that, as indicated by the Fourth Circuit in *Raymond*, plaintiffs' challenge could not be sustained under the correct application of the relevant legal principles. In December 2022, after an election that would change the composition of this Court, but prior to the expiration of the terms of two outgoing justices, the majority—half of which was composed of those two justices—issued an opinion affirming the lower court's issuance of the injunction. *Holmes v. Moore*, 383 N.C. 171, 881 S.E.2d 486 (2022). In so doing, the majority claimed to apply federal precedent but declined to follow the Fourth Circuit's guidance from *Raymond*, the federal case which found that S.B. 824 did not violate the federal Equal Protection Clause. *Id.* at 189, 881 S.E.2d at 500.

Following this Court's decision, defendants timely filed a petition for rehearing, arguing that the majority of this Court overlooked or misapprehended relevant points of fact and law. This Court determined that petitioners had satisfied the requirements of Rule 31 of the Rules of Appellate Procedure and ordered rehearing in an order entered 3 February 2023. After supplemental briefing and oral argument, and upon rehearing pursuant to Rule 31, we withdraw the prior decision reported at 383 N.C. 171, 881 S.E.2d 386 "and treat the case before us as a hearing de novo on the issue raised." *Alford v. Shaw*, 320 N.C. 465, 467, 358 S.E.2d 323, 324 (1987) (citing *Trust Co. v. Gill, State Treasurer*, 392 N.C. 164, 237 S.E.2d 21 (1977); *Clary v. Bd. of Educ.*, 286 N.C. 525, 212 S.E.2d 160 (1975)).

II. Standard of Review

"Whether a statute is constitutional is a question of law that this Court reviews de novo." *State v. Grady*, 372 N.C. 509, 521–22, 831 S.E.2d 542, 553 (2019) (quoting *State v. Romano*, 369 N.C. 678, 685, 800 S.E.2d 644, 649 (2017)). "Under a de novo review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Bartley v. City of High Point*, 381 N.C. 287, 293, 873 S.E.2d 525, 532 (2022) (quoting *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009)). "In exercising de novo review, 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 reasonable doubt." *Cooper v. Berger*, 370 N.C. 392, 413, 809 S.E.2d 98, 111 (2018) (quoting *State v. Berger*, 368 N.C. 633, 639, 781 S.E.2d 248, 252 (2016)).

"[T]he trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Parisi*, 372 N.C. 639, 649, 831 S.E.2d 236, 243 (2019) (cleaned up). While "a [trial] court's finding[s] of fact on the question of discriminatory intent [are] reviewed for clear error," when "a finding of fact is based on the application of an incorrect burden of proof, the finding cannot stand." *Abbott v. Perez*, 138 S. Ct. 2305, 2326 (2018). "[W]hether the court applied the correct burden of proof is a question of law subject to plenary review." *Id.*

III. Analysis

A. Introduction

"Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.' " *Burdick v. Takushi*, 504 U.S. 428, 433, 112 S. Ct. 2059, 2063 (1992) (quoting *Storer v. Brown*, 415 U.S. 724, 730, 94 S. Ct. 1274, 1279 (1974)). "[I]t should go without saying that a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2348 (2021). Indeed, "the integrity of the election process empowers the state to enact laws to prevent voter fraud before it occurs, rather than only allowing the state to remedy fraud after it becomes a problem." *Fisher v. Hargett*, 604 S.W.3d 381, 404 (Tenn. 2020) (cleaned up).

The Supreme Court of the United States has recognized that "every voting rule imposes a burden of some sort." *Brnovich*, 141 S. Ct. at 2338. "The burden of acquiring, possessing, and showing a free photo identification is simply not severe." *Crawford*, 553 U.S. at 209, 128 S. Ct. at 1627 (Scalia, J., concurring). "[T]he inconvenience of making a trip to [a government office], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Id.* at 198, 128 S. Ct. at 1621. *See also Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶ 4, 357 Wis. 2d 469, 475–76, 851 N.W.2d 262, 265 ("[P]hoto identification is a condition of our times where more

and more personal interactions are being modernized to require proof of identity with a specified type of photo identification. With respect to these familiar burdens, which accompany many of our everyday tasks, [a photo identification requirement] does not constitute an undue burden on the right to vote.").

B. Judicial Review

Plaintiffs here have asserted that in enacting S.B. 824, the legislature acted "at least in part to entrench itself by burdening the voting rights of reliably Democrat[ ] African-American voters." Although the Supreme Court of the United States has recognized that "partisan motives are not the same as racial motives," *Brnovich*, 141 S. Ct. at 2349, plaintiffs contend that the mere allegation that race played some part in enactment of the law compels us to consider the effects S.B. 824 has on "reliably Democrat" voters when evaluating intent of the legislature, and in doing so, to depart from our well-settled approach to reviewing the constitutionality of legislative acts. However, "[a] facial challenge must fail where the statute has a plainly legitimate sweep." *Crawford*, 553 U.S. at 202, 128 S. Ct. at 1623 (cleaned up).

Under our Constitution, "power remains with the people and is exercised through the General Assembly, which functions as the arm of the electorate. An act of the people's elected representatives is thus an act of the people and is presumed valid *unless it conflicts with the Constitution*." *Pope*, 354 N.C. at 546, 556 S.E.2d at 267; *see also State v. Strudwick*, 379 N.C. 94, 105, 864 S.E.2d 231, 240 (2021) ("[W]e presume that laws enacted by the General Assembly are constitutional." (quoting *Grady*, 372 N.C. at 521–22, 831 S.E.2d at 553)). "The Legislature alone may determine the policy of the State, and its will is supreme, except where limited by constitutional inhibition, which exception or limitation, when invoked, presents a question of power for the courts to decide. But even then the courts do not undertake to say what the law ought to be; they only declare what it is." *State v. Revis*, 193 N.C. 192, 195 136 S.E. 346, 347 (1927) (citation omitted).

The presumption of constitutionality is a critical safeguard that preserves the delicate balance between this Court's role as the interpreter of our Constitution and the legislature's role as the voice through which the people exercise their ultimate power. *Id.* ("To interpret, expound, or declare what the law is, or has been, and to adjudicate the rights of litigants, are judicial powers; to say what the law shall be is legislative.").

To that end, "we will not declare a law invalid unless we determine that it is unconstitutional beyond a reasonable doubt." *Strudwick*, 379 N.C. at 105, 864 S.E.2d at 240 (quoting *Grady*, 372 N.C. at 522, 831 S.E.2d

at 553). "In addressing the facial validity of [a statute], our inquiry is guided by the rule that a facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully." *State v. Bryant*, 359 N.C. 554, 564, 614 S.E.2d 479, 485 (2005) (cleaned up) (quoting *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100 (1987)). To succeed in this endeavor, one who facially challenges an act of the General Assembly may not rely on mere speculation. Rather, "[a]n individual challenging the facial constitutionality of a legislative act must establish that no set of circumstances exists under which the act would be valid." *Id.* at 564, 614 S.E.2d at 486 (cleaned up).[3]

> [W]e emphasize that "the role of the legislature is to balance the weight to be afforded to disparate interests and to forge a workable compromise among those interests. The role of the Court is not to sit as a super legislature and second-guess the balance struck by the elected officials." Rather, this Court must "measure the balance struck by the legislature against the required minimum standards of the constitution."

Id. at 565, 614 S.E.2d at 486 (quoting *Harvey v. Edmisten*, 315 N.C. 474, 491, 340 S.E.2d 720, 731 (1986)).

C. Equal Protection

[1] The North Carolina Constitution, under which plaintiffs' claim is brought, provides in pertinent part that "[n]o person shall be denied the

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3. Our dissenting colleague expresses skepticism of this Court's continued adherence to *Salerno*'s standard. However, the requirement that plaintiffs facially challenging a presumptively valid law carry this burden is far from "novel." Only eighteen months ago, our dissenting friend wrote, with added emphasis: "After all, it has been long established by this Court that an individual challenging the facial constitutionality of a legislative act must establish that *no* set of circumstances exists under which the act would be valid." *State v. Strudwick*, 379 N.C. 94, 108, 864 S.E.2d 231, 242 (2021) (quoting *Salerno*, 481 U.S. at 739, 107 S. Ct. at 2100).

Contrary to our friend's contention, our application of this standard to claims that a law was enacted with discriminatory intent is only "novel" in the sense that this Court has never before had the opportunity to address such a claim—the prior, withdrawn, and erroneous opinion in this matter notwithstanding. But, this Court's application of *Salerno*'s standard to facial challenges has not been questioned, until now. *See id.*; *State v. Grady*, 372 N.C. 509, 547, 831 S.E.2d 542, 570 (2019) (quoting and applying *Salerno*'s standard); *Kimberley Rice Kaestner 1992 Fam. Tr. v. N.C. Dep't of Revenue*, 371 N.C. 133, 138, 814 S.E.2d 43, 47 (2018), *aff'd sub nom. N.C. Dep't of Revenue v. Kimberley Rice Kaestner 1992 Fam. Tr.*, 139 S. Ct. 2213 (2019) (same); *Hart v. State*, 368 N.C. 122, 131, 774 S.E.2d 281, 288 (2015) (same); *Bryant*, 359 N.C. at 564, 614 S.E.2d at 485 (same); *State v. Thompson*, 349 N.C. 482, 491, 508 S.E.2d 277, 281–82 (1998) (same).

equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin." N.C. Const. art. I, § 19. In essence, "[e]qual protection requires that all persons similarly situated be treated alike." *Blankenship v. Bartlett*, 363 N.C. 518, 521, 681 S.E.2d 759, 762 (2009) (quoting *Richardson v. N.C. Dep't of Corr.*, 345 N.C. 128, 134, 478 S.E.2d 501, 505 (1996)).

This Court's analysis of our Constitution's Equal Protection Clause has "generally follow[ed] the analysis of the Supreme Court of the United States in interpreting the corresponding federal clause."[4] *Id.* at 522, 681 S.E.2d at 762. Both provisions guarantee equal treatment for individuals, not equality of outcome. *See Frank v. Walker*, 768 F.3d 744, 754 (7th Cir. 2014). However, "in the construction of [a] provision of the State Constitution, the meaning given by the Supreme Court of the United States to even an identical term in the Constitution of the United States is, though highly persuasive, not binding upon this Court." *Blankenship*, 363 N.C. at 522, 681 S.E.2d at 762 (quoting *Bulova*, 285 N.C. at 474, 206 S.E.2d at 146).

State supreme courts are not bound by federal courts when interpreting their state constitutions, and the parties here correctly concede that principles of federalism do not require lock-stepping. *See* Jeffrey S. Sutton, *51 Imperfect Solutions, States and the Making of American Constitutional Law*, 16 (2018) ("Nothing compels the state courts to imitate federal interpretations of the liberty and property guarantees in the U.S. Constitution when it comes to the rights guarantees found in their own constitutions . . . . Our federal system gives state courts the final say over the meaning of their own constitutions.").

Thus, it is the duty of the Supreme Court of North Carolina alone to declare what the law is under our Constitution. *See Bayard v. Singleton*, 1 N.C. 5 (1787). It follows that when a party challenges a presumptively valid act of the General Assembly under our Constitution's Equal Protection Clause, as in this case, we are in no sense bound to follow the analytical or evidentiary framework established by the Supreme Court of the United States or any other federal court for resolving equal protection challenges under the federal Constitution.

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4. The Fourteenth Amendment to the United States Constitution provides in pertinent part that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "The decisions of the Supreme Court of the United States as to the construction and effect of . . . the Fourteenth Amendment to the Constitution of the United States are, of course, binding upon this Court." *Bulova Watch Co., Inc. v. Brand Distribs. of N. Wilkesboro, Inc.*, 285 N.C. 467, 474, 206 S.E.2d 141, 146 (1974).

Accordingly, pursuant to both the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution, we reaffirm that "[a] statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race." *Washington v. Davis*, 426 U.S. 229, 241, 96 S. Ct. 2040, 2048 (1976). In addition, when a facially neutral statute is challenged, both proof of "a racially discriminatory purpose," *id.* at 239, 96 S. Ct. at 2047, and proof that the law actually "produces disproportionate effects," *Hunter v. Underwood*, 471 U.S. 222, 227, 105 S. Ct. 1916, 1920 (1985), are required to demonstrate the law's unconstitutionality. But a provision will not be declared unconstitutional "*solely* because it has a racially disproportionate impact." *Davis*, 426 U.S. at 239, 96 S. Ct. at 2047.

"Whenever a challenger claims that a state law was enacted with discriminatory intent, the burden of proof lies with the challenger, not the State." *Abbott*, 138 S. Ct. at 2324 (citing *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 481, 117 S. Ct. 1491, 1499 (1997)). Where a law is facially neutral, as here, the challenger faces an especially heavy burden of proving enactment of the law was motivated by discriminatory intent.

To meet this burden under the federal analytical framework, plaintiffs "must prove by a preponderance of the evidence that racial discrimination was a substantial or motivating factor" in the enactment of the challenged legislation. *Hunter*, 471 U.S. at 225, 105 S. Ct. at 1918 (quoting *Underwood v. Hunter*, 730 F.2d 614, 617 (11th Cir. 1984)). In *Arlington Heights*, the Supreme Court of the United States established a non-exhaustive list of evidentiary sources plaintiffs may use to establish discriminatory intent under the federal Constitution. *Vill. of Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252, 97 S. Ct. 555 (1977). Whether the government action " 'bears more heavily on one race than another' may provide an important starting point," *Id.* at 266, 97 S. Ct. at 564 (quoting *Davis*, 426 U.S. at 242, 96 S. Ct. at 2049), however, "official action will not be held unconstitutional solely because it results in a racially disproportionate impact." *Id.* at 264–65, 97 S. Ct. at 563. Thus, *Arlington Heights* commands federal courts to also consider "[t]he historical background of the decision," the "specific sequence of events leading up to the challenged decision," and the challenged action's "legislative or administrative history." *Id.* at 267–68, 97 S. Ct. at 564–65.

However, plaintiffs' claim in the instant suit is brought pursuant to Article I, Section 19 of the North Carolina Constitution, not the Fourteenth Amendment of the United States Constitution. Specifically, plaintiffs argue that application of the *Arlington Heights* test produces an inference of discriminatory intent in the passage of S.B. 824 such

that, even though the law is facially neutral, the law violates the Equal Protection Clause found in our state Constitution. But, plaintiffs' challenge, whether analyzed under *Arlington Heights* or under our traditional standard, must fail.

The result below, which endorsed plaintiffs' argument, is not only contrary to the result reached by the Fourth Circuit in *Raymond*, the federal corollary to this suit which held S.B. 824 does not contravene the Fourteenth Amendment, but also "would have the potential to invalidate just about any voting rule a State adopts." *Brnovich*, 141 S. Ct. at 2343. To utilize such a subjective test "would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Burdick*, 504 U.S. at 433, 112 S. Ct. at 2063.

Constitutional deference and the presumption of legislative good faith caution against casting aside legislative policy objectives on the basis of evidence that could be fairly interpreted to demonstrate that a law was enacted in spite of, rather than because of, any alleged racially disproportionate impact. To that end, a challenge to a presumptively valid and facially neutral act of the legislature under Article I, Section 19 of the North Carolina Constitution cannot succeed if it is supported by speculation and innuendo alone.

It is well settled that this Court has required plaintiffs to produce proof beyond a reasonable doubt to invalidate a legislative action as violative of our state's Constitution. *See Strudwick*, 379 N.C. at 105, 864 S.E.2d at 240 ("[W]e will not declare a law invalid unless we determine that it is unconstitutional beyond a reasonable doubt." (quoting *Grady*, 372 N.C. at 522, 831 S.E.2d at 553)); *Hart v. State*, 368 N.C. 122, 126, 774 S.E.2d 281, 284 (2015) ("Stated differently, a law will be declared invalid only if its unconstitutionality is demonstrated beyond a reasonable doubt."); *Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 888 (1991) ("[E]very presumption favors the validity of a statute. It will not be declared invalid unless its unconstitutionality be determined beyond reasonable doubt." (quoting *Gardner v. Reidsville*, 269 N.C. 581, 595, 153 S.E.2d 139, 150 (1967))).

With the ability to declare a legislative act unconstitutional, courts wield a "delicate, not to say dangerous" power which is "antagonistic to the fundamental principles of our government." *State v. White*, 125 N.C. 674, 688, 34 S.E. 532, 536 (1899) (Clark, J., dissenting). The power to invalidate legislative acts is one that must be exercised by this Court with the utmost restraint, and the proof beyond a reasonable doubt standard is a necessary protection against abuse of such power by unprincipled or undisciplined judges.

This is not a novel or unique approach, as federal courts have acknowledged that overturning state legislative acts requires a challenger to meet a heightened burden. *See Plain Loc. Sch. Dist. Bd. of Educ. v. DeWine*, 486 F. Supp. 3d 1173, 1198 (S.D. Ohio 2020) ("[T]he 'party challenging the constitutionality of a statute bears the burden of proving that it is unconstitutional beyond a reasonable doubt.' " (quoting *Cleveland v. State*, 989 N.E.2d 1072, 1078 (Ohio Ct. App. 2013))); *Huffman v. Brunsman*, 650 F. Supp. 2d 725, 742 (S.D. Ohio 2008) ("[A] person challenging a statute must prove that the statute is unconstitutional beyond a reasonable doubt." (citing *State v. Anderson*, 57 Ohio St. 3d 168, 171, 566 N.E.2d 1224, 1226 (1991))); *Coal. for Equal Rights, Inc. v. Owens*, 458 F. Supp. 2d 1251, 1258 (D. Colo. 2006) ("Challengers to a state law 'bear the burden of proving it unconstitutional beyond a reasonable doubt.' " (quoting *Mosgrove v. Town of Federal Heights*, 191 Colo. 1, 4, 543 P.2d 715, 717 (1975))).

Even in the context of "determining the federal constitutionality" of a state law challenged under *Arlington Heights*, federal courts should "begin[ ] with the presumption of constitutionality," should require the challengers to "demonstrate that the Act is unconstitutional beyond a reasonable doubt," and "must accept" the state's "plausible construction of the Act [if] that would result in a finding of constitutionality." *Villanueva v. Carere*, 873 F. Supp. 434, 447 (D. Colo. 1994), *aff'd*, 85 F.3d 481 (10th Cir. 1996).

Therefore, we hold that to prevail on such a facial challenge to a state statute under this state's traditional analytical framework, the challenger must prove beyond a reasonable doubt that: (1) the law was enacted with discriminatory intent on the part of the legislature, and (2) the law actually produces a meaningful disparate impact along racial lines.

We reach this determination not out of disagreement with the federal courts' analysis of these issues under the federal Equal Protection Clause. Rather, we reach this decision because *Arlington Heights*' analytical framework is incompatible with our state Constitution and this Court's precedent as it allows challengers to succeed on such claims by proffering evidence that is by its very nature speculative, subjective, and thus, insufficient to meet the well-established burden of proof. The differing outcomes reached by the Fourth Circuit in *Raymond* and the trial court below highlight the subjective nature of the *Arlington Heights* test. The fact that different results can be reached using the *Arlington Heights* test suggests that personal biases and subjective interpretations concerning presumptively valid legislative acts can greatly influence

outcomes in these types of cases. It is the objective application of legal principles that leads to consistent and fair judicial decisions. There, the *Arlington Heights* framework falls short.[5]

D. Federal Precedent

With this in mind, we now turn our attention to the trial court's order permanently enjoining S.B. 824. Because the trial court below relied heavily on *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016), it is appropriate to provide a brief review of that case. In addition, a proper review of the trial court's order requires a thorough analysis of *Abbott v. Perez*, 138 S. Ct. 2305 (2018) and *Raymond*, 981 F.3d 295.

1. North Carolina State Conference of the NAACP v. McCrory

In *McCrory*, the plaintiffs challenged various voting provisions contained in H.B. 589, a 2013 omnibus bill enacted by the North Carolina General Assembly that included voter identification provisions, arguing the law had been enacted with discriminatory intent. *McCrory*, 831 F.3d at 218.

The 2013 provision was enacted shortly after the Supreme Court of the United States "invalidated the preclearance coverage formula," a federal statutory mechanism that required North Carolina, and other states with histories of racially motivated voter suppression laws, to seek preclearance with the United States Department of Justice before enacting new voting laws. *Id.* at 216 (citing *Shelby County v. Holder*, 570 U.S. 529, 557, 133 S. Ct. 2612, 2631 (2013)). At the conclusion of trial, the district court found that the 2013 law was not enacted with discriminatory intent and entered judgment against the plaintiffs on all of their claims. *Id.* at 219.

On appeal, the Fourth Circuit noted that the "ultimate question" was whether "the legislature enact[ed] a law 'because of,' and not 'in spite of,' its discriminatory effect." *Id.* at 220. In concluding that the 2013 law was enacted because of its discriminatory effect, i.e., with discriminatory

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5. Our holding does not mean that the *Arlington Heights* test will not be appropriate in other circumstances in which the beyond a reasonable doubt standard does not apply. For example, it may remain a sound analytical framework for challenges to zoning or executive agency regulatory actions, which are the types of official action the test was designed to address. *See Arlington Heights*, 429 U.S. at 254, 97 S. Ct. at 558 ("[Plaintiffs] alleged that the denial [of a rezoning request] was racially discriminatory . . . ."). However, in the context of invalidating presumptively constitutional legislative action, our precedent is clear, and *Arlington Heights* is contrary to the overwhelming weight of authority in North Carolina.

intent, the Fourth Circuit determined that the "undisputed" facts regarding the "sequence of events leading up to the challenged decision" were "devastating." *Id.* at 227 (quoting *Arlington Heights*, 429 U.S. at 267, 97 S. Ct. at 564).

The Fourth Circuit noted that the legislature utilized various racial data in enacting portions of the law, including the photo identification provisions. *Id.* at 216–18. According to the Fourth Circuit, "relying on this racial data, the General Assembly enacted legislation restricting all—and only—practices disproportionately used by African Americans." *Id.* at 230. The Fourth Circuit determined that "[t]he district court erred in refusing to draw the obvious inference that this sequence of events signals discriminatory intent." *Id.* at 227. The Fourth Circuit concluded that, "at least in part, discriminatory racial intent motivated the enactment of" the 2013 law. *Id.* at 233. Because the plaintiffs carried their burden of establishing discriminatory intent, and because the State had failed to show that the challenged provisions would have been enacted without discriminatory intent, the Fourth Circuit reversed the district court's judgment and remanded the case "for entry of an order enjoining the implementation" of the challenged voting provisions of the 2013 omnibus law. *Id.* at 242.

2. Abbott v. Perez

Thereafter, the Supreme Court of the United States provided clarification to discriminatory intent analysis that is especially relevant here. In *Abbott*, the Court emphasized that "the 'good faith of [the] legislature must be presumed' " regardless of a prior finding of discriminatory intent. 138 S. Ct. at 2324 (alteration in original) (quoting *Miller v. Johnson*, 515 U.S. 900, 915, 115 S. Ct. 2475, 2488 (1995)). There, the Court reversed the decision of a three-judge panel of the Western District of Texas because that panel imputed past discriminatory intent to the then-sitting legislature and thereby failed to presume good faith. *Id.* at 2335. The Court stated that:

> The allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination. Past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful. The ultimate question remains whether a discriminatory intent has been proved in a given case. The historical background of a legislative enactment is one evidentiary source relevant to the question of intent. But we

> have never suggested that past discrimination flips the evidentiary burden on its head.

Id. at 2324–25 (cleaned up).

The Court in *Abbott* noted that the lower court "referred repeatedly to the 2013 Legislature's duty to expiate its predecessor's bad intent" and concluded that the "Texas court's references to the need to 'cure' the earlier Legislature's 'taint' cannot be dismissed as stray comments." *Id.* at 2325. Importantly, although the Court stated that "a [trial] court's finding of fact on the question of discriminatory intent is reviewed for clear error," it nonetheless reversed the panel because "when a finding of fact is based on the application of an incorrect burden of proof, the finding cannot stand." *Id.* at 2326.

Thus, the presumption of legislative good faith is only overcome when a plaintiff meets his or her burden of proving that the legislature responsible for enacting the challenged law acted with discriminatory intent in the present case. Past discrimination may be a relevant factor under an *Arlington Heights* analysis, but it is error to treat subsequent legislative acts as fruit of the poisonous tree such that subsequent similar legislation is per se verboten.[6]

In addition, *Abbott* clearly emphasized that a trial court errs when it makes findings of fact utilizing the incorrect burden of proof, and any findings which result therefrom are not binding on a reviewing court. *See id.* at 2326 (holding that "when a finding of fact is based on the application of an incorrect burden of proof, the finding cannot stand"); *see also State v. Otto*, 366 N.C. 134, 136, 726 S.E.2d 824, 827 (2012) (holding

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6. "The world moves, and we must move with it." *State v. Williams*, 146 N.C. 618, 639, 61 S.E. 61, 68 (1908) (Clark, C.J., dissenting). Indeed, many of the historical facts referenced by the trial court and in plaintiffs' brief "hav[e] no logical relation to the present day." *Shelby Cnty. v. Holder*, 570 U.S. 529, 554, 133 S. Ct. 2612, 2629 (2013). The Lieutenant Governor, two members of this Court, and the minority leaders in the North Carolina Senate and the North Carolina House of Representatives are the most recent examples of the significant social progress made in North Carolina.

North Carolina's population has changed dramatically. North Carolina ranked 9th in population growth by percentage between 2021 and 2022; representing the third largest addition to population out of all 50 states. Michael Cline, *North Carolina Population Growth Bouncing Back*, Off. of State Budget & Man., (Dec. 22, 2022), https://www.osbm.nc.gov/blog/2022/12/22/north-carolina-population-growth-bouncing-back. While discrimination based on race is a historical reality, to imply that S.B. 824 is a product or derivative of that history is to imply that the people of North Carolina have failed to change. Such an implication is fundamentally at odds with the modern reality of our State. The imputation of wrongs committed in the distant past to current realities is not only unjust and disingenuous, but it also presents an insurmountable hurdle to future progress.

that when "evidence does not support the trial court's finding . . . [that] finding of fact is not binding on this Court").

3. Federal Review of S.B. 824

The federal corollary to the present appeal is found in *N.C. State Conf. of the NAACP v. Raymond*, 981 F.3d 295 (4th Cir. 2020). There, the plaintiffs challenged S.B. 824 under the federal Equal Protection Clause, alleging that the law had been enacted with discriminatory intent. *Id.* at 301. The plaintiffs moved to enjoin enforcement of the law, and the district court granted the injunction after concluding that the plaintiffs were likely to succeed on their constitutional claims. *Id.*

On appeal, the Fourth Circuit sharply criticized the district court and reversed "because of the fundamental legal errors that permeate the [district court's] opinion." *Id.* at 310–11. Principal among these fundamental errors was that the district court, contrary to the Supreme Court's explicit holding in *Abbott*, focused on the past finding of discriminatory intent in *McCrory* as evidence of discriminatory intent in the passage of S.B. 824. *Id.* Thus, the district court improperly "considered the General Assembly's discriminatory intent in passing the 2013 Omnibus Law to be effectively dispositive of its intent in passing the 2018 Voter-ID Law." *Id.* at 303. The Fourth Circuit stated:

> [t]he district court here made the same mistake as the panel in *Abbott* without even trying to distinguish the Supreme Court's holding. . . . [T]he district court noted that the General Assembly did not try to cleanse the discriminatory taint, or tak[e] steps to purge the taint of discriminatory intent. . . .
>
> The district court penalized the General Assembly because of who they were, instead of what they did. When discussing the sequence of events leading to the 2018 Voter-ID Law's enactment, the district court discounted the normalcy of the legislative process to focus on *who* drafted and passed the law.

Id. at 304 (cleaned up).

The Fourth Circuit explicitly disavowed the district court's inappropriate focus on *who* passed S.B. 824:

> The question of *who* reared its head again in the court's discussion of the 2018 Voter-ID Law's legislative history. In that section, the district court

> emphasized that the General Assembly's positions had "remained virtually unchanged" between *McCrory* and the enactment of the 2018 Voter-ID law. And the court assumed that the racial data remained in the minds of the legislators: "[T]hey need not have had racial data in hand to still have it in mind." By focusing on *who* passed the 2018 Voter-ID Law and requiring the General Assembly to purge the taint of the prior law, the district court flipped the burden and disregarded *Abbott*'s presumption.

Id. at 304–05 (alteration in original) (quoting *NAACP v. Cooper*, 430 F. Supp. 3d at 33–35).

The district court's analytical reliance on *who* passed S.B. 824 "also overlooked the state constitutional amendment" by which "[f]ifty-five percent of North Carolinian voters constitutionally required the enactment of a voter-ID law and designated to the General Assembly the task of enacting the law." *Id.* at 305 (citing N.C. Const. art. VI, § 2(4)). Because the amendment "served as an independent intervening event between the General Assembly's passage of the 2013 Omnibus Law and its enactment of the 2018 Voter-ID Law," Article VI, Section 2(4) of the North Carolina Constitution "undercut[ ] the district court's tenuous 'who' argument." *Id.*

The Fourth Circuit determined that "[o]nce the proper burden and the presumption of good faith are applied, the Challengers fail to meet their burden of showing that the General Assembly acted with discriminatory intent in passing the 2018 Voter-ID Law." *Id.* In reaching this conclusion, the Fourth Circuit clarified that although "North Carolina's historical background," including the 2013 omnibus law, "favors finding discriminatory intent, the facts considered under the remaining *Arlington Heights* factors—the sequence of events leading to enactment, legislative history, and disparate impact—cannot support finding discriminatory intent." *Id.* (cleaned up).

First, the Fourth Circuit analyzed "the sequence of events leading to the enactment of the 2018 Voter-ID Law." *Id.* Noting that S.B. 824 "underwent five days of legislative debate," "was permitted time for public comment," and "enjoyed bipartisan support," the Fourth Circuit determined that "the enactment was not the 'abrupt' or 'hurried' process that characterized the passage of the 2013 Omnibus Law." *Id.* at 305–06 (citing *McCrory*, 831 F.3d at 228–29).

Next, the Fourth Circuit analyzed "the 2018 Voter-ID Law's legislative history," which the district court found "supported finding discriminatory intent" because "Republican legislative leaders strongly opposed *McCrory*, remained committed to passing a voter-ID law that would withstand future court challenges, and did not change their positions, goals, or motivations between the passage of the 2013 Omnibus Law and the 2018 Voter-ID Law." *Id.* at 307. The Fourth Circuit specifically denounced the district court's reasoning because its findings "impermissibly stemmed from the comments of a few individual legislators and relied too heavily on comments made by the bill's opponents." *Id.* (cleaned up).

The Fourth Circuit also stated that the district court's reasoning "go[es] against inferring 'good faith' on the part of the legislature, which we are required to do: decrying a court opinion holding that you acted improperly in the past is not evidence that you have acted improperly again." *Id.* Noting that "[n]othing here suggests that the General Assembly used racial voting data to disproportionately target minority voters 'with surgical precision,' " the Fourth Circuit concluded that S.B. 824's legislative history did not evidence discriminatory intent. *Id.* at 308–09 (quoting *McCrory*, 831 F.3d at 214).

Finally, the Fourth Circuit analyzed "the racial impact of the 2018 Voter-ID Law." *Id.* at 309. While the Fourth Circuit "accept[ed] the district court's finding that minority voters disproportionately lack the types of ID required" by S.B. 824, it found significant that the law "contains three provisions that go 'out of [their] way to make its impact as burden-free as possible.' " *Id.* (second alteration in original) (quoting *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 603 (4th Cir. 2016)).

> First, the law provides for registered voters to receive free voter-ID cards without the need for corroborating documentation. Second, registered voters who arrive to the polls without a qualifying ID may fill out a provisional ballot and their votes will be counted if they later produce a qualifying ID at the county elections board. Third, people with religious objections, survivors of recent natural disasters, and those with reasonable impediments may cast a provisional ballot after completing an affidavit that affirms their identity and their reason for not producing an ID. Their votes must be counted unless the county board of elections has grounds to believe the affidavit is false.

Id. (cleaned up).

The Fourth Circuit noted that, because of these various mitigating provisions, "the 2018 Voter-ID law is more protective of the right to vote than other states' voter-ID laws that courts have approved." *Id.* at 310.

> In *Lee v. Virginia State Board of Elections*, we upheld Virginia's voter-ID law that only included two of these mitigating features—free voter IDs available without corroborating documentation and provisional voting subjected to 'cure.' Likewise, in *South Carolina v. United States*, the District Court of the District of Columbia precleared South Carolina's voter-ID law that included a different combination of two mitigating features—free voter IDs available without corroborating documentation and a reasonable impediment procedure. And recently, the Eleventh Circuit, in *Greater Birmingham Ministries v. Secretary of State for the State of Alabama*, upheld Alabama's Voter-ID law that included . . . mitigating features—free voter IDs that require corroborating documentation and provisional voting subject to 'cure.' Given these cases, it is hard to say that the 2018 Voter-ID Law does not sufficiently go out of its way to make its impact as burden-free as possible.

Id. (cleaned up).

Because of these mitigating provisions, the Fourth Circuit determined that any potential disparate impact of S.B. 824 did not evidence any discriminatory intent by the General Assembly. *Id.* The Fourth Circuit reversed the district court, but not because "[the district court] weighed the evidence before it differently than [the Fourth Circuit] would." *Id.* Rather, the Fourth Circuit reversed the district court's grant of a preliminary injunction "because of the fundamental legal errors that permeate the opinion—the flipping of the burden of proof and the failure to provide the presumption of legislative good faith—that irrevocably affected its outcome." *Id.* at 310–11. The district court "abused its discretion" because "it considered the North Carolina General Assembly's past conduct to bear so heavily on its later acts that it was virtually impossible for it to pass a voter-ID law that meets constitutional muster." *Id.* at 311.

E. Review of the Panel Below

1. Under the Federal Framework

[2] Although *Raymond* was decided under the federal Equal Protection Clause, we are confronted in the present appeal with a similar question

under the North Carolina Constitution. When properly analyzed under *Arlington Heights*, plaintiffs' claim here, as in *Raymond*, must fail because the same fundamental legal errors that permeated the district court's decision in *Raymond* pervade the trial court's order below.

A majority of the three-judge panel below made findings of fact based upon historical evidence that, while perhaps useful in a policy setting, has little bearing upon the constitutionality of S.B. 824 in light of *Abbott*. As the dissent below noted, to "place outsized weight on the increasingly distant past would constitute a failure by the judiciary to allow our [s]tate to fully progress from that shameful past. Any overreliance on our [s]tate's history is therefore misplaced." The trial court's findings demonstrate exactly this sort of overreliance on historical evidence, and these findings "were not merely 'stray comments. On the contrary, they were central to the court's analysis,' for they made explicit the burden-shifting that the court engaged in while assessing the *Arlington Heights* factors." *Raymond*, 981 F.3d at 304 (quoting *Abbott*, 138 S. Ct. at 2325).

The trial court's finding that "recent cases," including *McCrory*, "show that race is still a dominant consideration for the North Carolina General Assembly" is illustrative. As the Supreme Court of the United States has made abundantly clear, "[t]he allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination." *Abbott*, 138 S. Ct. at 2324. "Past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *Id.* (cleaned up). The trial court's attribution of past sins to the passage of S.B. 824 is plainly contrary to *Abbott*.

In addition, the trial court's finding that "[j]ust as with other states in the South, North Carolina has a long history of race discrimination generally and race-based voter suppression in particular," was a quotation of a Court of Appeals' quotation from *McCrory*, not a finding premised upon any evidence in this particular case. *See Holmes v. Moore*, 270 N.C. App. 7, 20–21, 840 S.E.2d 242, 257 (2020); *McCrory*, 831 F.3d at 223. Again, the trial court's use of historical information to strike down an otherwise lawful act is exactly what *Abbott* cautioned against.

Further, the trial court made specific findings of fact regarding statements made in the wake of *McCrory*, evidently considering that statements criticizing that decision and vowing to "continue the fight" for a voter identification law supported a finding that S.B. 824 was enacted with discriminatory intent. Once again, this finding is contrary to directly on-point federal precedent. In *Raymond*, "the district court

noted that Republican legislative leaders strongly opposed *McCrory*, [and] remained committed to passing a voter-ID law that would withstand future court challenges." *Raymond*, 981 F.3d at 307. The Fourth Circuit refused to sanction these findings because they "[went] against inferring 'good faith' on the part of the legislature, which we are required to do: decrying a court opinion holding that you acted improperly in the past is not evidence that you have acted improperly again." *Id.* (citing *Abbott*, 138 S. Ct. at 2324, 2327).

Also, the trial court found that both the passage of the constitutional amendment which required enactment of S.B. 824 and the enactment of S.B. 824 itself departed from normal legislative procedures, and the trial court evidently relied on this finding when determining that "[t]he [l]egislative [h]istory of S.B. 824 [r]aises [a]dditional [r]ed [f]lags." The trial court "found" that "[t]here is no reason why the General Assembly could not have followed normal procedures, passed implementing legislation to accompany the proposed constitutional amendment, and submitted that proposed legislation to the People of North Carolina for their approval." The trial court's findings on this issue, however, are contrary to both federal precedent, North Carolina precedent, and the historical role of the judiciary in not second-guessing the contours of the legislative process.

The Supreme Court of the United States has stated "we do not see how the brevity of the legislative process can give rise to an inference of bad faith—and certainly not an inference that is strong enough to overcome the presumption of legislative good faith." *Abbott*, 128 S. Ct. at 2328–29. This Court has stated "the role of the Court is not to sit as a super legislature and second-guess the balance struck by the elected officials." *Bryant*, 359 N.C. at 565, 614 S.E.2d at 485 (quoting *Harvey*, 315 N.C. at 491, 340 S.E.2d at 731). Moreover, and perhaps most importantly, the North Carolina Constitution contains an explicit separation of powers provision, *see* N.C. Const. art. I, § 6, which is violated "when one branch exercises power that the constitution vests exclusively in another branch" or "when the actions of one branch prevent another branch from performing its constitutional duties." *State v. Berger*, 368 N.C. 633, 645, 781 S.E.2d 248, 256 (2016).

There is no law in this state that implies the General Assembly possesses anything less than its full constitutional authority when conducting legislative business in a special session. Despite this, the trial court's order indicates that the panel below sees itself as possessing the power to second-guess the legislature's authority over its own procedures, thereby "prevent[ing] another branch from performing its constitutional

dut[y]." *Id*. It bears repeating that "[t]o interpret, expound, or declare what the law is, or has been, and to adjudicate the rights of litigants, are judicial powers; to say what the law shall be is legislative." *Revis*, 193 N.C. 192, 136 S.E. at 347.

One of the many governmental functions the constitution vests exclusively in the legislature is the balancing of policy interests involved when drafting, amending, and enacting laws. During this process for S.B. 824, the General Assembly accepted amendments proposed by Democrat members, and multiple Democrat members thanked and praised their Republican colleagues for the bipartisan and collaborative manner in which the law was passed. Democrats thanked the Republican members "for being open and inclu[sive] in listening to us on the other side of the aisle in trying to come up with something that is reasonable," "for the hard work that you have done in negotiating and accepting many of the amendments that have been placed before you," and for doing "a really terrific job working with us to help improve the bill, [which] is a much better bill than the bill that left this chamber in 2013."[7]

Despite this, the trial court went on to enter speculative findings of fact regarding additional measures the legislature could have taken, such as adopting more of the amendments proposed by Democrat members of both chambers. According to the trial court, the legislature's failure to take these additional steps, despite the obviously bipartisan nature of the law's enactment, led to the trial court's finding of fact heading that "The Design of S.B. 824 Does Not Evince an Intent by the General Assembly to Cure Racial Disparities Observed Under H.B. 589."

Under this heading, the trial court found "that [d]efendants have not rebutted [p]laintiffs' assertion that the General Assembly did not consider any updated racial demographic data prior to the enactment

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7. "One might question the relevance of bipartisanship in a discriminatory-intent analysis," *Raymond*, 981 F.3d at 306, n.3, because "partisan motives are not the same as racial motives." *Brnovich*, 141 S. Ct. at 2349. This is why, even under *Arlington Heights*, a court is required to "assess whether the plaintiffs have managed to disentangle race from politics and prove that the former drove" a law's enactment. *Cooper v. Harris*, 581 U.S. 285, 308, 137 S. Ct. 1455, 1473 (2017) (citation omitted). Under our standard, this means that plaintiffs must prove beyond a reasonable doubt that racial, rather than political, considerations motivated the passage of a law they claim was enacted with discriminatory intent. For plaintiffs here, that requirement is at odds with their theory of the case, which inextricably "[ ]entangle[s] race [and] politics[.]" *Id*. Article I, Section 19 prohibits discrimination based on race; political parties are not protected classes, and barring proof that racial animus, rather than political considerations, led to the passage of a particular measure, we find it difficult to imagine a scenario in which partisan interests would constitute sufficient evidence that a law was enacted with discriminatory intent.

of S.B. 824." Moreover, the trial court found that "[t]he categories of ID added to the list of acceptable ID were arbitrary, and [l]egislative [d]efendants have offered no evidence to show that inclusion of these ID[s] would make a difference to overcome the already existing deficiency." Presumably, this "already existing deficiency" was the prior outcome in *McCrory*, which clearly demonstrates that the General Assembly was not afforded the presumption of legislative good faith, rather, its decisions were criticized by the lower court for "demonstrating . . . lack of reasoning or logic."

Putting aside for a moment the glaringly obvious conflict with *Raymond* and *Abbott*, this heading itself indicates that the trial court fundamentally misunderstood the applicable legal framework, plaintiffs' burden, and its own task. Even presuming the findings underpinning this heading are supported by competent evidence, they at most support a conclusion that the legislature failed to do everything possible to ameliorate any alleged disparate impact. They do not support a conclusion that the legislature acted with discriminatory intent and actively designed a bill to cause the alleged disparate impact.

That reasonable minds may differ as to whether the legislature endeavored to pass the least restrictive voter identification law possible does not equate to a showing that the legislature endeavored to pass a voter identification law designed to disparately impact black North Carolinians. Plaintiffs' burden is not to demonstrate beyond a reasonable doubt that a hypothetical alternative law may have been less restrictive; it is to demonstrate beyond a reasonable doubt that *this* law was designed to discriminate on the basis of race. The evidence in the record cannot support such a contention because the hypothetical existence of a less restrictive alternative does not satisfy plaintiffs' burden. If that were so, no law could ever stand.

Hereto, the trial court's findings directly conflict with precedent of the Supreme Court of the United States which could not be clearer:

> The allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination. *Past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful.* The ultimate question remains whether a discriminatory intent has been proved in a given case. The historical background of a legislative enactment is one evidentiary source relevant to the question of intent. *But we*

> *have never suggested that past discrimination flips the evidentiary burden on its head.*

Abbott, 138 S. Ct. at 2324–25 (cleaned up) (emphases added).

The panel below "made the same mistake as the panel in *Abbott* without even trying to distinguish the Supreme Court's holding." *Raymond*, 981 F.3d at 304. The trial court inexplicably ignored *Abbott* and *Raymond*, and this serious and egregious error undermines the integrity of the trial court's decision and its decision-making process. The improper reliance on speculative historical evidence and failure to analyze *Abbott* made it "virtually impossible for [the legislature] to pass a voter-ID law that meets constitutional muster." *Id.* at 311.

"When evaluating a neutral, nondiscriminatory regulation of voting procedure, we must keep in mind that a ruling of unconstitutionality frustrates the intent of the elected representatives of the people." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 203, 128 S. Ct. 1610, 1623 (2008) (cleaned up). It is not the role of this Court to endorse an analytical approach that would effectively enjoin all future legislatures from effectuating the will of the people. This is why *Abbott* and *Raymond* are so critical to a proper analysis.

As the Supreme Court of the United States has noted, "a finding of fact . . . based on the application of an incorrect burden of proof . . . cannot stand." *Abbott*, 138 S. Ct. at 2326. Here, the trial court's findings of fact flow from impermissibly assigning the burden to the General Assembly and failing to presume legislative good faith.

The trial court's order is riddled with both explicit and implicit instances demonstrating that, as here, it erroneously placed the burden on the General Assembly to overcome a presumption of legislative bad faith. As in *Abbott*, these findings cannot stand, and the trial court's legal conclusions are left unsupported. Thus, the "fundamental legal errors that permeate the [lower panel's opinion]—the flipping of the burden of proof and the failure to provide the presumption of legislative good faith" have "irrevocably affected [the] outcome [of this case]," *Raymond*, 981 F.3d at 310–11, and we hold that even under *Arlington Heights*, the trial court's finding of discriminatory intent was erroneous.

2. Under North Carolina Law

[3] However, as previously noted, *Arlington Heights* is not the standard plaintiffs challenging a presumptively valid legislative act are required to meet in this state. *See Strudwick*, 379 N.C. at 105, 864 S.E.2d at 240 ("[W]e will not declare a law invalid unless we determine that

it is unconstitutional beyond a reasonable doubt." (quoting *Grady*, 372 N.C. at 522, 831 S.E.2d at 553)). Where a trial court applies the incorrect legal standard, regardless of whether the parties consent to that incorrect standard, the trial court per se abuses its discretion. *See Da Silva v. WakeMed*, 375 N.C. 1, 5 n.2, 846 S.E.2d 634, 638 n.2 (2020) ("[A]n error of law is an abuse of discretion.").

In addition, just as the Supreme Court of the United States has held that "a finding of fact . . . based on the application of an incorrect burden of proof . . . cannot stand," *Abbott*, 138 S. Ct. at 2326, this Court has held that "facts found under misapprehension of the law are not binding on this Court and will be set aside." *Van Hanford v. McSwain*, 230 N.C. 229, 233, 53 S.E.2d 84, 87 (1949). Because the trial court's findings of fact below were found under a misapprehension of law, i.e., under the incorrect legal standard, without requiring plaintiffs to carry their burden of demonstrating the unconstitutionality of S.B. 824 beyond a reasonable doubt, these findings cannot stand. Without them, the trial court's conclusions of law are wholly unsupported and the order below must be reversed.

The general procedure for disposing of a matter where the trial court's "facts found under misapprehension of the law are . . . set aside," would be to remand the case "to the end that the evidence should be considered in its true legal light." *Id.* However, such a procedure is inappropriate in matters such as this, where the evidence in the record is wholly insufficient to prove beyond a reasonable doubt that S.B. 824: (1) was enacted with discriminatory intent, and (2) produces a meaningful disparate impact. *See Snuggs v. Stanly Cnty. Dep't of Pub. Health*, 310 N.C. 739, 741, 314 S.E.2d 528, 529 (1984) (remanding to the trial court for entry of an order of dismissal); *Hunt ex rel. Hasty v. N.C. Dep't of Lab.*, 348 N.C. 192, 199, 499 S.E.2d 747, 751 (1998) (same). Here, plaintiffs have produced insufficient evidence to meet their burden.

To succeed in their claim, plaintiffs must demonstrate not only discriminatory intent, but must also demonstrate that the challenged law actually "produces disproportionate effects along racial lines." *Hunter*, 471 U.S. at 227, 105 S. Ct. at 1920; *see also Irby v. Va. State Bd. of Elections*, 889 F.2d 1352, 1355 (4th Cir. 1989) ("To establish an equal protection violation, a plaintiff must show discriminatory intent *as well as* disparate effect." (emphasis added)). On this point, plaintiffs' evidence consists of incompetent expert testimony and unfounded speculation upon which the trial court found that "S.B. 824 would bear more heavily on African American voters, if permitted to go into effect" because: (1) black voters are more likely to lack qualifying ID; (2) the burdens of obtaining qualifying IDs, including free IDs, fall more heavily on black

voters; and (3) black voters may be more likely to encounter problems navigating the reasonable impediment process.

Regarding the disparate lack of qualifying identifications, plaintiffs' expert failed to consider multiple types of qualifying identifications, the reasonable impediment provision, and the availability of free identifications under S.B. 824. Plaintiffs' expert simply produced a mathematical analysis based on DMV records that showed 7.61% of black voters and 5.47% of white voters lacked *some* of the qualifying IDs under S.B. 824. Such an incomplete consideration of the various forms of qualifying identification under S.B. 824 renders this expert's evidence fatally deficient and incapable of supporting a finding that black voters are more likely to lack the qualifying identifications permitted under S.B. 824.

Furthermore, the trial court's finding that black voters are "39% more likely to lack a form of qualifying ID" than white voters is exactly the kind of "highly misleading" statistical transformation the Supreme Court of the United States has expressly disavowed. *Brnovich*, 141 S. Ct. at 2345. This kind of manipulation of mathematical concepts is used to turn a difference "small in absolute terms," here, 2.14%, into "a distorted picture . . . by dividing one percentage by another," *id.* at 2344–45, and such evidence is insufficient to support a finding that black voters are more likely to lack qualifying identification under S.B. 824.

Similarly, plaintiffs' evidence that the burdens of obtaining qualifying identification, including free identification, fall more heavily on black voters is entirely speculative. Plaintiffs' expert essentially suggests that because "a [b]lack person is 2.5 times more likely to live in poverty as compared to a white person," it must logically follow that black voters would disproportionately suffer a legally significant burden in obtaining a qualifying identification, even if that identification is free. This is merely speculative forecasting and simply ignores the reality that compliance with *any* government licensing or registration requirement requires effort on the part of citizens. "[M]inor inconvenience[s] . . . do[ ] not impose a substantial burden." *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 600 (4th Cir. 2016). Plaintiffs cannot prove such a crucial aspect of their claim by relying on speculation; they must provide sufficient evidence demonstrating that S.B. 824 actually produces disparate impact in reality, not hypothetical circumstances.[8]

8. Further, the panel's assumption that black voters may have difficulty acquiring free identification due to lack of transportation or disabilities is legally suspect because the reasonable impediment provision in S.B. 824 allows individuals to vote without an identification if their inability to obtain an identification is due to, among other things, a "[l]ack of transportation" or "[d]isability or illness." N.C.G.S. § 163-166.16(e)(1)(a)–(b).

The trial court's finding that black voters may be more likely to encounter problems navigating the reasonable impediment process suffers from the same fatal flaw that plagues the previous examples. The trial court merely relied on plaintiffs' evidence of past voters' issues navigating a more restrictive reasonable impediment process in 2016 under H.B. 589 and testimony that "[a] hesitant or infrequent voter *may be* deterred from voting with a reasonable impediment declaration because the process is unfamiliar or because it appears the voter is being treated differently from everyone else at the polls." (Emphasis added). This again is speculation that falls short of the evidence required to support this factual finding.

Thus, because plaintiffs have failed to provide evidence that S.B. 824 would result in disparate impact along racial lines, remand of this case for further consideration in light of the applicable legal standard, presumption, and burden, would be futile. S.B. 824 allows *all* would-be voters in North Carolina to vote either with or without an approved form of identification. Plaintiffs failed to produce sufficient evidence that either they, or any other citizen of this state, would be precluded from voting due to the terms and conditions of S.B. 824. Every prospective voter can vote without an identification if they submit a reasonable impediment affidavit, which can only be rejected if the county board of elections unanimously determines that the declaration is false.[9]

As stated by the Supreme Court of the United States when reviewing Indiana's voter identification law,

> A photo identification requirement imposes some burdens on voters that other methods of identification do not share. For example, a voter may lose his photo identification, may have his wallet stolen on the way to the polls, or may not resemble the photo in the identification because he recently grew a beard. Burdens of that sort arising from life's vagaries, however, are neither so serious nor so frequent as to raise any question about the constitutionality of [Indiana's voter identification law]; the availability of the right

9. The dissent below correctly stated that "[a]s the federal court three-judge panel said of South Carolina's voter-ID law, on which S.B. 824 was modeled, 'the sweeping reasonable impediment provision in [that law]'—which, as noted, is in fact less sweeping tha[n] S.B. 824's—'eliminates any disproportionate effect or material burden that South Carolina's voter ID law otherwise might have caused.' " (quoting *South Carolina v. United States*, 898 F. Supp. 2d 30, 40 (D.D.C. 2012)).

> to cast a provisional ballot provides an adequate remedy for problems of that character.
>
> The burdens that are relevant to the issue before us are those imposed on persons who are eligible to vote but do not possess a current photo identification that complies with the requirements of [Indiana's voter identification law]. . . . But just as other States provide free voter registration cards, the photo identification cards issued by Indiana[ ]are also free. For most voters who need them, the inconvenience of making a trip to [a government office], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.

Crawford, 553 U.S. at 197–98, 128 S. Ct. at 1620–21.[10]

"[M]inor inconvenience[s] . . . do[ ] not impose a substantial burden" on the right to vote, *Lee*, 843 F.3d at 600, and the inconveniences theoretically imposed, not proven, on plaintiffs by S.B. 824 "arise[ ] from life's vagaries" and "are neither so serious nor so frequent as to raise any question about the constitutionality" of the voter identification law here. *Crawford*, 553 U.S. at 197, 128 S. Ct. at 1620. In no way do the hypothetical "disparate inconveniences" claimed by plaintiffs amount to a "denial or abridgement of the right to vote," let alone a denial or abridgment based on race. *Lee*, 843 F.3d at 600–01 (emphasis in original). Arguably, plaintiffs' speculations do not qualify as a legitimate attempt to carry their burden of "establish[ing] that no set

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10. It is undisputed that every legal vote should be counted. In oral argument, however, plaintiffs implied that every provisional ballot should be counted as legal even if not lawfully cast. Oral Argument at 55:01, Holmes v. Moore (No. 342PA19-3) (Mar. 15, 2023), https://www.youtube.com/watch?v=RSJu29af7_4 (last visited Mar. 24, 2023). The trial court's order contains a similar proposition under the guise of a factual finding regarding noncompliant votes in 2016. This is plainly wrong. *See* N.C.G.S. §§ 163-1 to 163-306 (2021); *see also Burdick*, 504 U.S. at 441, 112 S. Ct. at 2067 (citation omitted) ("[T]he right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system."); *Storer v. Brown*, 415 U.S. 724, 730, 94 S. Ct. 1274, 1279 (1974) ("Moreover, as a practical matter, there must be substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."). The right to vote and have a vote counted is dependent upon compliance with established rules and procedures, and to suggest this Court sanction noncompliance is to imply that the law has no meaning.

of circumstances exists under which the [a]ct would be valid." *Salerno*, 481 U.S. at 745, 107 S. Ct. at 2100.

The panel below relied heavily on the fact that plaintiff Mr. Holmes, who has cerebral palsy, has severe scoliosis, and is paraplegic, may encounter difficulties in obtaining a free identification under S.B. 824. Even if we ignore the fact that Mr. Holmes can still vote without an identification under S.B. 824, as discussed above, any difficulties he may face in acquiring an identification have nothing to do with race.

Such is the case with the other plaintiffs and their challenges. There is no evidence that Mr. Kearney's failure to present an identification in 2016 because he left it at home was related to race. Similarly, Mr. Smith's misplacement of his identification in 2016 was not related to race, nor was Mr. Culp's failure to present an acceptable identification in 2016. Setting aside the fact that any difficulties they are assumed to have encountered are wholly irrelevant because they occurred under a prior, much more restrictive law, these difficulties were not attributable to race, and all of these plaintiffs can vote under S.B. 824 without identification.

Moreover, the named plaintiffs can all obtain free identification cards that can be used for eleven years and, even if they fail to do so, can cast provisional ballots that will be counted if they comply with the forgiving requirements of S.B. 824. As the dissenting judge noted below, "[t]here is no credible evidence that obtaining" a form of qualifying identification under S.B. 824 "entails significant financial cost." The record also contains "no evidence that any voter, in particular any African American voter, would be dissuaded from using" the reasonable impediment declaration process if they failed to obtain a qualifying identification.

In sum, for all the aforementioned reasons, plaintiffs have failed to provide evidence sufficient to prove beyond a reasonable doubt that S.B. 824 will result in disparate impact. Because "plaintiff[s] must show discriminatory intent as well as disparate effect," *Irby*, 899 F.2d at 1355, to prevail, plaintiffs' failure to provide sufficient evidence of disparate impact ends the matter. Nevertheless, we note that plaintiffs also fail to provide sufficient evidence of discriminatory intent.

First, plaintiffs failed to produce any witness who could testify to the General Assembly's alleged discriminatory intent or otherwise rebut the presumption of good faith. Representative Harrison, plaintiffs' own witness, testified that she "cannot say that racial bias entered into [passage of S.B. 824] and [she] would not say that racial bias entered into [passage of S.B. 824]." As aptly put by the dissenting judge below, "[i]f

[p]laintiffs' own witness, who was in the General Assembly and actively participated in the passage of this legislation, did not then and does not now attribute the passage of S.B. 824 [to] any discriminatory intent, then this [c]ourt certainly [should] not either."

Further, the evidence that S.B. 824 was passed in a special legislative session, did not receive overwhelming support from Democratic legislators, and was enacted without the consideration of racial data, is wholly insufficient to demonstrate discriminatory intent beyond a reasonable doubt. Because our constitution commands that "[t]he role of the legislature is to balance the weight to be afforded to disparate interests and to forge a workable compromise among those interests," it is not the role of this Court "to sit as a super legislature and second-guess the balance struck by the elected officials." *Bryant*, 359 N.C. at 565, 614 S.E.2d at 486 (alteration in original) (quoting *Harvey*, 315 N.C. at 491, 340 S.E.2d at 731). As the dissent below correctly noted, the General Assembly's decision to comply with the people's command to pass a voter identification law by enacting such a law in a special session in order to override the veto of Governor Cooper, a vocal opponent of *any* such law, "was completely lawful and within [its] authority."

Finally, there are two further fundamental errors below worthy of brief discussion. First, the panel's factual findings regarding both the sequence of events leading to the enactment of S.B. 824 and the legislative history of S.B. 824 misapprehend the relevant presumptions in favor of the law's validity because they fail to properly consider and credit the crucial importance of the voter identification amendment. Because the constitutional amendment created a positive duty for the General Assembly to pass a voter identification law, adoption of S.B. 824 or some similar measure was mandatory, not optional. The evidence, viewed with the proper presumptions of both legislative good faith and constitutional compliance, plainly demonstrates an intent to comply with the peoples' will and the North Carolina Constitution, not an intent to discriminate on the basis of race.

Second, the panel appears to have given considerable weight to the fact that the General Assembly requested racial data when enacting H.B. 589 but did not request racial data when enacting S.B. 824. It bears repeating that the request of racial data, and the use of that data, was one of the primary reasons the Fourth Circuit held that H.B. 589 was enacted with discriminatory intent. *See McCrory*, 831 F.3d at 230; *see also Raymond*, 981 F.3d at 308–09 ("The 2018 Voter-ID Law's legislative history is otherwise unremarkable. Nothing here suggests that the General Assembly used racial voting data to disproportionately

target minority voters 'with surgical precision.' " (quoting *McCrory*, 831 F.3d at 214)).

According to the trial court, because the General Assembly did not request this data, "the legislature did not know whether these changes between S.B. 824 and H.B. 589 would have any impact on the racial disparities in ID possession rates that had been documented during the H.B. 589 litigation." Paradoxically, the trial court nevertheless implied, in the absence of any evidence, that the "62 members of the legislature who voted for H.B. 589 [and] also voted for S.B. 824" relied on the H.B. 589 data when enacting S.B. 824, stating that it was "implausible that these legislators did not understand the potential that S.B. 824 would disproportionately impact [black] voters, just as H.B. 589 had done."

Thus, in the absence of any evidence that any legislator utilized racial data from *McCrory*, and in direct contradiction of the testimony from Representative Harrison, the trial court imputed knowledge to 62 members of the General Assembly and presumed bad faith of an entire branch of our government. The General Assembly was placed in a "damned if you do, damned if you don't" conundrum in which, had it used racial data, it would run afoul of the prior admonition in *McCrory*, and by not using such data, it could never satisfy the trial court's application of the *Arlington Heights* test. There was, thus, no option available to the legislature that could lead to implementation of a voter identification measure. This is exactly the kind of reasoning explicitly disavowed by the Supreme Court of the United States and the Fourth Circuit. As stated by the Fourth Circuit:

> [T]he [trial] court emphasized that the General Assembly's positions had "remained virtually unchanged" between *McCrory* and the enactment of the 2018 Voter-ID Law. And the court assumed that the racial data remained in the minds of the legislators: "[T]hey need not have had the racial data in hand to still have it in mind." By focusing on *who* passed the 2018 Voter-ID Law and requiring the General Assembly to purge the taint of the prior law, the district court flipped the burden and disregarded *Abbott*'s presumption.

Raymond, 981 F.3d at 304–05 (third alteration in original); *see also Abbott*, 138 S. Ct. at 2324 ("[T]he good faith of the state legislature must be presumed. The allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination." (cleaned up)).

When this matter is considered under the applicable legal standards, plaintiffs can neither carry their burden of demonstrating discriminatory intent beyond a reasonable doubt nor their burden of demonstrating meaningful disparate impact beyond a reasonable doubt. Therefore, the order below is reversed and we remand to the trial court for entry of a dismissal in this matter.

IV. Conclusion

"A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. Const. art. I, § 35. This humble reminder applies not just to individual rights preserved by our Constitution, but to the fundamental structure of our government, without which rights cannot properly be protected.

In North Carolina "[t]he legislature is the great and chief department of government. It alone is created to express the will of the people." *Wilson v. Jordan*, 124 N.C. 683, 701, 33 S.E. 139, 150 (1899) (Clark, J., dissenting). Indeed, "for the courts to strike down valid acts of the [l]egislature would be wholly repugnant to, and at variance with, the genius of our institutions." *Revis*, 193 N.C. at 196, 136 S.E. at 348.

The people of North Carolina overwhelmingly support voter identification and other efforts to promote greater integrity and confidence in our elections. Subjective tests and judicial sleight of hand have systematically thwarted the will of the people and the intent of the legislature. But no court exists for the vindication of political interests, and judges exceed constitutional boundaries when they act as a super-legislature. This Court has traditionally stood against the waves of partisan rulings in favor of the fundamental principle of equality under the law. We recommit to that fundamental principle and begin the process of returning the judiciary to its rightful place as "the least dangerous" branch. The Federalist No. 78 at 402 (Alexander Hamilton) (Gideon ed. 2001).

Plaintiffs here have failed to prove beyond a reasonable doubt that S.B. 824 was enacted with discriminatory intent or that the law actually produces a meaningful disparate impact along racial lines. The prior opinion is withdrawn, and we reverse and remand to the trial court for entry of an order dismissing plaintiffs' claim with prejudice.

REVERSED AND REMANDED.

Justice MORGAN dissenting.

Not long ago, the current Chief Justice of this Court, who is the most senior member of the majority in the present case, observed in a dissenting opinion:

> Judicial activism is a philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore governing texts and precedents. It is difficult to imagine a more appropriate description of the action that the majority takes today.

State v. Kelliher, 381 N.C. 558, 597 (2022) (Newby, C.J., dissenting) (extraneity omitted). Consistent with this swashbuckling view, the Chief Justice also wrote this richly ironic nugget a few years back as a dissenter in one of this Court's opinions:

> As a monarch, King Louis XVI once famously said, "*C'est légal, parce que je le veux*" ("It is legal because it is my will."). Today, four justices of this Court adopt the same approach to the law, violating the norms of appellate review and disregarding or distorting precedent as necessary to reach their desired result. Apparently, in their view, the law is whatever they say it is. . . .
>
> . . . .
>
> . . . Instead of doing the legally correct thing, the majority opinion picks its preferred destination and reshapes the law to get there.

State v. Robinson, 375 N.C. 173, 193, 195 (2020) (Newby, J., dissenting) (footnote omitted).

In uniform fashion, the author of the majority opinion in this case[1] recently offered this dissenting view in one of this Court's decisions:

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1. For clarity, the authoring justice of the majority opinion and the identity of one of the named defendants are not one and the same. Although the two individuals have identical first and last names, the named defendant is the father of the authoring justice.

> The majority's dismissal of our precedent here is deeply troublesome, yet increasingly unsurprising. . . .
>
> . . . .
>
> That the majority has injected chaos and confusion into our political structure is self-evident.

N.C. State Conf. of the NAACP v. Moore, 382 N.C. 129, 182, 197 (2022) (Berger, J., dissenting).

Similarly, yet a third member of the majority in the instant case freshly penned this dissenting observation in response to an order of this Court a short time back:

> [T]he 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.

Harper v. Hall, 382 N.C. 314, 317 (2022) (order allowing expedited hearing and consideration) (Barringer, J., dissenting).

It is apparent from the artfully chosen words of my three distinguished colleagues that they have not been reticent about the notion of introducing partisan politics into this Court's opinions when they disagreed with various case outcomes. Indeed, these three justices of the majority have clearly been enamored with this strategic approach which has been conveniently conceived in order to cast aspersions in certain categories of cases which this Court decided in a manner which differed from their three united orientations. Yet now, joined by two more justices who subscribe to the trio's identical politically saturated legal philosophies and who were elected to serve on the Court since the dissenting opinions cited above were written, the five justices which constitute the majority here have emboldened themselves to infuse partisan politics brazenly into the outcome of the present case. This majority's extraordinarily rare allowance of a petition for rehearing in this case, mere weeks after this newly minted majority was positioned on this Court and mere months after this case was already decided by a previous composition of members of this Court, spoke volumes. My consternation with the majority's abrupt departure from this Court's institutionalized stature—historically grounded in this forum's own reverence for its caselaw precedent, its deference to the rule of law, and its severance from partisan politics—is colossal. When convenient at the time, Chief Justice Newby wrote in his dissenting opinion in *Harper v. Hall*:

> [T]he majority today wholeheartedly ushers this Court into a new chapter of judicial activism, severing ties with over two hundred years of judicial restraint in this area. . . . Undeterred, it untethers itself from history and caselaw.

380 N.C. 317, 434 (2022) (Newby, C.J., dissenting). As a member of the majority in the instant case, the Chief Justice's own words unwittingly and succinctly happen to apply to him and his counterparts of the majority in this case. I must dissent.

"All . . . will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable; that the minority possess their equal rights, which equal law must protect, and to violate would be oppression." President Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), available at https://avalon.law.yale.edu/19th_century/jefinau1.asp. Although the sentiment that all persons be afforded equal protection of the law was expressed early and often in the founding of our great republic, any substantive guarantee embedded in this provision did not come into fruition until much later in the respective histories of the nation and of this state. In particular, suffrage, a fundamental right that "is preservative of other basic civil and political rights," *Reynolds v. Sims*, 377 U.S. 533, 562 (1964), was explicitly restricted to white male property owners in North Carolina following the Constitutional Convention of 1835 and was not re-extended to Black people until 1868 following the conclusion of the Civil War and the beginning of Reconstruction.

Even then, Democrats, realizing that the interests of Blacks were better aligned with the Republican and Populist Parties at the time, began a campaign of racist rhetoric, violence, and outright fraud in order to regain a majority. J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910* 188 (1974). Once in office, the legislators passed a law in 1899 that relocated the power to appoint election officers from local officials to a state election board selected by the General Assembly which eventually became controlled by the Democrats. *Id.* at 190. The legislative body required voters to re-register and allowed registrars to disfranchise anyone as they saw fit. *Id.* In 1900, the Democratic General Assembly passed a constitutional amendment that required the completion of a literacy examination and payment of a poll tax in order to establish one's eligibility to vote. *Id.* at 190–95. As a result of this and

other facially neutral measures,[2] which exempted men who were eligible to vote in 1867 or whose fathers or grandfathers were eligible to vote in 1867 (i.e., white men) and empowered county officials to act as gatekeepers by administering the highly subjective literacy tests, Black voter turnout plummeted, and the state remained under conservative control until the mid-twentieth century. *Id.*

After the Voting Rights Act of 1965 was passed as part of the American civil rights movement, North Carolina was forced to remove many barriers to voting that had been previously implemented throughout the state, including the aforementioned literacy examination.[3] The Act also required that certain counties across the United States, including forty counties within North Carolina, obtain preclearance from the federal government before implementing any new election laws in order to ensure that any such laws would not be discriminatory in nature. A year later, registration of Black voters in North Carolina exceeded fifty percent for the first time since 1900. J. Morgan Kousser, *When African-Americans Were Republicans in North Carolina, The Target of Suppressive Laws Was Black Republicans. Now That They Are Democrats, The Target Is Black Democrats. The Constant Is Race* 14 (Apr. 17, 2014), https://www.aclu.org/sites/default/files/assets/lwv_expert_report_-_m__kousser.pdf. During this time, the General Assembly also passed a number of laws that had the effect of increasing access to voting, including laws that authorized early voting, out-of-precinct voting, same-day registration, and preregistration for teenagers. These efforts collectively boosted the registration of Black voters in the state by fifty percent and dramatically increased voter turnout, especially of Black voters. *Id.* at 17.

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2. As the United States Supreme Court held in 1959, the state's literacy requirement did not, on its face, violate the Fifteenth Amendment by denying the right to vote on the basis of race. *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 53 (1959). Noteworthily, Henry Frye, who was the first Black person to serve on this Court and who eventually became this Court's first Black Chief Justice, was denied the right to register to vote on the grounds that he was deemed to have failed this literacy test, even after graduating with highest honors from the collegiate institution now known as North Carolina Agricultural and Technical State University and after attaining the rank of Captain upon serving four years in the United States Air Force. Although he was declared unable to vote, he was accepted into the University of North Carolina School of Law and graduated with its law degree in 1959. *See* Adrienne Dunn, "Henry Frye," North Carolina History Project, https://northcarolinahistory.org/encyclopedia/henry-e-frye-1932/.

3. Although the Voting Rights Act banned states from requiring the completion of literacy tests as a prerequisite to voting, the literacy requirement remains part of the state Constitution as a "not . . . particularly pleasing relic" of North Carolina's racial past. Michael Hyland, *Bipartisan measure aims to remove literacy requirement from North Carolina Constitution*, FOX 8 (Mar. 2, 2023), https://myfox8.com/news/politics/your-local-election-hq/bipartisan-measure-aims-to-remove-literacy-test-from-north-carolina-constitution/.

Nevertheless, state politics have remained racially polarized going into the twenty-first century, "offer[ing] a political payoff" for legislators to "dilute or limit the minority vote," *Holmes v. Moore*, 270 N.C. App. 7, 22 (2020) (extraneity omitted), since the disenfranchisement of Black voters "predictably redound[ed] to the benefit of one political party and to the disadvantage of the other." *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016), *cert denied sub nom. North Carolina v. N.C. State Conf. of the NAACP*, 581 U.S. 985 (2017). For instance, after the United States Supreme Court invalidated the Voting Rights Act's preclearance requirements in 2013 through its decision in *Shelby County v. Holder*, 570 U.S. 529 (2013), the North Carolina General Assembly rapidly put together an omnibus bill altering state election law that the Fourth Circuit determined was motivated, at least in part, by discriminatory racial intent. *McCrory*, 831 F.3d at 233. This law eliminated or curtailed many voter-friendly initiatives that had been introduced in the 1960s—including early voting, same-day registration, and preregistration—and included a provision that required voters to present photographic identification in order to vote in person. *Id.* at 214–17. The Fourth Circuit found that the state legislature had crafted this law with the knowledge and intent that it would disproportionately impact Black voters who disproportionately made use of those initiatives that the bill worked to curtail or eliminate, tended to lack the forms of identification deemed acceptable by the Republican General Assembly, and voted overwhelmingly for the Democratic Party. *Id.*

"Unquestionably, North Carolina has a long history of race discrimination generally and race-based vote suppression in particular." *Id.* at 223. This historical reality is not one that anyone can legitimately deny, although the majority appears to represent in a footnote in its written opinion that the mere current presence of one Black man and one Black woman who were both elected to this Court, coupled with other individuals expressly identified by the majority who are members of the Black race who have also been elected to office in North Carolina in modern times, proves that this state has progressed so much that this state's contemptible racial history regarding electoral politics bears no logical relation to its present-day political climate.[4] This naïveté, if such, would be appalling; this callousness, if such, would be galling.

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4. It is both noteworthy and instructive that legislation intended to limit suffrage along racial lines was specifically introduced as backlash to the election of Black legislators during the Reconstruction Era, indicating both that racial progress is not always linear and that political gains for minorities often precede conservative pushback to universal suffrage. Olivia B. Waxman, *The Legacy of the Reconstruction Era's Black Political Leaders*, Time (Feb. 7, 2022), https://time.com/6145193/black-politicians-reconstruction/.

Courts are not obliged to turn a blind eye to the historical circumstances that might inform present-day efforts to encumber, restrict, or otherwise discourage the exercise of the precious right to vote. An equilibrium between presuming legislative good faith, while remaining cognizant of the insidious nature of discriminatory intent as a potential motivation for facially neutral legislative acts, is precisely what was captured by the United States Supreme Court when it decided *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). In issuing its decision in *Arlington Heights*, the nation's highest court recognized that "[t]he historical background of [a legislative act] is one evidentiary source" relevant to discriminatory intent, "particularly if it reveals a series of official actions taken for invidious purposes." *Id.* at 267. While the Supreme Court has subsequently cautioned that "past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful," *Mobile v. Bolden*, 446 U.S. 55, 74 (1980) (plurality opinion), it remains the case that historical discrimination is a relevant factor in ascertaining the existence of present discriminatory intent. *Abbott v. Perez*, 138 S. Ct. 2305, 2351–52 (2018) (Sotomayor, J., dissenting).

My esteemed colleagues who constitute the majority granted petitioners' request for rehearing of this case on the grounds that a previous majority of this Court was deemed to have committed legal error by failing to afford the General Assembly its presumption of good faith in accordance with federal precedent. However, in an egregious twist and twirl, this Court obliterates its recognition of federal precedent altogether in order to introduce its own new standard of review for equal protection claims arising under the state Constitution. In doing so, this majority conveniently and haughtily spurns federal caselaw precedent fostered by the decision of the United States Supreme Court in *Arlington Heights*, while simultaneously upending decades of state constitutional principles, in its quest to shield acts of the state legislature from scrutiny for invidious discriminatory intent.

I. Background and Standard of Review

"Using race as a proxy for party may [still] be an effective way to win an election." *McCrory*, 831 F.3d at 222. Even in the absence of explicit "race-based hatred" or animus, "intentionally targeting a particular race's access to the franchise because its members vote for a particular party, in a predictable manner, constitutes discriminatory purpose." *Id.* Furthermore, racially neutral laws motivated by discriminatory intent are "just as abhorrent, and just as unconstitutional, as laws that expressly discriminate on the basis of race." *Id.* at 220. Because

"[o]utright admissions of impermissible racial motivation are infrequent" in the contemporary context, *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999), courts must often make a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available" when determining whether a legislative body has acted with discriminatory intent in violation of the state or federal constitution. *Arlington Heights*, 429 U.S. at 266.

In deciding *Arlington Heights*, the United States Supreme Court established a nonexhaustive list of factors that courts may consider probative on this question, including: (1) the historical background of the action; (2) the sequence of events leading up to its enactment, including any departures from the normal procedural or substantive operations of that legislative body; (3) the law's legislative and administrative history; and (4) whether the law's effect "bears more heavily on one race than another." *Id.* at 266–68. Discriminatory purpose "may often be inferred from the totality of the relevant facts," *Washington v. Davis*, 426 U.S. 229, 242 (1976), and courts do not consider "each piece of evidence in a vacuum," but the "totality of the circumstances" when ascertaining the presence of discriminatory intent. *McCrory*, 831 F.3d at 233. The Supreme Court has further provided that, because legislative bodies are "[r]arely . . . motivated solely by a single concern," a plaintiff need only demonstrate that "invidious discriminatory purpose was a motivating factor" in the enactment of a piece of legislation, *Arlington Heights*, 429 U.S. at 265–66, before the burden shifts onto the legislature to demonstrate that "the law would have been enacted without this factor." *Hunter v. Underwood*, 471 U.S. 222, 228 (1985).[5] "[T]he ultimate question" then becomes whether a law was enacted "because of," rather than "in spite of," the discriminatory effect it would produce. *McCrory*, 831 F.3d at 220 (quoting *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

As a preliminary matter, the case before us was brought under Article I, Section 19 of the Constitution of North Carolina, which provides that "No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin." N.C. Const. art. I, § 19. This provision "expressly incorporated" the Equal Protection Clause that had been "made explicit in the Fourteenth Amendment to the Constitution of the United States." *S. S. Kresge Co. v. Davis*, 277 N.C. 654, 660 (1971). As such, "[t]his Court's analysis of the State Constitution's Equal Protection

5. The initial burden of proof by which plaintiffs must demonstrate that racial discrimination was a motivating factor in the adoption of a facially neutral act under *Arlington Heights* is by a preponderance of the evidence. *Hunter*, 471 U.S. at 225.

Clause generally follows the analysis of the Supreme Court of the United States in interpreting the corresponding federal clause." *Blankenship v. Bartlett*, 363 N.C. 518, 522 (2009). "However, in the construction of the provision of the State Constitution, the meaning given by the Supreme Court of the United States to even an identical term in the Constitution of the United States is, though highly persuasive, not binding upon this Court." *Bulova Watch Co. v. Brand Distribs. of N. Wilkesboro, Inc.*, 285 N.C. 467, 474 (1974). We maintain our authority to construe our state Constitution and its provisions separately from their federal analogues, so long as "our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision[s]." *Stephenson v. Bartlett*, 355 N.C. 354, 380–81 n.6 (2002) (quoting *State v. Carter*, 322 N.C. 709, 713 (1988)). The federal Constitution is a floor, below which we cannot sink. The majority ignores this fundamental principle.

In determining whether Senate Bill 824 violates Article I, Section 19 of the Constitution of North Carolina, this Court must accept any findings of fact made by the trial court as conclusive when supported by any competent evidence. When the trial court acts as factfinder, "the trial court's findings of fact . . . are conclusive on appeal if there is competent evidence to support them, even [if] the evidence could be viewed as supporting a different finding." *In re Estate of Skinner*, 370 N.C. 126, 139 (2017) (quoting *Bailey v. State*, 348 N.C. 130, 146 (1998)). Findings of fact that are "supported by competent, material and substantial evidence in view of the entire record[ ], are conclusive upon a reviewing court and not within the scope [of its] reviewing powers." *Id.* at 139 (alteration in original) (quoting *In re Revocation of Berman*, 245 N.C. 612, 616–17 (1957)). However, a trial court's conclusion as to whether a statute is constitutional, made in light of its findings of fact, is a question of law that this Court reviews de novo. *State v. Romano*, 369 N.C. 678, 685 (2017).

II. Discussion

"It is the state judiciary that has the responsibility to protect the state constitutional rights *of* the citizens; this obligation to protect the fundamental rights of individuals is as old as the State." *Corum v. UNC*, 330 N.C. 761, 783 (1992) (emphasis added). Rather than choosing to honor that duty, the majority instead strives to protect the state legislature *from* the citizens—first, by adopting a standard of proof for equal protection claims brought under Article I, Section 19 of the Constitution of North Carolina that unduly diminishes a claimant's ability to prevail and, second, by misconstruing federal precedent to neuter the sensitive inquiries specifically authorized under *Arlington Heights*.

A. The New Majority's Novel Standard of Proof

Throughout its opinion, the majority adopts an unprecedented burden of proof for claimants bringing equal protection claims arising under our state Constitution. Although the majority repeatedly characterizes its framework as traditional and consistent with the bulk of state authority, the depiction is, mildly put, a freewheeling exaggeration. In fact, the majority's new standard departs sharply from both federal *and* state precedent by abandoning the traditional equal protection framework and construing a provision of our state Constitution as providing lesser protection to citizens of our state than its federal analogue.

The majority cites numerous opinions of this Court for its assertion that facial constitutional challenges to an act of the legislature must be proven beyond a reasonable doubt. *See State v. Strudwick*, 379 N.C. 94 (2021); *Cooper v. Berger*, 370 N.C. 392 (2018); *Hart v. State*, 368 N.C. 122 (2015); *Pope v. Easley*, 354 N.C. 544 (2001); *Baker v. Martin*, 330 N.C. 331 (1991). The majority implies that these cases establish some state-specific analytical jurisprudence that departs from the federal framework and supersedes *Arlington Heights*; however, none of these cases concern equal protection claims arising under Article 1, Section 19 of the Constitution of North Carolina. This is a crucial misfire because precedent specific to Article 1, Section 19 tends to favor identical construction to the Fourteenth Amendment. *See S. S. Kresge Co.*, 277 N.C. at 660 ("[T]he principle of the equal protection of the law, made explicit in the Fourteenth Amendment to the Constitution of the United States . . . has now been expressly incorporated in Art. I, § 19, of the Constitution of North Carolina . . . ."); *Blankenship*, 363 N.C. at 522 ("This Court's analysis of the State Constitution's Equal Protection Clause generally follows the analysis of the Supreme Court of the United States in interpreting the corresponding federal clause.").

Furthermore, state jurisprudence favors a more liberal construction of state constitutional provisions as compared to their federal analogues and disavows any construction that would afford citizens fewer protections than are afforded federally. *See Carter*, 322 N.C. at 713 ("[W]e have the authority to construe our own constitution differently from the construction by the United States Supreme Court of the Federal Constitution, *as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision*." (emphasis added)); *see also Stephenson*, 355 N.C. at 380–81 (applying this principle to the Equal Protection Clause); *Corum*, 330 N.C. at 783 ("Our Constitution is more detailed and specific than the federal Constitution in the protection of the rights of its citizens."). The majority's decision flies in the face

of this precedent by rejecting *Arlington Heights* on the grounds that it makes it too easy for citizens of this state to succeed on claims that legislative acts were enacted with discriminatory intent and thereby to assert their right to equal protection of the law.

The majority contends that its adoption of the "beyond a reasonable doubt" standard is justified by the pursuit of objectivity and consistency. Specifically, the majority appears to be gravely concerned that courts applying *Arlington Heights* might come to different conclusions concerning the constitutionality of the same legislative act. However, inconsistent outcomes are a regular byproduct of complicated, fact-intensive legal inquiries which appellate courts are presumably equipped to review. Furthermore, the entire purpose of *Arlington Heights* and its progeny is to empower plaintiffs alleging equal protection claims against legislation which appears neutral on its face to put forward "such circumstantial and direct evidence . . . as may be available" across a range of factors that the Supreme Court of the United States has deemed probative on the question of discriminatory intent. 429 U.S. at 266.[6] By the very nature of such claims, the evidence presented by plaintiffs in these types of cases will necessarily appear from sources other than the face of the challenged piece of legislation; consequently, different groups of plaintiffs challenging the same law may build entirely different records from which factfinders may derive entirely different factual findings upon which to base their legal conclusions. These circumstances are routine and do not justify the extreme departure from proven precedent which the majority cavalierly creates.

As if this new standard of proof were not enough to ensure its desired outcome, the majority imposes additional hurdles onto plaintiffs in the form of legal tests that are not ordinarily applied to equal protection claims. Specifically, the majority discusses the so-called *Salerno* test, which establishes that an individual challenging the facial constitutionality of a legislative act "must establish that no set of circumstances exist under which the [a]ct could be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see also State v. Bryant*, 359 N.C. 554, 564 (2005). However, this test is rarely applied as strictly as it was conceived, *see Washington v. Glucksberg*, 521 U.S. 702, 740 (1997) (Stevens, J., concurring), and is barely applied at all in several areas of constitutional

6. Although the majority does not specifically state that its new legal framework disfavors the *Arlington Heights* factors as legitimate sources of evidence bearing on the issue of discriminatory intent, it does opine that evidence declared to be sufficient under the *Arlington Heights* framework is "by its very nature speculative" and open to subjective interpretation.

law, including Equal Protection Clause jurisprudence. *See* Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 Wm. & Mary Bill Rts. J. 657, 659–65 (2010); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235, 238–39 (1994). To the extent that this Court has previously cited *Salerno*, it has never been within the context of an equal protection claim. Finally, the United States Supreme Court itself has questioned the ongoing viability of this aspect of *Salerno* altogether. *See City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999) ("To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself . . . .").

B. The Majority's Abuse of *Abbott* and *Raymond*

Unsatisfied with its ability to eschew the federal framework for one which all but guarantees the state legislature's indemnity from plaintiffs' pesky claims of racial discrimination, the majority attempts to extract overly broad legal principles from two federal decisions that, as it acknowledges, are not binding on this Court and were cabined by their own records on appeal in order to claim that the trial court's analysis not only faltered under this Court's entirely new state standard, but also under a traditional application of *Arlington Heights*. However, neither case stands for such a sweeping proposition as the majority would assign to it and, in fact, both cases happen to expressly acknowledge historical context as a permissible source of insight into present legislative intent. Furthermore, both the United States Supreme Court in *Abbott*, as well as the Fourth Circuit in *Raymond*, were confronted with trial court findings that were distinctly and thoroughly flawed by the misapplication of the proper burden of proof. In the absence of such error by the trial court in the present case, the majority's effort to analogize the trial court's decision in this case with those presented in *Abbott* and *Raymond* falls flat.

i. *The United States Supreme Court's Decision in* Abbott v. Perez

In *Abbott*, the United States Supreme Court reversed in part the decision of a three-judge panel sitting in the Western District of Texas, finding that the redistricting plans adopted by the 2013 Texas Legislature had not been "cured" of the unlawful discriminatory intent that had been previously found in the plans adopted by the Texas Legislature in 2011. 138 S. Ct. at 2313. The *Abbott* Court held that the district court had "committed a fundamental legal error" by requiring "the State to show that the 2013 Legislature somehow purged the 'taint' that the court

attributed to the defunct and never-used plans enacted by a prior legislature in 2011." *Id.* at 2313, 2324. The Supreme Court acknowledged that *Arlington Heights* applied, and that the historical background of the 2013 redistricting plans was relevant to the question of whether they were enacted with discriminatory intent; however, it also emphasized that a finding of past discrimination alone did not justify shifting the burden of proof from plaintiffs to the State. *Id.* at 2324. The high Court therefore concluded that "the essential pillar of the three-judge court's reasoning was critically flawed" and that, reviewed under the "proper legal standards," all but one of the legislative districts were lawful. *Id.* at 2313–14.

The *Abbott* Court determined that, aside from the legislative body's prior bad acts, both the direct and circumstantial evidence did not support the district court panel's conclusion that the 2013 Texas Legislature had acted with discriminatory intent. *Id.* at 2327. The Supreme Court credited the fact that the 2013 redistricting plans had been approved and adopted by the three-judge court itself, and that the state attorney general had advised the 2013 Legislature that adopting these plans was the easiest way to bring legal challenges to a close as "expeditiously as possible," thus indicating the legislature's legitimate intent to adopt court-approved plans as a means of ending litigation. *Id.* at 2313, 2327. Meanwhile, it discredited the federal district court's inferences of unlawful intent as unsound and without supporting evidence. *Id.* at 2327–29. As such, the *Abbott* Court opined that the federal district court's inappropriate reallocation of the burden of proof onto the State was "central" to its analysis, noting that the lower court had

> referred repeatedly to the 2013 Legislature's duty to expiate its predecessor's bad intent, and when the court summarized its analysis, it drove the point home. It stated: "The discriminatory taint [from the 2011 plans] was not removed by the Legislature's enactment of the Court's interim plans, because the Legislature engaged in no deliberative process to remove any such taint, and in fact intended any such taint to be maintained but be safe from remedy."

Id. at 2325–26 (alteration in original) (quoting *Perez v. Abbott*, 274 F. Supp. 3d 624, 649 (W.D. Tex. 2017)). Having concluded that the plaintiffs had not met their burden of proof to demonstrate discriminatory intent under the correct legal standard except in the case of one district which had a design explicitly predicated on race, the Court reversed in part, affirmed in part, and remanded to the trial court. *Id.* at 2335.

The majority strains to construe *Abbott* as impacting the present case in at least two ways. First, the majority misconstrues the directive in *Abbott* that a finding of past discrimination cannot *alone* justify reallocating the burden of proof from plaintiffs onto the State as indicating that the trial court's findings in the present case, considering the historical background of Senate Bill 824, had *no* bearing on the intent of the legislature which had passed it. Second, the majority regards *Abbott* as permission for this Court to entirely disregard the second prong of *Arlington Heights* absent a finding that the General Assembly here not only deviated from its normal operating procedures but deviated so grossly as to have acted outside of its legitimate constitutional power. However, the United States Supreme Court's holding in *Abbott* cannot legitimately be stretched by the majority to substantiate the liberties which it takes with the high court's instructive reasoning in *Abbott*.

First, the *Abbott* Court's holding that the federal district court had improperly flipped the burden of proof was neither based on the lower court's mere consideration of the law's historical background, nor stray references to a prior legislature's discriminatory intent or knowledge of the plans' potential discriminatory impact. Indeed, the Supreme Court in *Abbott* fully recognized the relevancy of the 2013 redistricting plans' historical background, including the prior finding of discrimination on the part of the 2011 Legislature:

> In holding that the District Court disregarded the presumption of legislative good faith and improperly reversed the burden of proof, *we do not suggest either that the intent of the 2011 Legislature is irrelevant* or that the plans enacted in 2013 are unassailable because they were previously adopted on an interim basis by the Texas court. *Rather, both the intent of the 2011 Legislature and the court's adoption of the interim plans are relevant to the extent that they naturally give rise to—or tend to refute—inferences regarding the intent of the 2013 Legislature.* They must be weighed together with any other direct and circumstantial evidence of that Legislature's intent. But when all the relevant evidence in the record is taken into account, it is plainly insufficient to prove that the 2013 Legislature acted in bad faith and engaged in intentional discrimination.

Id. at 2326–27 (emphases added). Justice Sotomayor's dissent in *Abbott* credits the majority for exactly this distinction, noting that the majority

opinion "does not question the relevance of historical discrimination in assessing present discriminatory intent. Indeed, [it] leaves undisturbed the longstanding principle recognized in *Arlington Heights* that the historical background of a legislative enactment is one evidentiary source relevant to the question of intent." *Id.* at 2351–52 (Sotomayor, J., dissenting) (extraneity omitted).

Instead, the holding in *Abbott* reflects the fact that the federal district court in that case had allowed the previous legislature's intent not only to invade its considerations of the other *Arlington Heights* factors, but also to dictate the lower court's findings at each stage by requiring the legislature to affirmatively prove that it had cured the discriminatory taint of the prior legislative body. *See Perez*, 274 F. Supp. 3d at 648. It would be nearly impossible to disentangle the *Perez* court's factual findings from its improper legal framework because, as the federal district court itself explicitly stated, it conducted its analysis believing that the "most important consideration [was] whether the 2011 plans continue[d] to have discriminatory or illegal effect, and whether the [2013] reenactment further[ed] that existing discrimination." *Id.* The Supreme Court addressed this misconception in deciding that the lower court had committed legal error, unequivocally declaring that: "[u]nder these circumstances, there can be no doubt about what matters: It is the intent of the 2013 Legislature. And it was the plaintiffs' burden to overcome the presumption of legislative good faith and show that the 2013 Legislature acted with invidious intent." *Abbott*, 138 S. Ct. at 2325.

Conversely, the trial court made no such legal error in the present case. The tribunal correctly identified the applicable legal framework as supplied by *Arlington Heights* and accurately acknowledged throughout that plaintiffs bore the initial burden of proving that Senate Bill 824 was enacted with discriminatory intent before defendants would ever be required to demonstrate that the law would have been enacted absent discrimination as a motivating factor. Unlike the federal district court in *Perez*, the trial court in this case never contemplated that the primary consideration might be the intent of the prior legislature that had passed the previous voter identification provision; indeed, it never strayed from its objective to determine the intent of the legislature which passed Senate Bill 824 using the factors provided by *Arlington Heights*. While, in its thorough analysis, the trial court referenced both the previous voter identification law, House Bill 589—and the Fourth Circuit's decision in *McCrory* that had determined that House Bill 589 was itself passed with discriminatory intent—the trial court appropriately did so by properly considering House Bill 589 as part of the overall historical

background leading up to Senate Bill 824 and by using *McCrory*'s analysis of House Bill 589 in order to guide its own analysis of Senate Bill 824 rather than to dictate its outcome.

The majority ascribes much significance to one of the trial court's numerous subheadings in the lower forum's issued order: "The Design of S.B. 824 Does Not Evince an Intent by the General Assembly to Cure Racial Disparities Observed Under H.B. 589." This organizational entry, and the trial court's subsequent analysis appearing under the section, do not constitute an improper reallocation of the burden of proof onto defendants. In this portion of its order, the trial court rejects some of defendants' counterarguments as to why and how the legislative history of Senate Bill 824 did not raise "additional red flags." Before reaching this section, as well as the one immediately following it which concluded that the "Limited Democratic Involvement in Enacting S.B. 824 [Did] Not Normalize the Legislative Process," however, the trial court specifically found that Senate Bill 824 had been enacted in an unusually expeditious process, leaving little time for concerns to be addressed about the law's impact on minority voters. The trial court further specifically found that amendments to the legislative bill that were proposed which might have benefitted Black voters were rejected and not incorporated into the final law. In the aforementioned category of the trial court's order, the tribunal acknowledged that Senate Bill 824 included forms of qualifying identification which were not included in House Bill 589 before concluding that the General Assembly did not "consider any updated racial demographic data prior to the enactment of S.B. 824" and, therefore, could not be credited with actively persevering to reduce the known racial impact of requiring voters to present photographic identification. This segment of the trial court's order did not directly ascribe the *discriminatory intent* of the legislature that had passed House Bill 589 to the legislature that had passed Senate Bill 824; instead, it recognized the known disparate impact of a photographic identification requirement to vote, evidenced in part by data from the implementation of House Bill 589; the fact that those amendments that would specifically assist Black voters in accessing the franchise despite such a requirement were rejected by the General Assembly; and that those additional forms of identification that were integrated into the final law were not fashioned to alleviate the law's disparate racial impact. All of these findings by the trial court were supported by competent evidence and should have been taken as conclusive on appeal.

The majority also cites *Abbott* for the majority's proposition that a speedy legislative process cannot give rise to an inference of bad faith.

In *Perez*, the federal district court found that the 2013 Texas Legislature "pushed the redistricting bills through quickly in a special session." 274 F. Supp. 3d at 649. The federal district court noted that the Texas Attorney General had urged the legislature to adopt the redistricting plans during the regular session, but that the regular session ended in May 2013 with no redistricting action, whereupon the Governor of Texas called a special session to consider legislation ratifying and adopting the court-approved redistricting plans. *Id.* at 634. On this point, the United States Supreme Court provided that:

> we do not see how the brevity of the legislative process can give rise to an inference of bad faith—and certainly not an inference that is strong enough to overcome the presumption of legislative good faith . . . . The "special session" was necessary because the regular session had ended. As explained, the Legislature had good reason to believe that the interim plans were sound, and the adoption of those already-completed plans did not require a prolonged process. After all, part of the reason for adopting those plans was to avoid the time and expense of starting from scratch and leaving the electoral process in limbo while that occurred.

Abbott, 138 S. Ct. at 2328–29. The majority clings to this snippet from *Abbott* in an effort to discredit the trial court's findings that the sequence of events leading to the enactment of Senate Bill 824 was unusual and "[m]arked by [d]epartures from [n]ormal [l]egislative [p]rocedure."

However, the relevant inquiry under *Arlington Heights* is not whether a challenged action was adopted after a brief legislative process as opposed to a lengthy one; rather, *Arlington Heights* directs courts to consider "[d]epartures from the normal procedural sequence." 429 U.S. at 267. Cases applying the *Arlington Heights* factors suggest that an actor's "normal procedural sequence" should be defined by the procedural norms of that particular entity. *See*, *e.g.*, *Familias Unidas Por La Educación v. El Paso Indep. Sch. Dist.*, 2022 U.S. Dist. LEXIS 180846 at *23–25 (W.D. Tex. 2022) (finding that the public school district had deviated from *its* typical procedures by failing to involve community members in its decision to close three elementary schools); *Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish*, 641 F. Supp. 2d 563, 573–74 (E.D. La.) (finding that the St. Bernard Parish and Parish Counsel deviated from the normal process for enacting a moratorium in relation to a proposed construction project by not involving a

variance and not being limited in scope); *see also Normal*, *Black's Law Dictionary* (6th ed. 1990) (defining "normal" as "[a]ccording to, constituting, or not deviating from an established norm"). Furthermore, a deviation from a legislature's normal operating procedure does not automatically constitute a violation of the legislature's defined procedural rules, and therefore certainly not constitutional constraints. *McCrory*, 832 F.3d at 228 ("But, of course, a legislature need not break its own rules to engage in unusual procedures.").

In *Perez*, the federal district court made no findings from which it or an appellate court could determine whether a convention of a legislative special session for the purpose of considering and adopting court-approved redistricting plans was outside of the Texas Legislature's normal operating procedures. 274 F. Supp. 3d 624. As the United States Supreme Court held, the "brevity" of the legislative process in that case was not enough to give rise to an inference of bad faith alone, especially considering the legislature's reason to believe that the court-issued redistricting plans were sound and the law-making body's motivation to avoid an indefinite disruption of the electoral process. *Abbott*, 138 S. Ct. at 2328–29. The circumstances in *Abbott* are readily distinguishable from the situation in the present matter, where the trial court made multiple findings that directly addressed the North Carolina General Assembly's normal operating procedures and the legislative body's deviation therefrom during both the enactments of House Bill 1092—the constitutional amendment requiring voters to produce photographic identification in order to vote—and Senate Bill 824 as its implementing legislation. Instead of accepting these findings as binding and relevant to its *Arlington Heights* analysis, the majority proposes in its opinion here that *any* consideration of procedural abnormalities, short of the legislature plainly acting outside of its constitutional authority, amount to judicial overreach into the legislative process and consequently squelch the viability of this *Arlington Heights* factor in North Carolina.

ii. *The Fourth Circuit's Decision in* NAACP v. Raymond

As with *Abbott*, the majority here also labors to contort the Fourth Circuit's decision in *Raymond*. In *Raymond*, the Fourth Circuit reviewed a decision of the United States District Court for the Middle District of North Carolina which granted the plaintiffs' motion for a preliminary injunction enjoining the enforcement of Senate Bill 824 under the federal Equal Protection Clause. *N.C. State Conf. of the NAACP v. Raymond*, 981 F.3d 295, 298 (4th Cir. 2020), *rev'g N.C. State Conf. of the NAACP v. Cooper*, 430 F. Supp. 3d 15 (M.D.N.C. 2019). The Fourth Circuit reversed the federal district court, finding that the lower court

had "improperly disregarded" the principle that a legislature's "discriminatory past" cannot be used to condemn its later acts, by "reversing the burden of proof and failing to apply the presumption of legislative good faith." *Id.* Specifically, the Fourth Circuit determined that the federal district court had "considered the General Assembly's discriminatory intent in passing the 2013 Omnibus Law to be effectively dispositive of its intent in passing the 2018 Voter-ID Law." *Id.* at 302. The Fourth Circuit analogized to *Abbott*, finding that:

> The district court here made the same mistake as the panel in *Abbott* without even trying to distinguish the Supreme Court's holding. Explaining that it is " 'eminently reasonable to make the State bear the risk of non-persuasion with respect to intent' when the very same people who passed the old, unconstitutional law passed the new," *Cooper*, 430 F. Supp. 3d at 32, the district court noted that the General Assembly did not "try[] to cleanse the discriminatory taint," *id.* at 43, or "tak[e] steps to purge the taint of discriminatory intent," *id.* at 35. . . . These were not merely "stray comments." *Abbott*, 138 S. Ct. at 2325. "On the contrary, they were central to the court's analysis," *id.*, for they made explicit the burden-shifting that the court engaged in while assessing the *Arlington Heights* factors.

Id. at 303 (first and second alterations in original). The Fourth Circuit also observed that the federal district court repeatedly referenced the fact, throughout its *Arlington Heights* analysis, that the legislature that enacted Senate Bill 824 was largely composed of the same legislators who had passed House Bill 589. *Id.* at 304–05; *see Cooper*, 430 F. Supp. 3d at 31 ("Plaintiffs' more potent sequence-related argument is less about 'how' than 'who.' "); *Cooper*, 430 F. Supp. 3d at 35 ("[T]he legislative history reveals that the General Assembly's goals and motivations went virtually unchanged in the time between H.B. 589 and S.B. 824. Rather than taking steps to purge the taint of discriminatory intent, the bill's supporters expressed their resolve to circumvent *McCrory* and stave off future legal challenges.").

Just as the United States Supreme Court did in *Abbott*, the Fourth Circuit in *Raymond* comprehensively explained that the historical discrimination exhibited by the General Assembly that had enacted House Bill 589 *was* a relevant factor in discerning the existence of present discriminatory intent on the part of the General Assembly that had

passed Senate Bill 824. *Raymond*, 981 F.3d at 305. The federal appellate court cautioned:

> None of this suggests that the 2013 General Assembly's discriminatory intent in enacting the 2013 Omnibus Law is irrelevant. *See Abbott*, 138 S. Ct. at 2327. But the appropriate place to consider the 2013 Omnibus Law is under the "historical background" factor. *See Arlington Heights*, 429 U.S. at 267; *see also Abbott*, 138 S. Ct. at 2325 (finding that the historical background leading to the law's enactment is but " 'one evidentiary source' relevant to the question of intent" (quoting *Arlington Heights*, 429 U.S. at 267)). And yet the "historical background" section is the one part of the district court's discriminatory-intent analysis where the court did not discuss the 2013 Omnibus Law.

Id. at 305. Finding that the federal district court's legal errors had "fatally infected" its findings, the Fourth Circuit reviewed the remaining evidence and determined that, aside from historical background, the remaining factors of *Arlington Heights* did not support a finding of discriminatory intent. *Id.* at 303. Specifically, the Fourth Circuit acknowledged the federal district court's finding that there were no procedural irregularities leading up to the enactment of Senate Bill 824 and that minority voters disproportionately lacked the forms of identification required by the law before the federal appellate court determined that the federal district court had erred in discrediting the bill's bipartisan support, the impact of the intervening constitutional amendment, and the effect of the law's mitigating features. *Id.* at 305–10. The Fourth Circuit therefore reversed, explaining that it did not do so because the federal district court weighed the available evidence differently than the federal appellate court would have, but instead because "of the fundamental legal errors that permeate[d] the [lower court's] opinion." *Id.* at 310–11.

As a previous composition of this Court noted, *Raymond* was decided in an entirely different procedural posture and on an entirely different factual record. As the trial court in the instant case acknowledged, quoting *Holdstock v. Duke University Health System*, 270 N.C. App. 267, 280 (2020), "the [C]ourt of [A]ppeals cannot ask questions that might help resolve issues or prompt responses necessary to create a complete record." For this reason, appellate courts rely upon the trial courts to develop sufficient factual records from which the higher tribunals can make their own determinations upon appellate review;

furthermore, an appellate court's determinations will necessarily be premised upon the presence or absence of sufficient record evidence, as opposed to some abstract absolute truth. Whereas the trial court's decision here was based on a full and final record developed after the completion of a three-week bench trial, the federal district court in *Cooper* issued its opinion based upon a preliminary pretrial record and without the benefit of much of the evidence that was provided to the trial court in this case.

As a result, the federal district court's findings of fact, upon which the Fourth Circuit based its own review, differed significantly from those made by the trial court in the present case. For example, while the federal district court in *Cooper* found that the events leading up to the passage of Senate Bill 824 lacked any "procedural irregularity," 430 F. Supp. 3d at 32, the trial court in *Holmes* made numerous findings on the irregularities leading up to the enactments of both House Bill 1092 and Senate Bill 824 based upon expert testimony that the federal district court in *Cooper* did not receive. Likewise, the trial court here received and credited expert testimony discussing the disproportionate impact that Senate Bill 824's reasonable impediment provisions would have on Black voters that was unavailable to the federal district court in *Cooper*, and therefore to the Fourth Circuit in *Raymond*.

The trial court's findings in this case flowed directly from the evidentiary record before it, rather than from an improperly inverted assignment of the burden of proof. Whereas the federal district court's analysis in *Cooper* repeatedly paralleled the *Perez* court's improper legal standard nearly verbatim, the trial court in this case never ascribed the "discriminatory taint" of House Bill 589 to the legislature that had passed Senate Bill 824. *Compare Cooper*, 430 F. Supp. 3d at 43 ("[R]ather than trying to cleanse the discriminatory taint which had imbued H.B. 589, the legislature sought ways to circumvent state and federal courts and further entrench itself."), and *Cooper*, 430 F. Supp. 3d at 35 ("Rather than taking steps to purge the taint of discriminatory intent, the bill's supporters expressed their resolve to circumvent *McCrory* and stave off future legal challenges."), *with Perez*, 274 F. Supp. 3d at 649 ("Further, the Legislature did not engage in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans."). By contrast, the majority decision here largely relies upon one instance in which the trial court supposedly inverted the evidentiary burden; namely, where the trial court had found that Senate Bill 824's substantive departures from House Bill 589 were not made for the purpose of alleviating the racially disparate *impact* that had been previously observed under House Bill

589. In doing so, the trial court did not, however, ascribe the previous legislature's *intent* to that legislative body which had passed Senate Bill 824, nor did it purport by its order that defendants were required to cleanse, purge, or cure any discriminatory intent which had traversed from House Bill 589 to Senate Bill 824.

For these reasons, inasmuch as the Fourth Circuit's decision in *Raymond* was explicitly based on the federal district court's "fundamental legal errors that permeate[d] the opinion," 981 F.3d at 311, and a full consideration of the particular evidentiary record before the Fourth Circuit, *Raymond* provides no meaningful grist for the majority's mill: the trial court's findings were derived from an entirely different and more extensive evidentiary record, and the trial court never required defendants to prove that they had purged Senate Bill 824 of the discriminatory taint of House Bill 589.

C. The Majority's Reconsideration of the Evidence

The remainder of the majority's opinion engages in an improper and self-serving reweighing evaluation of the evidence presented to the trial court which bears on disparate impact. While it is elementary that reweighing evidence upon appellate review is fundamentally wrongful, the egregiousness of the majority's act is particularly pronounced since the case is back on *rehearing*. The correct standard of review for a trial court's findings of fact is highly deferential. "[T]he trial court's findings of fact . . . are conclusive on appeal if there is competent evidence to support them, even [if] the evidence could be viewed as supporting a different finding." *In re Estate of Skinner*, 370 N.C. at 139 (quoting *Bailey*, 348 N.C. at 146). Findings of fact "supported by competent, material and substantial evidence in view of the entire record[ ], are conclusive upon a reviewing court and not within the scope [of its] reviewing powers." *Id.* at 139 (alteration in original) (quoting *In re Revocation of Berman*, 245 N.C. at 616–17). Furthermore, a finding of "overwhelming" disparate impact is not required under *Arlington Heights*. *McCrory*, 831 F.3d at 231. Instead, the pertinent inquiry is merely whether Senate Bill 824 "bears more heavily" on Black voters. *Arlington Heights*, 429 U.S. at 266 (quoting *Washington*, 426 U.S. at 242).[7] In other words, whether the law

7. The majority repeatedly cites cases which consider whether state legislative acts imposed a "substantial burden" upon the right to vote through requirements related to voter identification. Notably, these analyses occurred not under *Arlington Heights* but under separate constitutional principles which limit legislatures' ability to encumber exercise of the constitutionally protected right to vote even when acting without racially discriminatory purpose. *See, e.g.*, *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 605–06 (4th Cir.

actually "produces disproportionate effects." *Hunter*, 471 U.S. at 227;[8] *see also McCrory*, 831 F.3d at 231 ("[T]he district court's findings that African Americans . . . disproportionately lacked the photo ID required by SL 2013-381, if supported by the evidence, establishes sufficient disproportionate impact for an *Arlington Heights* analysis.").

Here, the trial court received evidence over the course of a three-week trial which included extensive expert testimony before determining that (1) Black voters were more likely to lack qualifying forms of identification than white voters and (2) the burdens of obtaining qualifying forms of identification and navigating the reasonable impediment process fell more heavily upon Black voters than white voters. Plaintiffs' expert Professor Kevin Quinn showed that, similar to House Bill 589, Senate Bill 824 was very likely to have a disproportionate impact on Black voters, who were approximately 39% more likely than white voters to lack qualifying forms of identification; when the professor's data analysis was restricted to active voters, Black voters were more than twice as likely to lack qualifying identification as white voters. A majority of this Court concludes that Professor Quinn's evidence was "fatally deficient" because he was unable to access data concerning *all* forms of qualifying identification[9] even though he testified that, while accounting for these forms of identification would likely decrease the absolute number of individuals lacking any form of qualifying identification as defined by Senate Bill 824, the ultimate racial disparity was likely to be even greater than originally estimated.[10] The trial court also heard

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2016); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 190–91 (2008). Although these cases have some bearing on what types of voter-related requirements and restrictions have been determined to be facially unconstitutional, they do not stand for the proposition that claimants under *Arlington Heights* must demonstrate the imposition of a substantial burden along racial lines.

8. In its newly proposed standard, the majority contends that the relevant inquiry is whether a law produces a *meaningful* disparate impact along racial lines, separate and apart from the court's determination of whether the legislature acted with discriminatory intent. It is unclear what, if any, additional burden this standard imposes upon plaintiffs, but this too is a departure from *Arlington Heights*, which provided discriminatory effect as one relevant but not all-consuming factor in its constitutional analysis. 429 U.S. at 265 (holding that, although not "irrelevant," disproportionate impact is "not the sole touchstone of an invidious racial discrimination" (quoting *Washington*, 426 U.S. at 242)).

9. Specifically, Professor Quinn was unable to acquire identification databases for passports, military IDs, and veterans' IDs. He noted that these databases, by their very nature, contain highly confidential information and are not typically available for access.

10. This is due to the fact that these forms of identification are more likely to be held by whites than Blacks; for example, the trial court found that white voters are 2.4 times as likely to possess unexpired passports as Black voters.

testimony indicating that Senate Bill 824's ameliorative provisions failed to sufficiently mitigate the law's disparate impact on Black people. The trial court considered and credited evidence from the implementation of House Bill 589 which indicated that the bill's similar reasonable impediment provision had not been "uniformly provided to voters" and that the reasonable impediment process was "susceptible to error and implicit bias." To this end, the trial court found that those voters whose ballots were not counted were "much more likely" to be Black than the electorate's ballots as a whole. Finally, the trial court specifically discounted the testimony of defendants' experts as unpersuasive and incapable of rebutting the abovementioned findings.

In order to posit that these findings were not supported by competent evidence, the majority usurps the trial court's fact-finding function through its own credibility determinations and assigning its own weights to the plethora of evidence presented to the trial court. Where the majority cannot legitimately deny the trial court's statistical findings, the majority simply determines them to be overstated. In doing so, the majority both abandons the applicable standard of review and inflates plaintiffs' burden under *Arlington Heights*. *See In re I.K.*, 377 N.C. 417, 426 (2021) ("[T]his Court reviews the trial court's order to determine whether competent evidence supports the finding of fact and cannot reweigh the evidence when making this determination."); *In re J.A.M.*, 372 N.C. 1, 11 (2019) (holding that because "the trial court is uniquely situated to make . . . credibility determination[s] . . . appellate courts may not reweigh the underlying evidence presented at trial").

III. Conclusion

Our precedent, stretching back nearly 150 years into this Court's history, makes it exceedingly clear that those few and distinguished cases brought back before the Court for rehearing ought to be reconsidered only with tremendous caution.[11] Indeed, every presumption is construed in favor of the Court's previous holding, and we allow ourselves

11. *See Watson v. Dodd*, 72 N.C. 240, 240 (1875) ("The weightiest considerations make it the duty of the Courts to adhere to their decisions. No case ought to be reversed upon petition to rehear, unless it was decided hastily, or some material point was overlooked, or some direct authority was not called to the attention of the Court."); *Weisel v. Cobb*, 122 N.C. 67, 69 (1898) ("As the highest principles of public policy favor a finality of litigation, rehearings are granted by us only in exceptional cases, and then every presumption is in favor of the judgment already rendered."); *Hicks v. Skinner*, 72 N.C. 1, 2 (1875) ("[U]nless we have clearly mistaken some important fact, or overlooked some express and weighty authority, we must adhere to our decisions. We consider every case with care, and decide nothing with a venture.").

to upset our previous judgment if, and only if, we are able to determine that the previous majority either clearly mistook some important fact or overlooked an express and weighty authority in contradiction to its prior ruling. This principle exists precisely to ensure that the Court's judgments are not subject to immediate reversal upon a change in the direction of political winds. *See Weisel*, 122 N.C. at 70; *Devereux v. Devereux*, 81 N.C. 12, 16–17 (1879). Rather than abide by that lofty philosophy which has always permeated the fabric of this Court, the majority instead prefers to dismember both state and federal jurisprudence in order to demonstrate its alacrity to brandish its audacity to achieve its purposes, all while claiming to act in the name of judicial restraint. Perhaps the Chief Justice said it best when he once chose to dissent from a majority opinion of this Court when decrying judicial activism: "The ultimate damage to our jurisprudence and public trust and confidence in our judicial system is yet to be determined." *Robinson*, 375 N.C. at 214 (Newby, J., dissenting).

For these reasons, I respectfully dissent.

Justice EARLS joins in this dissenting opinion.

IN THE MATTER OF H.B.

No. 292A22

Filed 28 April 2023

1. Termination of Parental Rights—findings of fact—reference to timeline report—independent determination of credibility and reliability

The trial court's order terminating respondent mother's rights to her daughter based on willful failure to make reasonable progress was supported by sufficient findings of fact, including the court's finding that it relied on and accepted into evidence a timeline that was introduced by the department of social services without objection, which was signed and notarized by a social worker and which summarized the department's interactions with respondent. The finding was more than a mere recitation of the evidence and constituted a proper evidentiary finding reflecting the court's independent evaluation of the evidence where the court stated specifically that it determined the timeline to be "both credible and reliable."

2. Termination of Parental Rights—best interests of the child—statutory factors—bond between mother and child

The trial court did not abuse its discretion in the disposition phase of a termination of parental rights proceeding by concluding that termination of a mother's parental rights to her daughter was in the daughter's best interests. The court's findings reflected its consideration of the relevant statutory factors contained in N.C.G.S. § 7B-1110(a), including its finding that there was no bond between the mother and her daughter, and the findings were supported by competent evidence. Any discrepancies in the evidence were within the trial court's province to resolve based on its assessment of the credibility and weight to be given to the evidence.

3. Termination of Parental Rights—amendment of juvenile petition—additional allegations—harmless error

In a termination of parental rights proceeding, where the trial court properly terminated a mother's rights to her daughter on the ground of willful failure to make reasonable progress, any error by the trial court in allowing the department of social services to amend the juvenile petition during the termination hearing in order to add allegations in support of a different ground (that the parent's rights to another child had been involuntarily terminated and the parent lacked the ability or willingness to establish a safe home) was harmless.

Justice MORGAN dissenting.

Justice EARLS joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 285 N.C. App. 1 (2022), affirming an order entered on 19 August 2021 by Judge Vanessa E. Burton in District Court, Robeson County. Heard in the Supreme Court on 1 February 2023.

J. Edward Yeager Jr. for petitioner-appellee Robeson County Department of Social Services; and Matthew D. Wunsche, GAL Appellate Counsel, for appellee Guardian ad Litem.

Benjamin J. Kull for respondent-appellant mother.

DIETZ, Justice.

In this juvenile case, the trial court referenced a timeline introduced into evidence and expressly relied on that timeline for its determination. The court also made a key evidentiary finding that the timeline was "credible and reliable."

As explained below, this is a proper evidentiary finding because the trial court's order did not merely reference or recite a piece of evidence in the record. Instead, the trial court expressly evaluated that evidence, determined that it was credible, and stated that the court relied on that evidence to make findings of fact.

It is always a better practice for trial courts, in their written orders, to make specific findings about what the facts are, rather than reciting or referencing evidence in the record. Nevertheless, the court's findings in this case contain proper evidentiary findings and support the trial court's conclusion of law. Accordingly, we affirm the decision of the Court of Appeals, which in turn affirmed the trial court's order.

Facts and Procedural History

Respondent is the mother of Helena.[1] In June 2019, when Helena was four years old, the Robeson County Department of Social Services filed a petition alleging that Helena was neglected and dependent. DSS had been investigating a child protective services report involving respondent's newborn child, who had tested positive for cocaine and marijuana. Respondent told a social worker that she did not have her own residence and did not have the resources to care for her newborn.

During this time, Helena lived with her paternal grandmother. A social worker made a visit to Helena's grandmother's home and found several children, unsupervised and playing with dangerous objects. The social worker had a discussion with Helena's grandmother about the need for supervision. On a return trip, the social worker saw a group of children playing in the road outside of the grandmother's home and narrowly avoided hitting a small child—later discovered to be Helena. These events led DSS to file the initial juvenile petition.

The trial court placed Helena and her newborn sibling in nonsecure custody. Respondent agreed to a case plan that required her to complete substance abuse treatment and to maintain stable housing and employment.

Later in 2019, the trial court adjudicated both children as neglected based largely on respondent's failure to complete the goals in the case

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

plan. The trial court found that respondent had not completed her substance abuse assessment, did not have her own housing, and made intentional efforts to avoid the social workers who were overseeing her case.

After a review hearing early in 2020, the trial court found that social workers had not been able to contact respondent since October 2019. The trial court also found that respondent continued to require substance abuse treatment and mental health treatment and lacked stable housing and employment.

In July 2020, the trial court entered its first permanency planning order. The court found that respondent was not regularly visiting Helena and was not working on her case plan. The court also found that social workers had made numerous, unsuccessful attempts to contact or locate respondent. Respondent indicated a desire to relinquish her parental rights to Helena's grandmother. The court determined that relinquishment was not possible because of the grandmother's own living situation and history with social services. The trial court thus set a primary permanent plan of reunification with a concurrent plan of adoption.

Following a March 2021 hearing, the trial court entered a second permanency planning order. The court again found that respondent had not consistently visited Helena and had not made herself available to social workers. Although the order states that the court "does not change the plan," the court directed DSS "to primarily focus its efforts on the plan of adoption" with a secondary plan of guardianship with a court-approved caretaker.

In April 2021, DSS filed a petition to terminate respondent's parental rights to Helena. At the termination hearing, social worker Lataysha Carmichael testified about her work on respondent's case. During her testimony, DSS introduced a timeline into evidence. The timeline summarized DSS's interactions with respondent and reflected much of the key testimony from Carmichael. The timeline is titled "Affidavit" and is signed by Carmichael and notarized. Respondent did not object to the admission of the timeline:

> [DSS Counsel:]: Have you created — have you or the Department created a time line of efforts to work with [respondent] to reunite the family?
>
> [Carmichael:] I have.
>
> . . . .
>
> Q. And to your understanding are those facts in that affidavit true and accurate?

> A. Yes.
>
> Q. It's your understanding it is an accurate representation of all the efforts associated — strike that. Is it a recitation of the efforts by the Department to reunite this family?
>
> A. Yes.
>
> [DSS Counsel]: Your Honor, we would ask that Exhibit D be accepted into evidence.
>
> [Respondent's Counsel]: No objection.
>
> . . . .
>
> THE COURT: All right. It's admitted.

After the hearing, the trial court entered a written order terminating respondent's parental rights, with separate adjudicatory and dispositional sections. In the adjudication portion of the order, the trial court made the following relevant findings of fact:

> 7. That the Court takes judicial notice of the underlying Juvenile File 19JA173 and the Department's efforts to work with [respondent] . . . .
>
> 8. The mother, [respondent] has willfully left the child 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. . . .
>
> . . . .
>
> 15. The Court relies on and accepts into evidence the Timeline, marked DSS Exhibit '__", in making these findings and finds the said report to [be] both credible and reliable.

Based on these findings, the trial court concluded that "grounds exist based on clear, cogent and convincing evidence, to terminate the parental rights of the Respondent mother" because respondent "has willfully left the child in the legal and physical custody of the Robeson County Department of Social Services from June 11, 2019 until the present, for over 12 months without making reasonable progress to correct

the conditions that led to the removal of the child." The court then determined that termination of parental rights was in Helena's best interests.

Respondent timely appealed to the Court of Appeals. In a divided opinion, the Court of Appeals majority affirmed the trial court's order, holding that the trial court properly terminated respondent's parental rights for willful failure to make reasonable progress under N.C.G.S. § 7B-1111(a)(2). *In re H.B.*, 285 N.C. App. 1, 17 (2022). The dissent asserted that there were insufficient findings to support the trial court's adjudication under subsection 7B-1111(a)(2); that the trial court's best interests findings were not supported by the record; and that the trial court improperly permitted DSS to amend the juvenile petition during the hearing to add an additional ground for termination under N.C.G.S. § 7B-1111(a)(9). *Id.* at 20–30 (Wood, J., dissenting).

Respondent appealed to this Court based on the dissent. *See* N.C.G.S. § 7A-30(2) (2021).

Analysis

I. Adjudication

[1] We begin with respondent's challenge to the findings of fact in the adjudication portion of the termination order. Respondent argues, based on the reasoning of the Court of Appeals dissent, that the trial court's findings of fact are insufficient to support termination of parental rights for willful failure to make reasonable progress under N.C.G.S. § 7B-1111(a)(2).

The crux of this issue is an exhibit that the parties referred to at the hearing as a "timeline" of respondent's interactions with DSS and its social workers. The exhibit was prepared by the DSS social worker assigned to respondent's case and chronicles DSS's involvement in this matter up to the time of the termination hearing.

The timeline demonstrates that Helena was in DSS custody for far more than a year; that respondent continually missed scheduled visits with Helena; that respondent continually failed to attend substance abuse and mental health appointments; that respondent avoided contact with social workers; and that respondent was aware of the scheduled visits with Helena and of the appointments required by respondent's case plan, primarily through conversations with Helena's grandmother, but simply failed to attend without explanation.

Ordinarily, when a trial court intends to find facts mirroring those in an exhibit, the best practice is to set out those findings in the written

order. Here, for example, the trial court could have made findings that respondent missed scheduled visits with her daughter on each of the many specific dates set out in the timeline. The court then could have made similar findings with respect to the missed substance abuse and mental health appointments, with respect to respondent's lack of explanation for her failure to attend these meetings, and so on.

Instead, the trial court incorporated the timeline by reference into the order. In Finding of Fact 15, the trial court stated that it "relies on and accepts into evidence" this exhibit and finds it to be "both credible and reliable":

> 15. The Court relies on and accepts into evidence the Timeline, marked DSS Exhibit '__", in making these findings and finds the said report to [be] both credible and reliable.

Respondent argues that Finding of Fact 15 is deficient because the trial court "made no findings of fact based on the content of that exhibit" and "the trial court's brief observations about the exhibit accomplish nothing."

We do not agree. The key portion of Finding of Fact 15 is the trial court's finding that the timeline and its contents are "credible and reliable." This distinguishes Finding of Fact 15 from findings in which a trial court merely references evidence in the record. These mere references—such as recitations of witness testimony at the hearing—are not proper evidentiary findings standing alone. *In re C.H.*, 381 N.C. 745, 759 (2022). But this sort of referential finding is sufficient if it also includes "an indication concerning whether the trial court deemed the relevant portion of the testimony credible." *In re A.E.*, 379 N.C. 177, 185 (2021) (cleaned up). When a trial court makes a credibility determination about recited evidence, that transforms the recited evidence from a "mere recitation" into a proper "evidentiary finding." *Id.* at 186.

Applying this principle here, Finding of Fact 15 is a proper evidentiary finding because the trial court did not merely accept and rely upon the timeline and its contents; the court went further and expressly evaluated those contents and determined that they were credible and reliable based on other evidence received at the hearing.

We stress that our holding today is not an endorsement of this sort of fact finding. As noted above, the better practice always will be to make specific, express findings in the written order about what the trial court determined the facts to be, rather than referencing evidence in the

record and stating that the referenced evidence is credible. Nevertheless, Finding of Fact 15 is a proper evidentiary finding that incorporates all the contents of the timeline as the trial court's findings of fact.

Although respondent challenged the sufficiency of Finding of Fact 15, respondent did not argue that this timeline and its contents are unsupported by clear, cogent, and convincing evidence in the record. Thus, Finding of Fact 15 is binding on this court. That finding, together with the trial court's other findings, support the trial court's conclusion of law that respondent willfully left her child in DSS custody for more than 12 months without making reasonable progress to correct the conditions that led to the child's removal. Accordingly, the Court of Appeals properly affirmed the trial court's adjudication under N.C.G.S. § 7B-1111(a)(2).[2]

II. Disposition

[2] We next address respondent's challenge to the trial court's disposition portion of the trial court's order. After a trial court determines that one or more grounds exist for terminating parental rights, the court moves on to the dispositional stage, where the court assesses whether termination of parental rights is in the child's best interests. N.C.G.S. § 7B-1110 (2021).

We review the trial court's best interests determination at the disposition stage solely for abuse of discretion. *In re Z.L.W.*, 372 N.C. 432, 435 (2019). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re C.S.*, 380 N.C. 709, 712 (2022) (cleaned up).

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2. The Court of Appeals also made the following statement in its analysis:

> The trial court also makes a purported conclusion of law, which is better characterized as a finding of fact, in paragraph 3, subsection b, that reads: "The Respondent mother . . . has willfully left the child in the legal and physical custody of [DSS] from June 11, 2019 until the present, for over 12 months without making reasonable progress to correct the conditions that led to the removal of the child[.]"

In re H.B., 285 App. N.C. at 15–16 (emphasis omitted). This is not a correct statement. This portion of the trial court's order, contained in Conclusion of Law 3(b), is a conclusion of law that tracks the statutory language in N.C.G.S. § 7B-1111(a)(2). We must treat it as such. *See, e.g.*, *In re J.C.J.*, 381 N.C. 783, 793 n.3 (2022). We therefore modify this portion of the Court of Appeals' decision as contrary to well-established law.

In evaluating a child's best interests, trial courts are required to consider a series of enumerated statutory criteria:

> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

N.C.G.S. § 7B-1110(a).

The trial court must consider each of these statutory factors, but the court is "only required to make written findings regarding those factors that are relevant." *In re A.R.A.*, 373 N.C. 190, 199 (2019). "A factor is relevant if there is conflicting evidence concerning the factor." *In re E.S.*, 378 N.C. 8, 12 (2021).

"We review the trial court's dispositional findings of fact to determine whether they are supported by the evidence received before the trial court." *In re L.G.G.*, 379 N.C. 258, 272 (2021). Under this standard, we cannot reweigh the evidence or judge its credibility; we must uphold that trial court's fact findings if they are supported by *any* evidence in the record. *In re S.M.*, 380 N.C. 788, 791 (2022).

Respondent, based on the dissent in the Court of Appeals, challenges the trial court's finding that "there is no bond between the minor child and [respondent]." Respondent contends that no evidence supports this finding. This is wrong. There was *some* evidence that respondent had no bond with her child, including respondent's repeated, consistent failure to visit her child and her failure to make any efforts to contact or care for her child for a long period of time.

To be sure, there was counterevidence as well, such as the report of the guardian ad litem, which stated that the child "still has a bond" with respondent. But under the applicable standard of review, we cannot weigh this competing evidence. The trial court, as the fact finder, "is the sole judge of the credibility and weight to be given to the evidence, and it is not the role of the appellate court to substitute its judgment for

that of the trial court." *In re N.P.*, 374 N.C. 61, 66 (2020). The trial court, examining all of the competing evidence in this case, credited most of the guardian ad litem's report but rejected that particular assertion, along with the other evidence indicating a bond between respondent and her child. Instead, the court credited the testimony and evidence indicating respondent had no bond with her child, and made a corresponding finding of fact. That finding is supported by at least some evidence in the record and is therefore binding on appeal.

Respondent does not argue that the trial court's best interests determination is otherwise infirm, and it is not. The trial court made findings based on the relevant statutory criteria and its determination, in light of those findings, was well within the trial court's sound discretion. We therefore reject respondent's challenge to the trial court's disposition order.

III. Amendment of juvenile petition

[3] Finally, respondent argues that the trial court erred by permitting DSS to amend the juvenile petition during the termination hearing. This amendment added allegations under N.C.G.S. § 7B-1111(a)(9), which applies when "parental rights of the parent with respect to another child of the parent have been terminated involuntarily by a court of competent jurisdiction and the parent lacks the ability or willingness to establish a safe home."

Any error in amending the petition is harmless in light of our holding above. When "the trial court finds multiple grounds on which to base a termination of parental rights, and an appellate court determines there is at least one ground to support a conclusion that parental rights should be terminated, it is unnecessary to address the remaining grounds." *In re E.H.P.*, 372 N.C. at 395 (cleaned up). Because we hold that the trial court properly terminated respondent's parental rights under N.C.G.S. § 7B-1111(a)(2) for willfully failing to make reasonable progress, there is no need to address the trial court's findings and conclusions concerning the other grounds. Thus, even if the trial court erred by permitting an amendment that added an additional ground for termination, that error was harmless.

Conclusion

We modify and affirm the judgment of the Court of Appeals.

MODIFIED AND AFFIRMED.

Justice MORGAN dissenting.

Although I agree with the majority that potentially there was ample evidence in the record from which the trial court in this case *could* have made findings to support its termination of respondent-mother's parental rights, I disagree with the majority that the trial court fulfilled its fact-finding duty by making findings with sufficient specificity from which an appellate forum such as this Court could determine whether those findings of fact, in turn, supported the trial court's ultimate findings of fact and conclusions of law. I also take issue with the majority's conclusion that the trial court did not abuse its discretion at the dispositional stage in finding that there was no bond between Helena and respondent-mother, when all of the competent record evidence indicated that a parent-child bond certainly did exist. I would vacate the trial court's order and remand the case for further findings by the trial court.

I. Adjudication

I agree with respondent-mother and with the dissenting view of the Court of Appeals that the trial court did not make adequate material findings of fact upon which to support its ultimate findings of fact and conclusions of law at the adjudicatory stage of respondent-mother's termination of parental rights proceeding. This Court reviews a trial court's findings at the adjudicatory stage in order to determine whether the trial court's findings of fact are supported by "clear and convincing evidence," *In re W.K.*, 376 N.C. 269, 277 (2020) (citing N.C.G.S. § 7B-1111(b) (2019)), with de novo review as to "whether those findings support the trial court's conclusions of law[,]" *In re B.O.A.*, 372 N.C. 372, 379 (2019); *see also In re J.S.*, 374 N.C. 811, 814 (2020). The appellate courts, however, are not permitted to supplement the trial court's findings of fact with additional or different findings that were not actually made by the trial court, although they may have been indicated by record evidence. *See In re Montgomery*, 311 N.C. 101, 111 (1984) ("[W]e must review the evidence in order to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law . . . [because] appellate courts should refrain from accepting as facts of a case[ ] findings that are not part of the record on appeal."); *Coble v. Coble*, 300 N.C. 708, 712–13 (1980) ("It is not enough that there may be evidence in the record sufficient to support findings which *could have been made*. The trial court must itself determine what pertinent facts are actually established by the evidence before it . . . .").

This standard recognizes the statutory duty of the trial court, when determining a legal matter on the case's facts without a jury, such as in a

termination of parental rights proceeding, to "find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." N.C.G.S. § 1A-1, Rule 52(a)(1) (2021).[1] Under Rule 52(a), three "separate and distinct acts" are required of the trial court: it must "(1) find the facts specially, (2) state separately the conclusions of law resulting from the facts so found, and (3) direct the entry of the appropriate judgment." *Quick v. Quick*, 305 N.C. 446, 451 (1982). The proper recognition and implementation of this principle is critical, because as this Court has reasoned:

> The trial judge becomes both judge and juror, and it is his duty to consider and weigh all the competent evidence before him. He passes upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom. If different inferences may be drawn from the evidence, he determines which inferences shall be drawn and which shall be rejected.

Knutton v. Cofield, 273 N.C. 355, 359 (1968) (citations omitted). Although the trial court is not required to recite "*all* evidentiary facts presented at [the] hearing" in its order, it is required to find "specially . . . those material and ultimate facts from which it can be determined whether the findings are supported by the evidence and whether they support the conclusions of law reached." *Quick*, 305 N.C. at 451 (emphasis added). "In other words, a proper finding of facts requires a specific statement of the facts on which the rights of the parties are to be determined, and those findings *must be sufficiently specific to enable an appellate court to review the decision and test the correctness of the judgment*." *Id.* (emphasis added).

The trial court in the present case made the following fourteen findings of fact when the tribunal entered its written termination order which terminated the parental rights of respondent-mother with respect to Helena on 19 August 2021:

> 1. The name of the juvenile is [Helena], as evidenced by the child's Birth Certificate attached to the filed Petition, which is to be made part of this paragraph as if fully set forth herein.

---

1. This Court has held that N.C.G.S. § 7B-1109(e) "places a duty on the trial court as the adjudicator of the evidence" which is equivalent to that imposed by Rule 52(a)(1). *In re T.N.H.*, 372 N.C. 403, 407 (2019) (citing N.C.G.S. § 1A-1, Rule 52(a)(1) (2019)).

2. The child, [Helena], currently resides in a licensed foster home, under the supervision, direction and custody of the Robeson County Department of Social Services.

3. The mother of the child is [respondent-mother]. [Respondent-mother] was served with a copy of the Petition to Terminate Parental Rights on April 8, 2021. [Respondent-mother] had notice of this proceeding today.

4. That there is no father listed on the child's birth certificate. That an unknown father was served by process of publication.

5. That a Juvenile Petition and Non-Secure Custody Order were filed regarding the minor child, on June 11, 2019.

6. On September 12, 2019, the [c]ourt adjudicated the child, [Helena], as a neglected juvenile pursuant to N.C.G.S. 7B-101 (15).

7. That the Court takes judicial notice of the underlying Juvenile File 19JA173 and the Department's efforts to work with the Respondent mother . . . [and] the Respondent Unknown father of the child . . . .

8. The mother, [respondent-mother] has willfully left the child 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. There is a high likelihood that the neglect would continue.

10. The mother, [respondent-mother] has neglected the juvenile in that the juvenile lives in an environment injurious to the juvenile['s] welfare.[2]

11. The mother, [respondent-mother] failed to pay a reasonable portion of the costs of the children's

2. The trial court did not include a Finding of Fact 9 in its order.

care for a continuous period of six months immediately preceding the filing of the petition, although physically and financially able to do so.

12. The parental rights with respect to another child of the parent have been terminated involuntarily by a court of competent jurisdiction and the parent lacks the ability or willingness to establish a safe home.

13. That the unknown father, has willfully left the child in foster care for more than twelve months without showing to the satisfaction of the Court that reasonable progress under the circumstances has been made in correcting the conditions that led to the child's removal; has failed to file an affidavit of paternity in a central registry maintained by the Department of Health and Human Services; [has not] legitimated the juvenile pursuant to provisions of G.S. 49-10, G.S. 49-12.1, or filed a petition for this specific purpose; [has not] legitimated the juvenile by marriage to the mother of the juvenile; has not provided substantial financial support or consistent care with respect to the juvenile and mother; has not established paternity through G.S. 49-14, 110-132, 130A-101, 130A-118, or other judicial proceeding.

14. As such, and based on clear, cogent and convincing evidence, grounds exist to terminate the parental rights of the Respondent mother . . . and the Respondent unknown father.

15. The Court relies on and accepts into evidence the Timeline, marked DSS Exhibit '__", in making these findings and finds the said report to [be] both credible and reliable.

Based upon these findings of fact, the trial court drew these conclusions of law:

1. That the Court has jurisdiction over the parties and subject matter herein pursuant to Article 11 of Chapter 7B of the North Carolina General Statutes.

2. That the Petitioner, the Robeson County Department of Social Services, is authorized to file this petition pursuant to North Carolina General Statutes 7B-1103(3) for the reason that the Department has been awarded custody of the minor child, pursuant to Custody Orders entered by the undersigned, which are part of the underlying Juvenile File, 19JA173, and made part of this paragraph as if fully set forth herein.

3. That grounds exist based on clear, cogent and convincing evidence, to terminate the parental rights of the Respondent mother . . . and Respondent unknown father, pursuant to North Carolina General Statute[s] 7B-1111 in that:

    a. The juvenile has been placed in the custody of the Robeson County Department of Social Services for a continuous period of six months next preceding the filing of the [p]etition, and

    b. The Respondent mother . . . has willfully left the child in the legal and physical custody of the Robeson County Department of Social Services from June 11, 2019 until the present, for over 12 months without making reasonable progress to correct the conditions that led to the removal of the child; and

    c. The Respondent mother . . . has neglected the juvenile in that the juvenile live[s] in an environment injurious to the juvenile['s] welfare; and

    d. The Respondent mother . . . has willfully failed to pay a reasonable portion of the costs of the child's care for a continuous period of six months immediately preceding the filing of the petition, although physically and financially able to do so; and

    e. The parental rights of the [parent] with respect to another child of the parent have been [terminated] involuntarily by a court of competent jurisdiction and the parent lacks

> the ability or willing[ness] to establish a safe home; and
>
> f. That the unknown father, has willfully left the child in foster care for more than twelve months without showing to the satisfaction of the Court that reasonable progress under the circumstances has been made in correcting the conditions that led to the child's removal; has failed to file an affidavit of paternity in a central registry maintained by the Department of Health and Human Services; [has not] legitimated the juvenile pursuant to provisions of G.S. 49-10, G.S. 49-12.1, or filed a petition for this specific purpose; [has not] legitimated the juveniles by marriage to the mother of the juveniles; has not provided substantial financial support or consistent care with respect to the juvenile and mother; has not established paternity through G.S. 49-14, 110-132, 130A-101, 130A-118, or other judicial proceeding.

Among these conclusions, the trial court ultimately found four grounds to terminate respondent-mother's parental rights in its written order: (1) that respondent-mother had neglected Helena by allowing her to live in an environment injurious to her welfare pursuant to N.C.G.S. § 7B-1111(a)(1); (2) that respondent-mother had willfully left Helena in foster care or placement outside the home for more than twelve months without showing that reasonable progress had been made to correct those conditions which had led to her removal pursuant to N.C.G.S. § 7B-1111(a)(2); (3) that respondent-mother had willfully failed to pay a reasonable portion of the cost for Helena's care for a continuous period of six months preceding the filing of the petition although physically and financially able to do so pursuant to N.C.G.S. § 7B-1111(a)(3); and (4) that the respondent-mother's parental rights with respect to another child[3] had been terminated involuntarily and that respondent-mother lacked the ability or willingness to establish a safe home pursuant to N.C.G.S. § 7B-1111(a)(9). *See* N.C.G.S. § 7B-1111(a)(1)–(3), (9) (2021).

I disagree with the majority's determination that the trial court's findings of fact were premised on clear, cogent, and convincing evidence

3. Helena's younger brother A.L.

in order to establish the existence of grounds to terminate respondent-mother's parental rights. The trial court's findings were woefully deficient and, while the evidence in the record possibly may have amply supported sufficient findings of fact to substantiate grounds for the termination of respondent-mother's parental rights, the majority artificially bolsters the trial court's inadequate findings with an unfortunate relaxation of this Court's standards while simultaneously augmenting the trial court's shallow findings. Curiously, the majority readily acknowledges the trial court's failure to comply with the criteria for acceptable findings of fact, electing to couch the trial court's shortcomings in articulating sound findings as the forum's mere neglect to follow "the better practice" or the "best practice" of crafting proper findings of fact, instead of deeming the findings here to fall short of our stated principle that a proper finding of facts requires a sufficiently specific statement of the facts. As a result, I view the trial court's material findings of fact to be inadequate to sufficiently support its ultimate facts, and, in turn, the trial court's conclusions of law are faultily reached.

"Findings of fact are statements of what happened in space and time." *State ex rel. Utils. Comm'n v. Eddleman*, 320 N.C. 344, 351 (1987). "Facts are things in space and time that can be objectively ascertained by one or more of the five senses or by mathematical calculation" and that, "in turn, provide the bases for conclusions." *State ex rel. Utils. Comm'n v. Pub. Staff*, 322 N.C. 689, 693 (1988) (citing *Eddleman*, 320 N.C. at 351). Meanwhile, "any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law." *State v. Sparks*, 362 N.C. 181, 185 (2008) (quoting *In re Helms*, 127 N.C. App. 505, 510 (1997)). "Ultimate facts are those found in that vaguely defined area lying between evidential facts on the one side and conclusions of law on the other." *Woodard v. Mordecai*, 234 N.C. 463, 472 (1951). "Ultimate facts are the final resulting effect reached by processes of logical reasoning from the evidentiary facts." *In re Anderson*, 151 N.C. App. 94, 97 (2002) (quoting *Appalachian Poster Advert. Co. v. Harrington*, 89 N.C. App. 476, 479 (1988)).

The trial court's findings of material fact, findings of ultimate fact, and conclusions of law comprised an amalgamation of cluttered entries which do not afford meaningful appellate review. Except for the initial six findings of fact and the first two conclusions of law which combine to address jurisdiction and standing, in my view, none of the tribunal's findings of fact are sufficient to support its conclusions of law; consequently, the resulting conclusions of law are insufficient to support the trial court's termination of respondent-mother's parental rights.

There are several manifestations of these inadequacies in the trial court's order here. For example, Findings of Fact 8, 10, 11, and 12 are not findings of fact as contemplated by our aforementioned appellate court precedents because they are mere regurgitations of the relevant statutory language. Hence, they are plainly insufficient to allow this Court to determine whether the trial court formed its conclusions through the processes of logical reasoning and based on the specific evidentiary record before it. In *Coble*, after vacating an order requiring a mother to provide partial child support due to inadequate findings of fact by the trial court and remanding the case, we explained the outcome in this manner:

> Our decision to remand this case for further evidentiary findings is not the result of an obeisance to mere technicality. *Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated.* Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself. *Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto.*

300 N.C. at 714 (emphases added). It is this Court's responsibility, when called upon to examine a trial court's order, to ensure that the decree at issue comports with required standards and principles. "Accordingly, this Court reviews the termination order to determine whether the trial court made sufficient factual findings to support its ultimate findings of fact and conclusions of law, regardless of how they are classified in the order." *In re Z.A.M.*, 374 N.C. 88, 97 (2020); *see also In re A.H.F.S.*, 375 N.C. 503, 510 (2020) ("Regardless of whether [a trial court's determination of willfulness] is classified as an ultimate finding of fact or a conclusion of law, it still must be sufficiently supported by the evidentiary findings of fact."). Therefore, a trial court's findings must amount to more "than a recitation of allegations. They must be the 'specific ultimate facts . . . sufficient for the appellate court to determine that the judgment is adequately supported by competent evidence.' " *In re Anderson*, 151 N.C. App. at 97 (alteration in original) (quoting *Montgomery v. Montgomery*, 32 N.C. App. 154, 156–57 (1977)).

Based upon these well-established guideposts for appellate review of a trial court's order—particularly an order which contains such far-reaching consequences as the termination of a parent's rights to a child—it is difficult to comprehend the majority's cavalier approach that the trial court's order in the present case merely constitutes an infraction of "better" or "best" practices, when Findings of Fact 8, 10, 11, and 12 here can hardly be rationalized to evince the trial court's engagement in the processes of logical reasoning required at an adjudicatory hearing. *See In re J.W.*, 241 N.C. App. 44, 45 ("At an adjudicatory hearing, the trial court must, *through processes of logical reasoning*, *based on the evidentiary facts before it*, find the ultimate facts essential to support the conclusions of law." (emphasis added) (quoting *In re O.W.*, 164 N.C. App. 699, 702 (2004))), *disc. review denied*, 368 N.C. 290 (2015). My application of the customary guideposts for appellate review of a trial court's order does not support the majority's satisfaction with the identified findings of fact that these findings exhibited a process of logical reasoning by the trial court when they amount only to near-verbatim recitations of the relevant statutory language, with no reference to the particular evidentiary facts or circumstances of the case which were before the trial court. Therefore, I would hold that Findings 8, 10, 11, and 12 are not sufficient determinations upon which the trial court could have drawn its conclusions of law because these insufficient findings preclude effective appellate review as to whether the trial court correctly exercised its function to find the specific facts of the case and to apply the law to such facts.

In its Finding of Fact 7, the trial court "takes judicial notice of the underlying Juvenile File 19JA173 and the Department's efforts to work with the Respondent mother . . . [and] the Respondent Unknown father of the child." As previously observed and substantiated in this viewpoint, a determination such as Finding of Fact 7 is an insufficient finding under *Quick* because no fact has been specially found, with no material fact established or ultimate fact reached from which it can be determined whether the finding is supported by the evidence. *See Quick*, 305 N.C. at 451. Additionally, such a finding which is based upon a trial court's judicial notice of an underlying case file fails to derive any factual determinations from it which could be properly reviewed on appeal. *Cf. In re J.C.M.J.C.*, 268 N.C. App. 47, 57 (2019) ("To allow the trial court to find adjudicatory facts simply by taking judicial notice of its prior findings . . . risks insulating the adjudicatory findings from appellate review and undermines the procedural safeguards for adjudications prescribed by [the General Statutes.]").

In like fashion, the trial court's Finding of Fact 15—the entry which attracts the majority's primary focus—is similarly lacking in that it is bereft of the necessary emphasized features which properly qualify it to be a sufficient finding of fact and an element of an actual ultimate fact which, in turn, could lead to a legally acceptable conclusion of law. Finding of Fact 15 indicated that the trial court "relies on and accepts into evidence the Timeline, marked DSS Exhibit '___", in making these findings and finds the said report to [be] both credible and reliable." Although the trial court clearly fails to identify what, if any, actual facts that it found in reliance on this Timeline, nonetheless the majority expressly declares that Finding of Fact 15 is supported by the undisputed evidentiary standard of "clear, cogent and convincing" by virtue of the majority's willingness to gratuitously scour the records in order to fortify the finding, despite this Court's unequivocal admonition in *In re Montgomery* against such an act which the majority has implemented.

Based upon these observations, I would vacate the trial court's written termination order and remand the case for further and fuller development of sufficient findings of fact in order to permit effective appellate review with regard to the properness of the trial court's ultimate findings of fact and resulting conclusions of law.

II. Disposition

I also agree with the positions of respondent-mother and the lower appellate court's dissent that the trial court abused its discretion by entering a finding that there was no bond between Helena and respondent-mother. This Court reviews a trial court's determination at the dispositional stage of a termination of parental rights proceeding for abuse of discretion, which requires an appellate court to defer to the lower court's decision "unless it is manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *In re Z.A.M.*, 374 N.C. at 100 (quoting *Briley v. Farabow*, 348 N.C. 537, 547 (1998)). "The standard of review that applies to an assignment [of error] challenging a dispositional finding is whether the finding is supported by competent evidence." *In re C.M.*, 183 N.C. App. 207, 212 (2007). "The court's dispositional findings are binding on appeal if supported by any competent evidence[,]" *In re J.B.*, 379 N.C. 233, 235–36 (2021), even if there was evidence presented that would support a finding to the contrary, *In re K.S.*, 183 N.C. App. 315, 323 (2007).

In relevant part, the trial court's written order in this case contains the following dispositional finding: "[T]here is no bond between the minor child and the Respondent mother." Despite the majority's representations

to the contrary, this finding was not supported by any competent evidence. It is noteworthy that the Robeson County Department of Social Services' own witness testified during the termination of parental rights hearing that Helena recognized respondent-mother as her mother, that Helena was happy to see respondent-mother when visits between the two of them occurred, and that said visits "[w]ent well." Additionally, the guardian ad litem's report which was submitted as evidence to support the petition to terminate parental rights specifically and candidly stated that "[e]ven though [Helena had] been in foster care for over two years, she still [had] a bond with her mother" and that Helena loved and missed her mother. While the majority heavily relies upon its depiction of the record evidence that there was *some* evidence presented which tended to indicate that Helena's mother did not have a *strong* maternal bond with Helena, nonetheless there was still *no* evidence presented which showed that Helena and respondent-mother shared *no* bond whatsoever as indicated by the trial court's findings. *Cf. In re R.G.L.*, 379 N.C. 452, 464–65 (2021) (holding that a trial court's finding that a minor child had "absolutely no bond" with his parents was not supported by the evidence when the evidence tended to show that the respondent-parents attended visits with the child and a social worker testified that the child and his mother shared a bond even though evidence was presented that the respondent-parents were repeatedly tardy for and demonstrated a lack of engagement with the aforementioned visits). This is yet another example, demonstrated in the appellate review of the disposition phase of the proceedings just as it was in the adjudication phase, of the majority's unfortunate penchant for excusing the trial court's failure to adhere to established standards for rooting the lower court's findings in the record evidence through the majority's willingness to relax our clear principles in this area of the law.

Because "the weight assigned to . . . the various dispositional factors in N.C.G.S. § 7B-1110(a)[ ] is the sole province of the trier of fact[,]" *In re B.E.*, 375 N.C. 730, 749, (2020), it is impermissible upon this dissenting view to speculate as to whether the trial court would have made the same dispositional determination in the absence of the trial court's finding that Helena and respondent-mother shared no bond. I would therefore remand this case to the trial court based on the disposition phase as well.

III. Conclusion

A trial court must make sufficiently specific material findings of fact to support its ultimate findings of fact and conclusions of law such that an appellate court can determine whether the trial court has properly

exercised the forum's function to find the facts specially and to apply the pertinent law to the findings of fact. In the absence of such findings which serve as the foundation for the remainder of the elements of a trial court's proper order as illustrated in *Quick*, I would vacate the trial court's order and remand for further findings.

I respectfully dissent.

Justice EARLS joins in this dissenting opinion.

IN THE MATTER OF R.A.F., R.G.F.

No. 274A22

Filed 28 April 2023

1. Appeal and Error—appellate jurisdiction—discretion to issue writ of certiorari—not limited by Rules of Appellate Procedure

The Court of Appeals had jurisdiction to review the trial court's order terminating a mother's parental rights where, although the mother filed a pro se notice of appeal addressed to the Supreme Court rather than to the Court of Appeals, the intermediate appellate court and opposing parties received notice of the appeal and all parties filed briefs in the correct court. The Court of Appeals properly exercised its discretion pursuant to N.C.G.S. § 7A-32(c) in issuing a writ of certiorari in aid of its jurisdiction, which was not limited by the Rules of Appellate Procedure or by any statute.

2. Termination of Parental Rights—parental right to counsel—failure of respondent to appear—dismissal of provisional counsel—statutory requirements met

The trial court acted in accordance with N.C.G.S. §§ 7B-1108.1(a)(1) and 7B-1101.1(a)(1) in a termination of parental rights matter when it dismissed respondent mother's provisional counsel after respondent failed to appear at a pretrial hearing. Respondent did not challenge the court's determination that all service and notice requirements had been met and did not argue that she lacked notice of the hearing in her arguments to the Court of Appeals, which erred by addressing the notice issue without first being presented with that issue.

Justice MORGAN concurring in part and dissenting in part.

Justice EARLS joins in this concurring in part and dissenting in part opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 284 N.C. App. 637 (2022), vacating orders entered on 15 July 2021 by Judge Mack Brittain in District Court, Henderson County, and remanding for a new hearing. Heard in the Supreme Court on 31 January 2023.

James L. Palmer for petitioner-appellants.

Peter Wood for respondent-appellee mother.

BARRINGER, Justice.

To reach the merits raised by this appeal, we first must address whether the Court of Appeals had jurisdiction to hear respondent-mother's appeal. Since we conclude that the Court of Appeals did have jurisdiction, we proceed to the merits on appeal concerning the trial court's dismissal of respondent-mother's provisional counsel upon respondent-mother's failure to appear at the termination-of-parental- rights hearing. We hold that the Court of Appeals erred by vacating the trial court's orders and remanding for a new hearing based on its concerns about the fundamental fairness of the procedures afforded respondent-mother before the trial court dismissed her provisional counsel in accordance with N.C.G.S. § 7B-1108.1(a)(1) and N.C.G.S. § 7B-1101.1(a)(1). Because the trial court complied with N.C.G.S. § 7B-1108.1(a)(1) and N.C.G.S. § 7B-1101.1(a)(1), the trial court did not err. Accordingly, we reverse the decision of the Court of Appeals and remand to the Court of Appeals to address respondent-mother's remaining argument that the trial court erred by not appointing a guardian ad litem on behalf of her minor children.

I. Jurisdiction

[1] Respondent-mother, acting pro se, filed a notice of appeal addressed to this Court, rather than the Court of Appeals, on 13 August 2021. The legislature had recently amended N.C.G.S. § 7B-1001, which addresses the right to appeal orders in matters under the Juvenile Code's Subchapter on Abuse, Neglect, and Dependency. An Act to Modify the

Right to Appeal in Termination of Parental Rights Cases, S.L. 2021-18, 2021 N.C. Sess. Laws 73. The amendments repealed the right to appeal an order terminating parental rights from a district court directly to the Supreme Court of North Carolina. § 1, 2021 N.C. Sess. Laws at 73–74. The amendments also added the right to appeal to the Court of Appeals an order terminating parental rights. § 2, 2021 N.C. Sess. Laws at 74. These changes were effective on 1 July 2021, just a month before respondent-mother filed her pro se notice of appeal. § 5, 2021 N.C. Sess. Laws at 75.

Despite the notice being addressed to the wrong court, the Court of Appeals and opposing parties received notice of the appeal and briefed the appeal in the Court of Appeals as if properly filed. A divided panel of the Court of Appeals elected to exercise its discretion to issue a writ of certiorari in aid of its jurisdiction, as authorized by N.C.G.S. § 7A-32(c). *See In re R.A.F.*, 284 N.C. App. 637, 642 (2022); *see also* N.C.G.S. § 7A-32(c) ("The Court of Appeals has jurisdiction . . . to issue the prerogative writs, including . . . certiorari . . . in aid of its own jurisdiction . . . .").

In its opinion, the Court of Appeals majority stated that "pursuant to North Carolina Rules of Appellate Procedure 21(a)(1)," it would treat respondent-mother's pro se notice of appeal to the Supreme Court of North Carolina and subsequent brief by appointed counsel as a petition for writ of certiorari. *Id.* This led the dissent to contend that the Rules of Appellate Procedure do not permit the Court of Appeals to construe these filings as a petition for a writ of certiorari because the filings "clearly do not meet the requirements set forth in Rule 21(c)." *Id.* at 650 (Tyson, J., dissenting). As a result, the dissent argued that the majority could issue the writ of certiorari only if it invoked "the provisions of Rule 2 of the Rules of Appellate Procedure" and excuse the noncompliance with Rule 21. *Id.*

This discussion of the Rules of Appellate Procedure—by both the majority and the dissent—is a non sequitur. As Rule 1 of the Rules of Appellate Procedure explains, "[t]hese rules shall not be construed to extend or limit the jurisdiction of the courts of the appellate division as that is established by law." N.C. R. App. P. 1(c).

By law, the Court of Appeals has *jurisdiction* to issue a writ of certiorari in any case in aid of its own jurisdiction. N.C.G.S. § 7A-32(c) (2021). Rule 21, by contrast, provides a *procedure* that *litigants* must use to petition for a writ of certiorari. Thus, Rule 21 does not limit the Court of Appeals itself. As we held in *State v. Ledbetter*, notwithstanding the procedural limits of Rule 21, "the Court of Appeals maintains broad jurisdiction to issue writs of certiorari unless a more specific statute revokes or limits that jurisdiction." 371 N.C. 192, 195 (2018). Here, no

statute limits the Court of Appeals' authority to issue a writ of certiorari in these circumstances, so the Court of Appeals "has jurisdiction and authority to issue the writ of certiorari here." *State v. Killette*, 381 N.C. 686, 691 (2022).

In sum, the Court of Appeals expressly indicated that it was exercising its discretion to issue a writ of certiorari. The circumstances of this case, as noted above, permit the Court of Appeals to do so in the exercise of its sound discretion. Accordingly, the Court of Appeals properly had appellate jurisdiction in this case. We reject the dissent's assertion to the contrary.

II. Dismissal of Provisional Counsel Pursuant to N.C.G.S. § 7B-1101.1(a)(1)

[2] We now turn to the merits of the appeal concerning the trial court's dismissal of respondent-mother's provisional counsel after respondent-mother failed to appear at the termination-of-parental-rights hearing.

A. Trial Court Proceedings

On 6 April 2021, petitioners filed a petition for termination of parental rights. Respondent-mother was personally served with the petition and summons and was appointed provisional counsel. Respondent-mother's provisional counsel moved for an extension of time to respond to the petition. The trial court granted the motion. Thereafter, petitioners filed a notice of hearing to proceed on all issues raised by their petition and served the notice on respondent-mother's provisional counsel but not on respondent-mother. Respondent-mother did not appear at the hearing on the noticed date. During the pre-hearing, the trial court called respondent-mother's name to see if she was present. Hearing nothing, the trial court then conducted a limited inquiry of provisional counsel, asking, "[A]ny contact from your client, ma'am?" Provisional counsel responded,

> Your Honor, she reached out to me, initially, when she was served. I did hear from her. She never came into the office for her appointment. She did contact my office and say she was in a treatment facility.
>
> I contacted that facility. She apparently graduated successfully, but has not contacted my office since then. It's been probably April since I heard from her.

Having heard this, the trial court thanked provisional counsel and said, "[S]o requested then by our legislature, I'll release you at this time."

After the termination hearing, the trial court entered orders terminating respondent-mother's parental rights. Respondent-mother appealed on the basis that the trial court abused its discretion by dismissing her provisional counsel, holding the termination hearing without respondent-mother or her provisional counsel present, and failing to properly inquire into provisional counsel's attempt to contact respondent-mother.

B. Court of Appeals' Decision

The Court of Appeals held that the trial court reversibly erred by dismissing respondent-mother's provisional counsel in accordance with N.C.G.S. § 7B-1101.1(a)(1) without asking her provisional counsel about provisional counsel's efforts to: (1) communicate with respondent-mother and (2) inform respondent-mother of the date and time of the termination hearing. *In re R.A.F.*, 284 N.C. App. at 647. In other words, "the trial court committed reversible error by not ensuring that [respondent-m]other's substantial rights to counsel and to adequate notice of such proceedings were protected." *Id.*

The dissent disagreed, arguing that the trial court was "statutorily required to 'consider the . . . [r]etention or release of provisional counsel,' and '[w]hether all summons, service of process, and notice requirements have been met.' " *Id.* at 653 (Tyson, J., dissenting) (alterations in original) (quoting N.C.G.S. § 7B-1108.1(a)(1), (3) (2021)). Subsection (a)(1) of N.C.G.S. § 7B-1101.1 additionally requires that: "At the first hearing *after service* upon the respondent parent, the court *shall dismiss* the provisional counsel if the respondent parent: [d]oes not appear at the hearing." *Id.* (quoting N.C.G.S. § 7B-1101.1(a)(1) (2021)).

In this matter, "[t]he trial court found and concluded [that] all service and notice requirements had been met and that [respondent-m]other's provisional attorney should be released, despite efforts by the respective attorney to engage the [respondent-m]other in the participation of this proceeding." *Id.* (cleaned up). Since these findings and conclusions were unchallenged, the dissent recognized that the Court of Appeals was bound to them on appeal. *Id.*

According to the dissent, the only issue was whether respondent-mother had "argued and shown an abuse of discretion and reversible error in the trial court's decision." *Id.* at 654. The dissent concluded respondent-mother had not met her burden and would have affirmed the trial court's orders. *Id.*

We agree with the dissent that respondent-mother has not shown error reversible by the Court of Appeals. Unlike prior cases addressed

by this Court, this appeal involves the unilateral dismissal of provisional counsel by the trial court in accordance with N.C.G.S. § 7B-1108.1(a)(1) and N.C.G.S. § 7B-1101.1(a)(1). These statutes are abundantly clear.

Section 7B-1108.1 states that:

> (a) The court shall conduct a pretrial hearing. However, the court may combine the pretrial hearing with the adjudicatory hearing on termination in which case no separate pretrial hearing order is required. *At the pretrial hearing, the court shall consider the following*:
>
> (1) *Retention or release of provisional counsel.*
>
> (2) Whether a guardian ad litem should be appointed for the juvenile, if not previously appointed.
>
> (3) *Whether all summons, service of process, and notice requirements have been met.*
>
> (4) Any pretrial motions.
>
> (5) Any issues raised by any responsive pleading, including any affirmative defenses.
>
> (6) Any other issue which can be properly addressed as a preliminary matter.
>
> (b) Written notice of the pretrial hearing shall be in accordance with [N.C.]G.S. [§] 7B-1106 and [N.C.] G.S. [§] 7B-1106.1.

N.C.G.S. § 7B-1108.1 (emphases added).

Subsection (a) of N.C.G.S. § 7B-1101.1 states that:

> (a) The parent has the right to counsel, and to appointed counsel in cases of indigency, unless the parent waives the right. The fees of appointed counsel shall be borne by the Office of Indigent Defense Services. *When a petition is filed, unless the parent is already represented by counsel, the clerk shall appoint provisional counsel for each respondent parent* named in the petition in accordance with rules adopted by the Office of Indigent Defense Services, shall indicate the appointment on the juvenile summons, and shall provide a copy of the summons and petition to the attorney. *At the first hearing after service upon the respondent parent,*

> *the court shall dismiss the provisional counsel if the respondent parent*:
>
> (1) *Does not appear at the hearing*;
>
> (2) Does not qualify for court-appointed counsel;
>
> (3) Has retained counsel; or
>
> (4) Waives the right to counsel.
>
> The court shall confirm the appointment of counsel if subdivisions (1) through (4) of this subsection are not applicable to the respondent parent. The court may reconsider a parent's eligibility and desire for appointed counsel at any stage of the proceeding.

N.C.G.S. § 7B-1101.1(a) (emphases added).

The trial court's findings of fact and conclusions of law relating to the pretrial hearing and notice are also clear and unchallenged:

> The Respondent Mother was served by Henderson County Sheriff on July 16, 2021, and upon the filing of this action, was provisionally appointed [an] attorney. . . . Returns of service for each Respondent appear in the court file, and the Notice of Hearing (filed on June 23, 2021) gives proper notice for this hearing.
>
> Neither Respondent was present at the 9:00am calendar call and was not present at the time of the hearing, which began at approximately 9:40am;
>
> The [c]ourt further finds that subject matter jurisdiction, notice of hearing, and personal jurisdiction as to the Respondents in this matter are proper;
>
> As to other pre-trial hearing matters, the court notes that . . . neither Respondent has sought to contest the Petition; there are no issues or pre-trial motions raised by any party, no responsive pleading has been submitted by the Respondent (although the court notes that a Motion and Order for extension of time in regards to the Respondent Mother appears in the court file). . . . All service and notice requirements have been met. The provisionally appointed attorneys for each Respondent should be released, despite efforts by the respective attorneys to engage the Respondent parents in the participation of this proceeding.

Given the foregoing, the trial court did not err; the trial court complied with N.C.G.S. § 7B-1108.1(a) and N.C.G.S. § 7B-1101.1(a)(1).

Notably, before the Court of Appeals, respondent-mother did not argue that she lacked notice of the termination hearing. The Court of Appeals, however, construed N.C.G.S. § 7B-1101.1(a)(1) to "presume[ ] that the respondent parent has been given notice of the hearing and, therefore, an opportunity to decide whether to participate in the proceedings" and concluded "there is no evidence in the record that [respondent-m]other *knew* about the hearing." *In re R.A.F.*, 284 N.C. App. at 645. Thus, only now, before this Court, has respondent-mother through her appellate counsel made this allegation. This Court has reiterated many times that "a party to a suit should not be allowed to change his position with respect to a material matter in the course of litigation." *Whitacre P'ship v. BioSignia, Inc.*, 358 N.C. 1, 26 (2004) (quoting *Roberts v. Grogan*, 222 N.C. 30, 33 (1942)) (collecting cases). Further, the Court of Appeals may not address an issue not raised or argued by respondent for "[i]t is not the role of the appellate courts . . . to create an appeal for an appellant." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402 (2005); *see also State v. Hart*, 361 N.C. 309, 311 (2007) ("[I]n *Viar*, we held that the Court of Appeals acted improperly when it reviewed issues not raised or argued by the appellant.").

III. Conclusion

Since the trial court complied with our legislature's enactments concerning provisional counsel under N.C.G.S. § 7B-1101.1(a)(1) and considered at the pretrial hearings the issues listed in N.C.G.S. § 7B-1108.1(a)(1), we conclude that the Court of Appeals erred by concluding that the trial court erred. Therefore, we reverse the decision of the Court of Appeals and remand for consideration of the remaining argument presented by respondent-mother that the Court of Appeals did not reach.

REVERSED AND REMANDED.

Justice MORGAN concurring in part and dissenting in part.

I fully agree with the majority's conclusion that the Court of Appeals properly exercised its discretion in this matter in order to obtain jurisdiction here in the manner in which it did. However, I must respectfully disagree with my learned colleagues in the majority that the Court of Appeals erred in vacating the trial court's orders and remanding the

matter for a new hearing because the lower appellate court determined that the trial court improperly released respondent-mother's provisional counsel in light of the trial court's failure to fully and correctly ascertain statutorily mandated information regarding the parent's absence from the scheduled termination of parental rights hearing prior to the trial court's dismissal of respondent-mother's provisional counsel. The dispositive issue is whether respondent-mother's parental rights to her children may be terminated at a hearing (1) conducted outside of the parent's presence, (2) without any legal representation on the parent's behalf, (3) upon the release of the parent's provisional counsel, (4) without any attempt by the trial court to determine whether the parent had notice of the hearing, and (5) despite the existence of circumstances presented to the trial court by the parent's provisional counsel that the parent received notice of the hearing. Due to the majority's demonstrated and disappointing disregard for fundamental fairness here which is otherwise routinely recognized and protected when an individual's inherently significant parental rights to one's children are being determined, I respectfully dissent and would instead affirm the decision of the Court of Appeals.

This Court has observed that "[i]n order to adequately protect a parent's due process rights in a termination of parental rights proceeding, the General Assembly has created a statutory right to counsel for parents involved in termination proceedings." *In re K.M.W.*, 376 N.C. 195, 208 (2020). When respondent-mother did not appear for the scheduled 15 July 2021 hearing on the petition for termination of parental rights after there had been service only on respondent-mother's attorney and not respondent-mother, the trial court conducted a pretrial hearing at which respondent-mother's provisional counsel was present. During the pretrial hearing, the trial court had the following exchange with respondent-mother's provisional counsel, Kassia Walker:

> THE COURT: Ms. Walker, any contact from your client, ma'am?
>
> MS. WALKER: Your Honor, she reached out to me, initially, when she was served. I did hear from her. She never came into the office for her appointment. She did contact my office and say she was in a treatment facility.
>
> I contacted that facility. She apparently graduated successfully, but has not contacted my office since then. It's been probably April since I heard from her.

> THE COURT: Thank you. And so requested then by our legislature, I'll release you at this time.

The majority acknowledges the applicability to this case of the statutory provisions contained in N.C.G.S. § 7B-1101.1(a)(1) and N.C.G.S. § 7B-1108.1(a)(1) and (a)(3). Subsection 7B-1101.1(a) states, in pertinent part:

> At the first hearing *after service upon the respondent parent*, the court shall dismiss the provisional counsel if the respondent parent:
>
> (1) Does not appear at the hearing[.]

N.C.G.S. § 7B-1101.1(a) (2021) (emphasis added). Subsection 7B-1108.1(a) reads, again in pertinent part:

> (a) The court shall conduct a pretrial hearing . . . . At the pretrial hearing, the court *shall consider* the following:
>
> (1) *Retention or release of provisional counsel.*
>
> . . .
>
> (3) *Whether all summons, service of process, and notice requirements have been met.*

N.C.G.S. § 7B-1108.1(a) (2021) (emphases added).

It is clear from the content of these statutory provisions that the trial court is required to determine at the obligatory pretrial hearing whether all notice requirements have been satisfied as the trial court considers the appropriateness of the retention or the release of provisional counsel, with the trial court mandatorily releasing the provisional counsel at the first hearing after the parent has been served if the parent does not appear at the hearing. During the trial court's scant colloquy with respondent-mother's provisional counsel, the attorney related that respondent-mother had contacted counsel upon initial service and that respondent-mother had "apparently graduated successfully" from a treatment facility in the interim time period during which there had been no communication between respondent-mother and the parent's provisional counsel. While the record plainly shows that respondent-mother was not served with notice of the 15 July 2021 termination of parental rights hearing, provisional counsel for respondent-mother could only speculate about the parent's whereabouts and circumstances as the attorney attempted to offer a comprehensive response to the trial court's limited and narrow inquiry to counsel, "Ms. Walker, any contact from your client, ma'am?"

The trial court's sole question to respondent-mother's provisional counsel was not sufficiently focused upon the issue of notice, as contemplated by N.C.G.S. §§ 7B-1101.1(a)(1) and 7B-1108.1(a)(1) and (3), to provide the requisite information to the trial court to determine whether all notice requirements had been met regarding respondent-mother's knowledge of the 15 July 2021 termination of parental rights hearing so as to be able to responsibly consider the retention or release of provisional counsel, particularly in light of the prospect that if notice of the hearing had not been served upon respondent-mother, then the 15 July 2021 hearing would not have qualified as "the first hearing after service upon the respondent parent" under N.C.G.S. § 7B-1101.1(a)(1) so as to require the trial court's dismissal of the provisional counsel. *See* N.C.G.S. § 7B-1101.1(a).

This omission by the trial court is compounded by its failure to develop the record with further inquiries of respondent-mother's provisional counsel beyond the initial question, including the efforts which counsel had undertaken to alert respondent-mother as to the date of the hearing. This Court has instructed that "before allowing an attorney to withdraw or relieving an attorney from any obligation to actively participate in a termination of parental rights proceeding when the parent is absent from a hearing, the trial court must inquire into the efforts made by counsel to contact the parent in order to ensure that the parent's rights are adequately protected." *In re K.M.W.*, 376 N.C. at 210 (quoting *In re D.E.G.*, 228 N.C. App. 381, 386–87 (2013)). Ultimately, however, in its written termination of parental rights order, despite no inquiry into whether respondent-mother had notice of the termination of parental rights hearing and no evidence otherwise of such notice in the record, the trial court nonetheless found that "[a]ll service and notice requirements have been met" and "[t]he provisionally appointed attorney[ ] for [respondent-mother] should be released, despite efforts by the . . . attorney[ ] to engage [the respondent-mother] in the participation of this proceeding."

Here, the record on appeal indicates that after respondent-mother was served with the termination of parental rights petition in this case, she communicated her desire to her provisional counsel to contest the petition and to seek extensions of time to respond. The time period of such demonstrated engagement by respondent-mother with this matter correlates with her admission to a substance abuse treatment facility. In my view, such circumstances, when coupled with the cited statutory law, the legal precedent from this Court, and the trial court's lack of adherence to these governing authorities, raise the haunting specter

of respondent-mother's lack of notice of the termination of parental rights proceeding and undergird the correctness of the decision of the Court of Appeals.

Accordingly, I respectfully dissent in part.

Justice EARLS joins in this concurring in part and dissenting in part opinion.

IN THE MATTER OF S.R.

No. 172PA22

Filed 28 April 2023

1. Termination of Parental Rights—grounds for termination—willful failure to pay child support—sufficiency of findings—correct standard of review

In a private termination of parental rights action, the trial court's determination that grounds were not established to terminate respondent father's parental rights to his daughter based on willful failure to pay child support (N.C.G.S. § 7B-1111(a)(4)) was affirmed where the trial court made no findings that an order existed requiring respondent to pay support—despite evidence that respondent had paid support but that his payments stopped after petitioner mother elected to stop garnishment of his wages through centralized collections—or that respondent's failure to provide support was willful. The correct standard of review at the adjudication stage is whether the findings of fact are supported by clear, cogent, and convincing evidence, and whether the findings support the conclusions of law; to the extent the Court of Appeals' opinion affirming the trial court's decision could be read to instead apply the abuse of discretion standard, that portion of its opinion was modified.

2. Termination of Parental Rights—grounds for termination—neglect—willful abandonment—sufficiency of evidence

In a private termination of parental rights action, the trial court's determination that grounds were not established to terminate respondent father's parental rights to his daughter based on neglect or willful abandonment (N.C.G.S. § 7B-1111(a)(1), (7)) was affirmed where there was no record evidence demonstrating that respondent had previously neglected the child, that there was a

likelihood of future neglect if she were to be placed in his care, or that respondent showed an intention to give up all parental rights to her, particularly where there was evidence that petitioner mother actively prevented respondent from forming a relationship with the child.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 283 N.C. App. 149 (2022), affirming an order entered on 8 June 2021 by Judge Caroline S. Burnette in District Court, Granville County. Heard in the Supreme Court on 1 February 2023.

Edward Eldred for petitioner-appellant.

Wendy C. Sotolongo, Parent Defender, and Jacky L. Brammer, Assistant Parent Defender, for respondent-appellee father.

EARLS, Justice.

This case involves a petition to terminate parental rights in a private setting with no Department of Social Services involvement. Cases involving divorce and the breakdown of marital relationships are often contentious, and each party may have their own version of what has transpired. In cases involving children and the termination of parental rights, both parents have a "fundamental liberty interest . . . in the care, custody, and management of their child," and this interest "does not evaporate simply because they have not been model parents." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). To protect this vital interest and others, our legal system operates under a set of procedures, one of which dictates that the trial court is the finder of fact. *In re N.W.*, 381 N.C. 851, 857 (2022) ("[T]he trial court . . . [has the] responsibility for evaluating the credibility of the witnesses, weighing the evidence, and determining the relevant facts." (citing *In re R.D.*, 376 N.C. 244, 258 (2020))). In contrast, this Court is not a fact-finding court. *See id.*

In the context of termination of parental rights proceedings, the proper inquiry is often fact-dependent and the trial court, as a fact-finding court, is in the best position to determine the credibility of the witnesses before it and make findings of fact. *See id.* With this in mind, this opinion underscores the importance of following these procedures and the correct standard of review by applying the law only to those findings of fact made by the trial court. In doing so, we affirm the Court of

Appeals' decision regarding the denial of the petition to terminate Mr. Savard's parental rights but modify its decision to clarify the correct standard of review at both the adjudication and the dispositional stage.

I. Factual Background

The petitioner, Tiffany Roberto, and the respondent, Bruce Savard, were previously married. On 23 April 2014, their only child, Sarah,[1] was born. The day before Sarah was born, Mr. Savard experienced a mental health related incident and threatened to kill himself. Ms. Roberto contacted her current husband, Joe Roberto, who successfully retrieved the gun from Mr. Savard. In June 2014, Ms. Roberto sought and received an ex parte domestic violence protective order against Mr. Savard, in part based on this incident. The couple then separated, and Mr. Savard, who was an active-duty member of the United States Marine Corps, continued living on the military base. Ms. Roberto went to live with Mr. Roberto.

Ms. Roberto and Mr. Savard's divorce decree was entered on 8 June 2016. Despite Ms. Roberto knowing Mr. Savard's telephone number and home address, Mr. Savard was served with notice of the complaint for divorce by publication and only learned of the divorce eight days later, on 16 June 2016, through a text message from Ms. Roberto. That same day, and in the same text message, Mr. Savard also learned that as part of the divorce proceedings, Ms. Roberto was granted "the sole and exclusive care, custody, and control" of Sarah.

Ms. Roberto and Mr. Roberto were married on 22 November 2016. Mr. Savard paid child support for Sarah, which was withheld from his paycheck and mailed to North Carolina Centralized Collections. Ms. Roberto sought legal advice about terminating Mr. Savard's parental rights and was counseled to stop the garnishment of his wages through North Carolina Centralized Collections, such that Mr. Savard would be personally responsible for payment and nonpayment could be used as a ground to terminate his parental rights.

Toward the end of 2018, Ms. Roberto "closed [Mr. Savard's] support case" but "Mr. Savard was under the impression that he was no longer required to pay child support as Ms. Roberto never informed him that he as [sic] not make payments directly to her after his child support case was closed." Thus, once child support payments were no longer collected through the garnishment of his wages, the child support

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

payments stopped. As a result, Mr. Savard accumulated past-due child support obligations. Ms. Roberto asked Mr. Savard to relinquish his parental rights to Sarah in exchange for her forgiving his child support debt, but he declined this request.

In its order denying the petition to terminate Mr. Savard's parental rights, the trial court found that Mr. Savard made an effort to have a relationship with Sarah. It also found that he attempted to exercise his supervised visitation rights with Sarah and sent Ms. Roberto text messages asking about Sarah. However, Ms. Roberto ultimately blocked Mr. Savard's telephone number, and he was no longer able to contact her by phone. Ms. Roberto also blocked Mr. Savard from contacting her on social media. This left Mr. Savard with no reliable way to contact Sarah or her mother. The trial court further found that "Mr. Savard regularly checks Facebook for pictures of [Sarah]. He prints them out and keeps them in an album. While he has been blocked from Facebook by most of Ms. Roberto's family, he still finds a way to find those pictures."

The trial court also found that Mr. Savard had reached out to Ms. Roberto about adding Sarah to his "insurance," but Ms. Roberto never responded. Taking this information together, the trial court concluded that Ms. Roberto knew how to contact "Mr. Savard when it benefited [sic] her but ignored him at all other times" and this "benefitted her agenda which was to terminate [Mr. Savard's] parental rights."

On 25 July 2019, Ms. Roberto had Sarah's last name legally changed from Savard to Roberto. No service was effectuated on Mr. Savard, and "[h]e had no clue his child's name had been changed and had absolutely no notice of the proceedings." At the time of the trial court's 8 June 2021 order, Sarah was seven years old and had "no clue that Mr. Savard [wa]s her father." Ultimately, the trial court found that Mr. Roberto and Ms. Roberto had planned to terminate Mr. Savard's parental rights since at least 2018 and Ms. Roberto had "actively hindered and . . . precluded Mr. Savard from being part of [Sarah's] life."

On 22 June 2020, Ms. Roberto filed a petition to terminate Mr. Savard's parental rights. She alleged that grounds for termination existed under N.C.G.S. §§ 7B-1111(a)(1), (4), and (7) for neglect, failure to pay child support, and willful abandonment of Sarah. On 10 September 2020, Mr. Savard filed his answer. The case was heard in the trial court on 28 January 2021 and 18 March 2021. The trial court entered its order on 8 June 2021, denying Ms. Roberto's petition and concluding that Ms. Roberto had failed to establish grounds to terminate Mr. Savard's parental rights. The trial court concluded that Sarah was not neglected, nor

had Mr. Savard "*willfully failed without justification*," to pay child support for Sarah or "*willfully*" abandoned Sarah. Ms. Roberto appealed, and the Court of Appeals unanimously affirmed the trial court's order. *In re S.R.*, 283 N.C. App. 149 (2022). Now, we affirm the Court of Appeals' decision regarding the denial of the petition to terminate Mr. Savard's parental rights but modify its decision to clarify the correct standard of review at both the adjudication and the dispositional stage.

II. Standard of Review

There are two stages involved in a termination of parental rights proceeding. *In re Q.P.W.*, 376 N.C. 738, 741 (2021). These are the adjudication stage and the dispositional stage. *Id.* A different standard of review applies to each stage. *Id.* "At the adjudication stage, the party petitioning for the termination must show by clear, cogent, and convincing evidence that grounds authorizing the termination of parental rights exist." *In re Young*, 346 N.C. 244, 247 (1997). If "[a] trial court's finding of fact . . . is supported by clear, cogent, and convincing evidence[, it will be] deemed conclusive even if the record contains evidence that would support a contrary finding." *In re B.O.A.*, 372 N.C. 372, 379 (2019). We review whether the findings of fact support the conclusions of law, and conclusions of law are reviewed de novo. *In re K.N.*, 381 N.C. 823, 827 (2022) (citing *In re S.C.L.R.*, 378 N.C. 484, 489 (2021)).

At the dispositional stage, the trial court's assessment of the best interests of the child is reviewed for abuse of discretion. *In re C.B.*, 375 N.C. 556, 560 (2020). "[A]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.* (alteration in original) (quoting *In re T.L.H.*, 368 N.C. 101, 107 (2015)). "We review the trial court's dispositional findings of fact to determine whether they are supported by competent evidence[,]" *id.* (quoting *In re J.J.B.*, 374 N.C. 787, 793 (2020)), mindful that N.C.G.S. § 7B-1110 provides that at the disposition stage "[t]he court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the best interests of the juvenile." N.C.G.S. § 7B-1110(a).

Moreover, as is always true, a mistake of law is an abuse of discretion. *State v. Rhodes*, 366 N.C. 532, 536 (2013) (citing *Koon v. United States*, 518 U.S. 81, 100 (1996) ("[An abuse of discretion] standard does not mean a mistake of law is beyond appellate correction. A [trial] court by definition abuses its discretion when it makes an error of law." (citation omitted)). At the dispositional stage, as with the adjudication stage,

the trial court's conclusions of law are reviewable de novo on appeal. *In re Q.P.W.*, 376 N.C. at 741. Because the present case did not proceed past the adjudication stage, the proper standard of review in this case first requires this Court to assess whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence even if the record contains evidence that would support a contrary finding. *In re B.O.A.*, 372 N.C. at 379.

III. The Child Support Order

[1] A trial court may terminate parental rights if

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

N.C.G.S. § 7B-1111(a)(4) (2021). In *In re C.L.H.*, this Court explained that the party petitioning for termination of parental rights under N.C.G.S. § 7B-1111(a)(4) must show "the existence of a support order that was enforceable during the year before the termination petition was filed." 376 N.C. 614, 620 (2021) (quoting *In re I.R.L.*, 263 N.C. App. 481, 485 (2019)). There, this Court concluded that because the trial court had not made any "findings of fact that a child support order existed in the year prior to the filing of the petition to terminate respondent's parental rights," those factual findings could not support termination pursuant to N.C.G.S. § 7B-1111(a)(4). *Id.* at 621.

Ms. Roberto argues that, although "not explicit, it is apparent" the trial court and the Court of Appeals accepted that the child support order existed and was enforceable. Ms. Roberto also argues that Mr. Savard also accepted this as true, stating in his brief to the Court of Appeals that "[a]n [o]rder establishing Mr. Savard's child support obligation was entered on 24 November 2014." Ms. Roberto states that because of this admission and implicit acceptance of a child support order existing and being enforceable, the trial court and Court of Appeals both erred in concluding Mr. Savard's parental rights could not be terminated.

However, the Court of Appeals found that although there was evidence in the record to support termination of parental rights pursuant to N.C.G.S. § 7B-1111(a)(4), the trial court did not make any findings of

fact to this effect. *In re S.R.*, 283 N.C. App. at 159–60. In doing so, the Court of Appeals analogized the present case to *In re C.L.H.*, determining that a trial court must make findings of fact as to whether a support order exists. *Id.* at 159. In *In re C.L.H.*, this Court concluded that when "the trial court fails to make findings of fact indicating that a child support order existed or that the parent failed to pay support as required by the child support order, its findings are insufficient to support the conclusion that grounds for termination exist pursuant to N.C.G.S. § 7B-1111(a)(4)." *In re C.L.H.*, 376 N.C. at 620 (cleaned up). Here, the trial court only made findings that Mr. Savard paid child support and that his child support payments stopped after Ms. Roberto elected to stop garnishment of his wages through North Carolina Centralized Collections. However, the trial court did not make a finding that an order existed requiring Mr. Savard to pay child support.

Ms. Roberto urges this Court to apply *In re Faircloth*, which states that "by failing to deny . . . certain allegations contained in the petition, [the respondent], in fact, admitted" those allegations. 153 N.C. App. 565, 576 (2002). However, not only is this case not binding on this Court, but here Ms. Roberto had the burden of proof and cannot satisfy that burden simply by alleging unproven assertions that are not directly denied. *See In re K.S.D-F.*, 375 N.C. 626, 632 (2020) ("At the adjudicatory stage, the petitioner bears the burden of proving by 'clear, cogent, and convincing evidence' the existence of one or more grounds for termination under section 7B-1111(a) of the General Statutes." (quoting *In re A.U.D.*, 373 N.C. 3, 5–6 (2019))). Accordingly, the conclusion of the trial court and the Court of Appeals that no grounds to terminate Mr. Savard's parental rights existed under N.C.G.S. § 7B-1111(a)(4) was correct. *See In re C.L.H.*, 376 N.C. at 620.

Furthermore, N.C.G.S. § 7B-1111(a)(4) requires that "for a period of one year or more next preceding the filing of the petition or motion" a parent act "willfully" and "without justification [in failing] to pay for the care, support, and education of the juvenile, as required by the decree or custody agreement." N.C.G.S. § 7B-1111(a)(4). To this effect, the trial court found that in the "one year or more next preceding the filing of the petition," Mr. Savard had not "*willfully failed without justification* to pay for [Sarah's] care, support and education . . . as required by decree or custody agreement." Thus, the trial court properly concluded that Mr. Savard's parental rights should not be terminated pursuant to N.C.G.S. § 7B-1111(a)(4).

Because we find that the trial court made no findings of fact related to the existence of a child support order or the willfulness of the

respondent's failure to pay during the relevant period of time, we affirm that grounds were not established to terminate Mr. Savard's parental rights under N.C.G.S. § 7B-1111(a)(4).

Subsection 7B-1111(a) provides that "[t]he court *may* terminate the parental rights" if it finds "one or more" of the grounds enumerated in the statute. N.C.G.S. § 7B-1111(a) (2021) (emphasis added). Here, while the trial court found that Mr. Savard had stopped making child support payments once Ms. Roberto stopped the wage garnishment through North Carolina Centralized Collections, it also found that Ms. Roberto never informed Mr. Savard he was required to make child support payments directly to her.[2] Moreover, according to the trial court's findings, Ms. Roberto tried to use Mr. Savard's resulting child support debt as a bargaining chip, promising to forgive the debt if he relinquished his parental rights to Sarah.

The trial court also found that Ms. Roberto previously consulted an attorney who counseled her to stop the wage garnishment so that if Mr. Savard failed to pay child support, she could use that as a ground to seek termination of his parental rights. Importantly, in weighing the evidence before it, the trial court determined that Ms. Roberto "knew how to reach out to Mr. Savard when it benefitted her but ignored him at all other times," and this "benefit[t]ed [Ms. Roberto's] agenda which was to terminate [Mr. Savard's] parental rights." In the end, after weighing the evidence, the trial court concluded the grounds necessary to terminate Mr. Savard's parental rights were not present.

However, because this case involves the adjudication phase in a termination of parental rights proceeding, the abuse of discretion standard is not applicable. Thus, to the extent the Court of Appeals opinion could be read to be applying an abuse of discretion standard at the adjudication stage, we modify that portion of the decision and note the correct standard of appellate review at this stage is whether the findings of fact are supported by clear, cogent, and convincing evidence, and whether the findings support the conclusions of law. *In re B.O.A.*, 372 N.C. at 379.

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2. Our decision should not be read as stating that a parent does not have a duty to "pay a reasonable portion of the [financial] cost of care for [their] children." *See In re S.E.*, 373 N.C. 360, 366 (2020) (explaining that a parent "cannot hide behind a cloak of ignorance to assert her failure to pay a reasonable portion of the cost of care for her children was not willful."). As we said in that case, "[t]he absence of a court order, notice, or knowledge of a requirement to pay support is not a defense to a parent's obligation to pay reasonable costs, because parents have an inherent duty to support their children." *Id.* (cleaned up).

IV. Neglect and Abandonment

[2] Although the Court of Appeals did not complete an analysis of these termination grounds, it concluded that the record did not support termination on either ground. *In re S.R.*, 283 N.C. App. at 158. Our review of the record yields the same result. Under N.C.G.S. § 7B-1111(a)(1) parental rights can be terminated if the "parent has . . . neglected the juvenile . . . within the meaning of [N.C.G.S. §] 7B-101." Under the statute, a neglected juvenile is

> [a]ny juvenile less than 18 years of age (i) who is found to be a minor victim of human trafficking under G.S. 14-43.15 or (ii) whose parent, guardian, custodian, or caretaker does any of the following:
>
> a. Does not provide proper care, supervision, or discipline.
>
> b. Has abandoned the juvenile.
>
> c. Has not provided or arranged for the provision of necessary medical or remedial care.
>
> d. Or whose parent, guardian, or custodian has refused to follow the recommendations of the Juvenile and Family Team made pursuant to Article 27A of this Chapter.
>
> e. Creates or allows to be created a living environment that is injurious to the juvenile's welfare.
>
> f. Has participated or attempted to participate in the unlawful transfer of custody of the juvenile under G.S. 14-321.2.
>
> g. Has placed the juvenile for care or adoption in violation of law.
>
> In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

N.C.G.S. § 7B-101(15) (2021). Grounds of abandonment are established where a

> parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion, or the parent has voluntarily abandoned an infant pursuant to G.S. 7B-500 for at least 60 consecutive days immediately preceding the filing of the petition or motion.

N.C.G.S. § 7B-1111(a)(7). Because the Court of Appeals determined the record did not support either of these grounds it necessarily concluded the trial court's findings of fact were supported by competent evidence. *In re S.R.*, 283 N.C. App. at 158.

First, regarding termination on the ground of neglect, Ms. Roberto asserts that parental rights can be terminated for neglect if a parent neglects their child by abandonment, citing *In re K.C.T.*, 375 N.C. 592, 599–600 (2020). The relevant period for determining neglect by abandonment "is not limited to the six consecutive months immediately preceding the filing of a termination petition." *In re N.D.A.*, 373 N.C. 71, 81 (2019). In some cases "a trial court may terminate a parent's rights based on neglect that is currently occurring at the time of the termination hearing." *In re M.A.*, 378 N.C. 462, 466 (2021). "However, for other forms of neglect, the fact that 'a child has not been in the custody of the parent for a significant period of time prior to the termination hearing' would make 'requiring the petitioner in such circumstances to show that the child is currently neglected by the parent . . . impossible.' " *Id.* (alteration in original) (quoting *In re N.D.A.*, 373 N.C. at 80). In those cases, "evidence of neglect by a parent prior to losing custody of a child . . . is admissible in subsequent proceedings to terminate parental rights," but "[t]he trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." *Id.* (second alteration in original) (quoting *In re Ballard*, 311 N.C. 708, 715 (1984)). If after weighing the evidence the trial court finds "a likelihood of future neglect by the parent," then it can find a neglect ground to terminate parental rights. *Id.* (quoting *In re R.L.D.*, 375 N.C. 838, 841 (2020)).

Ms. Roberto claims that the trial court impermissibly limited its review to the six months before Ms. Roberto filed the petition. However, this is incorrect as the trial court explicitly noted "[t]he history of this case is extremely relevant in the analysis of this matter," and given that the trial court's findings of fact go as far back as 2014, there is no reason to conclude that the relevant history was limited to the six months before Ms. Roberto filed her petition. Furthermore, the trial court specifically stated that it reviewed Mr. Savard's conduct outside of the

six-month window to assess his credibility. *See In re C.B.C.*, 373 N.C. 16, 22 (2019) ("[T]he trial court may consider a parent's conduct outside the six-month window *in evaluating a parent's credibility and intentions* . . . ." (quoting *In re D.M.O.*, 250 N.C. App. 570, 573 (2016))).

Ms. Roberto also argues that the trial court did not ask whether Mr. Savard previously neglected Sarah or whether there was a likelihood of future neglect if Sarah was placed in Mr. Savard's care. Ms. Roberto points to Mr. Savard's prior suicidal behavior as proof that he "assaulted Ms. Roberto in Sarah's presence" and that there was a likelihood of future neglect because Mr. Savard has not adequately addressed his mental health needs. *See In re G.C.*, No. 241A22, 2023 WL 2799798, at *5 (N.C. Apr. 6, 2023) ("[T]here must be some physical, mental, or emotional impairment of the juvenile *or a substantial risk of such impairment* as a consequence of the failure to provide proper care, supervision, or discipline." (cleaned up)). But Ms. Roberto's characterization of Mr. Savard's suicidal ideation as an assault is not supported by the trial court's findings of fact. Rather, the trial court found that although Mr. Savard had threatened suicide in Ms. Roberto's presence, he was "not threatening or combative" towards her or their unborn child, Sarah. Accordingly, the Court of Appeals was correct in holding that no grounds existed to terminate Mr. Savard's parental rights under N.C.G.S. § 7B-1111(a)(1).

Second, regarding termination on the ground of willful abandonment, the determinative period for adjudicating willful abandonment is the six consecutive months preceding the filing of the petition. N.C.G.S. § 7B-1111(a)(7); *In re A.A.M.*, 379 N.C. 167, 172 (2021). "Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re C.B.C.*, 373 N.C. at 19 (quoting *In re Young*, 346 N.C. at 251). Willful "intent is an integral part of abandonment and this is a question of fact to be determined from the evidence." *Id.* (quoting *Pratt v. Bishop*, 257 N.C. 486, 501 (1962)). "If a parent withholds that parent's presence, . . . love, . . . care, the opportunity to display filial affection, and willfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *Id.* (cleaned up).

Ms. Roberto asserts that our holding in *In re C.B.C.* is instructive in analyzing Mr. Savard's actions during the relevant six-month period from 22 December 2019 to 22 June 2020. In *In re C.B.C.*, this Court determined the parent had willfully abandoned his daughter because he did not make an effort to pursue a relationship with her. *In re C.B.C.*, 373 N.C. at 23. Specifically, the parent did not send cards or letters or contact the petitioners to ask about the child's well-being. *Id.* The

parent also did not take steps to modify the custody order, resume visitation, or provide financial support for his daughter. *Id.* Although Ms. Roberto argues that Mr. Savard's actions are like that of the parent in *In re C.B.C.*, the trial court saw the evidence differently. Namely, the trial court found that "[w]hile Mr. Savard [had] not made valiant efforts to forge a relationship with his daughter, he [had] made some efforts" and these efforts were "often times . . . thwarted by Ms. Roberto." Indeed, the trial court found that "Ms. Roberto has actively hindered and essentially precluded Mr. Savard from being part of [Sarah]'s life." Perhaps most importantly, the trial court also found that Mr. Savard had "not shown an intention to give up all parental rights to [Sarah]."

While Ms. Roberto claims that *In re C.B.C.* is instructive, that case does not contemplate a situation, such as here, where one parent actively thwarts the other parent's ability to have a relationship with their child. Furthermore, to the extent that Ms. Roberto claims that her efforts to preclude Mr. Savard from being a part of Sarah's life were justified by Mr. Savard's prior domestic violence towards her, the trial court did not make any findings of fact to support that any abuse had occurred. The trial court made no findings that Mr. Savard had sexually assaulted Ms. Roberto or that he had threatened her with a gun. Furthermore, as noted above, and as it relates to Mr. Savard's suicidal behavior, the trial court found that when Mr. Savard threatened suicide, he was not acting in a manner that was "threatening or combative" towards Ms. Roberto or their unborn child. Thus, based on the record before it, the Court of Appeals was correct to conclude that no grounds existed to terminate Mr. Savard's parental rights for willful abandonment pursuant to N.C.G.S. § 7B-1111(a)(7).

We affirm the Court of Appeals' decision and hold that there are no grounds to terminate Mr. Savard's parental rights to Sarah pursuant to N.C.G.S. § 7B-1111(a)(1), (4), or (7). We modify the decision of the Court of Appeals to the extent the Court of Appeals' decision could be read to be applying an abuse of discretion standard of review at the adjudicatory stage of this proceeding to reiterate that our review at the adjudicatory stage is to determine whether there is clear, cogent, and convincing evidence in the record to support the trial court's findings of fact, and whether the findings of fact support the conclusions of law.

MODIFIED AND AFFIRMED.

STATE OF NORTH CAROLINA
v.
SCOTT WARREN FLOW

No. 202PA21

Filed 28 April 2023

Constitutional Law—right to be present at criminal trial—waiver—voluntariness of absence—suicide attempt—competency

The trial court's decision to proceed with a criminal trial in defendant's absence, without conducting further inquiry into defendant's capacity to proceed with the trial after defendant made an apparent suicide attempt partway through the trial by jumping off a balcony at the county jail, did not violate defendant's statutory protections with regard to competency to stand trial (pursuant to N.C.G.S. §§ 15A-1002 and 15A-1443) or his constitutional due process rights. Based on evidence taken by the trial court regarding the incident and defendant's mental health as well as arguments from defense counsel and the State, there was not substantial evidence that defendant may have lacked competency at the time of his apparent suicide attempt. The trial court's determination that defendant's absence from trial was voluntary because he committed an intentional act was supported by the court's prior colloquies with defendant (during which defendant waived his right to testify or to present evidence on his own behalf), the court's own direct observation of defendant's demeanor, and the court's review of evidence—including surveillance footage—of defendant's actions and demeanor at the time he jumped.

Justice EARLS dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 277 N.C. App. 289 (2021), affirming the judgments entered on 20 December 2019 by Judge Nathan H. Gwyn, III in Superior Court, Gaston County. This matter was calendared for argument in the Supreme Court on 9 February 2023 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Joshua H. Stein, Attorney General, by Rebecca E. Lem, Assistant Attorney General, for the State-appellee.

Mark Montgomery for defendant-appellant.

MORGAN, Justice.

Defendant's appeal in this criminal case raises the issue of whether the trial court erred in declining to conduct further inquiry into defendant's capacity to proceed following his apparent suicide attempt on the morning of the sixth day of trial before the jury was given its instructions, but after the jury had heard closing arguments from both sides. We hold that, within the particular facts and overall context of this case, the trial court acted in accordance with the Constitution of the United States and the North Carolina General Statutes by receiving evidence concerning defendant's medical history and defendant's state of mind at the time of his apparent suicide attempt and by determining that defendant's actions voluntarily absented him from further court proceedings. Accordingly, we affirm the decision of the Court of Appeals, which found no error in the judgments entered by the trial court.

I. Procedural and Factual Background

Defendant was indicted by a grand jury for the criminal offenses of first-degree rape, first-degree burglary, first-degree kidnapping, first-degree sexual offense, possession of a firearm by a convicted felon, and violation of a protective order in connection with events occurring between 26 May 2018 and 27 May 2018 in Dallas, North Carolina. Defendant's charges were joined for trial. His trial began on 9 December 2019. Defendant stipulated to the existence of his prior felony conviction and pleaded not guilty to the charges lodged against him. The trial court conducted the following colloquy with defendant to ensure that defendant was entering this stipulation freely, voluntarily, and intelligently:

> THE COURT: All right. For the record, Mr. Flow, among the charges you face is one that's called felony possession of a firearm while being a convicted felon. The State, by this piece of paper, has handed up something that says, on February 3rd, 2003, in Lancaster County, South Carolina, under File Number 02GS29-862, the defendant – that's you – was convicted of a felony that was committed on May 1st, 2002.
>
> I am told that you and your attorney and the State have considered whether or not to go along with that stipulation. This is a decision that is yours and yours alone. It's not up to your attorney, it's not up to

anyone in your family, it's not up to the DA, it's not up to me, it is yours and yours alone.

Do you understand everything I have said so far?

THE DEFENDANT: Yes, sir.

THE COURT: So knowing that, you are – if you sign off on this stipulation, knowing that you would be admitting to something that the State has got the burden of proving by proof beyond a reasonable doubt, and that you don't have to enter into that stipulation if you don't want to, is this what you're asking to do?

Are you so stipulating and are you comfortable with doing that?

Do you want to talk to your attorney a little bit more?

You can. Just do it privately so I don't hear you.

THE DEFENDANT: Yes, sir.

(Discussion off record)

THE DEFENDANT: Yes, I – yes, sir.

THE COURT: Okay. Now, before I write this up, are you fully aware of what you're doing?

THE DEFENDANT: Yes, sir.

THE COURT: You're not taking any mind-altering medications or substances are you?

THE DEFENDANT: No, sir.

THE COURT: Do you have any questions of me about what this might mean for you —

THE DEFENDANT: No, sir.

THE COURT: — that haven't already been answered by your attorney?

THE DEFENDANT: No, sir.

THE COURT: So you make this decision to make this stipulation freely and voluntarily and of your own free will?

THE DEFENDANT: Yes.

THE COURT: And you know what the legal consequences might be for you?

THE DEFENDANT: Yes, sir.

THE COURT: Do you want any additional time to talk to your attorney?

If you want additional time we can take this up later.

THE DEFENDANT: No, sir.

THE COURT: You're good to make the call now?

THE DEFENDANT: Yes, sir.

THE COURT: Does that satisfy you, Mr. Higdon, and, Ms. Monteleone?

MR. HIGDON: Yes, Your Honor.

MS. MONTELEONE: Yes, Your Honor.

THE COURT: Okay. Well, I'll hand it back to both of you for signing.

It still needs to be signed by Mr. Flow, and you, Mr. Higdon.

And the stipulation as to that will be accepted by the Court.

Throughout the course of the trial, the State elicited evidence through the testimony of thirteen witnesses. The evidence presented at trial tended to show the following: in the early morning hours of 27 May 2018, law enforcement officers of the Gaston County Police Department's Emergency Response Team entered the home of defendant's ex-girlfriend, Hannah,[1] where she was being held at gunpoint by defendant. Sergeants Anderson Holder and Matthew Hensley testified at trial that the Emergency Response Team had to initiate an emergency rescue of Hannah after three and a half hours of negotiations with defendant failed to secure her release. Holder testified that the police team placed an explosive charge on the front door of Hannah's home to gain entry to the residence and that he subsequently ran inside, kicked open

1. The pseudonym "Hannah" is used throughout this opinion to protect the identity of the victim.

the door to the master bedroom, and made his way into a small bathroom where defendant had his legs around Hannah and was holding a pistol to her head. Sergeant Holder then engaged in a physical confrontation with defendant in order to disarm and detain him while Sergeant Hensley removed Hannah from the bathroom.

Hannah and her teenage daughter, Brooklin, provided testimony regarding the relationship between Hannah and defendant leading up to 26 May 2018. Hannah testified that she met defendant in the spring of 2017. At first, Hannah and defendant were just friends, but later they began dating while refraining from engaging in sexual relations with one another. Both Hannah and Brooklin testified about an argument that took place between Hannah and defendant around Thanksgiving of 2017 during which defendant began "cussing and raging" at Hannah after defendant had taken a wrong turn while driving with her and Brooklin in the car. Afterward, Hannah chose to end her relationship with defendant and, in response, defendant told Hannah that she would come to "regret the day [that she] ever met [him]." Around Christmas of 2017, Hannah and Brooklin discovered that someone had damaged Hannah's vehicle by puncturing the tires on the right side of the vehicle; after that incident, Hannah sought and was granted a domestic violence protective order (DVPO) against defendant in February 2018 pursuant to N.C.G.S. § 50B-1(b)(6).

Hannah further testified that she resumed contact with defendant after he came to visit Hannah's mother in the hospital after the mother had fallen and had developed double pneumonia. Defendant apologized to Hannah for puncturing Hannah's tires, and they soon resumed seeing each other. Hannah testified that she was afraid to stop speaking with defendant because he told Hannah that he would never leave her alone and that the protective order would not prevent defendant from contacting her. Hannah stated that she never contacted law enforcement about defendant's violation of the protective order because Hannah did not want to get defendant into trouble. Instead, Hannah tried to get defendant "on the right path" and to get him involved with "some good men at church" for support. Although they renewed their dating relationship and would hug and kiss each other, Hannah and defendant never had consensual sex.

On 26 May 2018, Hannah testified that she picked up Brooklin to go shopping in Lincolnton, North Carolina. While the two were on their way to Lincolnton, defendant called Hannah and screamed about driving down the road while being the target of gunshots. After defendant ended the telephone call, Hannah called him back to ask about the situation.

Defendant responded that his friend's father or father-in-law had started shooting at him and that he did not know why, but that he was going to go home and would call Hannah back later. While Hannah and Brooklin were in the Walmart store in Lincolnton, defendant called Hannah back on FaceTime[2] and asked her if she knew where he was. Hannah recognized defendant's location as her niece's house. Hannah asked defendant what he was doing at her niece's house and defendant responded that he was "hiding out from the law." Hannah tried to call defendant again after she and Brooklin left Walmart, but he did not answer Hannah's call. Later that day, after Hannah had returned home, defendant called her again and told Hannah that he was "going to kill a ni**er." Hannah was concerned that defendant was referring to the Black boyfriend of Hannah's older daughter Brittany, about whom defendant had spoken in the past. Hannah then left her residence to drive to Brittany's house to make sure that defendant was not there; after verifying that he was not, Hannah turned around to return home. During Hannah's return trip to her residence, she called defendant's father by telephone; defendant's father commented that defendant was "not his normal self." While talking to defendant's father, Hannah missed several telephone calls and text messages from both Brooklin and defendant.

Brooklin testified that she had been left at Hannah's house with Brooklin's two young nieces, Armoni and Daeja, while Hannah went to determine whether defendant was at Brittany's house. Brooklin put Daeja in the youngster's crib and was in the kitchen with Armoni when defendant pulled his vehicle into the driveway of Hannah's residence. Brooklin told Armoni to run upstairs; Brooklin locked the door of the home and proceeded to go upstairs with Armoni. Brooklin told Armoni to hide in the bed in Brooklin's bedroom and turned off the light; Brooklin then went into the laundry room, where Daeja's crib had been placed, to check on Daeja. From the laundry room, Brooklin looked through the window and saw defendant exit his car, approach the residence, bang on the back door of the home, and subsequently kick in the back door in order to enter the house.

Brooklin watched as defendant walked toward her mother Hannah's bedroom and heard defendant as he rummaged through Hannah's dresser drawers. When defendant left the bedroom, Brooklin saw one of Hannah's guns in his hand. Brooklin asked defendant for what purpose he had acquired her mother's gun, and he started to walk towards her.

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2. A communication method available to specified cellular telephone users which allows them to see one another while they talk to each other.

Brooklin then retreated into her room as defendant yelled at her, asking Brooklin why her mother Hannah was ignoring him and demanding that Brooklin call Hannah. Brooklin told defendant to stop because he was scaring her and because her young nieces were in the house. Nonetheless, defendant continued to yell and "lunged" at Brooklin with the gun behind his back. Brooklin attempted to reach Hannah via text messages and telephone calls throughout this encounter, but Hannah did not answer; as an alternative, Brooklin texted and then called her neighbor, Brittany Brady, to tell Brady that defendant had broken into the house and that Brooklin needed help to remove the children from the residence. Defendant then exited the house and stood outside.

When Hannah returned home, she saw defendant's vehicle in her driveway. After Hannah parked her vehicle in the driveway, defendant attempted to get into Hannah's vehicle. Hannah then exited her vehicle and walked into the house with defendant following her. Hannah asked defendant for the reason that both of the doors to Hannah's home were open and for the reason that his glasses were in a broken condition outside of the carport. Defendant shrugged in response. Brooklin informed her mother Hannah that defendant had retrieved both of Hannah's guns after kicking in the doors to the house and that defendant was going to try to kill them. Their neighbor Brady then pulled her own vehicle into Hannah's driveway as Brady and Brooklin endeavored to remove the children, Armoni and Daeja, from the house while defendant and Hannah went upstairs. Brooklin noticed that defendant was holding Hannah by the arm. Brooklin told her mother that Brooklin was going to call the police. Defendant continued to hold Hannah by the arm so that Hannah was unable to leave after Hannah escorted Armoni and Daeja down the stairs in order to exit the house with Brooklin and Brady.

After Brooklin, Brady, Armoni, and Daeja departed from Hannah's house, defendant removed the wristwatch from his arm and threw it onto the ground, causing the wristwatch to break and scatter into pieces. Defendant then grabbed Hannah and began dragging her upstairs. He pushed Hannah into her bedroom and then cocked her gun and made sure that it was loaded. Defendant locked the door, put the gun to the back of Hannah's head, and threatened to "blow [her] brains out." Hannah began praying, at which point defendant pulled her up from the floor and pushed her into the small bathroom attached to her bedroom. Defendant then shut the bathroom door and locked it behind him, confining the two of them to the bathroom. Defendant grabbed Hannah by the neck, placed the gun against her temple, and began to tell her that she had "used" him. He pushed the gun into Hannah's eye socket and

continued to threaten her. Hannah begged for her life. Defendant then ordered Hannah to sit on the floor and to keep her hands flat on the floor while he began to empty his pockets and to throw the contents into the sink in search of cigarettes and a lighter. When defendant found his cigarettes and lighter, he sat on the edge of the shower and began to smoke a cigarette. Defendant blew smoke from the cigarette into Hannah's face. Defendant talked about how "it wasn't supposed to end like this" and that he had intended to kill himself, defendant's father, and Hannah when they were all in South Carolina to visit defendant's father for the elder's birthday. Defendant then spoke of getting into a confrontation with a man with whom he formerly worked and wanting to "kill that ni**er."

Defendant continued to blow smoke from his cigarette into Hannah's face while they were locked in the small bathroom adjacent to Hannah's bedroom. Hannah asked defendant to turn on the ceiling fan or to crack the bathroom door because the temperature inside the bathroom was hot. Defendant refused Hannah's request and then he stood up, stating that he had heard something. Defendant cracked the bathroom door and noticed that blue lights were flashing from a law enforcement vehicle across the street. Defendant instructed Hannah to call the emergency telephone number 911 and to tell emergency personnel to "cut those blue lights off" or he would "blow [her] brains out." After Hannah satisfied defendant's commands so that defendant would not kill her, defendant directed Hannah to sit back down in the bathroom with her hands on the floor. When Hannah moved her hand to redirect some of her hair that had fallen across her face, defendant struck Hannah with the butt of the firearm. Later, defendant told Hannah that he needed to use the bathroom. Defendant forced Hannah to straddle the commode and to unzip his pants for him. Defendant then ordered Hannah to pull out his penis and to aim it toward the toilet bowl. Defendant continued to hold Hannah's gun while he urinated. Hannah was unable to direct defendant's urine into the toilet bowl and the urine went "everywhere" while he "just stood there."

Defendant allowed Hannah to wipe some of his urine from her legs and feet with a towel. He then instructed her to get off of the commode. Defendant began to jerk at Hannah's pants and told her to remove them. Hannah said no. In response, defendant threatened to "blow [off her] kneecaps." Defendant pointed the gun at Hannah and she removed her pants. Defendant then directed Hannah to remove her shirt; Hannah complied. Defendant pushed Hannah toward the commode, removed his own pants, and unsuccessfully attempted to put his penis into Hannah's rectum. Defendant next tried to put his penis into Hannah's vagina, also without success.

Defendant unlocked the bathroom door and pulled Hannah out of the bathroom and into her bedroom. He pushed Hannah toward the bed and ordered her to get onto her knees. Defendant then got behind Hannah, put the gun to her back, and stuck his penis into her vagina and began to have intercourse with her. Defendant made Hannah turn over as he continued to have intercourse with her. At this point, Hannah's telephone was ringing as law enforcement was attempting to get into contact with her. Defendant then compelled Hannah to lie across the bed and forced her to put his penis into her mouth to perform fellatio. Subsequently, defendant allowed Hannah to put her clothing back on. Defendant stated that he was thirsty and that he wanted a bottle of water. Hannah offered to obtain a bottle of water from the kitchen for defendant, but he would not allow her to leave the bedroom without him. Instead, defendant put his arm around Hannah's neck and placed the gun at her temple before leaving the bedroom with her.

When defendant and Hannah entered the living room, defendant attempted to turn on the light, but mistakenly flipped the switch for the ceiling fan instead. Defendant then began to holler that "they've cut the lights off" and pulled Hannah backwards into another bathroom. Hannah's telephone rang and defendant answered it; he began speaking to law enforcement about his desire for some water. Hannah used the bathroom and both she and defendant drank some water from the faucet of the bathroom sink before he pulled her back into the bedroom. Defendant then ended the telephone call with law enforcement and instructed Hannah to take off her clothes again. He directed Hannah to lie on the bed and defendant inserted his penis into her vagina. Defendant then rolled onto his back and told Hannah to get on top of him. Defendant continued to hold the firearm throughout these occurrences. After defendant allowed Hannah to get off of him, defendant positioned himself behind her and again inserted his penis into her. When defendant had finished, he allowed Hannah to put back on her shirt and pants.

Throughout the night, defendant periodically allowed Hannah to answer telephone calls from law enforcement officers. He also directed Hannah to call her pastor, the pastor's wife, and Hannah's friend Laurie Parker. Neither Hannah's pastor nor the pastor's wife answered Hannah's calls, but Parker called Hannah back. Defendant told Hannah that Hannah "better talk to [Parker] now while [she could]." At one point, defendant permitted Hannah to answer a telephone call from law enforcement while defendant attempted to contact his uncle on his own telephone. Defendant's uncle did not answer defendant's calls, and defendant then attempted to reach his uncle's daughter, Jennifer.

When Jennifer answered defendant's telephone call, he told Jennifer that he needed to speak with her father and that he had done something "really bad." Defendant's telephone subsequently lost power to operate. Defendant then looked over at Hannah and said "it's time." Defendant told Hannah that he was going to kill her and then himself. Hannah began to scream and to attempt to get away from defendant. Hannah then heard a "big boom," which was the explosion that the Gaston County Police Department's Emergency Response Team had initiated in order to make entry into the house.

After the Emergency Response Team successfully removed Hannah from the house, Hannah was reunited with her daughters. Hannah told law enforcement that defendant had raped her twice. Hannah's older daughter Brittany then transported Hannah to the local hospital, where medical professionals recorded Hannah's medical history and Hannah's description of defendant's assault on her. Hospital staff took photographs of Hannah's injuries; conducted a physical examination of Hannah; and took swabs of Hannah's fingernails, breast, mouth, vaginal, and external genital areas. The anal, vaginal, and external genital swabs all tested positive for defendant's DNA[3] profile. Hannah's injuries included bald patches on her scalp where defendant had pulled at her hair, bruises on her arms and the back of her head, abrasions to her leg and knee, a broken toe, and both internal and external lacerations to her vagina.

After the State had rested its case on Friday, 13 December 2019, defense counsel made a motion to dismiss each charged offense and all lesser-included offenses against defendant on the grounds that the State's evidence was insufficient as a matter of law. The trial court granted defendant's motions to dismiss both of the first-degree kidnapping charges and allowed the first-degree burglary charge to go forward as second-degree but denied the remainder of defendant's motions to dismiss. Upon defendant's election not to testify or to present evidence on his own behalf, the trial court conducted the following colloquies to ensure that defendant was making these choices freely, voluntarily, and intelligently. The first colloquy occurred on 13 December 2019 in the following manner:

> [DEFENSE COUNSEL]: I just want for Your Honor to inquire with my client regarding he understands he has the right to testify. It's my belief he's going to elect not to testify at this time. I just wanted to get that on the record.

3. Deoxyribonucleic acid.

THE COURT: I will put that on the record now. And I will also re-address it Monday, and give him an opportunity to think about it over the weekend.

Mr. Flow, have you been able to go over with your attorneys your choice of whether or not you want to testify?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Just answer yes or no.

You have?

THE DEFENDANT: Yes.

THE COURT: And have they answered all of your questions about that?

THE DEFENDANT: Yes, sir.

THE COURT: And how are you feeling today?

Is your mind clear?

THE DEFENDANT: Yes.

THE COURT: Are you taking any kind of medicines or any kind of substances at all that would affect how you think or feel?

THE DEFENDANT: No, sir.

THE COURT: So your mind is clear as we have this conversation?

THE DEFENDANT: Correct, yes, sir.

THE COURT: And you realize you have the right not to testify?

THE DEFENDANT: Yes, sir.

THE COURT: Do you also realize, as a result of your conversation with the attorneys, that you have the right to testify?

THE DEFENDANT: Yes, sir.

THE COURT: You have both of those rights.

THE DEFENDANT: Right.

THE COURT: And you understand that at this juncture, at this point in the trial, it is your decision entirely as to whether or not you decide to testify or not.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: It is not your lawyer's decision, it's not the DA's decision, it's not my decision, it's your decision and your decision alone.

So have you been able to think some this afternoon about whether or not you want to testify?

THE DEFENDANT: Yes, sir, I have.

THE COURT: And what is your decision?

THE DEFENDANT: I'm not going to testify.

THE COURT: Okay. Well, that is certainly your right.

Let the record reflect the Court has had the colloquy with Mr. Flow outside the presence of the jury, at the request of his counsel. And the decision at this point, 10 till 4 on December 13th, is not to testify.

Is that correct, sir?

THE DEFENDANT: Correct, sir.

THE COURT: Do you have any questions about your decision to testify or not?

THE DEFENDANT: No, sir.

THE COURT: How far did you go in school?

THE DEFENDANT: I have a GED, and I had some technical college.

THE COURT: And some technical beyond a GED?

THE DEFENDANT: Yes, sir.

THE COURT: So then you can read and write?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Does that satisfy —

> [DEFENSE COUNSEL]: Yes, Your Honor.
>
> THE COURT: — you, Mr. Higdon, about the colloquy the Court is required to have?
>
> [DEFENSE COUNSEL]: Yes, Your Honor.

On Monday, 16 December 2019, the trial court conducted the following additional colloquy to ensure that it was defendant's legally acceptable choice not to present evidence or to testify on his own behalf:

> [DEFENSE COUNSEL]: The defendant will not be putting on any evidence.
>
> THE COURT: Okay. If you would please stand.
>
> (The defendant complied)
>
> THE COURT: You've been over that choice of yours with both Ms. Monteleone and you[r] attorney Mr. Higdon?
>
> THE DEFENDANT: Yes, yes, Your Honor.
>
> THE COURT: Do you have any questions about that?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Do you realize it's your choice and your choice alone as to whether or not you put on evidence or not?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: That you have the constitutional right to present evidence?
>
> THE DEFENDANT: Yes.
>
> THE COURT: To offer witnesses on your behalf?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And also you have the constitutional right not to.
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: It is not your lawyer's decision, it is not your family's decision, it's not mine, or the assistant DA's, it is yours and yours alone.

> Do you have any questions about that?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Have all of your questions about that issue been satisfactorily answered by your attorneys, Ms. Monteleone and Mr. Higdon?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: Okay. You may have a seat.
>
> (The defendant complied)
>
> THE COURT: I am finding that that choice, like his choice not to testify, is made freely, voluntarily, and intelligently, and that he has had the opportunity to confer with counsel about that.
>
> . . . .
>
> THE COURT: Have you thought anymore about your decision not to testify?
>
> I take it that by you not presenting any evidence you also mean for that to mean you're not going to testify?
>
> (The defendant stood)
>
> THE DEFENDANT: Yes, Your Honor.

Following this exchange, defense counsel renewed the motion, on defendant's behalf, to dismiss all of the charges against defendant. The trial court denied the motion and the jury charge conference took place. The jury was then brought into the courtroom and it heard closing arguments from both sides before trial proceedings concluded for the day.

On the next day of Tuesday, 17 December 2019—the sixth day of trial and the day that the jury was scheduled to receive its instructions prior to the start of its deliberations in this case—defendant jumped off of the second-story mezzanine of the Gaston County Jail by first hanging onto a balcony railing before jumping a distance of sixteen feet onto the floor below and striking a steel table feet-first. Defendant was subsequently taken to the CaroMont Regional Medical Center via emergency transport, where he received surgery for his injuries which resulted from his actions. Defense counsel challenged defendant's competency under N.C.G.S. § 15A-1002 to continue with the trial proceedings and asked the trial court to delay any further proceedings until such a time as the court was satisfied that it had made an inquiry as to whether defendant had

the capacity to proceed. In response, the State argued that defendant's apparent suicide attempt did not implicate his capacity to proceed, but instead represented a voluntary absence and therefore constituted a waiver of his constitutional right to be present at every stage of his trial. The trial court instructed defense counsel to acquire information on defendant's condition and on the events leading to his absence.

Following a recess from trial proceedings during which both defense counsel and the State gathered evidence regarding the events being explored and defendant's circumstances, defense counsel called an investigator with the public defender's office, Shana Withers, to testify as to defendant's condition at CaroMont. Withers testified that defendant was "clearly medicated" and had been fitted with a neck brace as well as an immobilizing device on his left leg. Withers also testified that defendant's trauma surgeon spoke to defendant regarding a surgery that defendant needed in order to repair the upper femur of defendant's left leg; the doctor also reported that defendant had broken two ribs. Withers noted that defendant's responses to the doctor were "[r]elatively inaudible" and that defendant appeared to be having a "hard time responding." According to Withers, the hospital's legal counsel was unable to release defendant's medical records without a court order, and Withers further testified that sheriff's deputies had informed her that no one from the psychological department of the hospital had examined defendant. Defense counsel asserted that this testimony met the "textbook definition of incapable of proceeding," given that defendant was heavily medicated and was unable to provide intelligible responses.

In order to determine whether defendant had forfeited his right to be present for the trial's ongoing proceedings by his own actions, the trial court also received testimony from Assistant Chief Deputy of the Gaston County Sheriff's Office Darrell Griffin and reviewed camera footage of the incident. Griffin testified that nothing in his investigation suggested that any other parties were involved in defendant's actions. Griffin related that this event occurred when defendant told jail officials that defendant wanted to return to his jail cell to retrieve his glasses before being brought to court. The trial court asked Griffin whether defendant had demonstrated any instances of mental or emotional disturbance during the time that defendant had been at the jail; Griffin testified that Griffin was not aware of any such occasion. No other witnesses were called forward to testify by either the State or the defense. The State argued that defendant had voluntarily absented himself from the trial proceedings due to defendant's actions, whereas defense counsel contended that the resumption of trial proceedings in defendant's absence "would violate his due process rights, his right to a

jury trial, under the Federal Constitution, the State Constitution, and the applicable statutes under North Carolina law." The State also submitted that defendant's actions may not have been suicidal in nature at all in light of the specific aspects of his jump.

The trial court observed that its inquiry was "limited to a very narrow issue" of whether defendant's actions were voluntary, rather than the question of whether his actions amounted to a suicidal gesture. Upon concluding that defendant's injuries were entirely caused by defendant's own voluntary actions, the trial court determined that defendant had voluntarily absented himself from the trial proceedings and that the trial could go forward properly in his absence. Neither the defense nor the State requested any additional findings from the trial court; however, defense counsel objected to the trial court's determination on the record before the parties participated in the remainder of the jury charge conference.

After deliberating for the remainder of the afternoon of Tuesday, 17 December 2019 and the beginning of the following morning of Wednesday, 18 December 2019, the jury returned a verdict of guilty on each of the charges against defendant while he was absent from the trial proceedings. For sentencing purposes, the trial court submitted for the jury's consideration the State's only requested aggravating factor, to wit: defendant knowingly violated a valid protective order in the course of constituting the second-degree burglary and first-degree kidnapping. The jury found the existence of this aggravating factor for purposes of sentencing defendant for his commission of these two particular crimes. Defense counsel repeatedly made motions to strike the jury verdicts as violations of defendant's rights to due process and to a jury trial under the Constitution of the United States and the Constitution of North Carolina. The trial court denied these motions and entered judgments against defendant. On Friday, 20 December 2019, after defendant had returned to court and in accordance with the jury's verdicts, the trial court sentenced defendant to consecutive sentences of incarceration of 276 to 392 months each for the commission of the crime of first-degree forcible sexual offense and both commissions of the crime of first-degree forcible rape. Defendant's convictions for first-degree kidnapping, second-degree burglary, DVPO violation with a deadly weapon, possession of a firearm by a felon, and false imprisonment were consolidated for judgment with defendant being sentenced to 180 to 228 months of incarceration to run consecutively to his three other consecutive sentences. Lastly, defendant was ordered to register as a sex offender for the remainder of his natural life.

Defendant appealed to the Court of Appeals, arguing that the trial court erred in denying defense counsel's motion to conduct an inquiry into defendant's capacity to proceed. Defendant also contended before the lower appellate court that the trial court's instructions on first-degree sexual offense deprived defendant of his right to a unanimous jury verdict; however, this issue is not the subject of the present appeal. In an opinion filed on 4 May 2021, *State v. Flow*, 277 N.C. App. 289 (2021), a unanimous Court of Appeals panel found no error in the judgments entered by the trial court. The lower appellate court acknowledged this Court's holding in *State v. Sides*, 376 N.C. 449, 450 (2020), in which we determined that the trial court in that case had erred in concluding that the defendant Sides had waived her constitutional right to be present at her trial as the result of her suicide attempt and by the trial court's subsequent failure to conduct a competency hearing *sua sponte* to determine whether the defendant had possessed the capacity to waive her right to be present where substantial evidence was presented to show that the defendant may have been incompetent at the time of her suicide attempt. *Flow*, 277 N.C. App. at 296–97, 299. In *Sides*, we concluded that "[o]nce the trial court had substantial evidence that defendant may have been incompetent, it should have sua sponte conducted a competency hearing to determine whether she had the capacity to voluntarily waive her right to be present during the remainder of her trial." 376 N.C. at 457. This Court observed:

> In such cases, the issue is whether the trial court is required to conduct a competency hearing before proceeding to determine whether the defendant made a voluntary waiver of her right to be present, or, alternatively, whether it is permissible for the trial court to forego a competency hearing and instead assume a voluntary waiver of the right to be present on the theory that the defendant's absence was the result of an intentional act.

Id. at 456. We further opined, however, that

> the issue of whether substantial evidence of a defendant's lack of capacity exists so as to require a sua sponte competency hearing requires a fact-intensive inquiry that will hinge on the unique circumstances presented in each case. Our holding should not be interpreted as a bright-line rule that a defendant's suicide attempt automatically triggers the need for a competency hearing in every instance. Rather, our

> decision is based on our consideration of all the evidence in the record when viewed in its totality.

Id. at 466. The Court of Appeals in the present case noted that, unlike in *Sides*, nothing in defendant's prior record, conduct, or actions provided the trial court with notice or evidence that defendant may have been incompetent. *Flow*, 277 N.C. App. at 299. Furthermore, the trial court here had the opportunity to personally observe defendant's conduct and demeanor at the time of his apparent suicide attempt, to hear arguments from both the State and the defense, and to receive evidence concerning defendant's competency before concluding that defendant had voluntarily absented himself from the trial proceedings. *Id.* Finally, unlike the defendant in *Sides*, defendant in this case engaged in multiple lengthy colloquies with the trial court and waived his right to testify or to present evidence on his own behalf. *Id.* at 300.

Here, the Court of Appeals decided that there was no substantial evidence which tended to show, or to support a finding, that defendant may have been incompetent apart from his apparent suicide attempt; consequently, the trial court was not required to preside over an additional *sua sponte* hearing regarding defendant's competency after having already conducted an appropriate fact-intensive inquiry into whether defendant had voluntarily waived his right to be present for the rest of the trial proceedings due to his intentional actions. *Id.* at 302. After further holding that the trial court did not deprive defendant of his right to a unanimous jury verdict with the trial court's jury instruction on first-degree sexual offense, the lower appellate court concluded that defendant had received a fair trial, free from prejudicial errors, and therefore affirmed the jury's verdicts and judgments thereupon entered. *Id.* at 303–04.

Defendant petitioned this Court for discretionary review pursuant to N.C.G.S. § 7A-31(c) to consider: (1) whether the trial court erred by failing to conduct further inquiry into defendant's capacity to proceed, and (2) whether the trial court's instruction on sexual offense deprived defendant of his right to a unanimous jury verdict. This Court allowed review as to the first issue and denied review as to the second issue by way of a special order issued on 17 August 2022. As such, our review in this matter is limited to whether the trial court erred by failing to conduct further inquiry into defendant's continued capacity to proceed following defendant's apparent suicide attempt on 17 December 2019 after the trial court had determined that defendant had voluntarily absented himself from the court proceedings as the result of his actions.

II. Analysis

Defendant depicts his appeal as presenting two interrelated arguments in his claim that the trial court erred in declining to conduct further inquiry into defendant's capacity to proceed—one statutory claim arising out of the North Carolina General Statutes and one constitutional claim arising out of the Due Process Clause of the Fourteenth Amendment. Because defendant's claims present questions of law concerning the trial court's alleged nonconformance with statutory requirements and alleged violations of defendant's constitutional rights, our review is de novo. *State v. Watlington*, 216 N.C. App. 388, 394 (2011); *State v. Ortiz-Zape*, 367 N.C. 1, 10 (2013). In evaluating defendant's contentions, we hold that the trial court did not err in declining to make further inquiry into defendant's capacity to proceed during the trial proceedings because the trial court received all of the evidence which the defense was prepared to present at the original hearing and there was not substantial evidence to indicate that defendant may have lacked capacity at the time of his apparent suicide attempt.

A. Defendant's Statutory Claim

First, defendant asserts that the trial court acted in violation of the North Carolina General Statutes by allowing criminal proceedings to continue against defendant while he was incompetent to stand trial. The pertinent statutory law states:

> No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner.

N.C.G.S. § 15A-1001(a) (2021). Relevant statutory provisions further provide that a question regarding a defendant's capacity to proceed "may be raised at any time on motion by the prosecutor, the defendant, the defense counsel, or the court" and that, once a defendant's capacity to stand trial is called into question, the trial court is required to "hold a hearing to determine the defendant's capacity to proceed." N.C.G.S. § 15A-1002(a)–(b) (2021). When a competency hearing is conducted, "[r]easonable notice shall be given to the defendant and prosecutor, and the State and the defendant may introduce evidence." N.C.G.S. § 15A-1002(b)(1). "A defendant has the burden of proof to show incapacity or that he is not competent to stand trial." *State v. O'Neal*, 116

N.C. App. 390, 395 (1994) (citing *State v. Gates*, 65 N.C. App. 277, 283 (1983)). At the conclusion of such a competency hearing, "[t]he order of the court shall contain findings of fact to support its determination of the defendant's capacity to proceed." N.C.G.S. § 15A-1002(b1) (2021). "Where the procedural requirement of a hearing has been met, defendant must show that the trial court abused its discretion in denying the motion [for an evaluation of defendant's capacity to stand trial] before reversal is required." *Gates*, 65 N.C. App. at 284 (citing *State v. McGuire*, 297 N.C. 69 (1979), *cert. denied sub nom. McGuire v. State*, 444 U.S. 943 (1979)).

Defendant calls our attention to a definitive request that his counsel made for a competency hearing after defendant injured himself on 17 December 2019. Specifically, the attorney stated to the trial court:

> [DEFENSE COUNSEL]: Your Honor, at this time the defense makes a motion, based on the best available information that I have, that this may be a suicide attempt, and I'm going to challenge my client's competency under 15A-1002, and the Court should delay any further proceedings until the Court is satisfied that it has made an inquiry as to whether or not the defendant has the capacity to proceed at trial.

We agree that this motion was plainly sufficient to trigger the statutory requirement that the court "hold a hearing to determine the defendant's capacity to proceed." N.C.G.S. § 15A-1002(b)(1). However, the relevant queries then become (1) whether the inquiry subsequently conducted by the trial court sufficed to meet the statutory requirements provided by N.C.G.S. § 15A-1002 and (2) if not, whether defendant has demonstrated that he was prejudiced by the trial court's failure to conduct a statutorily sufficient hearing. *See* N.C.G.S. § 15A-1443(a) (2021).

Section 15A-1002 provides sparse guidance regarding the procedural and substantive requirements of the competency hearing mandated by the statutory enactment. "Although the present statute requires the court to conduct a hearing when a question is raised as to a defendant's capacity to stand trial, no particular procedure is mandated. The method of inquiry is still largely within the discretion of the trial judge." *Gates*, 65 N.C. App. at 282. Indeed, this area of the General Statutes is largely characterized by permissive language delineating what the trial court *may* do when conducting a competency hearing, including, but not limited to, the court's issuance of an order for a medical examination of the defendant. On the other hand, there is correspondingly little reference in the statutes

to what the trial court *shall* do. *See*, *e.g.*, N.C.G.S. § 15A-1002(b)(1a) and (2). As a result, our appellate courts have ascertained that "[t]he hearing requirement . . . appears to be satisfied as long as it appears from the record that the defendant, upon making the motion, is provided an opportunity to present any and all evidence he or she is prepared to present." *Gates*, 65 N.C. App. at 283.

Consistent with this appropriate construction of the applicable statutory provisions and applying it to the instant case, we therefore hold that the inquiry conducted by the trial court following defense counsel's motion in this case was statutorily sufficient because defendant was provided an opportunity to present any and all evidence relating to his competency that he was prepared to present. Specifically, the trial court released defense counsel to visit defendant in the hospital and to gather any evidence pertaining to defendant's absence from court that the defense saw fit to present. When the parties reconvened and proceedings resumed, the trial court solicited evidence regarding whether defendant had a history of mental illness, evidence regarding whether anyone had witnessed previous instances of mental or emotional disturbance from defendant, and evidence regarding defendant's behavior leading up to, and at the time of, his apparent suicide attempt. In accordance with N.C.G.S. § 15A-1002(b)(1), both the State and the defense were permitted to introduce evidence for the trial court's consideration. The trial court was even able to review videographic evidence which showed defendant as he jumped from the jail's second-story mezzanine. At the conclusion of this hearing, the trial court determined that defendant had voluntarily absented himself from further proceedings.

Although the trial court declined to specifically consider whether defendant had manifested a "suicidal gesture" at the time of his jump, we do not deem the trial court's approach to connote inadequate contemplation by the tribunal of the evidence presented on defendant's capacity. Suicidality does not automatically render one incompetent; conversely, a defendant may be found incompetent by way of mental illness without being determined to be suicidal. However, a defendant cannot be found to have acted voluntarily if he lacked capacity at the time of his conduct in question. *See Sides*, 376 N.C. at 459 ("Logically, competency is a necessary predicate to voluntariness."). By receiving evidence concerning defendant's state of mind leading up to, and at the time of, his apparent suicide attempt, the trial court was able to determine whether defendant had acted voluntarily and had thereby waived his right to be present at all stages of his trial. *See State v. Woods*, 293

N.C. 58, 64 (1977) ("Clearly, the trial court considered all information relative to defendant's capacity which was presented to it and found, implicitly at least, that defendant was competent to proceed to trial."). Therefore, the trial court was not required to make a specific determination regarding whether defendant's acts amounted to a suicidal gesture.

Because we hold that the trial court's inquiry into defendant's capacity to proceed at the time of his apparent suicide attempt was statutorily sufficient, we therefore do not need to reach the issue of whether defendant has demonstrated prejudice. We do note, however, that defendant has made no showing that he was prejudiced by any failure on the part of the trial court to conduct any further inquiry. In order to demonstrate prejudicial statutory error in accordance with N.C.G.S. § 15A-1443(a), defendant would have to prove that there was a reasonable possibility that, had the trial court conducted further inquiry into his capacity to proceed, a different outcome would have resulted at his trial. Defendant was only absent from trial for the trial court's rendition of the charge to the jury and the announcement of the jury verdicts. Defendant himself expressly waived his right to present evidence and to testify on his own behalf after two lengthy colloquies with the trial court prior to his apparent suicide attempt. The trial court instructed the jury that it was not to speculate about the reason for defendant's absence or to infer anything from the fact that defendant was not physically present in court prior to the jury's deliberations. Defendant returned to court in person for sentencing on 20 December 2019. Therefore, assuming *arguendo* that there was any error in the trial court's execution of defendant's N.C.G.S. § 15A-1002 hearing, there are no grounds existent to vacate the trial court's judgment because it did not prejudice defendant.

B. Defendant's Constitutional Due Process Claim

Second, defendant contends that the trial court violated his constitutional rights because the Due Process Clause of the Fourteenth Amendment provides that (1) a criminal defendant has the right to be present at all stages of his own trial "whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge," *Snyder v. Massachusetts*, 291 U.S. 97, 105–06 (1934), and (2) a criminal defendant cannot be tried unless he is competent to stand trial, *Medina v. California*, 505 U.S. 437, 439 (1992). Although competency hearings mandated by state statute are largely within the discretion of the trial judge, do not confer onto defendants the right to a medical examination, and merely require that both sides be afforded an opportunity to present evidence bearing on the issue of competence, hearings arising under the Due Process Clause require

trial judges to actively "elicit adequate information" to "dispel[] the concerns that would ordinarily arise regarding competency." *United States v. Loyola-Dominguez*, 125 F.3d 1315, 1319 (9th Cir. 1997); *see also State v. Whitted*, 209 N.C. App. 522, 529 (2011). Under some circumstances, a trial court may even be constitutionally required to order a psychiatric examination to determine a defendant's ongoing capacity to stand trial. *State v. Rich*, 346 N.C. 50, 61 (1997); *State v. Heptinstall*, 309 N.C. 231, 235–36 (1983). However, a defendant is not entitled to a competency hearing under the Due Process Clause unless substantial evidence is presented which tends to demonstrate his or her incompetence.

"[T]he standard for competence to stand trial is whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him." *Godinez v. Moran*, 509 U.S. 389, 396 (1993) (extraneity omitted). "Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." *Drope v. Missouri*, 420 U.S. 162, 181 (1975). Specifically, a trial court may be required to investigate a defendant's competency when presented with evidence which "create[s] a sufficient doubt of his competence to stand trial." *Id.* at 180; *see also State v. Young*, 291 N.C. 562, 568 (1977) ("A trial court has a constitutional duty to institute, *sua sponte*, a competency hearing if there is substantial evidence before the court indicating that the accused may be mentally incompetent." (extraneity omitted)). Generally, this right cannot be waived. *See Pate v. Robinson*, 383 U.S. 375, 384 (1966) ("[I]t is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial."). However, a defendant who voluntarily induces his own inability to proceed may nonetheless be required to stand trial. *See, e.g.*, *United States v. Crites*, 176 F.3d 1096, 1097–98 (8th Cir. 1999) (holding that trial court did not err in finding that defendant was voluntarily absent after a suicide attempt left him unconscious and hospitalized); *Moore v. Campbell*, 344 F.3d 1313, 1324 (11th Cir. 2003) (denying defendant's petition for habeas corpus after state court found that defendant forfeited the right to be present by refusing to eat or drink, resulting in his incapacity).

On the other hand, a defendant in a non-capital case may ordinarily waive his right to be present at all stages of his trial:

> Where the offense is not capital and the accused is not in custody, the prevailing rule has been, that if,

> after the trial has begun in his presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present.

Taylor v. United States, 414 U.S. 17, 19 (1973) (extraneity omitted). Moreover, "a defendant may waive the benefit of statutory or constitutional provisions by conduct inconsistent with a purpose to insist upon it." *Young*, 291 N.C. at 567. However, the Supreme Court of the United States has cautioned that, in order to voluntarily waive his or her right to be present at trial, a defendant "must be aware of the processes taking place, of his right and of his obligation to be present, and he must have no sound reason for remaining away." *Taylor*, 414 U.S. at 19–20 n.3 (quoting *Cureton v. United States*, 396 F.2d 671, 676 (D.C. Cir. 1968)). In other words, a defendant's voluntary waiver must be "an intentional relinquishment or abandonment" of his right to be present. *Id.* at 19 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Consequently, this Court has held that a trial court, whenever presented with substantial evidence of a defendant's incompetence, must first determine whether a defendant possessed the capacity to voluntarily waive his constitutional right to be present at trial before determining that he or she had voluntarily absented himself or herself from the proceedings. *Sides*, 376 N.C. at 459 ("[I]f there is substantial evidence suggesting that a defendant may lack the capacity to stand trial, then a sufficient inquiry into her competency is required before the trial court is able to conclude that she made a voluntary decision to waive her right to be present at the trial . . . .").

As in *Sides*, this case raises a "classic 'chicken and egg' dilemma regarding how a trial court must proceed when faced with a situation where a defendant intentionally engages in conduct harmful to [himself] that has the effect of absenting [him] from trial" and potentially causing his present incompetence. *Id.* at 456. As in *Sides*, the determinative issue will be whether the trial court in the instant case had substantial evidence that defendant may have lacked capacity at the time of his apparent suicide attempt which resulted in his subsequent incompetence and inability to be present for the remainder of his trial. *Id.* at 457. Finally, like in *Sides*, the resolution of this issue "requires a fact-intensive inquiry that will hinge on the unique circumstances presented in [this] case." *Id.* at 466. Notably, this Court has previously established the legal principle,

which we have already applied here, that an apparent suicide attempt does not, standing alone, "automatically trigger[ ] the need for a competency hearing in every instance." *Id.* at 466. Because a suicide attempt does not inherently constitute sufficient evidence that a defendant may be incompetent so as to require a court to conduct further inquiry into his or her ongoing competence to stand trial prior to making a determination that the defendant had voluntarily absented himself or herself, we must therefore consider what, if any, additional evidence existed to support the conclusion that defendant lacked capacity at the time of his apparent suicide attempt in order to ascertain whether the trial court was required to conduct further inquiry into defendant's competence before concluding that defendant had voluntarily absented himself from further proceedings.

"Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Bowman*, 193 N.C. App. 104, 112 (2008) (quoting *State v. Denny*, 361 N.C. 662, 664–65 (2007)), *cert. denied*, 363 N.C. 657 (2009). "[E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required" but there are "no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed." *Drope*, 420 U.S. at 180. Furthermore, the trial court "may have insights" into a defendant's competency that are "not conveyed by the record" available to an appellate court. *Pierce v. Underwood*, 487 U.S. 552, 560 (1988); *see also Miller v. Fenton*, 474 U.S. 104, 116–17 (1985).

Defendant argues that defense counsel presented the trial court with substantial evidence in the form of three broad categories which called into question defendant's ongoing competence to stand trial. First, defendant underscores his behavior in the events leading up to his arrest, noting that several trial witnesses testified to his excessive acts on 26 May 2018, including, *inter alia*, his rants to Hannah on the telephone about being the target of gunshots and later being pursued by police while Hannah was driving in her car with her daughter Brooklin, his repeated and allegedly uncharacteristic use of a racial slur, his claimed inability to control his own urination, his threats of suicide, and his action of smashing his own wristwatch with no apparent purpose. Defendant emphasizes that both Hannah and defendant's father observed that defendant was "not himself" that day, thus leading Hannah to wonder if defendant was operating under the influence of mind-altering substances. Second, defendant points to his apparent suicide attempt on the sixth

day of his trial, which he contends "suggests a rather substantial degree of mental instability" standing on its own. *Drope*, 420 U.S. at 181. Lastly, defendant references Public Defender Investigator Withers' testimony that defendant was "clearly medicated" and had trouble communicating when she went to visit him in the hospital following defendant's apparent suicide attempt.

At the outset of our analysis of defendant's assertions as to the existence of substantial evidence of his ongoing incapacity to proceed in his trial, we view Ms. Withers' testimony as failing to provide any insight into the salient question of whether there was substantial evidence before the trial court that defendant may have lacked capacity *at the time of his apparent suicide attempt*. The fact that there was evidence indicating that defendant might have been incompetent to stand trial due to the influence of medication prescribed to him as a result of his self-inflicted injuries is irrelevant, because the evidence is not substantial that defendant lacked capacity independent of the administration of medication to him *after the time of his apparent suicide attempt*. Furthermore, as related above, while a defendant's attempt to commit suicide is "an act which suggests a rather substantial degree of mental instability" by itself, *id.*, it does not automatically trigger the need for a competency hearing in every case. *Sides*, 376 N.C. at 466. This Court is, therefore, left to consider whether any additional indicia of defendant's incompetence can be combined with his apparent suicide attempt to support the conclusion that he may have lacked the capacity on 17 December 2019 to voluntarily absent himself from court proceedings, thereby necessitating further inquiry into his competence under the Due Process Clause. *See Bowman*, 193 N.C. App. at 112.

Aside from Ms. Withers' testimony and his self-injurious act on 17 December 2019, the only indicia that defendant offers to support his assertion that the trial court was presented with substantial evidence which tended to show that he might have lacked capacity on the date at issue were the oddities of his behavior in the events leading up to his arrest in 2018. As a preliminary matter, although the nature of defendant's crimes and his key behaviors during the scrutinized events may be of some probative value in determining whether the trial court was presented with substantial evidence of defendant's incompetence, they too "cannot be equated with mental incompetence to stand trial." *Nguyen v. Reynolds*, 131 F.3d 1340, 1346 (10th Cir. 1997) ("Although the crime itself was horrific and irrational, that alone cannot be equated with mental incompetence to stand trial."). Indeed, even if defendant's offenses and behavioral absurdities may have been indicative of genuine mental

disturbance, they do not necessarily bear on the issue of competency to stand trial because "[n]ot every manifestation of mental illness demonstrates incompetence to stand trial." *United States ex rel. Foster v. De Robertis*, 741 F.2d 1007, 1012 (7th Cir. 1984). "Similarly, neither low intelligence, mental deficiency, nor bizarre, volatile, and irrational behavior can be equated with mental incompetence to stand trial." *Medina v. Singletary*, 59 F.3d 1095, 1107 (11th Cir. 1995). "[R]ather, the evidence must indicate a present inability to assist counsel or understand the charges." *De Robertis*, 741 F.2d at 1012.

Although characterizable as bizarre, defendant's behavior in the events leading up to his arrest in May 2018, combined with his later apparent suicide attempt, is inadequate to support the conclusion that defendant may have lacked the ability to understand the proceedings against him or to assist counsel in preparing defendant's defense in December 2019. Unlike in *Sides*, the trial court in the instant case was not presented with any evidence tending to indicate that defendant experienced a prolonged history of severe mental illness that could have hindered his ability to make a voluntary decision to absent himself from further proceedings. 376 N.C. at 464–65; *see also Pate*, 383 U.S. at 378–85. Nor, as in cases such as *Loyola-Dominguez*, did defendant give any indication in his interactions with the trial court or with defense counsel that defendant either failed to understand the nature and consequences of the proceedings against him or that he was unable to assist properly in his own defense prior to, or at the time of, his apparent suicide attempt. 125 F.3d at 1319. With these uncommon circumstances of a criminal defendant's apparent suicide attempt which was made during the course of trial proceedings, the trial court here was uniquely equipped to receive not only oral testimony which detailed defendant's behaviors leading up to his injurious act, but also videographic evidence which showed defendant at the exact time of his apparent suicide attempt. The trial court was, therefore, in an unusually enabled position to evaluate whether defendant's apparent suicide attempt evidenced such a sudden and severe decline in his mental health that defendant had lost the capacity to voluntarily absent himself from further proceedings without the trial court's need to conduct any further inquiry into defendant's capacity at that time. *See id.*

Moreover, the trial court in this case had ample opportunity to evaluate defendant's interactions with counsel and to conduct multiple lengthy colloquies with defendant throughout the course of trial, including such a conversational engagement between the trial court and defendant as recently as a single day prior to defendant's apparent

suicide attempt. During the three separate colloquies that the trial court conducted with defendant in the week leading up to defendant's apparent suicide attempt, defendant was lucid and appropriate in his responses. In open court, defendant confirmed that his head was "clear," that he wasn't under the influence of any mind-altering medications or substances, and that he had conferred with his attorney in electing to stipulate to his prior felony offense and to decline to testify and/or present evidence on his own behalf. In addition to his appropriate "yes, sir" and "no, sir" responses to the trial court's narrowly designed questions, defendant capably provided coherent details about his attained level of education and literacy when prompted. As a result, the trial court was able to conclude that defendant was entering into these strategic legal decisions "freely, voluntarily, and intelligently" with the assistance of counsel.

This form of evidence is especially pertinent because it directly relates to the crux of competency—whether a defendant, regardless of any mental or emotional disturbance, has the present ability to understand and to engage meaningfully with his trial counsel and with the legal proceedings brought against him. *See Heptinstall*, 309 N.C. at 236 (crediting the fact that, although the defendant provided testimony that was "bizarre and nonsensical" in response to inquiries about morality or religion, he was "accurately oriented" to his present circumstances, including the charges against him); *State v. Badgett*, 361 N.C. 234, 260 (2007) (stating that "[t]he record shows that defendant was able to interact appropriately with his attorneys during the trial[,]" that he "followed their advice by declining to testify during the guilt-innocence phase[,]" and that he "also responded directly and appropriately to questioning during the capital sentencing proceeding as well as to the trial court's inquiries throughout the trial"). *Cf. Drope*, 420 U.S. at 180–81 (stating that "as a result of petitioner's absence" during a "crucial portion" of his trial, "the trial judge and defense counsel were no longer able to observe him in the context of the trial and to gauge from his demeanor whether he was able to cooperate with his attorney and to understand the nature and object of the proceedings against him"). In addition, unlike in *Heptinstall* and *Badgett*, defendant's interactions with the trial court in this case were exclusively lucid and provided no indication of incompetency or even any degree of mental disturbance.

Based upon our review of the record, we conclude that, taking the facts on the whole which were before the trial court in the present case, there was not substantial evidence here which tended to cast doubt on defendant's competency at the time of his apparent suicide attempt. The

trial court was able to directly observe defendant over the course of the trial; to conduct multiple lengthy colloquies with defendant in the days of the trial which immediately preceded defendant's absence; and to receive and review evidence, including surveillance footage, detailing defendant's actual demeanor at the time of his apparent suicide attempt. Unlike other cases in which this Court has held that sufficient evidence existed to warrant additional inquiry into a defendant's capacity under the Due Process Clause, the trial court in this case was not presented with any evidence which tended to indicate that defendant had a history of mental illness; likewise, none of defendant's interactions with the trial court tended to cast doubt upon his ability to appropriately participate in and to understand the legal proceedings against him. Rather, the only evidence which tended to indicate defendant's incompetence on the morning of 17 December 2019 was: (1) his apparent suicide attempt itself, and (2) the nature of defendant's crimes and his behaviors at the time that his criminal offenses were committed in May 2018. We hold that these indicia, standing alone or in combination with each other, were not adequate to support the conclusion that defendant may have lacked competency at the time of his apparent suicide attempt. Therefore, the trial court was not constitutionally required to conduct any further inquiry into defendant's competency prior to making its determination that defendant had voluntarily absented himself from the trial proceedings.

III. Conclusion

In light of our determination that the trial court was not required to conduct further inquiry into defendant's continued capacity to proceed following the trial court's hearing concerning defendant's apparent suicide attempt, we affirm the decision of the Court of Appeals, thereby affirming the jury's verdicts at trial and the trial court's judgments which were entered against defendant.

AFFIRMED.

Justice EARLS dissenting.

A criminal defendant's right not to stand trial unless competent to do so is a vital part of American jurisprudence, with its origin tracing back to the common law. *See*, *e.g.*, *Medina v. California*, 505 U.S. 437, 446 (1992); *see also Youtsey v. United States*, 97 F. 937, 940 (6th Cir. 1899) (collecting cases). This right is enshrined in our federal Constitution under the Due Process Clause of the Fifth and Fourteenth Amendments.

U.S. Const. amend. V; U.S. Const. amend. XIV; *see also Pate v. Robinson*, 383 U.S. 375 (1966) (holding that when a defendant is not provided with procedures adequate to protect their right not to be tried or convicted while incompetent, their due process right to a fair trial is violated). Importantly, our federal Constitution guarantees every criminal defendant due process protection, no matter how heinous their crime. *See* U.S. Const. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law[.]"); *see* U.S. Const. amend. XIV ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law[.]"); *see also Drope v. Missouri*, 420 U.S. 164, 180 (1975) (finding a due process, competency to stand trial violation, for a defendant who was charged along with two others in the forcible rape of his wife); *see also Pate*, 383 U.S. at 376, 385–86 (finding that a defendant who murdered his common-law wife had his due process rights "abridged" because he did not "receive an adequate hearing on his competence to stand trial").

As early as 1899, the Sixth Circuit explained that "[i]t is fundamental that an insane person can neither plead to an arraignment, be subjected to a trial, or after trial, receive judgment, or, after judgment, undergo punishment." *Youtsey*, 97 F. at 940. The United States Supreme Court has since explained that "a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to trial." *Drope v. Missouri*, 420 U.S. at 171. This Court has held that "a trial court has a constitutional duty to institute, sua sponte, a competency hearing if there is substantial evidence before the court indicating that the accused may be mentally incompetent." *State v. Young*, 291 N.C 562, 568 (1977) (cleaned up) (quoting *Crenshaw v. Wolff*, 504 F.2d 377 (8th Cir. 1974)). Furthermore, because a defendant's competency status can change over time, "a trial court must always be alert to circumstances" that may signal a change in a defendant's competency. *State v. Sides*, 376 N.C. 449, 458 (2020) (quoting *Drope*, 420 U.S. at 181). Indeed, questions of competency can arise at any time, even for the first time during trial. *Id.*

In like manner, North Carolina also affords defendants a statutory protection against being subjected to trial when they are not competent. *See* N.C.G.S. § 15A-1001(a) (2021); *see also* N.C.G.S. § 15A-1002(a) & (b)(1) (2021). Thus, at the time of Mr. Flow's proceeding, the trial court had at least two reasons to conduct a competency hearing: one based on North Carolina's statutory protections, and another based on Mr. Flow's federal constitutional rights.

As the majority carefully documents, the crime in this case was undoubtedly beyond horrific for the victims. Without question, "[t]he Government's interest in bringing to trial an individual accused of a serious crime is important." *Sell v. United States*, 539 U.S. 166, 180 (2003). "[T]he Government seeks to protect through application of the criminal law the basic human need for security." *Id.* (citing *Riggins v. Nevada*, 504 U.S. 127 at 135–136 (1992) ("[P]ower to bring an accused to trial is fundamental to a scheme of 'ordered liberty' and prerequisite to social justice and peace." (alteration in original) (quoting *Illinois v. Allen*, 397 U.S. 337, 347 (1970) (Brennan, J., concurring)))). However, at the same time, "the Government has a concomitant, constitutionally essential interest in assuring that the defendant's trial is a fair one." *Id.* To be fair, the trial must comport with statutory and constitutional guarantees. "If a defendant is incompetent, due process considerations require suspension of the criminal trial until such time, if any, that the defendant regains the capacity to participate in his defense and understand the proceedings against him." *Medina*, 505 U.S. at 448 (citing *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam)). If we decide that defendants who commit especially heinous crimes do not need to be afforded due process rights, we undermine the very foundation of the rule of law. Furthermore, to be clear, as we said in *Sides*, a retrospective competency hearing rather than a new trial is a possible remedy in these circumstances. *See Sides*, 376 N.C. at 466.

A. Statutory Protections

In North Carolina a defendant has a statutory right not to be

> tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner.

N.C.G.S. § 15A-1001(a). When a defendant meets the above criteria, they are said to have "incapacity to proceed." *Id.* A court must "hold a hearing to determine the defendant's capacity to proceed" if a question is raised regarding the defendant's capacity. N.C.G.S. § 15A-1002(b)(1). A defendant's capacity to proceed "may be raised at any time on a motion by the prosecutor, the defendant, the defense counsel, or the court." N.C.G.S. § 15A-1002(a). Under this framework, once the question of capacity is raised, the defendant is not required to show evidence of incapacity to trigger a hearing. N.C.G.S. §§ 15A-1001(a) & 15A-1002(a). This is a

significant distinction. The issue here is not whether the evidence demonstrates that Mr. Flow was, at the time of his attempted suicide, not competent to stand trial. Rather it is simply whether the evidence was substantial enough to trigger the right to a hearing on that question.

In this case, as he was being brought to court for trial proceedings, Mr. Flow jumped off the second story of the Gaston County Jail and was seriously injured, requiring surgery. Mr. Flow's counsel subsequently raised the issue of competency and asked that the court make an inquiry into Mr. Flow's capacity to proceed. Defense counsel specifically noted, that "based on the best available information" Mr. Flow's actions may have been "a suicide attempt" and counsel thus raised a challenge to Mr. Flow's competency pursuant to N.C.G.S. § 15A-1002. Accordingly, defense counsel asked the court to delay proceedings until a hearing addressing Mr. Flow's capacity to proceed had been conducted. The trial court took the matter under advisement and asked defense counsel to obtain additional information on the length of Mr. Flow's unavailability. While the trial court ultimately held a hearing, this hearing did not meet the requirements delineated in N.C.G.S. § 15A-1002. Under that statute, Mr. Flow was entitled to a hearing to determine whether he had the "capacity to proceed" with trial. N.C.G.S. § 15A-1002(b)(1). However, rather than considering whether Mr. Flow was competent to proceed, the trial court examined whether his jump from the second story of the Gaston County Jail was a voluntary action absenting him from court. Those are two different questions. *Compare Ryan v. Gonzales*, 568 U.S. 57, 66 (2013) (holding that a defendant is competent to stand trial if he "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and a rational as well as factual understanding of the proceedings against him" (cleaned up)) *with Taylor v. United States*, 414 U.S. 17, 19 & n.3 (1973) (holding that a defendant in a non-capital case waives his right to be present if he voluntarily absents himself while being aware of the processes taking place, of his right and obligation to be present and having no sound reason for remaining away).

The majority contends that because N.C.G.S. § 15A-1002 provides little guidance on the appropriate procedural and substantive requirements for a competency hearing, any hearing that allows a defendant to present "any and all evidence [they] are prepared to present" is sufficient to satisfy the statutory requirement. *State v. Gates*, 65 N.C. App. 277, 283 (1983). In the first instance, the problem with this approach is that what matters is not simply whether the defendant can present evidence but what question the hearing is intended to resolve, what facts are relevant

to that question, and what legal standard applies. Moreover, contrary to the majority's assertion, N.C.G.S. § 15A-1002's language does provide the trial court with important guidance. Namely, that a court must "hold a hearing to determine the defendant's capacity to proceed" if a question is raised as to defendant's capacity. N.C.G.S. § 15A-1002(b)(1). This means that Mr. Flow was entitled to a hearing to determine whether he had the "capacity to proceed" with trial and not a hearing to determine whether his absence from the courtroom was the result of a voluntary action. *See* N.C.G.S. § 15A-1002. This is precisely what we held in *Sides*, 376 N.C. at 456.

Crucially, a court cannot consider if a defendant's actions were taken voluntarily without first determining if the defendant had the capacity to take a voluntary action. *Sides*, 376 N.C. at 457. When a defendant voluntarily absents themselves from trial, they make an "intentional relinquishment or abandonment of a known right or privilege." *Taylor*, 414 U.S. at 19 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)); *see also Sides*, 376 N.C at 458–59 ("[I]n order to waive the right to be present [at trial], there must be an intentional relinquishment or abandonment of that right." (cleaned up)). Thus, it follows that assessing the voluntariness of a defendant's actions without first determining their competency "put[s] the cart before the horse," as a defendant cannot engage in a voluntary action unless they are competent to do so. *Sides*, 376 N.C. at 457. Accordingly, because the trial court's hearing addressed whether Mr. Flow acted voluntarily when he jumped from the second story of the Gaston County Jail, and not whether he had the competency to proceed with trial, the hearing pursuant to N.C.G.S. § 15A-1002 was inadequate to satisfy the statutory mandate.

B. Constitutional Protections

Mr. Flow also has a constitutional due process right not to be tried unless he is competent to stand trial. U.S. Const. amend. V; U.S. Const. amend. XIV; *see also Pate v. Robinson*, 383 U.S. 375 (1966). This constitutional right establishes a trial court's duty to hold a competency hearing *sua sponte* if the court is presented with substantial evidence calling a defendant's competence into question. *Young*, 291 N.C. at 568; *Sides*, 376 N.C. at 458. Adherence to this requirement ensures that only competent defendants are subjected to trial.

While it is true that a non-capital defendant can waive their right to be present at trial by voluntarily absenting themselves, *Taylor*, 414 U.S. at 19, it is also true that a defendant must be competent to take a voluntary action. *Pate*, 383 U.S. at 384. This means that, as with the statutory

right, under the constitutional analysis a court cannot determine the voluntariness of a defendant's actions or whether they waived their right to be present at trial through those actions, without first determining their competency. *Sides*, 376 N.C. at 457, 459. Indeed, as this Court explained in *Sides*, "[a] defendant cannot be deemed to have voluntarily waived her constitutional right to be present at her own trial unless she was mentally competent to make such a decision in the first place. Logically, competency is a necessary predicate to voluntariness." *Id.* at 459.

State v. Sides is directly on point and controlling here. A court cannot "essentially skip[ ] over the issue of competency and simply assum[e] that [a] defendant's suicide attempt was a voluntary act that constituted a waiver of [their] right to be present during . . . [their] trial." *Id.* at 456–57. Instead, in circumstances where a trial court has "substantial evidence that [a] defendant may have been incompetent," it is required to conduct a competency hearing "to determine whether [the defendant] had the capacity to voluntarily waive [their] right to be present" at trial. *Id.* at 457. Following United States Supreme Court precedent, *Sides* articulated a standard, which provides that "evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required." *Id.* at 462 (quoting *Drope*, 420 U.S. at 180).

Although in *Sides* this Court stated "that a defendant's suicide attempt [does not] automatically trigger[ ] the need for a competency hearing in every instance," *id.* at 466, *Sides* also explained that a "defendant's suicide attempt itself 'suggests a rather substantial degree of mental instability.' " *Id.* at 464 (quoting *Drope*, 420 U.S. at 181). The United States Supreme Court and some federal circuit courts have also indicated the same. *Drope*, 420 U.S. at 181 (stating that suicide "suggests a rather substantial degree of mental instability"); s*ee also United States v. Loyola-Dominguez*, 125 F.3d 1315, 1319 (9th Cir. 1997) ("[Defendant]'s suicide attempt on the eve of trial raised significant doubts regarding his competency to stand trial. In these circumstances, due process required a hearing to ascertain whether or not he was competent."); *Maxwell v. Roe*, 606 F.3d 561, 570–71 (9th Cir. 2010) (holding that defendant's attempted suicide "in the midst of trial" was a significant factor warranting a competency inquiry); *United States v. Mason*, 52 F.3d. 1286, 1287, 1293 (4th Cir. 1995) (determining that the district court should have granted a retrospective competency hearing after defendant attempted suicide following his conviction on federal drug charges); *Estock v. Lane*, 842 F.2d 184, 186, 189 (7th Cir. 1988) (per curiam) (concluding that at a retrospective competency hearing, the federal district court

properly concluded that petitioner had not been competent at his plea hearing, in part, because he had attempted suicide six days prior)[1]; *Saddler v. United States*, 531 F.2d 83, 86 (2nd Cir. 1976) (per curiam) (holding that when evidence of defendant's history of mental illness, including a suicide attempt, became known to the trial court, it was error for the court not to order an evaluation into defendant's competency). Thus, even though a suicide attempt standing alone may not automatically trigger the need for a competency hearing in every instance, *Sides* 376 N.C. at 466, evidence of a suicide attempt must be analyzed alongside other evidence in the record of a "defendant's irrational behavior, [their] demeanor at trial, and any prior medical opinion on competence to stand trial." *Sides*, 376 N.C. at 462 (quoting *Drope*, 420 U.S. at 180–81).

In *Drope*, the United States Supreme Court noted that it "was sufficiently likely that in light of the evidence of [defendant's] behavior including his suicide attempt . . . [that] the correct course was to suspend the trial until such an evaluation could be made." *Drope*, 420 U.S. at 181. There, the additional evidence in the record included, *inter alia*, testimony from defendant's wife that she believed "her husband was sick and needed psychiatric care" and that he had tried to choke and kill her the night before. *Id.* at 165–66. Furthermore, in *Pate v. Robinson*, the Court reviewed testimony in the record detailing the defendant's history of disturbed behavior, including instances of erratic conduct and paranoia. 383 U.S. 375, 378–79 (1966). In both cases, the Court determined that the defendant was entitled to a competency hearing and the trial court's failure to provide such a hearing was a violation of the defendant's constitutional rights. *Id.* at 386; *Drope*, 420 U.S. at 172, 180.

Similarly, in Mr. Flow's case, Hannah testified that on the day of the incident Mr. Flow was talking in a way "[she] had never heard him talk before," and that when she called Mr. Flow's father to ask what was "going on with [him]," his father stated that Mr. Flow was "not his normal self." Hannah further testified that Mr. Flow had acted strangely by "grabb[ing] his watch and jerk[ing] it off his arm" and for no apparent reason "sl[inging]" it onto the floor where it broke into pieces. When Hannah and Mr. Flow entered Hannah's living room, and reached a tall lamp that Hannah owned, "[Mr. Flow] stopped and slammed [the

1. The standard for competence to stand trial is the same as the standard for competence to plead guilty and to waive the right to the assistance of counsel. *Godinez v. Moran*, 509 U.S. 389, 398 (1993) ("[W]e reject the notion that competence to plead guilty or to waive the right to counsel must be measured by a standard that is higher than (or even different from) the *Dusky* standard.").

lamp] on the ground and stepped over it." Hannah responded by asking "what are you doing, why are you acting like this, what's going on." She later said to him "what are you talking about, you're talking crazy, I don't understand anything you are saying." Furthermore, Hannah testified that during the commission of Mr. Flow's crime, while the police were attempting to speak with him, rather than engage in conversation with them, Mr. Flow "was saying something about water." Mr. Flow had experienced suicidal ideation on at least two prior occasions, both of which he shared with Hannah during the incident that led to his arrest. The first was when Mr. Flow told Hannah "it wasn't supposed to be this way" because she was "supposed to [have gone] to South Carolina" with him where he was "gonna kill [his] daddy and then [Hannah] and then [himself]." The second time was while Hannah was on the phone with the police, and Mr. Flow stated "[I]t's time . . . I'm gonna kill you and I'm gonna kill myself." This evidence was relevant to whether Mr. Flow was competent at the time of his suicide attempt during trial. As in *Pate* and *Drope*, Mr. Flow was entitled to a hearing to determine whether he was competent to stand trial. *Pate*, 383 U.S. at 386; *Drope*, 420 U.S. at 180. The trial court's failure to examine the issue of his competency was a violation of Mr. Flow's constitutional right to a fair trial. *See Pate*, 383 U.S. at 385; *see Drope*, 420 U.S. at 172, 180.

The State argues and the majority agrees that the trial court's colloquies with Mr. Flow refute the presence of substantial evidence sufficient to raise doubt as to Mr. Flow's competency. In *Pate*, the United States Supreme Court explained the role that colloquies between the court and the defendant might have in determining competency to stand trial. 383 U.S. at 386. There, despite having information suggesting the defendant was incompetent, the Illinois Supreme Court ultimately determined this evidence was not sufficient to warrant a competency hearing because the defendant had displayed "mental alertness and understanding . . . in [his] colloquies with the trial judge." *Id.* at 385 (cleaned up). Nevertheless, the United States Supreme Court concluded that even though the defendant had exhibited "mental alertness and understanding" in his exchanges with the trial court, this information while relevant, could not be used to dispense with a competency hearing. *Id.* at 385–86.

In this case the trial court engaged in three relevant colloquies with Mr. Flow. The first colloquy took place on 9 December 2019 when the court asked Mr. Flow whether he was willing to stipulate to his prior felony conviction, and after consulting with defense counsel, Mr. Flow replied "Yes, I - - yes, sir." The court subsequently asked Mr. Flow if he was making this decision "freely and voluntarily and of [his] own

free will." Mr. Flow stated that he was. During the second colloquy on 13 December 2019, the Court asked Mr. Flow if his "mind was clear," and Mr. Flow answered "Yes." In the third colloquy on 16 December 2019, the court asked Mr. Flow if he had discussed his choice not to present evidence with defense counsel, whether he had any questions about this, and whether he understood that it was his choice and only his choice to decide whether he wanted to present evidence. Mr. Flow responded "Yes, Your Honor," indicating his understanding. Mr. Flow also acknowledged his constitutional right and indicated he did not want to testify on his own behalf.

The majority finds these colloquies to be "especially pertinent" in determining whether substantial evidence of Mr. Flow's incompetence to stand trial was presented to the trial court. Namely, the majority states that these colloquies speak to whether Mr. Flow had the ability to understand the legal proceedings against him, and meaningfully consult with his attorney. The majority believes that because Mr. Flow was "lucid and appropriate in his responses" the trial court was not required to hold a competency hearing; however, this cannot be true. For "[e]ven when a defendant is competent at the commencement of his trial," this can change, and "a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." *Sides*, 376 N.C. at 458 (alteration in original) (quoting *Drope*, 420 U.S. at 181). Thus, while these colloquies may be relevant in ascertaining Mr. Flow's competency at the time they occurred, they are not instructive as to Mr. Flow's competency on the day of his suicide attempt, the days following his suicide attempt, or at the time defense counsel raised the issue of competency. Accordingly, these colloquies are relevant to but not sufficient to "dispense with a hearing" to determine Mr. Flow's competency. *See Sides*, 376 N.C. at 463 (quoting *Pate*, 383 U.S. at 385–86).

In addition, the State argues that Mr. Flow's actions leading up to his suicide attempt showed that he was competent at the time he jumped from the Gaston County Jail's second story, and thus that action was taken voluntarily. On the day Mr. Flow attempted suicide, the officer removed him from his cell for court. Mr. Flow asked the officer if he could return to his cell to retrieve his glasses and the officer allowed him to do so. Shortly thereafter a radio call went out stating that Mr. Flow was hanging off the second floor of the Gaston County Jail. The State suggests that Mr. Flow's actions leading up to his suicide attempt imply that he acted voluntarily in absenting himself from court. Specifically, the State contends that because Mr. Flow jumped off the jail mezzanine instead of retrieving his glasses from his cell, and attempted suicide by

hanging off the second story of the jail before landing on a table sixteen feet below, this guarantees that Mr. Flow was "lucid" when he jumped.

However, the proper analysis in this case requires a trial court to consider Mr. Flow's evidence of incompetency in the aggregate, including his previous suicidal ideation and erratic behavior on the day of his arrest. *Drope*, 420 U.S. at 180 (stating the defendant's "attempt to commit suicide 'did not stand alone' " (quoting *Moore v. United States*, 464 F.2d 663, 666 (9th Cir. 1972))). In the end, "[w]hatever the relationship between mental illness and incompetence to stand trial, in this case the bearing of the former on the latter was sufficiently likely that, in light of the evidence of petitioner's behavior including his suicide attempt . . . the correct course was to suspend the trial until" an evaluation into his competency was made. *Id.* at 181.

The competency to stand trial standard requires that a defendant have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and . . . a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam). While it is true that competency to stand trial must be determined by an analysis of the relevant evidence in the record, and that a suicide attempt is but one piece of that evidence, a defendant whose suicide attempt is the result of psychotic symptoms may not be competent to stand trial.[2] Defendants who experience psychotic symptoms may exhibit "cognitive or perceptual dysfunction, mainly delusions or hallucinations." Jeffrey A. Lieberman & Michael B. First, *Psychotic Disorders*, 379 New England J. of Med. 270, 270 (2018). In many cases, people experiencing these symptoms do not possess the ability to have a "rational understanding of the proceedings against [them]."[3] *See Dusky*, 362 U.S. 402 (1960). Only a trained

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2. Psychotic symptoms can be present in several psychiatric conditions. For example, a person suffering from schizophrenia, bipolar disorder, or depression with psychotic features can experience symptoms of psychosis. Jeffrey A. Lieberman & Michael B. First, *Psychotic Disorders*, 379 New England J. of Med. 270, 271 (2018).

3. Studies investigating the relationship between mental illness and competency to stand trial have "generally found that a large portion . . . of defendants [experiencing psychosis] are judged incompetent." Jodi Viljoen, Ronald Roesch, and Patricia A. Zapf, *An Examination of the Relationship Between Competency to Stand Trial, Competency to Waive Interrogation Rights, and Psychopathology*, 26 Law and Hum. Behav. 481, 484 (2002). Furthermore, in one study, defendants with primary psychotic disorders were found to have performed significantly worse on tests measuring three factors: (1) their understanding of the nature and object of their legal proceedings, including arrest, the charges against them, the role of key participants, the legal process itself, pleas and courtroom procedures; (2) their understanding of the potential consequences of the legal proceedings; and (3) their ability to communicate with counsel. *Id.* at 488, 493–494.

mental health professional can determine whether Mr. Flow's behavior is consistent with psychosis. Ultimately, because the trial court did not hold a hearing assessing Mr. Flow's competency, we cannot yet know whether Mr. Flow's suicide attempt during trial was indicative of, or resulted from, a mental condition that would render him incompetent to stand trial.

C. Adequacy of the Trial Court's Hearing

The hearing conducted by the trial court was inadequate for at least three reasons. As previously stated, N.C.G.S. § 15A-1002(b)(1) does not contemplate a hearing to determine the voluntariness of a defendant's actions; instead, it mandates that a hearing be held to determine a "defendant's capacity to proceed." N.C.G.S. § 15A-1002(b)(1). Thus, when defense counsel raised the question of Mr. Flow's competency, the trial court was required to hold a hearing addressing Mr. Flow's competency, not the voluntariness of his actions. *See* N.C.G.S. § 15A-1002(b)(1). Additionally, our decision in *Sides*, as well as United States Supreme Court precedent, requires a trial court to first determine whether a defendant is competent prior to determining whether their suicide attempt was the result of a voluntary action. *Sides*, 376 N.C. at 459; *Pate*, 383 U.S. at 384. However, the trial court acted in a manner contrary to *Sides* by only considering whether Mr. Flow acted voluntarily when he jumped from the second story of the Gaston County Jail. *See Sides*, 376 N.C. at 459 ("[I]f there is substantial evidence suggesting that a defendant may lack the capacity to stand trial, then a sufficient inquiry into her competency is required before the trial court is able to conclude that she made a voluntary decision to waive her right to be present at trial through her own conduct.").

Lastly, in the hearing it did hold, the trial court failed to take into account all the evidence before it. Specifically, it declined to consider whether Mr. Flow's actions were the result of "suicidal gesture." This was despite defense counsel having noted Mr. Flow's absence from court was "surrounded by mental health issues and a suicide attempt."[4] The trial court incorrectly reasoned that its task to determine whether the trial should proceed in Mr. Flow's absence was divorced from whether Mr. Flow's actions had been caused by suicidal behavior.

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4. The Court of Appeals has previously stated that "[b]ecause defense counsel is usually in the best position to determine that the defendant is able to understand the proceedings and assist in his defense, it is well established that significant weight is afforded to a defense counsel's representation that his client is competent." *State v. McRae*, 163 N.C. App. 359, 369 (2004). Thus, it follows that "significant weight" should also be afforded to defense counsel's representation that their client may not be competent. *See id.*

Instead, the court made findings of fact related to whether the defendant had taken a voluntary action or if "perhaps [he] had [been] pushed" or may have "slipped." Ultimately, the trial court decided Mr. Flow had acted voluntarily when he jumped off the second story of the jail building and "that the trial [would] in fact go forward." However, whether a defendant's actions are suicidal in nature speaks directly to the issue of competency, and although it is true that a suicide attempt in and of itself does not automatically determine the need for a competency hearing, it suggests the presence of mental instability and should be analyzed alongside other evidence in the record. *Sides*, 376 N.C. at 464 (citing *Drope*, 420 U.S. at 181).

Accordingly, the trial court's hearing was inadequate because it not only side stepped the issue of competency by only addressing the voluntariness of Mr. Flow's actions, but also because in doing so, the court failed to properly consider all the evidence relevant to whether Mr. Flow was competent at that point to stand trial.

D. *State v. Sides*

This Court decided *Sides* a little over two years ago. The majority attempts to distinguish *Sides* from the instant case on the grounds that, because a defendant's suicide attempt does not automatically trigger the need for a competency hearing in every case, "[t]his Court is, therefore, left to consider whether any additional indicia of defendant's incompetence can be combined with his apparent suicide attempt to support that he may have lacked the capacity to . . . voluntarily absent himself from the court proceedings." The majority suggests that Mr. Flow's crimes and his behavior during those crimes are not relevant to whether the trial court was presented with substantial evidence of Mr. Flow's incapacity to proceed, and thus the trial court was not required to hold a competency hearing. However, our opinion in *Sides* is not this narrow. Instead, whether there is substantial evidence of a defendant's incompetence to stand trial is a "fact intensive inquiry" into "evidence of a defendant's irrational behavior, his demeanor at trial and any prior medical opinion on competence to stand trial." *Sides*, 376 N.C. at 462, 466. Moreover, a defendant's "history of disturbed behavior, including instances of erratic conduct" are also relevant in determining whether substantial evidence existed to warrant a competency hearing. *Id.* at 462–63 (citing *Pate*, 383 U.S. at 378–79).

There was substantial evidence before the trial court to trigger the need for a competency hearing and defense counsel explicitly requested one. The majority fails to properly apply *Sides* and concludes that it was

not error in these circumstances to deny counsel's request for a competency hearing. I would remand the case to the trial court for a retrospective hearing based on all the evidence in the record relevant to Mr. Flow's mental state at the time the competency hearing was requested by counsel. Therefore, I respectfully dissent.

CRYAN v. NAT'L COUNCIL OF YMCAs OF THE U.S.

[384 N.C. 569 (2023)]

JOSEPH CRYAN, SAMUEL CRYAN, KERRY HELTON, THOMAS HOLE, RICKEY HUFFMAN, JOSEPH PEREZ, JOSHUA SIZEMORE, DUSTIN SPRINKLE, AND MICHAEL TAYLOR

v.

NATIONAL COUNCIL OF YOUNG MEN'S CHRISTIAN ASSOCIATIONS OF THE UNITED STATES OF AMERICA, YOUNG MEN'S CHRISTIAN ASSOCIATION OF NORTHWEST NORTH CAROLINA D/B/A KERNERSVILLE FAMILY YMCA, AND MICHAEL TODD PEGRAM

No. 424A21

Filed 16 June 2023

1. Appeal and Error—writ of certiorari—two-factor test—merit of issue—extraordinary circumstances

The Court of Appeals acted within its sound discretion when it issued a writ of certiorari to review the trial court's interlocutory order concluding that defendants had asserted a facial challenge to the SAFE Child Act and transferring the issue to a three-judge panel. The Court of Appeals properly applied the two-factor test for determining whether to issue a writ of certiorari, determining first that defendant's argument had merit and second that extraordinary circumstances existed to justify issuance of the writ—specifically, that review would advance the interest of judicial economy, that the appeal raised a recurring issue concerning a relatively new statutory scheme, and that the issue involved the trial court's subject matter jurisdiction.

2. Appeal and Error—scope of Supreme Court's review—based on Court of Appeals dissent—issues specifically set out in dissent

Where plaintiffs filed a notice of appeal to the Supreme Court based on a dissent in the Court of Appeals (COA) and did not petition for discretionary review of any additional issues, the Supreme Court considered the merits of only the issue specifically set out and explained by the dissenting COA judge. The dissenting COA judge's single sentence vaguely and impliedly disagreeing with another of the majority's holdings—without providing any reasoning—was not sufficient to confer appellate jurisdiction to the Supreme Court over that issue.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 280 N.C. App. 309 (2021), allowing defendant's petition for writ of certiorari, and vacating and remanding

an order entered on 22 July 2020 by Judge Richard S. Gottlieb in Superior Court, Forsyth County. Heard in the Supreme Court on 25 April 2023.

Lanier Law Group, P.A., by Donald S. Higley II, Robert O. Jenkins, and Lisa Lanier, for plaintiffs-appellants.

Nelson Mullins Riley & Scarborough LLP, by Lorin J. Lapidus, G. Gray Wilson, Denise M. Gunter, and Martin M. Warf; and Bell, Davis & Pitt, P.A., by Kevin G. Williams, for defendant-appellee YMCA of Northwest North Carolina.

DIETZ, Justice.

This appeal from a divided Court of Appeals decision presents an opportunity to reaffirm two settled principles of appellate procedure.

The first principle concerns the writ of certiorari, an extraordinary writ used to aid an appellate court's jurisdiction. When contemplating whether to issue a writ of certiorari, our state's appellate courts must consider a two-factor test. That test examines (1) the likelihood that the case has merit or that error was committed below and (2) whether there are extraordinary circumstances that justify issuing the writ.

The second principle concerns appeals to this Court based on a dissent at the Court of Appeals. To confer appellate jurisdiction, a Court of Appeals dissent must specifically set out the basis for the dissent—meaning the reasoning for the disagreement with the majority. A dissent that does not contain any reasoning on an issue cannot confer jurisdiction over that issue.

Applying these principles here, we hold that the Court of Appeals was well within its sound discretion to issue a writ of certiorari in this case. We further hold that the issuance of the writ of certiorari was the only issue for which the dissent set out any reasoning. We therefore decline to address the remaining issues contained in the plaintiffs' new brief.

Facts and Procedural History

On 26 June 2019, Defendant Michael Todd Pegram pleaded guilty to multiple charges of felony sexual assault. Pegram committed these crimes while he was employed by Defendant Young Men's Christian Association of Northwest North Carolina d/b/a Kernersville Family YMCA (the YMCA).

After Pegram's criminal case concluded, a group of plaintiffs brought a tort suit against Pegram and other parties, including the YMCA.

Plaintiffs' claims depend on a law known as the SAFE Child Act. *See* An Act to Protect Children from Sexual Abuse and to Strengthen and Modernize Sexual Assault Laws, S.L. 2019-245, 2019 N.C. Sess. Laws 1231. Plaintiffs acknowledge that their sexual abuse allegations occurred decades ago and that their claims would be barred by statutes of limitations in effect before enactment of the SAFE Child Act. But they assert that the SAFE Child Act revived their claims many years after the existing statute of limitations otherwise would have expired.

The YMCA moved to dismiss plaintiffs' claims under Rule 12(b)(6) of the Rules of Civil Procedure on the ground that the SAFE Child Act's revival of the statute of limitations violated the North Carolina Constitution. Importantly, the YMCA argued that the SAFE Child Act was unconstitutional only as applied to defendants for whom the statute of limitations already had expired. The YMCA contends that there is another category of defendants impacted by the act—those with unexpired statutes of limitations—and that the act is permissible with respect to those defendants because extending an unexpired limitations period (as opposed to an expired one) is not unconstitutional.

Plaintiffs rejected this dichotomy and asserted that the YMCA's claim was a facial challenge to the SAFE Child Act. They moved to transfer the claim to a three-judge panel of superior court judges under N.C.G.S. § 1-267.1, which applies to "claims challenging the facial validity of an act of the General Assembly."

After a hearing, the trial court determined that the YMCA's motion asserted a facial challenge and entered an order transferring the issue to a three-judge panel.

The YMCA filed a timely notice of appeal to the Court of Appeals. Plaintiffs then moved to dismiss the appeal, asserting that it was impermissibly interlocutory. In response, the YMCA filed a petition for a writ of certiorari.

The Court of Appeals issued a divided decision. *Cryan v. Nat'l Council of YMCAs of the U.S.*, 280 N.C. App. 309 (2021). The court unanimously concluded that the YMCA had no right to appeal from the trial court's interlocutory order transferring the case to a three-judge panel. *Id.* at 315. But the majority chose to exercise its discretion to issue a writ of certiorari. *Id.* at 315–16. The majority then examined the merits of the parties' arguments and held that the YMCA had asserted an as-applied

challenge. *Id.* at 317–18. As a result, the majority vacated the transfer order and remanded the case to the trial court for further proceedings. *Id.* at 318.

The dissent argued that it was improper to issue a writ of certiorari and described in detail a series of reasons why issuing a writ in these circumstances undermines the intent of the General Assembly, improperly shifts trial court responsibilities to the appellate courts, and encourages procedural gamesmanship by the litigants. *Id.* at 319–21 (Carpenter, J., dissenting).

Plaintiffs timely filed a notice of appeal to this Court based on the dissent. Plaintiffs did not petition for discretionary review of any additional issues not addressed by the dissent.

Analysis

I. The writ of certiorari

[1] We begin by addressing the issue expressly set out in the Court of Appeals dissent: whether it was appropriate to issue a writ of certiorari to review the trial court's order.

The writ of certiorari is one of the "prerogative" writs that the Court of Appeals may issue in aid of its own jurisdiction. N.C.G.S. § 7A-32(c) (2021). It "is intended as an extraordinary remedial writ to correct errors of law." *Button v. Level Four Orthotics & Prosthetics, Inc.*, 380 N.C. 459, 465 (2022) (cleaned up).

The procedure governing writs of certiorari is found in Rule 21 of the Rules of Appellate Procedure. But "Rule 21 does not prevent the Court of Appeals from issuing writs of certiorari or have any bearing upon the decision as to whether a writ of certiorari should be issued." *State v. Killette*, 381 N.C. 686, 691 (2022). Instead, the decision to issue a writ is governed solely by statute and by common law. *Id.*

Our precedent establishes a two-factor test to assess whether certiorari review by an appellate court is appropriate. First, a writ of certiorari should issue only if the petitioner can show "merit or that error was probably committed below." *State v. Ricks*, 378 N.C. 737, 741 (2021); *State v. Grundler*, 251 N.C. 177, 189 (1959). This step weighs the likelihood that there was some error of law in the case. *Button*, 380 N.C. at 465–66.

Second, a writ of certiorari should issue only if there are "extraordinary circumstances" to justify it. *Moore v. Moody*, 304 N.C. 719, 720

(1982). We require extraordinary circumstances because a writ of certiorari "is not intended as a substitute for a notice of appeal." *Ricks*, 378 N.C. at 741. If courts issued writs of certiorari solely on the showing of some error below, it would "render meaningless the rules governing the time and manner of noticing appeals." *Id.*

There is no fixed list of "extraordinary circumstances" that warrant certiorari review, but this factor generally requires a showing of substantial harm, considerable waste of judicial resources, or "wide-reaching issues of justice and liberty at stake." *Doe v. City of Charlotte*, 273 N.C. App. 10, 23 (2020).

Ultimately, the decision to issue a writ of certiorari rests in the sound discretion of the presiding court. *Ricks*, 378 N.C. at 740. Thus, when the Court of Appeals issues a writ of certiorari, we review solely for abuse of discretion, examining whether the decision was "manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *State v. Locklear*, 331 N.C. 239, 248 (1992) (cleaned up); *see also Ricks*, 378 N.C. at 740.

Applying this framework here, the Court of Appeals' decision to issue a writ of certiorari was well within the court's sound discretion. With respect to the merit factor, the court examined the parties' arguments and determined that the YMCA's argument had merit. *Cryan v. Nat'l Council of YMCAs of the U.S.*, 280 N.C. App. 309, 318 (2021). With respect to the extraordinary circumstances factor, the court determined that certiorari review was appropriate in the interest of "judicial economy." *Id.* at 315–16. The court observed that the appeal raised a recurring issue concerning "a relatively new statutory scheme which has limited jurisprudence surrounding it." *Id.* at 316. The court also noted that the question on appeal involved the trial court's "subject-matter jurisdiction," which potentially deprives the trial court of any power to rule in the case. *Id.* at 314–15. Although the Court of Appeals did not expressly state the follow-on point, this outcome could lead to a considerable waste of judicial resources if a trial court works through a complicated, novel constitutional issue only for that work to later be declared a nullity.

In short, the Court of Appeals' reasoning readily satisfies the abuse of discretion standard. The court explained its reasoning, which tracked the two-factor test established in our case law. That reasoning was not manifestly arbitrary. Thus, our review goes no further and we affirm the Court of Appeals' issuance of the writ of certiorari.

II. The scope of review based on the dissent

[2] We now turn to whether there is anything else for us to address in this appeal. Our jurisdiction in this case is based solely on the dissent in the Court of Appeals. *See* N.C.G.S. § 7A-30(2) (2021). Rule 16(b) of the Rules of Appellate Procedure states that, when we have jurisdiction based solely on a dissent, our review "is limited to a consideration of those issues that are (1) specifically set out in the dissenting opinion as the basis for that dissent." N.C. R. App. P. 16(b).

Many years ago, this Court held that Rule 16(b) required dissenting judges to explain their reasoning in order to confer jurisdiction on this Court. *C.C. Walker Grading & Hauling, Inc. v. S.R.F. Mgmt. Corp.*, 311 N.C. 170, 176 (1984). In that case, the Court of Appeals opinion stated at its conclusion that "Chief Judge VAUGHN dissents." *C.C. Walker Grading & Hauling, Inc. v. S.R.F. Mgmt. Corp.*, 66 N.C. App. 170, 173 (1984). We held that this was insufficient to confer jurisdiction on this Court because when "the dissenter does not set out the issues upon which he bases his disagreement with the majority, the appellant has no issue properly before this Court." *C.C. Walker Grading & Hauling*, 311 N.C. at 176.

In their new brief to this Court, plaintiffs challenge two separate issues from the Court of Appeals opinion: first, the majority's decision to issue the writ of certiorari, and second, the majority's determination that the YMCA asserted an as-applied constitutional challenge (not a facial challenge) to the SAFE Child Act.

The dissenting judge set out in detail the reasons why he opposed the first of those two decisions by the majority. In several pages of thorough analysis, the dissent asserted that issuing a writ undermines the intent of the General Assembly, improperly shifts trial court responsibilities to the appellate courts, and encourages procedural gamesmanship by the litigants. *Cryan*, 280 N.C. App. at 319–21 (Carpenter, J., dissenting).

By contrast, the dissent did not expressly oppose the majority's second decision—the determination that the YMCA raised an as-applied challenge—or provide any explanation for why that decision was wrong. Plaintiffs point to a single sentence at the conclusion of the dissent, after several pages of reasoning on the certiorari issue, in which the dissent states the following: "Because I would determine jurisdiction to decide the constitutional issue is proper before the three-judge panel in Wake County, I would deny Defendant's petition for writ of certiorari." *Id.* at 321.

This single sentence is insufficient to confer jurisdiction over the issue of whether the YMCA's claim is a facial or an as-applied challenge. Plaintiffs contend that, because the dissent stated that jurisdiction "is proper before the three-judge panel," and because this statement could be true only if the YMCA's claim were a facial challenge, the dissent necessarily disagreed with the majority's determination that the YMCA's claim was an as-applied challenge.

But that is all inference. The dissent did not say that. If this sort of vague, implied disagreement with the majority's decision—one in which the dissenting judge provided no reasoning—could be sufficient to confer jurisdiction on this Court, so too would a judge in a single-issue appeal stating, "I dissent." As noted above, this Court has long rejected the notion that this sort of statement, without providing any reasoning, satisfies Rule 16(b)'s requirement to "specifically set out in the dissenting opinion" the "basis for that dissent." N.C. R. App. P. 16(b); *C.C. Walker Grading & Hauling*, 311 N.C. at 176. Consistent with Rule 16 and this Court's precedent, we hold that dissenting judges must set out their reasoning on an issue in the dissent in order for the dissent to confer appellate jurisdiction over that issue under N.C.G.S. § 7A-30(2). That did not occur here and, accordingly, we decline to address the second issue raised in plaintiffs' new brief.

Conclusion

We affirm the decision of the Court of Appeals.

AFFIRMED.

HOWARD v. IOMAXIS, LLC

[384 N.C. 576 (2023)]

KELLY C. HOWARD AND FIFTH THIRD BANK, AS CO-TRUSTEES OF THE RONALD E. HOWARD REVOCABLE TRUST DATED FEBRUARY 9, 2016, AS AMENDED AND RESTATED
v.
IOMAXIS, LLC, BRAD C. BOOR A/K/A BRAD C. BUHR, JOHN SPADE, JR., WILLIAM P. GRIFFIN, III, AND NICHOLAS HURYSH, JR.

No. 64A22

Filed 16 June 2023

Attorneys—attorney-client privilege—multiparty attorney-client relationship—joint representation of co-defendants—complex business case

In a complex business case, where defendants (a company and its individual members) were jointly represented by the same law firm—which also represented the company in "general corporate matters" under a standard corporate engagement letter—in a dispute with plaintiffs (the trust of the estate of the company's majority owner), when the relationship between the individual defendants deteriorated and one individual defendant (Hurysh) brought cross-claims against the others, the trial court properly concluded that Hurysh could waive the attorney-client privilege and disclose a recording that he secretly had made of a conference call between defendants and counsel before the falling out among defendants. Competent evidence supported the court's finding that the attorney's advice was given not as corporate counsel but as joint defense counsel for defendants pursuant to an express engagement letter (not the standard corporate engagement letter), which provided that, in the event of a disagreement among the defendants, the attorney-client privilege would not protect the information shared by any defendant with the law firm. Therefore, the trial court's determination that Hurysh held the attorney-client privilege and could waive it was well within the court's sound discretion.

Appeal pursuant to N.C.G.S. § 7A-27(a)(3) from an order on defendant IOMAXIS, LLC's motion for protective order entered on 22 November 2021 by Judge Michael L. Robinson, Special Superior Court Judge for Complex Business Cases, in Superior Court, Mecklenburg County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(b). Heard in the Supreme Court on 1 February 2023.

Johnston, Allison & Hord, P.A., by Patrick E. Kelly, Greg Ahlum, and David T. Lewis, for plaintiffs-appellees.

Allen, Chesson & Grimes PLLC, by Benjamin S. Chesson, David N. Allen, and Anna C. Majestro; and Nelson Mullins Riley & Scarborough LLP, by Travis A. Bustamante, for defendant-appellant IOMAXIS, LLC.

Miller Monroe & Plyler, PLLC, by Jason A. Miller, Paul T. Flick, John W. Holton, and Robert B. Rader III; and Robert F. Orr, for defendant-appellee Nicholas Hurysh, Jr.

DIETZ, Justice.

In July 2020, the defendants in this business court litigation all were jointly represented by the same law firm. Those defendants are a corporate entity—IOMAXIS, LLC—and the individual corporate members of IOMAXIS.

During a joint conference call with counsel, one of the defendants, Nicholas Hurysh, secretly recorded the conversation. After a falling out among the co-defendants, Hurysh sought to waive the attorney–client privilege and disclose the contents of the call.

IOMAXIS moved for a protective order, arguing that the call was to discuss corporate matters. IOMAXIS further argued that counsel on the call (who also was IOMAXIS's counsel for general corporate matters) was providing advice to the individual defendants solely in their roles as agents of the company.

The trial court rejected this argument and ruled that Hurysh held the privilege individually and could waive it. As explained below, we affirm. The trial court made a fact finding that counsel was not acting as corporate counsel but instead as joint defense counsel for all the defendants, including Hurysh, under a written joint defense agreement. That finding is supported by at least some competent evidence in the record and thus is binding on appeal.

Based on that finding, the trial court properly determined that Hurysh jointly held the attorney–client privilege with respect to the secretly recorded call and "therefore may opt to waive the privilege if he so desires."

Facts and Procedural History

This case concerns a corporate entity known as IOMAXIS, LLC. In 2017, the founder and majority owner of IOMAXIS passed away. A dispute later arose between the trust formed by his estate, whose trustees are the plaintiffs in this action, and the remaining members of IOMAXIS, who are defendants in this action.

During this time period, the law firm Holland & Knight, LLP represented IOMAXIS in connection with "general corporate matters" under a standard corporate engagement letter. This engagement letter was solely between Holland & Knight and IOMAXIS and did not involve representation of the individual members of IOMAXIS.

The CEO of IOMAXIS, Bob Burleson, signed this engagement letter on behalf of the company. Adam August, the Holland & Knight attorney who signed the engagement letter, was the primary attorney handling the corporate legal matters described in the engagement letter on behalf of Holland & Knight.

In June 2018, plaintiffs brought this action against IOMAXIS and the remaining members of the company. Plaintiffs' suit sought to resolve "whether IOMAXIS is a North Carolina or Texas limited liability company; whether there is a valid operating agreement; whether the Trust is entitled to distributions from IOMAXIS on the basis of Decedent Howard's interest therein; and whether the buy-sell provisions under the North Carolina operating agreement controlled at the time of Decedent Howard's death."

In July 2018, Holland & Knight executed a second engagement letter, this one covering the "dispute" with plaintiffs and the lawsuit "in state court in North Carolina." This second engagement letter stated that Holland & Knight would jointly represent IOMAXIS and its individual corporate members, all of whom were named defendants in this litigation. The letter emphasized that "there will be no way in this joint representation for you to pursue your individual interests through your common attorney." A different Holland & Knight attorney, Phillip Evans, signed this second engagement letter.

There is nothing in the second engagement letter, or anywhere else in the record, indicating that Holland & Knight created any separation within the firm between attorneys handling the corporate matters and attorneys handling the litigation matters.

The second engagement letter also addressed potential implications of the joint representation. The letter stated that "as a necessary

consequence of this joint representation, all information you share with [Holland & Knight] in this joint representation will be shared among each other." It continued, "[I]n the unlikely event of a disagreement among you, the attorney–client privilege will not protect the information you share with us."

On 22 July 2020, Adam August of Holland & Knight participated in a Zoom call with IOMAXIS CEO Bob Burleson and IOMAXIS members Brad Buhr, Trey Griffin, Nicholas Hurysh, and John Spade.

Several months after this call, the relationship among the remaining members of IOMAXIS deteriorated. Hurysh retained new counsel, sought to bring crossclaims against the other members of IOMAXIS, and ultimately revealed that he had recorded the July 22 conference call. Hurysh asserted that he held the attorney–client privilege with respect to the call and intended to waive it so that he could use the contents of the call in this litigation.

In response, IOMAXIS asserted that it held the exclusive attorney–client privilege over the July 22 call and that Hurysh had no authority to waive that privilege. The presiding business court judge referred this issue to another business court judge for resolution. After a hearing, the trial court entered an order finding that August's legal advice on the July 22 call was made under the second engagement letter, in which Holland & Knight jointly represented Hurysh, the other corporate members, and IOMAXIS. As a result, the court determined that Hurysh held the attorney–client privilege and could choose to waive it despite objection from IOMAXIS.

IOMAXIS timely appealed this interlocutory order. We have appellate jurisdiction over this matter because a trial court order compelling the disclosure of purportedly privileged communications affects a substantial right and is immediately appealable. *See In re Miller*, 357 N.C. 316, 343 (2003).

Analysis

The crux of this case is whether the trial court properly determined that Hurysh jointly held the attorney–client privilege over the July 22 call and whether the court used the proper legal test to make that determination.

For the attorney–client privilege to apply, "the relation of attorney and client must have existed at the time the particular communication was made." *Friday Invs., LLC v. Bally Total Fitness of the Mid-Atl., Inc.*, 370 N.C. 235, 238 (2017) (cleaned up).

Typically, an attorney–client relationship arises "between an attorney and a single client the attorney represents." *Id.* But this Court also has recognized "a multiparty attorney–client relationship in which an attorney represents two or more clients." *Id.* The rationale for this multiparty attorney–client relationship "is that individuals with a common interest in the litigation should be able to freely communicate with their attorney, and with each other, to more effectively defend or prosecute their claims." *Id.*

Once a court determines that an attorney–client relationship exists, the court applies a five-factor test to assess whether a particular communication is protected by the privilege. *Id.* at 240. That test examines whether:

> (1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated and (5) the client has not waived the privilege.

Id.

"The trial court is best suited to determine, through a fact-sensitive inquiry, whether the attorney–client privilege applies to a specific communication." *Id.* (emphasis omitted). When conducting this fact-sensitive inquiry, the trial court is not *required* to make specific fact findings. *Id.* When the trial court does not make written fact findings, "it is presumed that the court on proper evidence found facts to support its judgment." *Id.* at 241. But when, as here, the trial court finds facts in its written order, a different standard of review applies, known as the "competent evidence" standard. Under this test, a trial court's findings of fact "will be upheld if supported by *any* competent evidence" in the record. *N.C. Farm Bureau Mut. Ins. Co. v. Stox*, 330 N.C. 697, 702 (1992) (emphasis added). "This is true even when evidence to the contrary is present." *Id.* Our role under the competent evidence standard is solely to assess if any competent evidence supports the trial court's finding; if so, that finding is "conclusive on appeal." *Hutchins v. Honeycutt*, 286 N.C. 314, 319 (1974). Once we determine which fact findings are supported by competent evidence, we then review whether the trial court's ruling, based on those findings, amounted to an abuse of the court's discretion. *Friday Invs.*, 370 N.C. at 241.

No party in this appeal disputes these principles of the attorney–client privilege. But IOMAXIS seeks review of what it describes as an "exceedingly narrow issue" that this Court has not yet addressed: Does our traditional five-factor test for attorney–client privilege apply to more complex attorney–client relationships in the corporate setting?

IOMAXIS argues that the trial court should not have used our state's traditional test and instead should have adopted a more sophisticated test that other courts apply when a corporate officer asserts a personal claim of attorney–client privilege over communications with the corporation's counsel. *See In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 123 (3d Cir. 1986). This test, which originated in the Third Circuit, is used by many other federal and state courts.

The *Bevill* test, as it is known, exists because a corporation "cannot speak directly to its lawyers." *United States v. Graf*, 610 F.3d 1148, 1156 (9th Cir. 2010). Instead, the corporation's attorney–client relationship is formed through communications between the attorney and the individual officers, directors, and employees of the company. *Id.* These same officers, directors, and employees occasionally seek personal legal advice from corporate counsel. When this occurs, courts have developed a test to determine whether a separate attorney–client relationship arose between the attorney and the individual officer, director, or employee. *Bevill*, 805 F.2d at 123. The *Bevill* test puts the burden on the individual to show that there was a separate attorney–client privilege beyond the existing relationship between the attorney and the corporation. *Id.*

Under the *Bevill* test, corporate officers asserting personal privilege claims must show (1) that they approached the corporate counsel for the purpose of seeking legal advice, (2) that when they approached counsel they made it clear that they were seeking legal advice in their individual rather than in their representative capacities, (3) that counsel saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise, (4) that their conversations with counsel were confidential, and (5) that the substance of their conversations with counsel did not concern matters within the company or the general affairs of the company. *Id.*

We see the benefit of endorsing the *Bevill* test for use when our courts must determine whether a corporate official can assert an individual attorney–client privilege over communications with corporate counsel. The *Bevill* test has been widely adopted by other state and federal courts. *See, e.g.*, *Graf*, 610 F.3d at 1157; *Ex parte Smith*, 942 So. 2d

356, 360 (Ala. 2006); *In re Grand Jury Subpoena*, 274 F.3d 563, 571–72 (1st Cir. 2001); *In re Grand Jury Subpoenas*, 144 F.3d 653, 659 (10th Cir. 1998); *Zielinski v. Clorox Co.*, 504 S.E.2d 683, 686 (Ga. 1998); *United States v. Int'l Brotherhood of Teamsters, Chauffers, Warehousemen & Helpers of Am., AFL-CIO*, 119 F.3d 210, 214–15 (2d Cir. 1997). In these other jurisdictions, the test has proved useful to guide expectations about the attorney–client privilege in the corporate context. This is important because, "if the purpose of the attorney–client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected." *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981). By endorsing this test, we can provide clarity for corporate counsel concerning the appropriate steps to either create, or avoid creating, a separate attorney–client privilege when communicating with corporate officers or employees.

Having said that, every attorney–client privilege question is a "fact-intensive inquiry" that must be resolved on a case-by-case basis. *Friday Invs.*, 370 N.C. at 240. Here, the facts found by the trial court mean there was no need to apply the *Bevill* test, because the advice Holland & Knight provided was not given as corporate counsel but instead as joint defense counsel for the company and its individual members who were named parties in this litigation.

Specifically, the trial court found that Hurysh was represented by Holland & Knight in this litigation under the terms of an express engagement letter. That engagement letter stated that Holland & Knight jointly represented Hurysh, his fellow corporate members, and IOMAXIS and that "there will be no way in this joint representation for you to pursue your individual interests through your common attorney." The engagement letter further stated that "in the unlikely event of a disagreement among you, the attorney–client privilege will not protect the information you share with us."

After reviewing the entire July 22 call transcript in context, the trial court found that "the purpose of the July 22 Call was for August, an H&K attorney, to give the four members of IOMAXIS information for them to determine whether it was in their individual best interests to sign the proposed amended operating agreement, drafted by H&K attorneys for possible execution, particularly in light of the pending litigation." Based on this finding, the court further found that, during the July 22 call, the communications from August were "in his capacity as an attorney" with "a firm that Hurysh had hired to defend him in this litigation, providing legal advice about the potential impact of Hurysh's possible actions (signing an amendment to IOMAXIS' operating agreement) on his defense in this litigation."

Finally, the trial court acknowledged that August "very messily" stated at one point during the July 22 call that "our client is the company" and that the amended operating agreement "is in the best interest of the company." But the trial court found that this "disclaimer" did not change the fact that August went on to "give Hurysh advice that was in his best interest in defending himself in the lawsuit" and that August gave that personal legal advice to Hurysh "without limitation or qualification." Thus, the trial court found that August's communications on the July 22 call were subject to the litigation engagement letter creating a joint defense relationship among Hurysh, his fellow IOMAXIS members, and the company itself.

All of these fact findings are supported by at least some competent evidence in the record. We acknowledge that IOMAXIS points to other, competing evidence in the record which suggests that August was acting in his role as corporate counsel for IOMAXIS. The trial court rejected this competing evidence. Under the competent evidence standard, we must accept the trial court's findings despite this competing evidence. *Adams v. AVX Corp.*, 349 N.C. 676, 681 (1998).

Based on the court's findings, there was no need to apply the *Bevill* test—a test designed to assess a corporate officer's communications with corporate counsel. The trial court found that Holland & Knight was not acting as corporate counsel but instead as joint defense counsel for a number of clients including Hurysh. Based on that finding, the trial court properly determined that Hurysh jointly held the attorney–client privilege with respect to the July 22 call and that Hurysh "therefore may opt to waive the privilege if he so desires."

We emphasize that our holding today is fact specific and does not diminish the ability of corporate counsel to preserve the corporation's attorney–client privilege when communicating with corporate directors, officers, and employees. There are many steps that corporations and their counsel can take to avoid factual disputes over the scope of counsel's legal advice.

Most obviously, counsel can choose not to jointly represent both the corporation and the individual directors, officers, or employees as counsel did in this case through the litigation engagement letter. But even when counsel chooses to do so, there are ways to avoid the factual confusion that arose here. For example, an engagement letter can identify the particular attorneys within the firm who are handling a joint litigation defense and separately identify the corporate attorneys who are handling the general legal affairs of the company. The letter can then

inform the jointly represented parties that any legal advice from the corporate attorneys is solely for the company, not the individuals.

Similarly, a corporate attorney speaking to officers or employees of the company can offer a clear disclaimer of representation, emphasizing that counsel represents the corporation for purposes of the discussion; that the communications are covered by an attorney–client privilege held solely by the company; and that the participants must consult their own counsel if they seek personal legal advice about the subject matter.

None of this took place here, thus creating a factual dispute about the scope of Holland & Knight's representation on the July 22 call. The trial court resolved that factual dispute by making findings in favor of Hurysh. Those findings are supported by competent evidence, and the trial court's resulting determination that Hurysh held the attorney–client privilege was well within the trial court's sound discretion. We therefore affirm the trial court's order.

AFFIRMED.

IN THE MATTER OF J.M., N.M.

No. 200PA21

Filed 16 June 2023

1. Child Abuse, Dependency, and Neglect—permanency planning—removal of reunification from permanent plan—sufficiency of findings

In an abuse and neglect matter, in which two children were removed from the home due to unexplained life-threatening injuries that the younger child suffered when she was six weeks old, the trial court did not err in the dispositional phase by removing reunification with the parents from the permanent plan where the court had properly determined that further reunification efforts would be clearly unsuccessful and inconsistent with the children's health or safety. Although both parents had made significant progress on their family case plans, competent evidence supported the court's findings of fact—which were binding on appeal, since the parents did not appeal the adjudication order containing them—establishing that: the younger child's injuries resulted from abuse; the parents were the only caregivers who could have abused the child; and

neither parent accepted responsibility for the abuse, offered a plausible explanation for the child's injuries, or expressed any reservations about leaving the children alone with the other parent.

2. Child Abuse, Dependency, and Neglect—permanency planning—ceasing reunification efforts—constitutionally protected status as parents—issue not preserved for appellate review

In an abuse and neglect matter, in which two children were removed from the home due to unexplained life-threatening injuries that the younger child experienced when she was six weeks old, and where the trial court removed reunification with the parents from the permanent plan on grounds that the parents—who were found to be the only ones who could have caused their child's injuries—neither accepted blame for the abuse nor provided plausible explanations for the injuries, the Supreme Court reversed the Court of Appeals' decision holding that the trial court erred by preconditioning reunification on an admission of fault by the parents without first finding that the parents were unfit or had acted inconsistently with their constitutionally protected status as parents. Neither parent had raised the constitutional issue before the trial court, and therefore it had not been preserved for appellate review.

Justice MORGAN concurring in part and dissenting in part.

Justice EARLS dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 276 N.C. App. 291 (2021), reversing and remanding an order entered on 17 March 2020 by Judge Burford A. Cherry in District Court, Catawba County. Heard in the Supreme Court on 31 January 2023.

Lauren Vaughan for petitioner-appellant Catawba County Department of Social Services.

Michelle FormyDuval Lynch for appellant Guardian ad Litem.

David A. Perez for respondent-appellee mother.

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

ALLEN, Justice.

As a six-week-old infant, Nellie suffered physical abuse so severe that it left her near death and with brain bleeds, retinal hemorrhages too numerous to count in both of her eyes, and broken ribs.[1] Medical examination revealed that Nellie had suffered at least one of the broken ribs from a prior instance of abuse. Nellie's parents denied abusing Nellie but admitted that they were the only individuals with unsupervised access to her. The trial court removed Nellie and her one-year-old brother from the parents' custody. Although the parents subsequently participated in training and counseling programs as directed by the court, neither parent accepted responsibility for the harm to Nellie, offered a plausible explanation for her injuries, or expressed any reservations about leaving the children alone with the other parent. Unable to conclude that Nellie and her brother would be safe if returned to their parents, the trial court entered an order removing reunification with the parents from the permanent plan.

The Court of Appeals reversed the trial court, citing the parents' substantial compliance with their case plans and perceived deficiencies in the investigation conducted by the Catawba County Department of Social Services. *In re J.M.*, 276 N.C. App. 291, 856 S.E.2d 904 (2021). Because competent evidence supports the trial court's findings of fact and those findings sustain the trial court's conclusions of law, we reverse the Court of Appeals.

I. Background

Respondent-father and respondent-mother lived together in Newton, North Carolina with their two children: Jon, born 20 April 2017, and Nellie, born 3 July 2018. On the morning of 15 August 2018, six-week-old Nellie began crying. Respondent-father fed her and then changed her diaper. Both parents later reported that Nellie had screamed while being changed, though respondent-mother also claimed to have been in another room. Later that morning, Nellie suddenly fell silent. Respondent-father picked her up and noticed that she had gone completely limp. Nellie then gasped for air and began moving a little and arching her back before going limp again.

Respondents took Nellie to Catawba Valley Medical Center, where a CAT scan showed a subdural hematoma (brain bleed). Nellie was airlifted to Levine Children's Hospital in Charlotte, where she underwent

1. This opinion uses pseudonyms for juveniles to protect their identities.

an MRI, a skeletal survey, and examinations by Dr. James LeClair, a radiologist with a subspeciality in neuroradiology, and Dr. Patricia Morgan, a board-certified child abuse pediatrician.

Dr. LeClair observed two areas of bleeding on Nellie's brain and an ischemic infarct (a brain injury caused by oxygen deprivation). The brain bleeds had occurred no more than two days before the MRI and had most likely resulted from serious physical trauma of the sort associated with an automobile accident or a fall from a significant height. An ophthalmologist observed "innumerable" severe multilayer retinal hemorrhages in both of Nellie's eyes. Nellie also had two rib fractures that were the product of blunt force trauma or squeezing. The callous formation on one of the broken ribs indicated that the fracture to that rib was several days old.

Neither Dr. LeClair nor Dr. Morgan saw anything in Nellie's medical history—which included a raised white blood cell count, high blood pressure, and opioid withdrawal—that could account for Nellie's injuries. Dr. Morgan regarded the injuries as strongly indicative of child abuse. Specifically, they were consistent with a shaking incident in which Nellie was squeezed tightly enough to break her ribs and shaken violently enough to rupture blood vessels in her brain and eyes. The age of one of the rib fractures implied that Nellie had also suffered a previous instance of abuse.

On 21 August 2018, the Catawba County Department of Social Services (Catawba DSS) filed a juvenile petition alleging that Nellie had been abused and that both she and Jon were neglected. The district court entered an order that same day granting Catawba DSS nonsecure custody of Nellie and Jon.

Following several hearings on the petition from May to July 2019, the court declared its adjudication and disposition on 26 August 2019 and filed its adjudication and disposition order on 22 October 2019. The court adjudicated Nellie abused and neglected and adjudicated Jon neglected. It described Nellie's injuries in detail, summarizing the testimony of Dr. LeClair and Dr. Morgan. Consistent with that testimony, the court found that "the constellation of injuries suffered by [Nellie] were the result of nonaccidental trauma, or child abuse." The court likewise found that Nellie's injuries "were not caused by another child or caretaker," basing that finding on respondents' admission to social workers and law enforcement officers that respondents were Nellie's only care providers and that "they were extremely vigilant and rarely allowed others to handle her." Although respondent-mother had two older daughters

(approximately ages nine and thirteen at the time of Nellie's hospitalization) by another father, respondents reported that they closely supervised all contact between the girls and Nellie. Respondent-mother did admit to noticing bruising on Nellie's back and under Nellie's arms about one week before Nellie's hospitalization and asking respondent-father to handle the infant more gently.

Turning to the dispositional phase, the court reviewed the results of respondents' psychological evaluations. The evaluation of respondent-mother revealed that she had experienced significant traumatic events in early childhood for which she needed therapy and that she had "expressed some blame" toward respondent-father for Nellie's injuries. The psychological evaluation of respondent-father did not yield valid outcomes "due to response patterns by [respondent-father] which were indicative of deception." Respondent-father "seemed to have no insight into the fact that he repeatedly finds himself in situations in which he is accused of violence and aggression."

The court further observed that respondent-mother had completed a life skills program and attended a substance abuse treatment program, in which she had progressed from daily sessions to weekly sessions and was on track to progress to biweekly sessions. Respondent-father was attending a mate abuser treatment program, had finished a comprehensive clinical assessment, and was undergoing therapy. Respondents were no longer living together, and both were employed.

In light of its findings of fact, the court concluded that "[r]eturn to the home or custody of either parent [would be] contrary to the best interests, safety and welfare of the [children]" and that "removal of the [children was] necessary." It granted custody of Nellie and Jon to Catawba DSS and directed Catawba DSS to arrange for foster care or other placement. The court ordered respondents to enter into and comply with case plans requiring psychological evaluations, random drug tests, and life skills programs. It also ordered respondents to maintain stable housing and employment and to refrain from using or possessing illegal drugs. The court allowed each respondent to visit Nellie and Jon for one hour each week.

On 4 November 2019, the court held a permanency planning hearing. In the permanency planning order entered after the hearing, the court remarked on respondents' case plan progress, finding that it was "likely or possible that the minor children [would] return to the home of a parent within six months." Significantly, however, the court cautioned that respondents' failure to explain Nellie's injuries constituted a barrier to

reunification. While concluding that returning Nellie and Jon to one or both respondents would be contrary to the children's health, safety, and welfare, the court increased respondents' supervised visitation to three hours per week. The permanency planning order made reunification the primary plan and adoption the secondary plan.

A second permanency planning hearing took place on 12 February 2020. Catawba DSS and the guardian ad litem submitted new reports to the court. The report by Catawba DSS recommended maintaining a primary plan of reunification with a secondary plan of adoption. The guardian ad litem's report recommended a primary plan of adoption with a secondary plan of reunification.

The court heard testimony from respondents and the children's foster mother. During her testimony, respondent-mother conceded that Nellie's injuries were "nonaccidental," but she denied knowing how they had happened. She insisted that, although respondent-father might have been a danger to Nellie and Jon at some point, he no longer posed any threat. When asked what her plan would be if reunited with her children, respondent-mother said that she wanted to share custody with respondent-father and that she would have no concerns about leaving Nellie and Jon alone with him. Respondent-father again denied knowing the cause of Nellie's injuries but opined that some of them had resulted from a bowel movement. The foster mother testified that respondents had demonstrated a good bond with the children, that Nellie and Jon had enjoyed their visits with respondents, and that she had never seen either respondent engage in any inappropriate behavior.

In the permanency planning order entered after the 12 February 2020 hearing, the court acknowledged the continued progress of respondents on their case plans. Respondent-mother had received counseling for substance abuse and domestic violence, attended a substance abuse treatment program, screened negative for drugs at each test, completed several life skills and parenting courses, and maintained employment and her own residence. Similarly, respondent-father had undergone a second psychological evaluation and additional therapy, participated in the mate abuser treatment program and domestic violence classes, and screened negative for drugs consistently after failing his first drug test.

Despite the progress on case plans and the foster mother's positive assessment, the trial court expressed concern that, "[w]ithout some acknowledgement by the parents of responsibility for the injuries, there can be no mitigation of the risk of harm to the children." According to the court, respondent-mother essentially took the position that, even "if

the father was a danger to the child at the time of the removal, he is not a danger now." The court also characterized as "disturbing" some of the statements made by respondent-father during his second psychological evaluation, especially the following: "To my knowledge, nothing malicious happened. Experts have conflicting information regarding dates and timelines of injuries. I've ruled out that [respondent-mother] had anything to do with it . . . . My daughter had medical issues before this."

Given the severity of Nellie's injuries and that neither respondent had "acknowledged responsibility for th[e] nonaccidental abusive injuries to [Nellie]," the court found "no evidence that either parent w[ould] protect their children over protecting one another, and therefore the risk to these children of abuse and neglect remain[ed] high." Under the circumstances, the court deemed it unlikely that Nellie and Jon would return home within six months. The court concluded that returning the children home would be contrary to their health, safety, and welfare and that efforts to reunify them with either respondent "would clearly be unsuccessful and inconsistent with the children's health and safety." The court modified the permanent plan, eliminating reunification from the plan and specifying a primary plan of adoption and guardianship and a secondary plan of custody with an approved family member. Nonetheless, unconvinced that adoption would prove to be in the children's best interest "due to the bond with their parents," the court determined that Catawba DSS should not initiate proceedings to terminate respondents' parental rights. The court maintained respondents' visitation and ordered a home study of the paternal grandmother for potential placement.

Respondents appealed the trial court's second permanency planning order. A unanimous panel of the Court of Appeals held that the findings of fact in the order were not supported by competent evidence and that the findings did not support the trial court's conclusion that reunification efforts would be contrary to the children's health, safety, and need for a permanent home. *In re J.M.*, 276 N.C. App. at 302–04, 856 S.E.2d at 912–13. The Court of Appeals likewise held that the trial court could not lawfully precondition reunification on an admission of fault by respondents without first finding that respondents had forfeited their constitutional rights to the custody, care, and control of their children. *Id.* at 308, 856 S.E.2d at 915.

Pursuant to Rule 31 of the North Carolina Rules of Appellate Procedure, Catawba DSS and the guardian ad litem filed a petition for rehearing with the Court of Appeals. The Court of Appeals denied the petition, whereupon Catawba DSS and the guardian ad litem filed a

petition for discretionary review with this Court under N.C.G.S. § 7A-31 (2021). We allowed the petition.

II. Standard of Review

Appellate review of a trial court's permanency planning order is restricted "to whether there is competent evidence in the record to support the findings [of fact] and whether the findings support the conclusions of law." *In re A.P.W.*, 378 N.C. 405, 410, 861 S.E.2d 819, 825 (2021) (alteration in original) (quoting *In re H.A.J.*, 377 N.C. 43, 49, 855 S.E.2d 464, 469 (2021)). "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *State v. Ashworth*, 248 N.C. App. 649, 651, 790 S.E.2d 173, 176 (2016) (quoting *State v. Chukwu*, 230 N.C. App. 553, 561, 749 S.E.2d 910, 916 (2013)). At a permanency planning hearing, competent evidence may consist of "any evidence, including hearsay evidence . . . or testimony or evidence from any person that is not a party, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition." N.C.G.S. § 7B-906.1(c) (2021).

"The trial court's findings of fact are conclusive on appeal if supported by any competent evidence." *In re A.P.W.*, 378 N.C. at 410, 861 S.E.2d at 825. Uncontested findings of fact are likewise binding on appeal. *In re D.W.P.*, 373 N.C. 327, 330, 838 S.E.2d 396, 400 (2020). Moreover, "[t]he trial [court's] decisions as to the weight and credibility of the evidence, and the inferences drawn from the evidence[,] are not subject to appellate review." *Id.*

"The trial court's dispositional choices—including the decision to eliminate reunification from the permanent plan—are reviewed for abuse of discretion." *In re A.P.W.*, 378 N.C. at 410, 861 S.E.2d at 825–26. "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). "In the rare instances when a reviewing court finds an abuse of . . . discretion, the proper remedy is to vacate and remand for the trial court to exercise its discretion. The reviewing court should not substitute its own discretion for that of the trial court." *In re A.J.L.H.*, 384 N.C. 45, 48, 884 S.E.2d 687, 690 (2023).

III. Analysis

A. Removal of Reunification from the Permanent Plan

[1] The provisions in Chapter 7B (Juvenile Code) of our General Statutes "reflect[ ] the need both to respect parental rights and to protect

children from unfit, abusive, or neglectful parents." *In re R.T.W.*, 359 N.C. 539, 543, 614 S.E.2d 489, 492 (2005). The Juvenile Code divides abuse, neglect, and dependency proceedings into two main phases: adjudicatory and dispositional. During the adjudicatory phase, the burden of proof is on DSS to show by clear and convincing evidence that a juvenile qualifies as abused, neglected, or dependent as the Juvenile Code defines those terms. N.C.G.S. § 7B-805 (2021). If the court adjudicates the juvenile abused, neglected, or dependent, proceedings move to the dispositional phase, the purpose of which "is to design an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State in exercising jurisdiction." N.C.G.S. § 7B-900 (2021).[2]

This case involves a challenge to rulings made in the dispositional phase. Respondents have not disputed the trial court's adjudications of abuse and neglect. During the dispositional phase, the court may select among or combine various alternatives for disposition: dismissal or continuance of the case; supervision of the juvenile in the juvenile's home by DSS or another individual, subject to conditions specified by the court; placement of the juvenile in the custody of a parent, relative, private agency, or some other suitable person; appointment of a guardian of the person for the juvenile; or placement of the juvenile in DSS's custody. N.C.G.S. § 7B-903(a) (2021).

There is no burden of proof at the dispositional phase. Rather, "[t]he essential requirement, at the dispositional hearing . . . , is that sufficient evidence be presented to the trial court so that it can determine what is in the best interest of the child." *In re Shue*, 311 N.C. 586, 597, 319 S.E.2d 567, 574 (1984); *see also* N.C.G.S. § 7B-100(5) (2021) (explaining that one purpose of the Juvenile Code is "[t]o provide standards . . . for ensuring that the best interests of the juvenile are of paramount consideration by the court and that when it is not in the juvenile's best interest to be returned home, the juvenile will be placed in a safe, permanent home within a reasonable amount of time"). Moreover, "[t]he court may consider any evidence, including hearsay evidence . . . , that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition." N.C.G.S. §§ 7B-901(a), 7B-906.1(c) (2021).

The first step in the dispositional phase is the initial disposition hearing, which the court must hold immediately following the adjudicatory hearing and complete within thirty days of finishing the adjudicatory hearing. N.C.G.S. § 7B-901(a) (2021). Depending on the trial

2. The objectives of the Juvenile Code are set out in N.C.G.S. § 7B-100.

court's custody decision at the initial disposition hearing, the case goes on either the review hearing track or the permanency planning track. When, as in this case, the court removes custody of the juvenile from a parent, guardian, or custodian at the initial disposition hearing, the statutory provisions regarding permanency planning apply. The court must conduct a permanency planning hearing within ninety days of the initial disposition hearing and, in general, follow-up permanency planning hearings at least every six months as long as it retains jurisdiction over the matter.[3] The permanent plan adopted by the court must contain a primary plan and a secondary plan. N.C.G.S. § 7B-906.2(b) (2021). The most common primary and secondary plans include reunification of the juvenile with his or her parent(s), adoption, guardianship with relatives or others, and custody to a relative or other suitable person.[4] N.C.G.S. § 7B-906.2(a) (2021).

The goal of the permanency planning process is to "return the child to their home or when that is not possible to a safe, permanent home within a reasonable period of time." Sara DePasquale, *Abuse, Neglect, Dependency, and Termination of Parental Rights Proceedings in North Carolina* 7-10 (UNC School of Government 2022). Accordingly, reunification ordinarily must be the primary or secondary plan in a juvenile's permanent plan. N.C.G.S. § 7B-906.2(b). The court must make written findings at each permanency planning hearing regarding certain factors used to evaluate progress—or the lack thereof—toward reunification:

> (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.
>
> (2) Whether the parent is actively participating in or cooperating with the plan, [DSS], and the guardian ad litem for the juvenile.
>
> (3) Whether the parent remains available to the court, [DSS], and the guardian ad litem for the juvenile.
>
> (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

N.C.G.S. § 7B-906.2(d) (2021).

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3. The court must hold the first permanency planning hearing within thirty days of the initial disposition when the initial disposition relieves DSS of making reasonable efforts to reunite the juvenile with his or her parent(s). N.C.G.S. § 7B-901(d) (2021).

4. The other options listed in N.C.G.S. § 7B-906.2(a) are Another Planned Permanent Living Arrangement for a juvenile who is sixteen or seventeen years old and reinstatement of parental rights pursuant to N.C.G.S. § 7B-1114.

The requirement to make reunification the primary or secondary plan is not absolute. The court need not pursue reunification during the permanency planning process if: (1) the court made written findings specified in N.C.G.S. § 7B-901(c) at the initial disposition hearing; (2) the court made written findings described in N.C.G.S. § 7B-906.1(d)(3) at a review hearing or an earlier permanency planning hearing; (3) the permanent plan has been achieved; or (4) "the court makes written findings that reunification efforts clearly would be unsuccessful or . . . inconsistent with the juvenile's health or safety." N.C.G.S. § 7B-906.2(b). The court's written findings do not have to track the statutory language verbatim, but they "must make clear that the trial court considered the evidence in light of whether reunification would be [clearly unsuccessful] or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time." *In re H.A.J.*, 377 N.C. at 49, 855 S.E.2d at 470.[5]

B. Inconsistency of Reunification Efforts with Juveniles' Health and Safety

The trial court eliminated reunification from the permanent plan for Nellie and Jon after concluding that returning them to the custody of their parents would be "contrary to the health, safety and welfare of the children" and that "[f]urther efforts to reunify the children with either parent would clearly be unsuccessful and inconsistent with the children's health and safety." The court based its conclusion on the failure of respondents to acknowledge responsibility for the extreme abuse that left Nellie fighting for her life at six weeks old. In the court's view, without some acknowledgement of responsibility, there was no reason to believe that "either parent [would] protect their children over protecting one another, and therefore the risk to these children of abuse and neglect remain[ed] high."

In reversing the trial court, the Court of Appeals held that the evidentiary record does not prove by clear and convincing evidence that reunification efforts would be futile.[6] The Court of Appeals noted that

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5. Although *In re H.A.J.* and other permanency planning cases cite to *In re L.M.T.*, 367 N.C. 165, 752 S.E.2d 453 (2013), that case interprets provisions in the Juvenile Code as they existed prior to amendments enacted in 2015. It should not be relied upon going forward.

6. In 2015 and 2016, the General Assembly amended the Juvenile Code to remove all references to "futile." In its place, the General Assembly adopted the language "clearly would be unsuccessful or inconsistent with the juvenile's health or safety." *Compare* N.C.G.S. §§ 7B-906.1 (2016), -507 (2015), *with* N.C.G.S. §§ 7B-906.1 (2015), -507 (2013). *See also* N.C.G.S. § 7B-906.2(b) (2015).

respondent-mother had "complied with and substantially completed her case plan; acknowledged what brought Jon and Nellie into DSS's care; and exhibited changed behaviors, including installing safeguards in the familial home and requiring [r]espondent-[f]ather to move out of the home." *In re J.M.*, 276 N.C. App. at 302, 856 S.E.2d at 912. Additionally, respondent-mother had "engaged in all services required of her in order to correct the conditions that led to the removal of the children." *Id.* With respect to respondent-father, the Court of Appeals observed that he had "participated in and completed services; . . . that [r]espondent-[m]other and the children's foster mother . . . did not have safety concerns about [him]; and . . . [that he] had completed all the weekly sessions in the Mate Abuser Treatment Program." *Id.* at 304, 856 S.E.2d at 913. The Court of Appeals also concluded that Catawba DSS had failed to make reasonable efforts towards reunification by not interviewing respondent-mother's two older children, both of whom "resided in the familial home with [r]espondents, Jon, and Nellie."[7] *Id.* at 307, 856 S.E.2d at 915.

In their briefs to this Court, Catawba DSS and the guardian ad litem argue that the Court of Appeals ignored pertinent precedents from this Court with comparable fact patterns. They further argue that the Court of Appeals should not have considered the alleged shortcomings in the investigation by Catawba DSS because respondents did not appeal the trial court's adjudication order.

Insisting that the Court of Appeals should be affirmed, respondents attempt to distinguish this case from the precedents cited by Catawba DSS and the guardian ad litem. They argue that the Court of Appeals did not engage in impermissible factfinding as to the Catawba DSS investigation. Respondent-mother contends that no competent evidence supports the trial court's conclusion that she would not protect the children, if necessary, from respondent-father. Respondent-father maintains that removing reunification from the permanent plan over his refusal to acknowledge guilt is fundamentally unfair and at odds with the children's best interest.

We hold that the Court of Appeals erred in reversing the trial court's decision to eliminate reunification from the permanent plan. As explained below, binding precedent required the Court of Appeals to affirm.

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7. In their petition for rehearing filed with the Court of Appeals, Catawba DSS and the guardian ad litem alleged that, in fact, Catawba DSS did interview respondent-mother's older daughters.

1. Sufficiency of Catawba DSS's Reunification Efforts

"Unless reunification efforts were previously ceased, at each permanency planning hearing the court shall make a finding about whether the reunification efforts of the county [DSS] were reasonable." N.C.G.S. § 7B-906.2(c) (2021). State law defines "reasonable efforts" towards reunification to demand

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

N.C.G.S. § 7B-101(18) (2021).

In concluding that further reunification efforts "would clearly be unsuccessful and inconsistent with the children's health and safety," the trial court partly relied on these key findings of fact that appear in its adjudication order:

> 24. Both parents reported to social workers and police that only they provided care to [Nellie], that they were extremely vigilant and rarely allowed others to handle her. The parents reported, and the court finds, that the parents supervised contact between Ms. Smith's older daughters and [Nellie] very closely, as well as contact between [Nellie] and [Jon]. The parents reported, and the court finds that [Jon] was never left alone with [Nellie]. Based on the parents' statements, the Court finds that the injuries to [Nellie] were not caused by another child or caretaker.
>
> . . . .
>
> 28. The Court specifically finds, after considering all of the evidence, that the constellation of injuries suffered by the minor child [Nellie] were the result of nonaccidental trauma, or child abuse.

Taken together, the above findings of fact establish that (1) Nellie's life-threatening injuries resulted from intentional conduct and (2) no one other than respondents could have inflicted the injuries. The trial court based its finding of intentional conduct on the testimony of the medical experts who treated Nellie. Respondents' own statements to social workers and law enforcement officers informed the finding that no other caregiver or child could have abused Nellie.

In holding that Catawba DSS did not make reasonable efforts to reunify respondents with Nellie and Jon, the Court of Appeals focused on the alleged failure of Catawba DSS to interview respondent-mother's two older children. The Court of Appeals speculated that the interviews might have provided an explanation for Nellie's injuries that would have exonerated respondents.

> DSS offers no reason why it failed to interview Respondent-Mother's older children. The trial court found, in the adjudication order, Jon and Nellie were under Respondents' exclusive custody and care based on the statements made by the Respondents to social workers and police regarding their care of Nellie. It is unreasonable to presume, however, that parents have eyes on their children at all times. Parents and children must sleep at some point, and presumably, parents must tend to other children or to household needs, allowing for children to be left without eyes-on supervision for some periods of time, no matter how short.

In re J.M., 276 N.C. App. at 306, 856 S.E.2d at 914.

Regardless of whether Catawba DSS interviewed respondent-mother's two older children, precedent required the Court of Appeals to treat the findings of fact in the adjudication order as binding on appeal. In *In re Wheeler*, the trial court's order adjudicating two children abused and neglected found that their father had sexually abused them. 87 N.C. App. 189, 191–93, 360 S.E.2d 458, 459–61 (1987). The father did not appeal the adjudication order, and when the county DSS filed a petition to terminate his parental rights, the trial court prohibited the parties from relitigating the sexual abuse issue. *Id.* at 192, 360 S.E.2d at 460. The Court of Appeals upheld the trial court's refusal to revisit the adjudication order's abuse finding: "[b]ecause no appeal was taken or other relief sought from the [adjudication] order, it remained a valid final order which was binding in the later proceeding on the facts regarding abuse and neglect

which were found to exist at the time it was entered." *Id.* at 194, 360 S.E.2d at 461; *see also In re N.G.*, 186 N.C. App. 1, 4, 650 S.E.2d 45, 48 (2007) (holding that the trial court's earlier findings of abuse barred the parents from denying responsibility for injuring their oldest child in a later proceeding), *aff'd*, 362 N.C. 229, 657 S.E.2d 355 (2008).

Here, respondents have appealed the trial court's permanency planning order that eliminated reunification from the permanent plan for Nellie and Jon. Like the father in *Wheeler*, they did not exercise their right to appeal or to seek other appropriate relief from the adjudication order. *See* N.C.G.S. § 7B-1001(a)(3) (2021) (allowing a direct appeal to the Court of Appeals from "[a]ny initial order of disposition and the adjudication order upon which it is based"). Although *Wheeler* is not binding on this Court, it remains controlling authority for the Court of Appeals. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). For this reason, the Court of Appeals should not have allowed respondents to transform their appeal from the permanency planning order into a collateral attack on findings of fact in the adjudication order.

The trial court's findings of fact in the adjudication order indicate that no one other than respondents could have inflicted Nellie's life-threatening injuries. The Court of Appeals was constrained by these findings during its review of the permanency planning order on appeal in this case. *See*, *e.g.*, *In re A.P.W.*, 378 N.C. 405, 410, 861 S.E.2d 819, 825 (2021) ("Uncontested findings [of fact] are binding on appeal."); *In re D.W.P.*, 373 N.C. 327, 330, 838 S.E.2d 396, 400 (2020) ("Unchallenged findings of fact made at the adjudicatory stage . . . are binding on appeal.").

2. Sufficiency of Permanency Planning Order's Findings of Fact and Conclusions of Law

Citing respondent-mother's compliance with her case plan, changed behaviors, and participation in mandated services, the Court of Appeals held that the trial court's "findings and conclusions of law that reunification efforts would be futile is unsupported by clear and convincing evidence." *In re J.M.*, 276 N.C. App. at 302, 856 S.E.2d at 912. Similar factors persuaded the Court of Appeals that, with respect to respondent-father, the trial court's second permanency planning order "does not make 'findings that embrace the requisite ultimate finding that reunification efforts clearly would be unsuccessful or . . . inconsistent with the juvenile's health or safety.' " *Id.* at 304, 856 S.E.2d at 913 (quoting *In re D.A.*, 258 N.C. App. 247, 254, 811 S.E.2d 729, 734 (2018)).

Due regard for our own precedent requires us to reverse the Court of Appeals. In *In re D.W.P.*, the Guilford County Department of Health and Human Services (GCDHHS) initiated juvenile proceedings after the mother's infant son received emergency medical treatment for a broken femur. 373 N.C. at 328, 838 S.E.2d at 399. The mother and her then-fiancé were the infant's only caregivers when the injury occurred. *Id.* at 328, 838 S.E.2d at 399. Medical examination revealed older clavicle, tibia, fibula, and rib fractures that were still in the process of healing. *Id.* The mother offered various explanations for the injuries, all of which shifted blame away from her and her fiancé. *Id.* She first blamed the family dog for the broken femur and suggested that the infant's biological father—not her fiancé—had inflicted the older injuries. *Id.* The mother later said that the infant's injuries "may have occurred because he 'slept funny.' " *Id.* at 329, 838 S.E.2d at 399. While she eventually admitted that her fiancé might have been alone with her son at some point on the night of the femur injury, the mother remained unwilling to implicate anyone other than the infant's biological father. *Id.* at 336, 838 S.E.2d at 404.

The trial court adjudicated the infant abused and neglected and adjudicated the mother's four-year-old daughter neglected.[8] *Id.* at 328, 838 S.E.2d at 399. Following a permanency planning hearing that resulted in an order to cease reunification efforts, GCDHHS filed a petition to terminate the mother's parental rights under Article 11 (Termination of Parental Rights) of the Juvenile Code. *Id.* at 329, 838 S.E.2d at 399. The trial court held a hearing on the petition and entered an order terminating the mother's parental rights. *Id.* The order found as fact that either the mother or her (by then former) fiancé had abused her son. *Id.* at 329, 838 S.E.2d at 400. Conceding that the mother had satisfied many of the permanent plan's requirements, the termination order emphasized her failure to offer an honest explanation for her son's injuries. *Id.* at 329, 838 S.E.2d at 399–400. Absent such an explanation, the court believed, GCDHHS could not formulate a plan "to ensure that injuries would not occur in the future." *Id.* at 329, 838 S.E.2d at 400.

On appeal, we rejected the mother's contention that the findings of fact in the termination order were unsupported by clear, cogent, and

8. The mother appealed the trial court's adjudication order. The Court of Appeals affirmed the adjudication of the son as abused and neglected but reversed the daughter's neglect adjudication, remanding the case "with instructions to the trial court to make appropriate findings of fact and conclusions of law to determine whether [the daughter was] a neglected juvenile." *In re D.P. and B.P.*, No. COA16-529, slip op. at 13 (N.C. Ct. App. Nov. 15, 2016) (unpublished). In subsequent proceedings, the mother stipulated that her daughter was neglected. *In re D.W.P.*, 373 N.C. at 329.

convincing evidence, the evidentiary standard at the adjudicatory phase of termination proceedings. *Id.* at 331–38, 838 S.E.2d at 401–05; *see also* N.C.G.S. § 7B-1109(f) (2021) ("The burden in [an adjudicatory hearing on termination] shall be upon the petitioner or movant and all findings of fact shall be based on clear, cogent, and convincing evidence."). In particular, we upheld the trial court's finding that the mother had not gained insight into the cause of her son's injuries.

> Respondent-mother has maintained that she does not know the cause of [her son's] injuries and has offered explanations that are not medically supported. She acknowledged that she would not rule out the possibility that [her fiancé] committed the injuries . . . but she also admits to resuming contact with him after the children were taken from the home. While we recognize that respondent-mother has taken the proper steps to attend parenting classes and therapy[ ] and has followed the majority of the court's recommendations to become a better parent, she has failed to acknowledge the harm that has resulted from her failure to identify what happened to [her son]. Without recognizing the cause of [her son's] injuries, respondent-mother cannot prevent them from reoccurring. Therefore, the trial court's finding that respondent-mother failed to gain insight and make reasonable progress regarding [her son's] injuries is supported by clear, cogent and convincing evidence.

In re D.W.P., 373 N.C. at 338, 838 S.E.2d at 404–05.

This Court went on to hold that the findings of fact supported the trial court's conclusion that grounds existed under N.C.G.S. § 7B-1111(a)(1) to terminate the mother's parental rights for neglect.

> While we recognize the progress respondent-mother has made in completing her parenting plan, including completing parenting classes, attending therapy, and regularly visiting with her children, we are troubled by her continued failure to acknowledge the likely cause of [her son's] injuries. . . .
>
> Here, the findings of fact show that respondent-mother has been unable to recognize and break patterns of abuse that put her children at risk. Despite

> respondent-mother's acknowledgement that [her fiancé] could have caused [her son's] injuries, she re-established a relationship with him that resulted in domestic violence [before finally marrying someone else]. Respondent-mother acknowledges her responsibility to keep [her son] safe, but she refuses to make a realistic attempt to understand how he was injured or to acknowledge how her relationships affect her children's wellbeing. These facts support the trial court's conclusion that the neglect is likely to reoccur if the children are returned to respondent-mother's care.

Id. at 339–40, 838 S.E.2d at 406.

The parallels between *In re D.W.P.* and this case are obvious and compelling. Each case involves the serious physical abuse of an infant at home and in the care of two adults. In each case, the trial court found that the two caregivers were the only persons who could have inflicted the abuse. Moreover, while the mother in each case suggested that she was elsewhere in the home when the abuse took place, she refused to blame her partner or to supply any other plausible explanation for the infant's injuries. The explanations that were offered in each case bordered on the absurd, with the mother in *In re D.W.P.* blaming the family dog or strange sleep positions for the harm to her child and respondent-father in the present case theorizing that a difficult bowel movement accounted for Nellie's injuries. In each case, the trial court found that parental inability or unwillingness to confront the cause of the abuse prevented the parent(s) from adequately mitigating the risk of further abuse or neglect.

To be sure, there are factual differences between *In re D.W.P.* and this case. Respondent-mother has done a better job of complying with her case plan and availing herself of services than the mother in *In re D.W.P.* Furthermore, there is no evidence in the record that respondent-mother has been a party to any post-removal incidents of domestic violence, unlike the mother in *In re D.W.P.*, whose homelife after her child's hospitalization was marred by such incidents.

Major distinctions between the two cases only strengthen the arguments for upholding the trial court, however. Whereas the mother in *In re D.W.P.* ultimately ended her relationship with the only other person who could have inflicted her son's injuries, respondent-mother made it clear during the second permanency planning hearing that she desires to share custody of Nellie and Jon with respondent-father and has no

reservations about leaving the children alone with him. If we assume for the sake of argument that respondent-mother did not injure Nellie, this means that she is willing to entrust her children unsupervised to the person who physically abused Nellie twice—the second time so badly that he nearly killed her—and who has thus far refused to accept any degree of responsibility for his actions. Of course, if we assume that respondent-mother abused Nellie, there is no reason to believe that respondent-father would protect the children from her. According to him, Nellie was not abused at all.

Additionally, *In re D.W.P.* concerned the termination of parental rights—a final order—not a permanency planning order, which can be modified at any time in response to new developments in a case. The permanency planning order on appeal here does not foreclose the possibility that one or both respondents might one day regain custody of Nellie and Jon. Indeed, the order expressly finds that termination of parental rights would not be in the children's best interest. It stands to reason that evidence sufficient to support the termination of parental rights is sufficient to sustain the less dramatic step of removing reunification from a permanent plan.

Just as the evidence in *In re D.W.P.* supported the findings of fact and conclusions of law in the trial court's termination order, the record evidence in this case provides ample basis for the trial court's determination that respondents' persistent unwillingness to acknowledge responsibility for Nellie's life-threatening injuries would render further efforts at reunification clearly unsuccessful and "inconsistent with the [juveniles'] health or safety." N.C.G.S. § 7B-906.2(b). The Court of Appeals should have followed *In re D.W.P.* and upheld the findings of fact and conclusions of law in the permanency planning order.[9]

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9. Our opinion should not be understood to hold that a parent's refusal to acknowledge responsibility for abuse will always sustain a conclusion that reunification efforts would clearly be unsuccessful or inconsistent with a child's health or safety. Rather, we simply hold that the facts of this case, which so closely resemble those of *D.W.P.*, support such a conclusion. In both cases, the evidence provided the trial court with grounds to believe that the parent(s) did not appreciate the seriousness of the abuse and would not be willing to take the steps necessary to keep the children safe.

Neither do we hold that the trial court was *required* by its findings of fact and conclusions of law to remove reunification from the permanent plan. Even when grounds exist to eliminate reunification from a permanent plan, the decision to eliminate or retain reunification lies within the trial court's sound discretion. *See In re A.P.W.*, 378 N.C. at 410, 861 S.E.2d at 825–26 ("The trial court's dispositional choices—including the decision to eliminate reunification from the permanent plan—are reviewed for abuse of discretion.").

C. Non-Preservation of Constitutional Claim

[2] The Court of Appeals held that "[t]he trial court's insistence for [r]espondents to admit blame as a . . . basis to cease reunification has no lawful basis without the threshold finding of unfitness or conduct inconsistent with their constitutionally protected status as a parent." *In re J.M.*, 276 N.C. App. at 308, 856 S.E.2d at 915. Because the trial court did not make any such findings regarding respondents' constitutional rights, the Court of Appeals reasoned that the trial court erred by removing reunification from the permanent plan. We disagree.

This Court has long recognized that "a parent enjoys a fundamental right 'to make decisions concerning the care, custody, and control' of his or her children under the Due Process Clause of the Fourteenth Amendment to the United States Constitution." *Adams v. Tessener*, 354 N.C. 57, 60, 550 S.E.2d 499, 501 (2001) (quoting *Troxel v. Granville*, 530 U.S. 57, 66 (2000)). To that end, "absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount rights of parents to custody, care, and control of their children must prevail." *Petersen v. Rogers*, 337 N.C. 397, 403–04, 445 S.E.2d 901, 905 (1994). Nonetheless, "the existence of a constitutional protection does not obviate the requirement that arguments rooted in the Constitution be preserved for appellate review." *In re J.N.*, 381 N.C. 131, 133, 871 S.E.2d 495, 497 (2022); *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39 (2002) ("It is well settled that an error, even one of constitutional magnitude, that [the party] does not bring to the trial court's attention is waived and will not be considered on appeal.").

In *In re J.N.*, "DSS sought to change the primary plan from reunification to guardianship with an approved caregiver." 381 N.C. at 132, 871 S.E.2d at 497. Although the father argued during the permanency planning hearing "that reunification should remain the primary plan[, he] did not argue or otherwise contend that the evidence failed to demonstrate he was an unfit parent or that his constitutionally-protected right to parent his children had been violated." *Id.* The trial court entered an order granting guardianship of the children to their grandparents. *Id.*

On appeal, the father argued "that the trial court erred in granting guardinship to the maternal grandparents without first finding that he was an unfit parent or he had acted inconsistently with his constitutional right to parent." *Id.* Affirming the trial court, this Court held that the issue had not been preserved for appellate review because the father had "failed to assert his constitutional argument in the trial court." *Id.* at 133, 871 S.E.2d at 498. In so ruling, we noted that the father "was on

notice that DSS and the guardian ad litem were recommending that the trial court change the primary permanent plan in th[e] case from reunification to guardianship." *Id.* at 133–34, 871 S.E.2d at 498. "Despite having [notice and] the opportunity to argue or otherwise assert that awarding guardianship to the maternal grandparents would be inappropriate on constitutional grounds, [the father] failed to do so." *Id.* at 134, 871 S.E.2d at 498.

Similarly, in this case, the guardian ad litem filed a report prior to the permanency planning hearing recommending that reunification be removed as the primary plan inasmuch as "the cause of [Nellie's] injuries remain[ed] unexplained." When the trial court announced at the hearing that it was contemplating eliminating reunification from the permanent plan, it gave the parties a thirty-minute recess to consider their responses. Notwithstanding the pre-hearing notice that reunification would be on the table and the 30-minute recess, respondents at no point during the permanency planning hearing argued that the proposed changes to the permanent plan would be improper on constitutional grounds. Consequently, they did not preserve the issue for appellate review. *Id.* ("Despite having the opportunity to argue or otherwise assert that awarding guardianship to the maternal grandparents would be inappropriate on constitutional grounds, respondent failed to do so. Therefore, respondent waived the argument for appellate review.").

IV. Conclusion

In this case, the trial court removed two young children from the custody of their parents after one or both parents inflicted life-threatening injuries on the youngest child, then just six weeks old. Faced with the gravity of the abuse and the persistent unwillingness of either parent to admit responsibility or to fault the other, the trial court determined that reunification with the parents would be inconsistent with the children's health and safety. The evidence in this case supports the trial court's findings of fact, and those findings support the conclusions of law in the permanency planning order. Furthermore, the constitutional issue addressed by the Court of Appeals was not preserved for appellate review. We therefore reverse the decision of the Court of Appeals.

REVERSED.

Justice MORGAN concurring in part and dissenting in part.

I join my esteemed colleagues in the majority to the extent that they conclude that the trial court did not err by eliminating reunification from the permanency plan for Nellie and Jon with regard to respondent-father and to the extent that they discuss the sufficiency of Catawba County DSS's reunification efforts and the non-preservation of respondent-father's constitutional argument. However, I disagree with the majority's conclusion that the trial court made sufficient findings to support its conclusion that efforts to reunify the two youngsters with respondent-*mother* would be unsuccessful or inconsistent with the children's health and safety. Specifically, the trial court's sole grounds for reaching this conclusion were that respondent-mother had failed either to take responsibility herself for injuring Nellie or to offer "any better explanation" for the manner in which Nellie's injuries had occurred. I would hold that respondent-mother's inability to provide a more specific explanation for how Nellie's injuries had occurred, under the facts and circumstances existent in this case, provided an insufficient basis for the trial court's conclusion that further reunification efforts would be clearly unsuccessful or inconsistent with the health and safety of both Nellie and Jon when respondent-mother otherwise took sufficiently reasonable steps to ensure the health and safety of the children including, but not limited to, separating residences from respondent-father. *See* N.C.G.S. § 7B-906.2(b) (2019). I would therefore affirm the Court of Appeals to the extent that the lower appellate court reversed the trial court's order on these grounds.

As the majority here readily acknowledges, the overarching goal of the permanency planning process is to "return the child to their home" or, only when such an outcome is not possible, to instead deliver the child "to a safe, permanent home within a reasonable period of time." Sara DePasquale, *Abuse, Neglect, Dependency, and Termination of Parental Rights Proceedings in North Carolina* 7-10 (UNC School of Government 2022). Accordingly, the North Carolina General Statutes directs as follows:

> Reunification shall be a primary or secondary plan unless the court made findings under G.S. 7B-901(c) or G.S. 7B-906.1(d)(3), the permanent plan is or has been achieved in accordance with subsection (a1) of this section, or the court makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety.

N.C.G.S. § 7B-906.2(b) (2019).[1] As such, the trial court must make findings of fact as to each of the following factors which tend to indicate the success or failure of reunification efforts at all permanency planning hearings:

> (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.
>
> (2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.
>
> (3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.
>
> (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

Id. § 7B-906.2(d) (2019). The trial court's findings "must make clear that the trial court considered the evidence in light of whether reunification would be [clearly unsuccessful] or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time." *In re H.A.J.*, 377 N.C. 43, 49 (2021) (citation omitted).

In the present case, the trial court made the following findings of fact that tended to either support or contradict its conclusion that further reunification efforts between respondent-mother and the two children would be clearly unsuccessful or inconsistent with the juveniles' health and safety:

> 9. The Mother continues to attend substance abuse treatment at Addiction Recovery Medical Services (ARMS), where she had progressed from daily sessions, to weekly sessions, and will soon progress to biweekly sessions. The Mother has screened negative for all eighteen drug screens since her children entered foster care.

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1. The applicable statute was amended in 2021 to add the word "written" before the first occurrence of the word "findings," which did not appear in the 2019 version that was applied by the lower appellate court in its review of this case. This update has no impact on the majority's analysis of the pertinent legal issues.

10. The Mother has completed the Life Skills program and Triple P Parenting, an online course. She has provided two certificates of completion for Raising Confident, Competent Children and Raising Resilient Children, both in October 2019.

11. The Mother completed a Comprehensive Clinical Assessment at Family Net on October 7, 2019. She was recommended weekly outpatient therapy and has been compliant.

. . . .

14. The parents are living separate and apart from each other. The mother resides in the home that she . . . once shared with her children and their father. The Father has an independent residence.

. . . .

20. The purpose of the parents' case plans is to address the issue that brought these children before the Court and into foster care, i.e. the nona[c]cidental traumatic and life-threatening injuries to the minor child [Nellie] while in the care of her parents. As of this date, neither parent has offered any better explanation for these injuries than they offered at the adjudication of this matter or at any hearing since. Without some acknowledgement by the parents of responsibility for the injuries, there can be no mitigation of the risk of harm to the children.

21. *In her testimony today, the Mother has stated that she acknowledges that her child suffered nonaccidental injury; however, she does not know how. Her position is that, if the father was a danger to the child at the time of the removal, he is not a danger now.*

. . . .

23. The injuries to the minor child [Nellie] which brought these children before the Court included two subdural hematomas caused by abusive head trauma, equivalent to a motor vehicle accident

> or fall from a significant height. In addition, she sustained multiple retinal hemorrhages (described as too many to count), and a posterior rib fracture[ ] that occurred days prior to her brain bleeds. *Although the parents have participated and completed services, neither has acknowledged responsibility for these nonaccidental abusive injuries to [Nellie]. Without that acknowledgment, the Court has no evidence that either parent will protect their children over protecting one another, and therefore the risk to these children of abuse and neglect remains high.*

(Emphases added.) From these findings, the trial court drew its conclusion that "[f]urther efforts to reunify the children with either parent would clearly be unsuccessful and inconsistent with the children's health and safety[.]"

On review, the Court of Appeals held, *inter alia*, that this conclusion, as it applied to respondent-mother, was not consistent with the evidence presented because this evidence tended to suggest that respondent-mother had (1) substantially complied with and completed her case plan, (2) required respondent-father to move out of the home, (3) engaged with all required services, and (4) acknowledged the nonaccidental nature of Nellie's injuries. *In re J.M.*, 276 N.C. App. 291, 302 (2021). I agree with the lower appellate court's analysis of this issue and would affirm its decision on this basis. In my view, this is the appropriate result in light of the particular facts and circumstances of this case in which the trial court categorically found that reunification of the children with respondent-mother would be clearly unsuccessful or inconsistent with the health and safety of the juveniles when respondent-mother specifically refused to accept responsibility for the child Nellie's injuries, refused to affirmatively testify that respondent-father caused Nellie's injuries when respondent-mother represented that she did not know unequivocally that he did so, and declined to speculate as to the manner in which Nellie's injuries were caused. I find it especially relevant that the remainder of the trial court's findings indicated that respondent-mother had taken definitive measures to mitigate risks to Nellie and Jon such as separating residences from respondent-father, whom the trial court found to be most likely responsible for the abuse. In the compelling face of these facts and circumstances, the majority's embrace of the trial court's leap to conclude that respondent-mother

sought to protect respondent-father at the expense of the children's health and safety is unconvincing and unfortunate.

Further consternation arises regarding the majority's decision here upon its misguided determination that our decision in *In re D.W.P.*, 373 N.C. 327 (2020), requires us to reverse the outcome reached by the Court of Appeals. In *D.W.P.*, the respondent-mother not only failed to specify how her child David had received his suspected abusive injuries—including a femur fracture and multiple injuries to his ribs and tibia—but respondent-mother additionally provided multiple *false* explanations for the injuries, including representations that David's injuries had been caused by the family dog or by the child's biological father, with whom David had not been at or near the time of his last reported injury. *Id.* at 331–32. Respondent-mother also offered the rationale that the juvenile had simply "slept funny." *Id.* at 336. In addition to finding that respondent-mother had failed to gain sufficient insight into the cause of David's injuries to protect him from future harm, the trial court in *D.W.P.* also found that respondent-mother had (1) violated the conditions of her probation by failing to obtain a psychiatric evaluation; (2) resumed romantic contact with, and provided a key to her home to, her fiancé, who was the person most likely responsible for inflicting injuries to her child and who had committed multiple acts of domestic violence against respondent-mother following their reunification; (3) withheld information regarding her subsequent marriage to another man; (4) evaded social workers; (5) discontinued therapy; and (6) ultimately failed to make adequate progress with her case plan. *Id.* at 332–37.

It is apparent how *D.W.P.* might guide this Court's analysis with respect to respondent-father in the instant case who, like the respondent-mother in *D.W.P.*, repeatedly denied the nonaccidental character of Nellie's injuries here and provided medically implausible, and even absurd, explanations as to the cause of the injuries. However, reunification is statutorily defined as the placement of a juvenile in the home of *either* parent from whom the child was removed and therefore the appropriateness of reunification with respondent-mother—who no longer shares a residence with respondent-father—ought to be considered separately in this matter. *See* N.C.G.S. § 7B-101(18c) (2021). Indeed, the relevance of *D.W.P.* with regard to respondent-*mother* is swallowed by the case's distinctions. Despite the fact that the trial court here found that respondent-mother had substantially complied with and completed her case plan, that she had engaged in and benefited from recommended services, and that she had acknowledged that the juvenile

Nellie's injuries were nonaccidental in nature, the trial court determined that reunification efforts would be clearly unsuccessful or inconsistent with the health and safety of both Nellie and Jon on the sole basis that respondent-mother could not affirmatively testify as to who had injured Nellie or the manner in which Nellie's injuries had occurred despite the trial court's knowledge of (1) the available evidence tending to implicate respondent-father, and (2) respondent-mother's repeated statements that she "didn't see [Nellie] get hurt" and therefore could not "fairly speculate what happened." The majority likewise adopts the trial court's approach in diminishing the significance of respondent-mother's statements in her favor on one hand, yet choosing on the other hand to derive heightened significance from respondent-mother's unhelpful statements. For example, both the majority and the trial court noted that respondent-mother desired to share custody of the children with respondent-father and that she trusted that respondent-father no longer posed a threat to them as the result of extensive domestic violence counseling, while both conveniently ignored respondent-mother's additional explanatory testimony that she would abide by any court order prohibiting respondent-father's contact with them.

Unlike in *D.W.P.* or other cases cited by petitioners including *In re Y.Y.E.T.*, 205 N.C. App. 120, *disc. rev. denied*, 364 N.C. 434 (2010), and *In re A.W.*, 377 N.C. 238 (2021), respondent-mother in this case (1) acknowledged that the juvenile Nellie had suffered a nonaccidental injury, (2) removed respondent-father from the home and did not resume a romantic relationship with him, and (3) engaged with and benefited from services provided to her through her case plan. Consequently, the only evidence from which the trial court concluded that reunification would be clearly unsuccessful or inconsistent with the health and safety of Nellie and Jon was the fact that respondent-mother was not in position either to take personal responsibility for Nellie's injuries or to provide a specific explanation for how these injuries had been inflicted at the hands of respondent-father. As such, the majority's holding that the trial court's conclusion of law which eliminated reunification of the children with respondent-mother was supported by its findings, which were in turn supported by competent evidence, exceeds the parameters of our prior decisions by allowing the trial court here to foreclose reunification on the sole grounds that a parent may be unable to testify unequivocally as to facts about which the parent possessed no affirmative knowledge, even though the parent took definitive steps to substantially comply with the parent's prescribed case plan as well as to ensure the health and safety of the juveniles at issue.

For these reasons, I respectfully dissent in part.

Justice EARLS, dissenting.

At the heart of this case is the question of what law and justice require when an infant too young to identify her assailant is severely injured. No one suggests that the injuries inflicted on Nellie were anything other than non-accidental, repeated, and life-threatening. The real question is whose responsibility it is to determine the truth about who caused those injuries? Do our statutes and precedents permit a court to abdicate its fact-finding responsibility and punish both parents when the agency charged with protecting children fails to fully investigate the circumstances? More specifically, can a court eliminate the possibility that either parent will be reunified with their child under the child's permanency plan when both parents consistently maintain that they do not know who or what caused a child's injuries, the Department of Social Services (DSS) makes no effort to interview or report to the court regarding interviews of other potential witnesses, and both parents make substantial efforts to remedy the circumstances that are believed to have given rise to the child's injuries?

Based on the circumstances of this case, I would answer this question in the negative. I therefore dissent from the majority's decision affirming the trial court's elimination of reunification from the children's permanency plan. Though I would hold that the evidence was insufficient to support the trial court's conclusion as to both parents, I join in my dissenting colleague's analysis that the trial court made insufficient findings to support its decision denying respondent-mother the possibility of reunification with her children. I concur with the majority's conclusion that respondent-parents did not properly preserve their constitutional argument for appellate review.

The record in this case is replete with evidence supporting the progress respondent-parents have made since DSS became involved with the family and the efforts both parents have made to regain custody of their children. After DSS took custody of Nellie in August 2018, both of her parents entered into detailed case plans with DSS. As part of respondent-mother's case plan, she was required to undergo a full psychological evaluation, complete "any recommended services," submit to random drug screenings, abstain from any drug use, complete a domestic violence assessment and follow related recommendations, obtain and maintain employment for at least six months, and engage in other parenting skills lessons.

After agreeing to this case plan and before the adjudication hearing, respondent-mother began participating in daily individual and

group therapy sessions at an addiction treatment center,[1] completed a clinical assessment at the facility, and submitted to weekly drug testing. Throughout her participation with the DSS case plan, she remained in "compliance with all aspects" of the addiction program and passed all completed drug screenings, including hair follicle tests, despite having previously suffered from an opioid addiction.[2] She completed a psychological evaluation and attended domestic violence and life skills classes once a week for four months. She did not miss a single class. She engaged in parenting-skills lessons, and DSS recognized that she gained insight as a result. Less than two weeks after entering the case plan with DSS, respondent-mother found a job and "consistently sent pictures of her work schedule and check stubs" to a DSS social worker to prove her continued employment.

Though he had one setback with respect to his case plan, respondent-father also substantially complied with the plan's requirements and objectives. The first psychological evaluation he completed revealed that he was "not completely forthcoming" and "demonstrated signs of externalizing blame onto others." Even so, respondent-father engaged in parenting lessons "and prepared a well-thought out report" on one assignment, which, according to DSS, demonstrated that he gained knowledge as a result. Respondent-father later completed a second psychological evaluation, which revealed that "he answered in a reasonably forthright manner and did not attempt to present an unrealistic or inaccurate impression." DSS reported that he was "very appropriate during his visits with his children[,] and he display[ed] appropriate parenting techniques and knowledge. He is attentive to each child's needs and shows affection for each child." (Italics omitted.)

Like respondent-mother, respondent-father completed a clinical assessment at an addiction rehabilitation facility. He began attending individual and family therapy sessions multiple times a month, and only needed to reschedule a single session. His therapist reported that respondent-father was "thoughtful with ideas and seem[ed] to be genuine in his efforts to work through [identified] issues." Furthermore, during a hearing at DSS, his counselor stated that respondent-father was

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1. Respondent-mother attended the group and individual therapy sessions daily until she completed the first phase of treatment and advanced to weekly, bi-weekly, and ultimately monthly sessions.

2. Respondent-mother also reported to a social worker that "she did have an opioid problem in the past and that she . . . stopped hanging out with friends from her past who she knew were involved in that lifestyle[ ] because she was done with that and focusing on what she needs to do to get her children back."

"doing great, [which] is rare in his line of work in regards to attendance and engagement in therapy." Respondent-father passed all drug tests, including a hair follicle screen, with the exception of the first test he took on the same day that he entered into the case plan with DSS when he tested positive for marijuana use. Respondent-father completed a domestic violence tools assessment, attended domestic violence perpetrators classes, and maintained employment.

In addition to all of these efforts, respondent-parents ceased their romantic relationship and respondent-father moved into a different residence, as required by his case plan. In short, the parents did not merely "check [ ] the boxes," as the Guardian ad Litem suggests. To the contrary, they turned their entire lives around, doing everything in their power to regain custody of their children. But they have maintained that the one thing that is not in their power is the ability to determine the cause of Nellie's injuries. To the majority, this is all that matters.

Never mind that both parents have taken drastic steps to ensure that a similar incident does not happen again. For example, respondent-father explained that, after Nellie was hospitalized, respondent-mother "cut ties with [him] and wouldn't speak to [him]. She claimed if [he was] guilty . . . she didn't want [him] to be around." This means that even if respondent-mother or respondent-father is telling the truth—that they do not know how Nellie sustained her injuries—this parent can try anything and everything to regain custody of Nellie, but it will not be enough. There is nothing the parent can do to overcome his or her ignorance about the cause of Nellie's injuries unless the parent chooses to dishonestly blame the other.

This result risks perverse consequences. For example, consider that a child sustains injuries that a court determines could only have been caused by abuse. The parents were the child's sole care providers, and the court therefore determines that one of the parents must have caused the injuries. As here, both parents maintain that they do not know how their child was injured, but for purposes of this example, the mother is, in fact, responsible. If the mother eventually falsely accuses the father of causing the injuries, she at least has a chance of regaining custody over the child. But if the father truthfully maintains that he does not know how the child was injured, he will not have this opportunity. In this example, not only could the child be returned to the parent who caused the injuries, but an innocent parent who was unwilling to lie for his own benefit would suffer. This is not to say that a parent's refusal to accept fault or place blame for a child's injuries is irrelevant in determining whether it is appropriate to maintain reunification as part of a

child's permanency plan. For example, as the majority recognizes, in *In re D.W.P.*, 373 N.C. 327 (2020), this Court held that a mother's failure to acknowledge responsibility for her child's injury indicates a likelihood that injury will reoccur, despite the progress the mother made in her case plan.

In *In re D.W.P.*, the Court affirmed an order terminating a mother's parental rights after her child had been adjudged abused and neglected. 373 N.C. at 340. The mother's eleven-month-old son was treated for a broken femur and had numerous other fractures. *Id.* at 328. The mother and her fiancé were the child's only caretakers. *Id.* at 329. The trial court found that the mother failed to offer a medically feasible explanation for the injuries or to take responsibility for the role she and her fiancé had played in causing them, despite evidence that the injuries could only have been caused by the parents. *Id.* at 331. The trial court terminated the mother's parental rights, highlighting the mother's refusal to honestly report how her son's injuries occurred and the court's inability to create a plan to ensure that injuries would not occur in the future without knowing the cause of the injuries. *Id.* at 329.

In affirming the trial court's conclusion, this Court noted the troublesome nature of the mother's "continued failure to acknowledge the likely cause of [her son's] injuries," *id.* at 339, and her refusal "to make a realistic attempt to understand how [her son] was injured or to acknowledge how her relationships affect her children's wellbeing." *Id.* at 340. This Court added, "[w]ithout recognizing the cause of [the child's] injuries, respondent-mother cannot prevent them from reoccurring." *Id.* at 338. Based on this similarity, the majority concludes tha*t In re D.W.P.* controls here, requiring that the trial court's order on the children's permanency plan be affirmed. But this similarity is not the only factor that influenced this Court's decision in *In re D.W.P.*

Of note, the mother in *In re D.W.P.* discontinued therapy, failed to complete a psychiatric evaluation, entered an *Alford* plea regarding her child's injuries, at which point she offered a new theory for how her child was injured, and then violated the terms of her probation, resumed a relationship with the child's father who was potentially responsible for the child's injuries and in spite of the fact that there had been multiple incidents of domestic violence between the parents, and concealed her marriage to another man. *Id.* at 339. Indeed, this Court explained that the trial court relied on

> past abuse and neglect; failure to provide a credible explanation for [the child]'s injuries; respondent-mother's discontinuance of therapy; respondent-mother's

> failure to complete a psychiatric evaluation; respondent-mother's violation of the conditions of her probation; the home environment of domestic violence; respondent-mother's concealment of her marriage from GCDHHS; and respondent-mother's refusal to provide an explanation for or accept responsibility for [the child]'s injuries.

Id. Here, by contrast, neither parent was criminally charged; they did not have analogous case plan failures; and they did not resume a romantic relationship or live together after Nellie was injured. Furthermore, the mother in *In re D.W.P.* offered competing theories regarding how her child was injured raising concerns about her honesty, whereas the parents here have not engaged in such behavior. *See id.* at 334. Thus, unlike in *In re D.W.P.*, the trial court's conclusion was based almost entirely on respondent-parents' insistence that they do not know who or what caused Nellie's injuries.

In other words, in *In re D.W.P.*, *all* of the circumstances, including the mother's decision to "re-establish[ ] a relationship with" her boyfriend who she previously acknowledged could have been responsible for injuring her child, led this Court to conclude that the mother's inability "to recognize and break patterns of abuse that put her children at risk" prevented her from "mak[ing] a realistic attempt to understand how [her child] was injured or to acknowledge how her relationships affect her children's wellbeing." *Id.* at 340. The parents here have done just the opposite by both taking important remedial steps, such as attending relevant classes and terminating their relationship in recognition of the possibility that their continued co-habitation posed a risk to their children, and actually demonstrating growth as a result of these steps.

Contrary to the majority's conclusion that *In re D.W.P.* requires this Court to affirm the trial court's elimination of reunification from the permanency plan here, *In re D.W.P.* suggests that a holistic review of respondent-parents' subsequent conduct was required, rather than treating their lack of knowledge about the cause of Nellie's injuries as determinative. Specifically, the parents' relationship with their children, their compliance with their case plans, and their demonstrated behavioral growth as a result of engaging with their case plan requirements are all relevant considerations in assessing whether reunification is appropriately included in their children's permanency plans.

The trial court's failure to conduct this thorough analysis and its improper focus on a single fact in the record in contravention of *In re*

D.W.P. are demonstrated by its finding that "[w]ithout . . . acknowledgment" of the source of Nellie's injuries, there was "*no* evidence that either parent will protect their children over protecting one another." (Emphasis added.) As the discussion above demonstrates, however, the idea that there is a complete dearth of evidence supporting that respondent-parents will protect their children over each other is patently inaccurate. This finding can therefore only follow from the fact that respondent-parents have continued to maintain that they do not know who injured Nellie. In light of all of the evidence in the record, this singular fact is insufficient to support the trial court's factual finding, meaning the finding is not supported by competent evidence in the record. In holding to the contrary, the majority allows trial courts to abandon the holistic approach of *In re D.W.P.* and instead focus exclusively on one factor that may say very little about parents' ability to protect the well-being of their children or the children's best interests.

In addition to the requirement that the trial court's factual findings be supported by competent evidence, the trial court's findings of fact must also support its conclusions of law. *See*, *e.g.*, *In re H.A.J.*, 377 N.C. 43, 49, 52 (2021). Here, the trial court concluded that "[f]urther efforts to reunify the children with either parent would clearly be unsuccessful and inconsistent with the children's health and safety." This conclusion is in turn based on the finding that, without respondent-parents acknowledging the source of Nellie's injuries, there is "no evidence that either parent will protect their children over protecting one another, and therefore the risk to these children of abuse and neglect remains high." The trial court, unsatisfied that one of the parents had not blamed the other or personally accepted responsibility, determined that both parents were incapable of caring for Nellie. Based on the discussion above, this extreme conclusion is not supported by the trial court's findings of fact.

Nonetheless, the trial court could have made certain findings that would support this legal conclusion. Specifically, the trial court could have made specific findings regarding which parent was most likely responsible for Nellie's injuries and whether the other parent was telling the truth about not knowing how she was injured. It is possible that the trial court did not believe there was enough evidence in the record to support such findings, which highlights the reality that DSS's investigation into respondent-parents was insufficient.

Evidence that could have supported such factual findings that would have in turn supported the trial court's legal conclusion (or required a different one) includes interviews with or testimony from individuals

who know respondent-parents and were familiar with the dynamics in their home at the time Nellie was injured, such as respondent-mother's older children who likely had unique and intimate insight into respondent-parents' treatment of Nellie and her brother. As mentioned, this obvious source of evidence could have allowed the trial court to find as fact which parent was responsible for abusing Nellie. Furthermore, such evidence could shed additional light on whether the other parent was being truthful about not knowing the cause of Nellie's injuries. But because there was insufficient evidence in the record from which the trial court could make these specific factual findings, it effectively held both parents responsible, despite the possibility that this blame was misplaced as to one of them.

These untapped avenues of evidence demonstrate that more could have been done in this case to either support the trial court's legal conclusions or to require different conclusions that would have preserved reunification as a possibility for at least one of the parents. Without more specific findings with respect to respondent-parents' responsibility, however, the trial court's findings do not support its legal conclusion that "[f]urther efforts to reunify the children with either parent would clearly be unsuccessful and inconsistent with the children's health and safety." Accordingly, the trial court's decision to eliminate reunification from respondent-parents' permanency plans was an abuse of discretion.

Finally, it is important to recognize that the options available to the trial court here were not limited to the extremes of eliminating reunification entirely from the permanency plan or immediately returning custody of the children to the parents and terminating DSS involvement. Rather, the parents simply requested that reunification remain part of the permanency plan.[3] The trial court was free to fashion a plan that maintained the status quo and DSS's involvement with the family. This unobtrusive approach was warranted given the significant efforts that respondent-parents made to correct the circumstances that resulted in Nellie's injuries.

It is well established that "a parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and, absent

3. Similarly, prior to the February 2020 permanency planning hearing, the GAL recommended that "the court order a primary plan be one of adoption, with a secondary plan of reunification, while the cause of [Nellie's] injuries remains unexplained." DSS recommended a primary plan of reunification and a secondary plan of adoption. Thus, neither of the appealing parties sought elimination of reunification from the permanency plan as a whole.

a powerful countervailing interest, protection.' " *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981) (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)). By taking a myopic view of the considerations that are relevant in determining whether reunification is appropriate under the circumstances presented in this case, the majority ignores this powerful countervailing interest. Further, the majority implicitly holds that maintaining honesty may be treated as deception and parents' diligent engagement with their case plans may be meaningless if they are unable to prescribe the cause of a child's injuries or refuse to place improper blame on another individual. Because the Court's holding represents a woefully inadequate analysis of the circumstances that bear on the children's permanency plan, I respectfully dissent from the majority's conclusion that the trial court's elimination of reunification from the permanency plan was supported by competent evidence in the record.

IN THE MATTER OF J.U.

No. 263PA21

Filed 16 June 2023

Juveniles—delinquency petition—misdemeanor sexual battery—force—sufficiency of allegations

A juvenile delinquency petition was not fatally defective where it contained sufficient facts to support each essential element of misdemeanor sexual battery, in particular the element of force, which was clearly inferable from allegations that the juvenile willfully engaged in sexual conduct with a classmate by touching her vaginal area against her will for the purpose of sexual gratification.

Justice EARLS dissenting.

Justice MORGAN joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 from an unpublished decision of the Court of Appeals, No. COA20-812 (N.C. Ct. App. July 6, 2021) (unpublished), vacating in part an adjudication order entered on 12 February 2020 and vacating a disposition order entered on 16 July 2020 by Judge Rebecca Blackmore in District Court, Cumberland County. Heard in the Supreme Court on 26 April 2023.

IN RE J.U.

[384 N.C. 618 (2023)]

Joshua H. Stein, Attorney General, by Janelle E. Varley, Assistant Attorney General, for the State-appellant.

Glenn Gerding, Appellate Defender, by Heidi Reiner, Assistant Appellate Defender, for juvenile-appellee.

BERGER, Justice.

We address here the jurisdictional sufficiency of allegations in a juvenile delinquency petition. Just as "it is not the function of an indictment to bind the hands of the State with technical rules of pleading," *State v. Williams*, 368 N.C. 620, 623 (2016) (quoting *State v. Sturdivant*, 304 N.C. 293, 311 (1981)), the plain language of N.C.G.S. § 7B-1802 does not require the State in a juvenile petition to aver the elements of an offense with hyper-technical particularity to satisfy jurisdictional concerns. Because the juvenile petition sufficiently pled the offense of misdemeanor sexual battery and provided adequate notice to the juvenile, the pleading requirements of N.C.G.S. § 7B-1802 were satisfied. We reverse the decision of the Court of Appeals.

I. Background

A juvenile petition alleged that J.U. had committed misdemeanor sexual battery against B.A., a classmate.[1] J.U. and B.A. became friends when they were in seventh grade. In the fall of their eighth-grade year, J.U. snapped B.A.'s bra strap, prompting her to yell at him and draw the attention of their teacher. Thereafter, as part of the investigatory process, B.A. submitted an initial written statement which detailed the incident. Two other students submitted written statements, one of which described a separate incident in which J.U. had touched B.A. on her buttocks, breasts, and vaginal area. B.A. also submitted a second statement detailing inappropriate touching by J.U. B.A. testified that she did not report these actions to the school because she did not think anyone else witnessed the events and feared that she would not be believed.

On 6 November 2019, the State filed a juvenile petition, which the State later dismissed. On 9 January 2020, the State filed three additional juvenile petitions alleging that J.U. committed simple assault and sexual battery. One of the juvenile petitions alleging sexual battery was later dismissed by the trial court. The other sexual battery petition specifically alleged that "the juvenile did unlawfully, willfully engage in sexual

1. Initials are used to refer to juveniles pursuant to N.C. R. App. P. 42(b).

contact with [B.A.] by touching [her] vaginal area, against the victim[']s will for the purpose of sexual gratification." Prior to the adjudication hearing, J.U. waived the formal reading of the petitions and entered a plea of not guilty. J.U. did not object to the language of the sexual battery petition, nor did he move to dismiss due to a deficiency in the charging document.

On 12 February 2020, the Honorable Rebecca Blackmore of the District Court, Cumberland County, adjudicated J.U. delinquent for simple assault and sexual battery. The trial court entered a Level II disposition order, and J.U. was required to complete twelve months of probation and up to fourteen twenty-four-hour periods of secure custody in addition to fulfilling certain other requirements.

J.U. timely appealed to the Court of Appeals, arguing that: (1) the juvenile petition charging sexual battery was "fatally defective in failing to allege the necessary element of force"; (2) the State "failed to present sufficient evidence of all elements of sexual battery"; (3) his trial counsel committed per se ineffective assistance of counsel by "conceding guilt to simple assault" without the trial court conducting a colloquy with J.U. to determine "whether the concession was knowing and voluntary"; and (4) the disposition order lacked "findings of fact sufficient to support the punishment imposed." *In re J.U.*, No. COA20-812, slip op. at 1–2 (N.C. Ct. App. July 6, 2021).

In analyzing the charging language in the juvenile petition, the Court of Appeals determined that "[a]s with criminal indictments, a juvenile petition 'is subject to the same requirement that it aver every element of a criminal offense, with sufficient specificity that the accused is clearly apprised of the conduct for which he is being charged.' " *Id.* at 6 (quoting *In re S.R.S.*, 180 N.C. App. 151, 153 (2006)). Further, the Court of Appeals stated that the element of force in the sexual battery statute was defined as "force applied to the body," *id.* at 7 (quoting *State v. Scott*, 323 N.C. 350, 354 (1988)), and that element was "present if the defendant use[d] force sufficient to overcome any resistance the victim might make." *Id.* (quoting *State v. Brown*, 332 N.C. 262, 267 (1992)).[2]

The Court of Appeals relied on *State v. Raines*, 72 N.C. App. 300 (1985), to conclude that the allegation in the petition that J.U. touched

2. The Court of Appeals did not address the juvenile's arguments concerning sufficiency of the evidence or the contents of the trial court's disposition order; however, the case was remanded to the trial court for an evidentiary hearing on the ineffective assistance of counsel claim.

B.A.'s vaginal area against her will "does not, standing alone, disclose that he accomplished that act through an application of force to her body sufficient to overcome any resistance the victim might make." *In re J.U.*, slip op. at 7 (cleaned up). The Court of Appeals therefore vacated the lower court's adjudication order in part and disposition order in whole, holding that the juvenile petition charging J.U. with sexual battery "was fatally defective and failed to invoke the trial court's jurisdiction over the petition." *Id.* at 15.

On 4 May 2022, this Court allowed the State's petition for discretionary review under N.C.G.S. § 7A-31 to determine a single issue: whether the Court of Appeals erred in holding that the sexual battery petition was fatally defective and failed to invoke the trial court's jurisdiction.

II. Analysis

A. Pleading Standards

The district court division "has exclusive, original jurisdiction over any case involving a juvenile who is alleged to be delinquent." N.C.G.S. § 7B-1601(a) (2021). Generally, a delinquent juvenile is an individual under the age of eighteen but over the age of ten who "commits a crime or infraction under State law or under an ordinance of local government." N.C.G.S. § 7B-1501(7) (2021).

A juvenile petition is the pleading in a juvenile delinquency proceeding. N.C.G.S. § 7B-1801 (2021). To properly allege that a juvenile is a delinquent juvenile, and thus under the court's jurisdiction, juvenile petitions must "contain a plain and concise statement, without allegations of an evidentiary nature, asserting facts supporting every element of a criminal offense and the juvenile's commission thereof with sufficient precision clearly to apprise the juvenile of the conduct which is the subject of the allegation." N.C.G.S. § 7B-1802 (2021).

The General Assembly has instructed that the statutes related to juvenile delinquency are to be "interpreted and construed":

> (1) To protect the public from acts of delinquency.
>
> (2) To deter delinquency and crime, including patterns of repeat offending:
>
> a. By providing swift, effective dispositions that emphasize the juvenile offender's accountability for the juvenile's actions; and
>
> b. By providing appropriate rehabilitative services to juveniles and their families.

> (3) To provide an effective system of intake services for the screening and evaluation of complaints and, in appropriate cases, where court intervention is not necessary to ensure public safety, to refer juveniles to community-based resources.
>
> (4) To provide uniform procedures that assure fairness and equity; that protect the constitutional rights of juveniles, parents, and victims; and that encourage the court and others involved with juvenile offenders to proceed with all possible speed in making and implementing determinations required by this Subchapter.

N.C.G.S. § 7B-1500 (2021).

While juvenile delinquency proceedings are not "criminal prosecutions," *In re Burrus*, 275 N.C. 517, 529 (1969), the General Assembly utilized nearly identical language to describe the necessary content of juvenile petitions and criminal pleadings. *Compare* N.C.G.S. § 7B-1802, *with* N.C.G.S. § 15A-924(a)(5) (2021). Our appellate courts have long held that petitions alleging delinquent acts "serve[ ] essentially the same function as an indictment." *In re S.R.S.*, 180 N.C. App. at 153 (quoting *In re Griffin*, 162 N.C. App. 487, 493 (2004)). Despite obvious procedural differences in the issuance of a juvenile petition and a true bill of indictment, "juvenile petitions are generally held to the standards of a criminal indictment." *Id.* (quoting *In re B.D.W.*, 175 N.C. App. 760 (2006)).

Criminal pleadings, including indictments, are:

> [S]ufficient in form for all intents and purposes if [they] express the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality of refinement, if in the bill of proceeding, sufficient matter appears to enable the court to proceed to judgment.

N.C.G.S. § 15-153 (2021).

It is well-established that "it would not favor justice to allow [a] defendant to escape merited punishment upon a minor matter of form." *Sturdivant*, 304 N.C. at 311. This Court has been consistent in retreating from the highly technical, archaic common law pleading requirements which promoted form over substance:

> "[I]t is not the function of an indictment to bind the hands of the State with technical rules of pleading," and . . . we are no longer bound by the "ancient strict pleading requirements of the common law." Instead, contemporary criminal pleading requirements have been "designed to remove from our law unnecessary technicalities which tend to obstruct justice."

Williams, 368 N.C. at 623 (first quoting *Sturdivant*, 304 N.C. at 311, then quoting *State v. Freeman*, 314 N.C. 432, 436 (1985)). "An indictment need not conform to any technical rules of pleading but instead must satisfy both . . . statutory strictures . . . and the constitutional purposes which indictments are designed to satisfy," i.e., notice sufficient to prepare a defense and to protect against double jeopardy. *State v. Oldroyd*, 380 N.C. 613, 617 (2022) (cleaned up).[3]

Initially, we observe that the plain language of "N.C.G.S. § 15A-924 does not require that an indictment contain any information beyond the specific facts that *support* the elements of the crime." *State v. Rambert*, 341 N.C. 173, 176 (1995) (emphasis added); *see also Sturdivant*, 304 N.C. at 309 (declaring that an indictment must set forth "a lucid prosecutive statement which factually particularizes the essential elements of the specified offense").

Moreover, the common law rule that defective indictments rob a court of jurisdiction is "an obsolete rule that detrimentally impacts the administration of justice in our State." *State v. Rankin*, 371 N.C. 885, 919 (2018) (Martin, C.J., dissenting). Persuasively noting that jurisdictional concerns were a "relic of the code pleading era," *id.* at 906, Chief Justice Martin's dissent in *Rankin* thoroughly recounted the history of criminal pleadings, ultimately concluding that because "our criminal law and procedure became 'hopelessly outdated,' " *id.* at 908, (quoting *Legislative Program and Report to the General Assembly of North Carolina by the Criminal Code Commission*, at i (1973)), by 1974, legislative reforms, including the adoption of N.C.G.S. § 15A-924, evolved from requiring elemental specificity to a more simplified requirement that indictments allege "facts supporting each essential element of the charged offense." *Id.* (citing N.C.G.S. § 15A-924(a)(5) (2017)).

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3. Here, J.U.'s counsel conceded that the petition at issue provided adequate notice. Thus, the only question remaining is whether the petition satisfied relevant statutory strictures. *See* Oral Argument at 44:24, In re J.U. (No. 263PA21) (Apr. 26, 2023), https://www.youtube.com/watch?v=HqMqqgKRxFI (last visited May 10, 2023).

Consistent with a proper understanding of indictment jurisprudence and the express language of N.C.G.S. § 7B-1802, a juvenile petition "does not have to state every element of the offense charged," so long as the elements are "clearly inferable from the facts, duly alleged." *State v. Jordan*, 75 N.C. App. 637, 639, *cert. denied*, 314 N.C. 544 (1985). Stated differently, magic words are not required; all that is required by N.C.G.S. § 7B-1802 and our precedent concerning criminal pleadings is that the charging document contain factual allegations supporting the elements of the crime charged.

"It is generally held that the language in a statutorily prescribed form of criminal pleading is sufficient if the act or omission is clearly set forth so that a person of common understanding may know what is intended." *State v. Coker*, 312 N.C. 432, 435 (1984). Indeed, "[t]he purpose of a juvenile petition is to clearly identify the crime being charged and should not be subjected to hyper[-]technical scrutiny with respect to form." *In re D.S.*, 197 N.C. App. 598, 601–02 (2009) (cleaned up), *rev'd in part on other grounds*, 364 N.C. 184 (2010). As with criminal pleadings, "[n]o provision of Chapter 7[B] mandates that flawed [petitions] have the effect of depriving the trial court of jurisdiction," *Rankin*, 371 N.C. at 911 (Martin, C.J., dissenting), and such a reading would be inconsistent with N.C.G.S. § 7B-1500.

B. Sufficiency of the Petition

The crime of sexual battery is committed when any person, "for the purpose of sexual arousal, sexual gratification, or sexual abuse, engages in sexual contact with another person . . . [b]y force and against the will of the other person." N.C.G.S. § 14-27.33(a) (2021). The petition here alleged that J.U. "unlawfully [and] willfully engage[d] in sexual contact with [B.A.] by touching [her] vaginal area, against the victim[']s will for the purpose of sexual gratification."

The Court of Appeals below relied on this Court's statement that the force element "is present if the defendant uses force sufficient to overcome any resistance the victim might make," *In re J.U.*, slip op. at 7 (quoting *Brown*, 332 N.C. at 267), to conclude that the allegation that J.U. "touched B[.A.] does not, standing alone, disclose that he accomplished that act through an application of force to her body sufficient to overcome any resistance the victim might make." *Id.* (cleaned up). In so doing, the Court of Appeals viewed the pleading requirements of N.C.G.S. § 7B-1802 through a hyper-technical lens not intended by the plain language of the statute and routinely cautioned against by this Court.

Although the term "by force" is not defined in the relevant statutory scheme, this Court has stated that " '[p]hysical force' means force applied to the body." *Scott*, 323 N.C. at 354. Further, the "requisite force may be established either by actual, physical force or by constructive force in the form of fear, fright, or coercion." *Brown*, 332 N.C. at 267 (quoting *State v. Etheridge*, 319 N.C. 34, 45 (1987)).

In *Brown*, the defendant "entered [a] hospital in which the victim was a patient[,] . . . pushed open the door of the victim's hospital room[,] . . . pulled back the bedclothes on the victim's bed, pulled up her gown, [and] pulled down her panties" before sexually assaulting her. *Id.* at 270. The Court of Appeals reversed the defendant's conviction for second-degree sexual offense after concluding that "no substantial evidence was introduced at trial to support a reasonable finding that the defendant . . . used force in the commission of the offense charged." *Id.* at 265.

Because this Court concluded that the evidence presented in *Brown* "tended to show the defendant used actual physical force surpassing that inherent in the sexual act he committed upon the victim," we reversed the decision of the Court of Appeals. *Id.* at 269. However, this Court left open the question of whether the "physical force which will establish the force element of a sexual offense may be shown simply through evidence of the force inherent in the sexual act at issue," and we "expressly defer[red] any decision on that question until we [we]re presented with a case which requires its resolution." *Id.*

Put simply, the question this Court declined to answer in *Brown* was whether "physical force" is present when an assailant engages in unlawful, nonconsensual sexual contact with a victim, or whether "physical force" requires some level of force beyond the unlawful, nonconsensual touching itself. Here, J.U. argues that the petition was fatally defective because it "did not allege physical force" and therefore, the trial court was deprived of jurisdiction.

However, just as "common sense dictates that one cannot unlawfully kidnap or unlawfully restrain another with his consent," *Sturdivant*, 304 N.C. at 310, one cannot engage in nonconsensual sexual contact with another person without the application of some "force," however slight. *See Scott*, 323 N.C. at 354; *Brown*, 332 N.C. at 267.

The petition here alleged that J.U. "engage[d] in sexual contact with [B.A.] by touching [her] vaginal area, against the victim[']s will for the purpose of sexual gratification." By alleging that J.U. touched B.A.'s vaginal area without her consent, the petition asserted a fact from which the element of force was, at the very least, "clearly inferable," *Jordan*,

75 N.C. App. at 639, such that "a person of common understanding may know what [wa]s intended." *Coker*, 312 N.C. at 435. Thus, the factual allegations in the juvenile petition supported each element of misdemeanor sexual battery. The petition, therefore, complied with statutory pleading standards, and no jurisdictional defect existed.

The Court of Appeals erred in requiring a rote repetition of the elements of the offense of misdemeanor sexual battery rather than analyzing the ultimate question of whether the element of force was clearly inferable from the facts alleged in the petition. We reverse the decision of the Court of Appeals and remand this matter to the Court of Appeals for determination of the issues not considered in its previous decision.

REVERSED AND REMANDED.

Justice EARLS dissenting.

It stands to reason that our laws must serve to protect people from unwanted touching, sexual assault, and unwanted sexual advances in general. This is especially true in the case of a minor victim, who through qualities inherent to childhood is rendered particularly vulnerable. In a perfect world, our laws would provide this protection through a victim-centered legal framework that emphasizes the victim's sexual autonomy over the perpetrator's intent. Under this framework, the focus would not be on whether the perpetrator used force or intended to hurt the victim. Rather, the focus would be on whether the actions taken by the perpetrator were welcome and whether in taking those actions the perpetrator violated the victim's freedom to choose not to consent to that action. However, this is not the choice our General Assembly has made.

In North Carolina, our legislature has determined that force is required to commit sexual battery. N.C.G.S. § 14-27.33(a) (2021).[1] Thus, any petition alleging sexual battery must provide facts supporting this element of the offense. N.C.G.S. § 7B-1802 (2021). While North Carolina is not alone in requiring force as an element of sexual battery, *see, e.g.*, Tenn. Code Ann. § 39-13-505 (West 2021); Ind. Code Ann. § 35-42-4-8 (West 2014), other states have determined that force is not necessary

1. To be clear, North Carolina's sexual battery statute requires the use of force unless the victim has "a mental disability[, is] mentally incapacitated or physically helpless, and the person performing the act knows or should reasonably know that the other person has a mental disability or is mentally incapacitated or physically helpless." N.C.G.S. § 14-27.33(a)(2).

to commit this offense, *see, e.g.*, Utah Code Ann. § 76-9-702.1 (West 2023); Miss. Code. Ann. § 97-3-95 (West, Westlaw through 2023 Regular Session effective through April 21, 2023); Kan. Stat. Ann. § 21-5505 (West 2021). Thus, if the General Assembly had wanted to, it could have written a statute similar to those in effect in Utah, Mississippi, and Kansas. However, "make no mistake: [the General Assembly] wrote the statute it meant to." *Sackett v. EPA*, No. 21-454, 2023 WL 3632751, at *29 (U.S. May 25, 2023) (Kagan, J., concurring in the judgment). Today the majority chooses to override that legislative choice. *Cf. West Virginia v. EPA*, 142 S. Ct. 2587, 2628 (2022) (Kagan, J., dissenting) (admonishing the majority for "overrid[ing]" Congress's legislative choice to grant the EPA the power to curb emission of greenhouse gases).

In 2015, the previous sexual battery statute, N.C.G.S. § 14-27.5(a), was recodified as N.C.G.S. § 14-27.33, which is the version of the statute in effect today. While changes were made to other areas of the statute, the requirement that sexual battery be "[b]y force and against the will of the other person" remained the same. *Compare* N.C.G.S. § 14-27.5(a) (2015), *with* N.C.G.S. § 14-27.33 (2021). Furthermore, our Court has long held that we are to "presume that [when enacting a statute] the Legislature [chooses] its words with due care." *C Invs. 2, LLC v. Auger*, 383 N.C. 1, 10 (2022) (citing *Sellers v. Friedrich Refrigerators, Inc.*, 283 N.C. 79, 85 (1973)). Yet by determining that J.U.'s petition was sufficient to plead sexual battery, despite failing to include facts supporting the necessary element of force, the majority's opinion "alters . . . the statute [the General Assembly] drafted." *See Sackett*, 2023 WL 3632751, at *29 (Kagan, J., concurring in the judgment). Accordingly, I disagree with the majority that J.U.'s petition was sufficient to plead misdemeanor sexual battery under North Carolina law. I agree with the Court of Appeals that J.U.'s adjudication and disposition must be vacated because the State's petition failed to allege all necessary elements of the offense. *See In re J.U.*, No. COA20-812, slip op. at 5 (N.C. Ct. App. July 6, 2021) (unpublished). Thus, I respectfully dissent.

It is well established that a delinquency proceeding is not a criminal prosecution. *In re Burrus*, 275 N.C. 517, 529 (1969). Unlike the North Carolina Criminal Procedure Act, our Juvenile Code specifically identifies the rehabilitation of juveniles as one of its primary purposes. N.C.G.S. § 7B-1500 (2021). Similarly, this Court's own precedent explains that "[i]n the Juvenile Code, the General Assembly enacted procedural protections for juvenile offenders with the aim that delinquent children might be rehabilitated and reformed and become useful, law-abiding citizens." *State v. Dellinger*, 343 N.C. 93, 96 (1996). Consistent with these

principles, "[t]he state has a *greater* duty to protect the rights of a respondent in a juvenile proceeding than in a criminal prosecution." *State v. Fincher*, 309 N.C. 1, 24 (1983) (Martin, J., concurring in result). Accordingly, our Court "shall" protect "[t]he right to written notice of the facts alleged in the petition" in order "to assure due process of law." N.C.G.S. § 7B-2405 (2021); *see also* N.C. Const. art. I, § 23 (identifying the rights of the accused, including "the right to be informed of the accusation").

In delinquency proceedings, notice must "set forth the alleged misconduct with particularity" and identify "the specific issues [the juvenile] must meet." *In re Gault*, 387 U.S. 1, 33–34 (1967). Accordingly, our state statute requires a delinquency petition to contain "a plain and concise statement, without allegations of an evidentiary nature, asserting facts supporting every element of a criminal offense and the juvenile's commission thereof with sufficient precision clearly to apprise the juvenile of the conduct which is the subject of the allegation." N.C.G.S. § 7B-1802. Under subsection 14-27.33(a), sexual battery occurs, in pertinent part, when a person "for the purpose of sexual arousal, sexual gratification, or sexual abuse, engages in sexual contact with another person . . . [b]y force and against the will of the other person." N.C.G.S. § 14-27.33(a). Because force is an element of sexual battery, it must be pled alongside "facts supporting" J.U.'s use of force. *See* N.C.G.S. § 7B-1802. The element of force "may be established either by actual, physical force or by constructive force in the form of fear, fright, or coercion." *State v. Etheridge*, 319 N.C. 34, 45 (1987). Physical force refers to force that is applied to the body, *State v. Scott*, 323 N.C. 350, 354 (1988), and "is present if the defendant uses force sufficient to overcome any resistance the victim might make[,]" *State v. Brown*, 332 N.C. 262, 267 (1992). "Constructive force is demonstrated by proof of threats or other actions by the defendant which compel the victim's submission to sexual acts." *Etheridge*, 319 N.C. at 45.

Rather than plead the necessary element of force, J.U.'s petition only alleged that J.U. "unlawfully, willfully engage[d] in sexual contact with [B.A.] by touching [B.A.]'s vaginal area, against [B.A.'s] will for the purpose of sexual gratification." J.U.'s petition does not allege the use of physical or constructive force, nor does it allege that J.U. used "threats or other actions . . . which compel[led] [B.A.'s] submission to sexual acts." *Id.* Additionally, the allegation that J.U. "touch[ed] [B.A.]'s vaginal area" does not, standing alone, show that J.U. accomplished this act by any application of physical force or force to B.A.'s body "sufficient to overcome any resistance [B.A.] might make." *Brown*, 332 N.C. at 267.

In short, the indictment does not allege facts supporting the required element of force.

Furthermore, while the petition alleges that J.U. acted "against [B.A.'s] will," acting against the will of the victim and acting with force are not synonymous, and the law draws a distinction between both actions. *See State v. Jones*, 304 N.C. 323, 330 (1981) (stating the four elements of first degree sexual offense are: "(1) a sexual act, (2) against the will and without the consent of the victim, (3) using force sufficient to overcome any resistance of the victim, [and] (4) effected through the employment or display of a dangerous or deadly weapon."); *State v. Alston*, 310 N.C. 399, 407 (1984) ("[S]econd degree rape involves vaginal intercourse with the victim both by force and against the victim's will."). Moreover, a petition that only alleges the victim was "touch[ed]" is not sufficient to meet the necessary element of force as required under North Carolina's sexual battery statute. *See* N.C.G.S. § 14-27.33(a). Thus, because J.U.'s petition did not contain "a plain and concise statement . . . asserting facts supporting every element of a criminal offense and the juvenile's commission thereof," his delinquency petition was fatally defective. *See* N.C.G.S. § 7B-1802.

Additionally, while the majority argues that a juvenile petition " 'does not have to state every element of the offense charged' so long as the elements are 'clearly inferable from the facts, duly alleged,' " quoting *State v. Jordan*, 75 N.C. App. 637, 639 (1985), the statutory language of section 7B-1802 and subsection 15A-924(a)(5) are not consistent with this idea. *See* N.C.G.S. §§ 7B-1802, 15A-924(a)(5) (2021). While section 7B-1802 is concerned with the standards for juvenile petitions, subsection 15A-924(a)(5) provides the standard for a criminal indictment. Both statutes use similar language to state that a juvenile petition and criminal indictment require "[a] plain and concise factual statement" that "asserts facts supporting every element" of the offense and "the defendant's [or juvenile's] commission thereof." N.C.G.S. § 15A-924(a)(5); *see also* N.C.G.S. § 7B-1802. These two statutes, both serving similar functions, do not contain any limiting language stating that a failure to "assert[ ] facts supporting every element of a criminal offense," *see* N.C.G.S. § 7B-1802, "is not ground[s] for dismissal of the charges or for reversal of a conviction." *See* N.C.G.S. § 15A-924(a)(6).

In contrast, subsection 15A-924(a)(6) states that a pleading must contain

> [f]or each count a citation of any applicable statute, rule, regulation, ordinance, or other provision of law

> alleged therein to have been violated. *Error in the citation or its omission is not ground for dismissal of the charges or for reversal of a conviction.*

N.C.G.S. § 15A-924(a)(6) (emphasis added). By including subsection (a)(6), the General Assembly has shown that it knows how to use such language when it intends to. The General Assembly's choice not to include similar language in section 7B-1802 or in subsection 15A-924(a)(5) shows a clear intent by the General Assembly not to excuse the failure to list facts supporting every element of an offense and instead shows that such a failure is grounds for dismissal of the allegations or reversal of an adjudication or a conviction.

It is not this Court's function to usurp the role of the legislature and change the expressed will of the General Assembly or the people of North Carolina. Indeed, this Court "may not rewrite [the General Assembly's] plain instructions because they go further than preferred." *See Sackett*, 2023 WL 3632751, at *30 (Kagan, J., concurring in the judgment). Here, those instructions mandate that "[a] petition in which delinquency is alleged shall contain a plain and concise statement . . . asserting facts supporting every element of a criminal offense." N.C.G.S. § 7B-1802. And because force is a necessary element of sexual battery, a delinquency petition alleging sexual battery must include "facts supporting" the use of force. *See id.*; N.C.G.S. § 14-27.33(a)(1).

While the majority characterizes the pleading requirements listed in section 7B-1802 as "highly technical[ ] [and] archaic[,]" those requirements are more properly characterized as constitutional procedural due process protections. Procedural due process is "a guarantee of fair procedure." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). While state action that deprives a person of " 'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*." *Id.* As Justice Frankfurter previously noted, "[t]he history of American freedom is, in no small measure, the history of procedure." *Malinski v. New York*, 324 U.S. 401, 414 (1945) (Frankfurter, J., concurring).

In 1967, in *In re Gault*, 387 U.S. 1 (1967), the United States Supreme Court determined that constitutional due process protections applied to juvenile offenders. To ensure that our legal system is fair and just, "[d]ue process of law [acts as] the primary and indispensable foundation of individual freedom." *Id.* at 20. Furthermore, procedural due process serves to "define[ ] the rights of the individual" while also "delimit[ing] the powers which the state may exercise." *Id.* Notably, procedural due

process protections allow courts to pursue the truth by "enhanc[ing] the possibility that truth will emerge from the confrontation of opposing versions [of events] and conflicting data." *Id.* at 21. Thus, while the majority appears to reduce the pleading requirements under section 7B-1802 as only requiring that notice be sufficient "to prepare a defense and to protect . . . [against] double jeopardy," *State v. Oldroyd*, 380 N.C. 613, 618 (2022), due process protections are far broader and relate to all areas of procedural fairness, *see In re Gault*, 387 U.S. at 20.

The statutory framework in section 7B-1500 is consistent with these constitutional principles and requires juvenile delinquency statutes to be "interpreted and construed so as to implement" a set of "purposes and policies." N.C.G.S. § 7B-1500. Importantly, these statutes must be "interpreted and construed":

> (4) To provide uniform procedures that assure fairness and equity; that protect the constitutional rights of juveniles, parents, and victims; and that encourage the court and others involved with juvenile offenders to proceed with all possible speed in making and implementing determinations required by this Subchapter.

Id. Although the majority cites section 7B-1500, its opinion glosses over the fourth prong of the statute. But there is no "get-out-of-text-free card[,]" *see West Virginia v. EPA*, 142 S. Ct. at 2641 (Kagan, J., dissenting), and the majority cannot choose to ignore the statutory text in either section 7B-1500 or section 7B-1802.

Because section 7B-1802 requires that a delinquency petition "contain a plain and concise statement, without allegations of an evidentiary nature, asserting facts supporting every element of a criminal offense," N.C.G.S. § 7B-1802, and the petition filed against J.U. failed to include facts supporting the necessary element of force, the adjudication and disposition should be vacated. Until the North Carolina General Assembly changes the law, force is a necessary element of the offense of sexual battery and not merely a technicality that can be inferred from an act against the victim's will.

Justice MORGAN joins in this dissenting opinion.

ERIC MILLER
v.
LG CHEM, LTD., LG CHEM AMERICA, INC., FOGGY BOTTOM VAPES, LLC, CHAD & JACLYNN DABBS D/B/A SWEET TEA'S VAPE LOUNGE, DOE DEFENDANTS 1-10

No. 69A22

Filed 16 June 2023

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 281 N.C. App. 531 (2022), affirming an order entered on 20 April 2020 by Judge Michael J. O'Foghludha in Superior Court, Durham County. Heard in the Supreme Court on 25 April 2023.

Gupta Wessler PLLC, by Deepak Gupta, pro hac vice, and Robert D. Friedman, pro hac vice; and The Paynter Law Firm PLLC, by Sara Willingham, Stuart M. Paynter, Celeste H.G. Boyd, and David D. Larson Jr., for plaintiff-appellant.

Lewis Brisbois Bisgaard & Smith LLP, by Christopher J. Derrenbacher and Wendy S. Dowse, pro hac vice, for defendants-appellees LG Chem, Ltd. and LG Chem America, Inc.

Abrams & Abrams, P.A., by Noah Abrams; Miller Law Group, by W. Stacy Miller II; and Schwaba Law Firm, by Andrew J. Schwaba for North Carolina Advocates for Justice, amicus curiae.

PER CURIAM.

Plaintiff Eric Miller appealed from a divided decision of the Court of Appeals which affirmed the trial court's order dismissing plaintiff's claims against Defendants LG Chem, Ltd. and LG Chem America, Inc. for lack of personal jurisdiction.

The trial court entered that dismissal order without ruling on plaintiff's motions to compel. Those motions sought responses to multiple discovery requests concerning the LG defendants' contacts with North Carolina.

On this issue, the Court of Appeals majority held that plaintiff "did not allege facts to support assertion of jurisdiction over LG Chem or LG America" and, therefore, further "jurisdictional discovery was not warranted." *Miller v. LG Chem, Ltd.*, 281 N.C. App. 531, 540 (2022). The

dissent asserted that the court should "remand the matter to the trial court to consider whether further jurisdictional discovery is warranted" in light of *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017 (2021). *Miller*, 281 N.C. App. at 555 (Inman, J., dissenting).

The Supreme Court of the United States decided the *Ford* case after the trial court entered its order. The decision clarified the proper standard for the "relating to" prong of the specific personal jurisdiction analysis employed by the trial court in this case. *Ford*, 141 S. Ct. at 1026–28.

The decision to permit jurisdictional discovery is left to the sound discretion of the trial court. *Azure Dolphin, LLC v. Barton*, No. 16 CVS 7622, 2017 NCBC 88, ¶ 29 (N.C. Super. Ct. Oct. 2, 2017), *aff'd*, 371 N.C. 579 (2018). To engage in meaningful appellate review of this discretionary decision, we must be confident that the trial court applied the appropriate legal standard in the exercise of that discretion. *See, e.g.*, *State v. Campbell*, 369 N.C. 599, 604 (2017). Because the trial court did not provide any reasons for the implied denial of plaintiff's requests for further jurisdictional discovery, we cannot be certain that the court applied an analysis consistent with *Ford*. Moreover, it is possible that additional discovery would lead the trial court to make new or additional findings of fact that could bear on the court's jurisdictional analysis and our appellate review.

We therefore reverse the decision of the Court of Appeals and remand this matter to the Court of Appeals with instructions to vacate the trial court's order and remand to the trial court for reconsideration of the plaintiff's discovery motions in light of *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017 (2021) and this Court's recent precedent in *Schaeffer v. SingleCare Holdings, LLC*, 384 N.C. 102 (2023); *Toshiba Glob. Commerce Sols., Inc. v. Smart & Final Stores LLC*, 381 N.C. 692 (2022); and *Mucha v. Wagner*, 378 N.C. 167 (2021).

REVERSED AND REMANDED.

POTTS v. KEL, LLC

[384 N.C. 634 (2023)]

W. AVALON POTTS, DERIVATIVELY ON BEHALF OF STEEL TUBE, INC., PLAINTIFF
v.
KEL, LLC, AND RIVES & ASSOCIATES, LLC, DEFENDANTS; STEEL TUBE, INC., NOMINAL DEFENDANT; AND LEON L. RIVES, II, DEFENDANT/COUNTERCLAIMANT/THIRD-PARTY PLAINTIFF
v.
AVALON1, LLC, THIRD-PARTY DEFENDANT/COUNTERCLAIMANT

No. 165A22

Filed 16 June 2023

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from the trial court's order and opinion on defendants' Rule 59 motion for a new trial and Rule 50(b) motion for judgment notwithstanding the verdict entered on 5 November 2021 by Judge Adam M. Conrad, Special Superior Court Judge for Complex Business Cases, in Superior Court, Iredell 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 25 April 2023.

Moore & Van Allen, PLLC, by Mark A. Nebrig, John T. Floyd, and Benjamin E. Shook, for plaintiff-appellee W. Avalon Potts, derivatively on behalf of Steel Tube, Inc., and third-party defendant-appellee Avalon1, LLC.

Tuggle Duggins P.A., by Richard W. Andrews, Jeffrey S. Southerland, and Daniel D. Stratton, for defendant-appellants Rives & Associates, LLC, and Leon L. Rives II.

No brief filed for defendant-appellee KEL, LLC.

PER CURIAM.

For the reasons stated in the trial court's 5 November 2021 order and opinion, we affirm the denial of defendants' motion for a new trial and motion for judgment notwithstanding the verdict.

AFFIRMED.[1]

1. The order and opinion of the North Carolina Business Court, 2021 NCBC 72, is available at https://www.nccourts.gov/assets/documents/opinions/2021%20NCBC%2072.pdf.

SPROUSE v. MARY B. TURNER TRUCKING CO., LLC

[384 N.C. 635 (2023)]

DONNA SPLAWN SPROUSE, EMPLOYEE
v.
MARY B. TURNER TRUCKING COMPANY, LLC, EMPLOYER, AND
ACCIDENT FUND GENERAL INSURANCE COMPANY, CARRIER

No. 51A22

Filed 16 June 2023

Workers' Compensation—written notice of injury to employer—delayed treatment—causal relation of injury—sufficiency of evidence

The Industrial Commission properly entered an opinion and award in favor of plaintiff, who, as an employee of a trucking company along with her husband, sustained spinal injuries in a work-related tractor-trailer accident in which her husband was also injured. Competent evidence, including expert testimony from plaintiff's spinal neurosurgeon, supported the Commission's findings of fact, which in turn supported its conclusions of law that: plaintiff's injury was causally related to the accident despite having some pre-existing medical conditions; that, although plaintiff filed an immediate report of the accident itself and her husband's injury, she had a reasonable excuse for delaying written notice of her own injury for a year and a half and her employer was not prejudiced by the delay; and that plaintiff was temporarily totally disabled and unable to work as of a particular date for a specified number of months.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 281 N.C. App. 372 (2022), reversing and remanding an opinion and award by the North Carolina Industrial Commission filed on 10 September 2019. Heard in the Supreme Court on 14 March 2023.

Roberts Law Firm, P.A., by Scott W. Roberts and D. Brad Collins, for plaintiff-appellant.

Holder Padgett Littlejohn & Prickett, by Laura L. Carter, for defendant-appellees.

Lennon Camak & Bertics, PLLC, by Michael W. Bertics; and Jay Gervasi, P.A., by Jay A. Gervasi, Jr., for North Carolina Advocates for Justice, amicus curiae.

MORGAN, Justice.

This appeal concerns an opinion and award issued by the North Carolina Industrial Commission (the Commission) in favor of plaintiff following a tractor-trailer accident on 24 September 2016 in which both plaintiff and her husband, who were employees of the Mary B. Turner Trucking Company, sustained injury. Immediately after the accident, plaintiff provided notice to the employer and its insurance carrier of the accident itself and of her husband's injury, but did not report any injury to herself. On appeal, defendants challenge whether the record contained competent evidence from which the Commission could have reached its conclusions that plaintiff's own injury was causally related to the 24 September 2016 accident, that plaintiff had a reasonable excuse for not providing written notice of her own injury to defendants until 2018, that defendants were not prejudiced by plaintiff's delay in providing this written notice to them, and that plaintiff was totally disabled from 28 September 2017 until 21 April 2018 as a result of her injury. This Court recognizes that the Commission is the "sole judge of the credibility of the witnesses and weight to be given their testimony." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433–34 (1965), and that "[t]he appellate court does not retry the facts." *Morrison v. Burlington Indus.*, 304 N.C. 1, 6 (1981). Rather, the reviewing court "merely determines from the proceedings before the Commission whether sufficient competent evidence exists to support its findings of fact." *Id.* Just as in each of these cited cases, the Commission's findings of fact in the present matter were supported by competent evidence and its conclusions of law were supported by the findings of fact. As a result, the findings of fact of this specialized agency should have been accorded proper deference and the agency's decision should not have been disturbed by the lower appellate court. Consequently, we reverse the decision of the Court of Appeals and reinstate the opinion and award filed by the Commission on 10 September 2019.

I. Procedural and Factual Background

Plaintiff and her husband, John Sprouse, were both employed as long-haul tractor-trailer drivers by Mary B. Turner Trucking Company (defendant-employer) in September 2016. On 24 September 2016, plaintiff was operating a tractor-trailer for defendant-employer in a westerly direction on Interstate 40 in Tennessee when the front right tire of the vehicle exploded. Consequentially, the tractor-trailer jerked to the right and crashed into an embankment on the side of the thoroughfare. Although the cab of the vehicle remained upright, the trailer which

it was pulling was upended by the force of the incident. The collision thrusted plaintiff's head severely enough that her eyeglasses and headset were flung from her head. On the day of the wreck, plaintiff communicated with defendant-employer and verbally informed the company of the accident. Plaintiff's husband, who was also present in the vehicle at the time of the accident, sustained foot and shoulder injuries which were immediately reported to the Accident Fund General Insurance Company (defendant-carrier), and subsequently accepted by the insurer as compensable.

Although plaintiff was "really sore and stiff" in the immediate aftermath of the 24 September 2016 accident, she did not seek medical attention for herself right away because she was "more focused" on returning her husband to their home area in North Carolina since he did not want to be treated by a doctor in Tennessee. However, two days after the accident, plaintiff presented herself to her primary care provider Emily Gantt, ANP-C[1] at Shelby Medical Associates upon experiencing soreness and muscle spasms. Gantt diagnosed plaintiff with low back and neck pain arising from the 24 September 2016 tractor-trailer accident in which plaintiff had been involved. The nurse practitioner prescribed an anti-inflammatory medication and muscle relaxer for plaintiff. Plaintiff had a history of neck pain, headaches, and intermittent sciatica resulting from an earlier automobile accident for which she had received treatment, but never missed significant time from work, prior to September 2016. On 13 October 2016, plaintiff returned to ANP-C Gantt and indicated to the nurse practitioner that there had been some improvement in plaintiff's condition. Between 26 January 2017 and 18 May 2017, plaintiff made three additional visits to her primary care provider Gantt concerning issues unrelated to the two vehicular accidents in which plaintiff had been involved, and plaintiff did not relate to Gantt during any of these three additional visits that plaintiff was feeling any lingering neck or back pain. However, plaintiff's condition deteriorated to a point where she had begun dragging her right foot as a result of pain emanating from her neck through her shoulders and down her right leg into her right foot. Plaintiff testified before the Commission that she had assumed at the time that this pain was not related to the tractor-trailer accident but was associated with her history of sciatica.

In January 2017, both plaintiff and her husband returned to work for defendant-employer. However, by 28 September 2017, plaintiff had developed weakness in her arms and a tingling sensation in her fingertips. She

1. Adult Nurse Practitioner—Certified.

returned to see ANP-C Gantt on that date, reporting "a lot of pain in her cervical and lumbar spine." At this medical appointment, plaintiff was diagnosed with cervical pain and acute left lumbar radiculopathy, after which plaintiff was referred for an MRI[2] of her lumbar and cervical spine. Following her appointment with Gantt, plaintiff ceased working and filed for short-term and long-term disability. On 29 November 2017, plaintiff returned to the nurse practitioner Gantt and reported cervical pain and lumbar spine pain radiating into plaintiff's right buttock and down her right leg. An MRI conducted on 7 December 2017 showed that plaintiff had "moderate to severe spinal stenosis at L4-5, and mild to moderate spinal stenosis at L3-4." On 14 December 2017, after plaintiff reported that her leg had given way which had led her to fall twice since her previous visit to ANP-C Gantt, plaintiff's primary care provider referred plaintiff to Matthew J. McGirt, M.D., an expert in spinal neurosurgery who practiced at Carolina Neurosurgery & Spine Associates in Charlotte, North Carolina.

Plaintiff first presented herself to Dr. McGirt on 27 December 2017, reporting "a chief complaint of back, buttock, and radiating left leg pain." Dr. McGirt noted that plaintiff's physical examination was "very concerning for cervical myelopathy" and recommended an MRI of plaintiff's cervical spine, suspecting cervical stenosis. The spinal neurosurgeon also recommended an epidural steroid injection for plaintiff's back pain. Plaintiff's cervical MRI study, conducted on 8 January 2018, revealed "focal spinal cord signal abnormality," a "large central disc extrusion," and "moderate-to-severe bilateral neural foraminal stenosis" at the C5-C6 level. The diagnostic study also showed a "[l]arge left paracentral disc extrusion" and "mild right and severe left neural foraminal stenosis" at the C6-C7 level. The radiologist's interpretation stated that the "focal cord signal abnormality . . . suggest[ed] edema and/or myelomalcia." On 10 January 2018, when plaintiff returned to Dr. McGirt in order to discuss plaintiff's MRI results, the physician observed that plaintiff "definitely ha[d] myelopathy with weakness in her hands[,] numbness in her hands[,] dropping things[,] and significant gait abnormalities[,] all which progressed over the last year." Dr. McGirt recommended a two-level anterior cervical discectomy and fusion (ACDF) from C5 to C7, explaining that without this surgery, plaintiff's condition was likely to worsen due to the degree of severity to which plaintiff's spinal cord had been pinched.

On 8 February 2018, plaintiff, through counsel, filed a Form 18 Notice of Accident to Employer, indicating that she had been injured

2. A medical diagnostic technique known as magnetic resonance imaging.

as a result of her accident on 24 September 2016. On 12 February 2018, the spinal neurosurgeon McGirt performed an ACDF on plaintiff, during which he removed "two large herniated discs which had herniated back and compressed the spinal cord" and "then rebuilt that by putting in two cages and some screws and a plate to hold that together for the two-level fusion." On 20 February 2018, plaintiff submitted a post-surgical claim for her asserted work injury to defendant-carrier. Plaintiff provided a recorded statement and told the insurance claims adjuster, Donshe Usher of Third Coast Underwriters, that plaintiff did not report a workers' compensation injury immediately following the 24 September 2016 accident because "[she] didn't think [she] was hurt that bad" and had assumed that her claim would be "dropped" as a result of her medical history. Usher had also been the insurance claims adjuster for the insurance claim of plaintiff's husband which arose out of the 24 September 2016 accident and, when plaintiff mentioned her husband's claim during plaintiff's recorded statement, Usher stated that "if you're going to talk about your John I'm going to have to disconnect the call." The audio portion of the interview call between insurance claims adjuster Usher and plaintiff was soon disconnected, and Usher filed a Form 61 Denial of Workers' Compensation Claim on the same day.

On 17 April 2018, plaintiff returned to Dr. McGirt for a follow-up visit after Dr. McGirt's performance of plaintiff's ACDF surgical procedure. Plaintiff reported that she was "doing extremely well" at this time and was "very pleased with her early outcome." Plaintiff reported no neck pain and informed Dr. McGirt that she felt stronger. Dr. McGirt released plaintiff "to return to work without restrictions the next week." On 21 April 2018, approximately two months after her surgery, plaintiff returned to work with defendant-employer. Plaintiff was last treated at Carolina Neurosurgery & Spine Associates on 11 July 2018 for her final post-operative follow-up visit and was discharged to consult with a physiatrist for an evaluation of her "left lower extremity radiculopathy" and "left hand numbness."

On 22 May 2019, Deputy Industrial Commissioner A.W. Bruce filed an opinion and award in favor of plaintiff after reviewing plaintiff's claim. Defendants appealed. After hearing the parties' arguments on 15 October 2019, the Full Commission entered an opinion and award affirming Deputy Commissioner Bruce's decision for plaintiff based on the record of the proceedings before Deputy Commissioner Bruce. The record included the deposition transcripts of both Dr. McGirt and the ANP-C Gantt, the Form 44 Application for Review, and the briefs and arguments of the parties. Among its findings of fact, the Industrial Commission included the following:

21. At his deposition, Dr. McGirt testified that the symptoms documented in Plaintiff's medical records prior to September 24, 2016, were different from the neurological dysfunction and loss of function (i.e. "weaknesses and numbness") for which he treated Plaintiff. Dr. McGirt further opined that it was more likely than not that the September 24, 2016 tractor trailer wreck caused the two levels of herniated discs in Plaintiff's spine and that the herniations necessitated the surgery he performed. Dr. McGirt also testified Plaintiff would have been unable to work from September 28, 2017, when Plaintiff began experiencing numbness and weakness. Dr. McGirt released Plaintiff to return to work without restrictions following her April 17, 2018 appointment.

22. According to Dr. McGirt, Plaintiff was "pretty tough because . . . she had some pretty darn significant weakness that she was not coming in and screaming nor did we have a long drawn out workers [sic] comp conversation nor a causation conversation." Dr. McGirt further testified that "she didn't realize that she had a spinal cord issue" and that such a delay in symptoms is not "out of the realm of what we typically see in spinal cord compression."

23. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiff sustained an injury by accident arising out of and in the course of her employment with Defendant-Employer when she was injured in the wreck of September 24, 2016. The Full Commission further finds that Defendant-Employer had actual notice of Plaintiff's September 24, 2016 injury by accident on or about September 24, 2016, when Plaintiff reported the wreck to the Defendant-Employer, and that Plaintiff had a reasonable excuse for the delay in providing written notice of her accident to Defendant-Employer as she did not reasonably know of the nature or seriousness of her injury immediately following the accident. The Full Commission further finds that Defendants failed to show they were prejudiced by any delay in the notice of Plaintiff's accident.

> 24. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds the medical treatment Plaintiff received from Dr. McGirt was reasonable and necessary to effect a cure, give relief, and lessen the period of disability from the cervical spine injury Plaintiff sustained on September 24, 2016.
>
> 25. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiff was unable to work from September 28, 2017 until April 21, 2018, the date she returned to work for Defendants.

From its findings of fact, the Commission made, *inter alia*, the following conclusions of law:

> 2. . . . [T]he greater weight of the credible evidence establishes that Plaintiff's cervical spine injury was caused by Plaintiff's September 24, 2016 work accident. N.C. Gen. Stat. § 97-2(6) (2019).
>
> . . . .
>
> 4. . . . Plaintiff had a reasonable excuse for not providing written notice within 30 days because Plaintiff communicated with her employer on the date of the accident and because she did not reasonably know of the nature or seriousness of her injury immediately following the accident. . . .
>
> 5. . . . Defendants have failed to show prejudice resulting from the delay in receiving written notice because Defendant-Employer had actual, immediate notice of Plaintiff's accident on the day of the accident. The actual notice provided to Defendant-Employer allowed ample opportunity to investigate Plaintiff's condition following the violent truck accident and direct Plaintiff's medical care. Thus, Defendants were not prejudiced by the delay in receiving written notice. Because Plaintiff has shown a "reasonable excuse" for not providing written notice of her accident to Defendants within 30 days, and because the evidence of record fails to show Defendants were prejudiced by not receiving written notice within 30

> days, Plaintiff's claim is not barred pursuant to N.C. Gen. Stat. § 97-22 (2019).
>
> 6. . . . Dr. McGirt opined that Plaintiff was unable to work from September 27, 2017 to April 20, 2018, which prevented her from working in her job as a long-haul tractor trailer driver or any other employment. Plaintiff was temporarily totally disabled from September 28, 2017 until April 21, 2018.

Based upon the abovementioned findings of fact and conclusions of law, along with the Commission's other findings and conclusions, and the parties' stipulations, the Commission approved plaintiff's claim and issued an award in her favor. Defendants filed a timely notice of appeal.

In an opinion filed on 18 January 2022, *Sprouse v. Turner Trucking Co.*, 281 N.C. App. 372 (2022), a divided panel of the Court of Appeals reversed and remanded the Commission's opinion and award on the grounds that: (1) the Commission's conclusion of law that plaintiff's condition was causally related to the 24 September 2016 accident was unsupported by the Commission's findings of fact; (2) plaintiff had failed to provide a reasonable excuse for failing to timely notify defendants of her injury and also failed to demonstrate that defendants were not prejudiced by plaintiff's delay in reporting her injury; and (3) undisputed facts showed that plaintiff was only disabled from 10 January 2018 to 21 April 2018. *Id.* at 381. In the dissenting judge's view, the majority misapplied the applicable standard of review and improperly reweighed the evidence in favor of defendants in order to reach its decision. *Id.* at 382 (Jackson, J., dissenting). Plaintiff filed a timely notice of appeal to this Court pursuant to North Carolina General Statute § 7A-30(2) on the basis of the dissent.

II. Analysis

The issues before this Court on appeal are whether, in determining plaintiff's claim, the Commission erred by concluding that: (1) plaintiff's condition was causally related to the 2016 accident; (2) plaintiff had a reasonable excuse for her delay in providing written notice to defendants of her injury which resulted from the 24 September 2016 accident and this delayed notice did not prejudice defendants; and (3) plaintiff was disabled from 28 September 2017 until 21 April 2018.

The North Carolina Industrial Commission is the fact-finding body under the Workers' Compensation Act. *See*, *e.g.*, *Brewer v. Powers Trucking Co.*, 256 N.C. 175, 182 (1962). As the finder of fact, the

Commission "is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson*, 265 N.C. at 433–34. An appellate court "does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains *any* evidence tending to support the finding." *Id.* at 434 (emphasis added); *see also* N.C.G.S. § 97-86 (2021) ("The award of the Industrial Commission . . . shall be conclusive and binding as to all questions of fact. . . ."). In this regard, the state appellate courts are limited when reviewing opinions and awards issued by the Commission to determinations of: (1) whether the Commission's findings of fact are supported by competent evidence, and (2) whether the Commission's conclusions of law are justified by its findings of fact. *See, e.g.*, *Clark v. Wal-Mart*, 360 N.C. 41, 43 (2005). Finally, "[t]he evidence tending to support plaintiff's claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115 (2000) (quoting *Adams v. AVX Corp.*, 349 N.C. 676, 681 (1998)).

At each stage of its analysis in the present case, the Court of Appeals majority significantly departed from these well-established principles of appellate review by making its own credibility determinations, viewing the evidence in a light which was not most favorable to plaintiff, and usurping the Commission's role as factfinder in this workers' compensation matter. Conversely, in applying here the standards governing appellate review which this Court has routinely recognized and utilized, we determine that the Commission's findings of fact were supported by competent evidence and that these findings, in turn, justified the agency's conclusions of law. As an appellate court, our duty goes no further. *See, e.g.*, *Cunningham v. Goodyear Tire & Rubber Co.*, 381 N.C. 10, 16 (2022). As a result, we reverse the lower appellate court's determinations of error and fully reinstate the Commission's opinion and award.

a. Causal Relation

Under the Workers' Compensation Act, "an 'injury' is compensable when it is (1) by accident, (2) arising out of employment, and (3) in the course of employment." *Wilkes v. City of Greenville*, 369 N.C. 730, 737 (2017) (citing N.C.G.S. § 97-2(6) (2015)). The claimant in a workers' compensation case bears the burden of initially proving each element of compensability, including a causal relationship between her injury and a work-related incident. *Whitfield v. Lab'y Corp. of Am.*, 158 N.C. App. 341, 350 (2003). To establish sufficient causation when complicated medical questions are involved, expert testimony that meets "the

reasonable degree of medical certainty standard necessary to establish a causal link" must be presented. *Holley v. ACTS, Inc.*, 357 N.C. 228, 234 (2003). This evidence "must be such as to take the case out of the realm of conjecture and remote possibility." *Gilmore v. Hoke Cnty. Bd. of Educ.*, 222 N.C. 358, 365 (1942). Furthermore, "where the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury." *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167 (1980). Nonetheless, because the Commission "is the sole judge of the credibility of the witnesses and the weight to be given to their testimony," it may "accept or reject the testimony of a witness solely on the basis of whether it believes the witness or not." *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595 (1982).

In the instant case, the Commission concluded that plaintiff's injury—specifically, the compression of her spinal cord as the result of two large disc herniations—resulted from the 24 September 2016 accident on the basis of spinal neurosurgeon McGirt's testimony that it would "take a pretty good force" to produce such an injury and that this accident was the "most sizable injury" in plaintiff's recent history. Consequently, the medical doctor rendered his conclusion that it was "more likely than not that [the 24 September 2016 accident] caused and contributed to some degree to that cervical disease." Dr. McGirt also concluded, to a reasonable degree of medical certainty, that the 24 September 2016 accident was a proximate cause in plaintiff's development of the two herniated discs in her cervical spine and that the crash was one of the reasons, or a proximate cause, necessitating surgical intervention. In response to cross-examination by defense counsel, Dr. McGirt specifically testified that plaintiff's history of back, neck, and limb pain did not influence his expert opinion on the cause of plaintiff's injury at issue because "pain syndrome [is] very different than what [Dr. McGirt] was treating which was neurological dysfunction and loss of function." Finally, the spinal neurosurgeon testified that this type of spinal cord injury often takes one to two years to become symptomatic. Although ANP-C Gantt also testified in this workers' compensation case, Dr. McGirt was the only witness who was tendered as a medical expert in this matter.

Because the testimony of the spinal neurosurgeon McGirt was the only expert testimony presented regarding the areas which we identified in *Click* as "the exact nature and probable genesis" of plaintiff's injury which "involves complicated medical questions," then Dr. McGirt's testimony obviously constituted the only "competent opinion evidence as to

the cause of the injury." 300 N.C. at 167. This sole expert testimony, which included the only competent opinion evidence from an expert here, directly supported the Commission's Finding of Fact 23 that plaintiff's injury arose out of and in the course of her employment with defendant-employer as a result of the accident which occurred on 24 September 2016. In turn, this finding supported the Commission's conclusion of law that "the greater weight of the credible evidence establishes that Plaintiff's cervical spine injury was caused by Plaintiff's September 24, 2016 work accident." Because *some* competent evidence—indeed, the *only* competent opinion evidence provided at plaintiff's hearing on the issue of causation—supported the Commission's findings, the Court of Appeals was constrained to affirm the agency's determinations on this factual issue. *See Anderson*, 265 N.C. at 434.

Instead, the lower appellate court decided that uncontested facts presented to the Commission established that plaintiff's "chronic medical conditions" existed prior to the 24 September 2016 accident and that the Commission therefore erred by concluding that plaintiff's injury was causally related to her work accident. *Sprouse*, 281 N.C. App. at 379. The Court of Appeals reached this outcome primarily based on the documented history of plaintiff's intermittent sciatica addressed in her medical records to which both parties stipulated. *Id.* at 378–79. However, a claimant's medical history, even though it may contain relevant diagnoses that predate the claimant's work-related incident, is not dispositive of whether a particular injury—in this case, plaintiff's two herniated discs and the resulting compression to her spinal cord—may be causally related to a workplace accident. A claimant's pre-existing medical condition cannot properly be deemed to constitute a complete bar to a successful workers' compensation claim when a plaintiff provides evidence to support the Commission's conclusion that a work-related accident has caused a new injury that aggravated or accelerated the individual's pre-existing condition. *See Anderson v. Nw. Motor Co.*, 233 N.C. 372, 374 (1951); *Morrison*, 304 N.C. at 18.

The appellate courts may not abandon the Commission's factual determinations when such determinations are supported by any competent evidence. *Anderson v. Lincoln Constr. Co.*, 265 N.C. at 434; *see* N.C.G.S. § 97-86 (2021). Consistent with our pronouncement in *Brewer*, the lower appellate court was not at liberty here to reweigh the evidence in the record by placing primary emphasis on plaintiff's pre-existing intermittent sciatica or any other matters in her medical history where there was "any evidence tending to support the [agency's] finding." *Anderson*, 265 N.C. at 434. Here, spinal neurosurgeon McGirt, as the only

expert witness in this case, supplied testimony which constituted evidence tending to support the Commission's finding that plaintiff's injury was causally related to her 24 September 2016 accident. Therefore, the Commission's Finding of Fact 23 was appropriately entered and the Commission's determination of medical causation in favor of plaintiff was properly reached.

b. Timely Notice

Under section 97-22, an injured worker is required to give written notice of an accident to her employer within thirty days of the accident's occurrence or she may be barred from receiving compensation under the North Carolina Workers' Compensation Act. N.C.G.S. § 97-22 (2021). However, this statutory requirement may be waived if the Industrial Commission is satisfied that (1) the plaintiff had a reasonable excuse for not giving such notice, and (2) the employer was not prejudiced thereby. *Id.* A claimant is required to substantiate a reasonable excuse for her failure to comply with the statutory notice requirements. *Jones v. Lowe's Cos.*, 103 N.C. App. 73, 75 (1991). Furthermore, "[s]ection 97-22 gives the Industrial Commission the discretion to determine what is or is not a 'reasonable excuse.' " *Chavis v. TLC Home Health Care*, 172 N.C. App. 366, 377 (2005) (quoting N.C.G.S. § 97-22 ("[U]nless reasonable excuse is made to the satisfaction of the Industrial Commission . . ." (alterations in original) (emphasis omitted))), *app. dismissed*, 360 N.C. 288 (2006). The Court of Appeals has cogently defined "reasonable excuse" to "include a belief that one's employer is already cognizant of the accident" as well as to encompass situations "where the employee does not reasonably know of the nature, seriousness, or probable compensable character of his injury and delays notification only until he reasonably knows." *Jones*, 103 N.C. App. at 75 (extraneity omitted); *see also Lawton v. County of Durham*, 85 N.C. App. 589, 592–93 (1987).

In the present case, the Commission found both that (1) defendant-employer had actual notice of the 24 September 2016 accident because plaintiff verbally reported the wreck to defendant-employer on the date of the accident and (2) plaintiff had a reasonable excuse for the delay in providing written notice to defendant-employer because she did not reasonably know of the nature or seriousness of her injury immediately following the accident. As a result, the Commission concluded that plaintiff had a reasonable excuse for not providing written notice of the accident to defendant-employer within thirty days of the accident's occurrence because she had "communicated with her employer on the date of the accident and because she did not reasonably know of the nature or seriousness of her injury immediately following the

accident." It is noteworthy that the Commission's finding that plaintiff had communicated with defendant-employer on the date of the accident to inform the trucking company of the crash was not challenged on appeal and is therefore binding upon our appellate review. In addition, the Commission's finding that plaintiff lacked reasonable knowledge of the nature and seriousness of her resulting injury was supported by competent evidence because the spinal neurosurgeon McGirt testified that plaintiff "didn't realize that she had a spinal cord issue" at her previous appointments and because plaintiff told defendant-carrier that she did not believe that she "was hurt that bad" immediately following the accident. Because this finding by the Commission was supported by competent evidence, it is likewise binding upon our appellate review. These findings of fact adequately supported the Commission's conclusion of law that plaintiff had established reasonable excuse for her failure to provide timely written notice of the accident in accordance with N.C.G.S. § 97-22.

Even where a worker can show such reasonable excuse, nonetheless her claim will still be barred if her employer can show that it was prejudiced by the lack of written notice provided within the statutory time period. *Yingling v. Bank of Am.*, 225 N.C. App. 820, 832 (2013). While N.C.G.S. § 97-22 itself does not specify which party in a workers' compensation action bears the burden of proof in establishing whether a defendant-employer was prejudiced by a plaintiff claimant's failure to comply with this statutory written notice requirement, the Court of Appeals has heretofore plausibly opined that the defendant-employer bears the burden of showing prejudice once a claimant has satisfactorily provided a reasonable excuse for her failure to provide written notice of the accident in which she was injured to the defendant-employer within thirty days of the accident's occurrence. *See*, *e.g.*, *Yingling*, 225 N.C. App. at 832; *Chavis*, 172 N.C. App. at 378; *Lakey v. U.S. Airways*, *Inc.*, 155 N.C. App. 169, 172–73 (2002), *disc. rev. denied*, 357 N.C. 251 (2003); *Peagler v. Tyson Foods*, *Inc.*, 138 N.C. App. 593, 604 (2000).[3] Because the purpose of the statutory written notice requirement is two-fold—to allow the employer to "provide immediate medical diagnosis and treatment with a view to minimizing the seriousness of the injury" as well as to "facilitate[ ] the earliest possible investigation of the circumstances

3. This assignment of the burden of proof conforms to N.C.G.S. § 97-23, which expressly assigns the burden of proving prejudice to employer-defendants on the issue of inadequate or defective notice. N.C.G.S. § 97-23 (2021) ("No defect or inaccuracy in the notice shall be a bar to compensation unless the employer shall prove that his interest was prejudiced thereby. . . ."); *see also Gregory v. W.A. Brown & Sons*, 363 N.C. 750, 757 (2010) (discussing section 97-23).

surrounding the injury"—an employer may show that it was prejudiced either by proving that the employer was denied the ability to direct a plaintiff's appropriate medical care or that the employer was unable to investigate the circumstances surrounding the plaintiff's injury. *Booker v. Duke Med. Ctr.*, 297 N.C. 458, 481 (1979).[4]

The Commission's conclusion in the instant case that defendant-employer was not prejudiced by plaintiff's failure to comply with the statutory written notice requirement is supported by the agency's findings which we deem to be consistent with our stated view in this area of law. The purposes of the notice requirement have been determined to be vindicated despite lack of timely written notice when a plaintiff received appropriate medical care and the defendant-employer "had immediate, actual knowledge of the accident and failed to further investigate the circumstances surrounding the accident at that time." *Yingling*, 225 N.C. App. at 834 (citation omitted); *see also Gregory v. W.A. Brown & Sons*, 363 N.C. 750, 759–62 (2010) (contemplating that "[f]indings of fact to the effect that [the] purposes of the notice requirement were vindicated despite the lack of timely written notice of an employee's accident could . . . support a legal conclusion that the employer was not prejudiced by the delay in written notice."). In keeping with our quoted observation in *Gregory* while approvingly referencing *Yingling*, we hold in the current case that the dual purposes of the notice requirement were vindicated despite the lack of timely written notice because: (1) plaintiff provided defendant-employer with actual notice of the 24 September 2016 accident on the same day that the accident occurred, (2) defendants failed to further investigate the circumstances surrounding the accident at the time, (3) plaintiff received proper and appropriate medical care for her injury which considerably improved her condition, and (4) defendants failed to show that they were otherwise prejudiced by any delay in receiving written notice of plaintiff's injury.

First, the Commission in this case found as fact that defendant-employer had received actual notice from plaintiff of the 24 September 2016 accident on the date of the wreck. This finding of fact was not challenged on appeal and is therefore binding on review. From its findings, the Commission concluded that defendants were not prejudiced by the lack of timely written notice because actual notice allowed ample

4. We disavow any indication by the Court of Appeals that an injured worker's failure to provide written notice to the defendant-employer for a period of at least 471 days is per se prejudicial and does not require the presentation of any additional evidence in order to show whether the defendant-employer was actually prejudiced by the failure to provide written notice within the thirty-day statutory time period.

opportunity for defendants to investigate plaintiff's condition following the accident and to direct plaintiff's medical treatment. Furthermore, defendants did not present any evidence which tended to suggest that they were unable to investigate the 24 September 2016 accident, the crash's attendant circumstances, or plaintiff's condition following the accident. Of course, given that defendants were able to sufficiently investigate the accident in order to satisfactorily conclude that the claim submitted by plaintiff's husband was compensable, then it is unassailable that a recognized purpose of the notice requirement—namely, that defendants be provided with a reasonable opportunity to investigate the circumstances of a work accident from which an employee's injury was alleged to have resulted—was vindicated in this case despite the lack of receipt of statutory written notice of plaintiff's injury.

Second, there was no evidence presented which tended to demonstrate that defendants were prejudiced due to lack of timely written notice of plaintiff's injury which resulted in defendants' inability to direct plaintiff's prompt and proper medical treatment. Defendants contend that the spinal neurosurgeon McGirt forced a course of treatment that may not have been required if plaintiff had received adequate medical treatment from the date of her injury. Although defendants claim that plaintiff's injury was either exacerbated by some delay in her medical treatment or that plaintiff was provided improper or inappropriate medical care which may have worsened her condition, thereby necessitating Dr. McGirt's surgical intervention at a later date, defendants did not offer any evidence to support these contentions. Defendants produced no expert testimony to support their assertions either that plaintiff's course of treatment would have been different, or that surgical intervention could have been avoided in the event that plaintiff had supplied written notice of her injury to them within the prescribed statutory time period. Similarly, defendants presented no expert testimony to support their assertion that Dr. McGirt's surgical intervention may not have been required at all to treat plaintiff's condition. These unsupported assertions pale in the face of the Commission's finding, grounded in competent evidence which was offered in the form of spinal neurosurgeon McGirt's own testimony, that "the medical treatment Plaintiff received from Dr. McGirt was reasonable and necessary to effect a cure, give relief, and lessen the period of disability from the cervical spine injury Plaintiff sustained on September 24, 2016."

Finally, even if defendants were able to demonstrate that they could have facilitated superior medical intervention which might have diagnosed, treated, or otherwise minimized plaintiff's injury in the event

that they had been provided timely written notice as established in N.C.G.S. § 97-22, we are not persuaded that defendants could demonstrate, under the particular facts of the present case, that any right to direct plaintiff's appropriate medical care was denied to them given the fact that defendants refused to accept plaintiff's claim as compensable upon the presentation of the claim. Generally speaking, employers do not have a right to direct medical care for denied claims. *Lauziere v. Stanley Martin Cmtys., LLC*, 271 N.C. App. 220, 224 (2020) ("[W]e have 'long held that the right to direct medical treatment is triggered only when the employer has accepted the claim as compensable.' " (quoting *Yingling*, 225 N.C. App. at 838)), *aff'd per curiam*, 376 N.C. 789 (2021); *see also Kanipe v. Lane Upholstery*, 141 N.C. App. 620, 624 (2000) ("[U]ntil the employer accepts the obligations of its duty, i.e., paying for medical treatment, it should not enjoy the benefits of its right, i.e., directing how that treatment is to be carried out."). Here, defendants denied plaintiff's claim on the grounds, *inter alia*, that her injury was not causally related to the 24 September 2016 accident. Defendants continue to challenge the issue of medical causation before this Court on appeal. Based on this stance, defendants would not have had any right to direct plaintiff's medical care after the 24 September 2016 accident, regardless of whether they had been provided statutory written notice of plaintiff's injury.[5] For these reasons, we hold that the Commission properly found that defendants failed to show any prejudice as the result of plaintiff's failure to provide written notice of her injury within the thirty-day statutory time period.

c. Date of Disability

Under the North Carolina Workers' Compensation Act, disability is defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C.G.S. § 97-2(9) (2021). "In workers' compensation cases, a claimant ordinarily has the burden of proving both the existence of his disability and its degree." *Hilliard*, 305 N.C. at 595. In order

5. We do not presume to conclude that there is absolutely no factual scenario in which a defendant to a workers' compensation case may be able to offer evidence tending to demonstrate that a worker received entirely inappropriate or inadequate medical care which aggravated her damages in order to limit its own liability for a worker's injury despite the defendant's failure to accept the worker's injury as compensable in the first instance. We merely apply to this case the general principle that defendants lack the right to direct the course of medical treatment for injuries which they deny as non-compensable and therefore cannot, under such circumstances, prove prejudice on the sole grounds that they may have directed a different course of treatment.

to conclude that a plaintiff is or was disabled, the Industrial Commission must find:

> (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury.

Id. (citation omitted). In the present case, the Court of Appeals held that the Commission had erred by concluding that plaintiff was temporarily totally disabled from 28 September 2017 to 21 April 2018 because it wasn't until 10 January 2018 that Dr. McGirt recommended that plaintiff stop work due to her condition. *Sprouse*, 281 N.C. App. at 381. Once again, the lower appellate court reached its conclusion on this issue by abandoning the applicable standard of review and making its own factual determinations instead of merely considering whether the Commission's findings of fact were supported by competent evidence and whether those findings, in turn, supported the Commission's conclusion of law that plaintiff's total disability began on 28 September 2017.

We affirm the Commission's sixth conclusion of law that plaintiff was temporarily totally disabled starting on 28 September 2017 because this conclusion was justified by Finding of Fact 21 that plaintiff would have been unable to work as of 28 September 2017 when she began to experience numbness and weakness in her extremities. Finding of Fact 21 was drawn from spinal neurosurgeon McGirt's testimony that plaintiff should not have been working upon the onset of these symptoms. Specifically, Dr. McGirt testified that plaintiff's disability began on 28 September 2017, when plaintiff noted significant pain in her cervical and lumbar spine which radiated into her neck and arms, created tingling in her fingers, and caused weakness in her arms. At this point, Dr. McGirt rendered his expert testimony that "she should not have been working" and that "[a]ny patient who has that degree of spinal cord compression should not be working." The spinal neurosurgeon further testified that "the standard of care in neurosurgery or orthopedic spine surgery is somebody with severe cervical stenosis from disc herniations should not be allowed to drive those cars or professionally go back to work until they're fixed." Lastly, Dr. McGirt was able to conclude to a reasonable degree of medical certainty that these herniations had occurred during the 24 September 2016 accident, although the onset of plaintiff's disabling symptoms manifested approximately one year later.

Although plaintiff was not formally diagnosed with cervical stenosis and removed from work by Dr. McGirt until 10 January 2018, it was the spinal neurosurgeon's expert opinion that plaintiff was unable to work at the onset of her symptoms in September 2017. This evidence was competent to support the Commission's finding of fact that plaintiff was unable to work beginning on 28 September 2017 which, in turn, justified its conclusion of law that plaintiff's temporary total disability also began on 28 September 2017.

III. Conclusion

Upon the application of the proper standard of review, we determine that the Industrial Commission did not err in its issuance of an opinion and award in favor of plaintiff in this matter. The agency's findings of fact were supported by ample competent evidence and, in turn, its conclusions of law were supported by the findings of fact. Accordingly, we reverse the decision of the Court of Appeals and direct that court to fully reinstate the Commission's opinion and award.

REVERSED.

STATE OF NORTH CAROLINA
v.
CONNOR ORION BRADLEY

No. 105A22

Filed 16 June 2023

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 282 N.C. App. 292 (2022), affirming the judgments entered on 29 July 2020 by Judge James M. Webb in Superior Court, Moore County. Heard in the Supreme Court on 25 April 2023.

Joshua H. Stein, Attorney General, by Robert C. Ennis, Assistant Attorney General, for the State-appellee.

Stephen G. Driggers for defendant-appellant.

PER CURIAM.

In accordance with the highly deferential standard of review which governs an appellate court's consideration of a trial court's probation revocation determination and the relaxed evidentiary parameters which exist in probation revocation hearings, we affirm the Court of Appeals opinion per curiam. In related fashion, we further note that the out-of-court statements of the witness Amber Nicole Gooch[1] provided additional competent evidence from which the trial court could have derived its findings of fact and subsequent conclusions of law. *See State v. Jones*, 382 N.C. 267, 272 (2022) (noting that the "[t]raditional 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" (alteration in original) (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 783 n.5 (1973))); *see also State v. Murchison*, 367 N.C. 461, 464 (2014). We modify the Court of Appeals opinion only to the extent that the lower appellate court may have mistakenly misconstrued Gooch's statements as incompetent evidence upon which the trial court could not and did not rely in entering the trial court's findings. *See Bradley*, 282 N.C. App. at 303 n.3 (Hampson, J., dissenting).[2]

AFFIRMED AS MODIFIED.

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1. The Court of Appeals opinion refers to "Amanda Gooch" as a result of the use of that name by at least one witness who testified at defendant's probation revocation hearing. However, it appears to us that her name is, in fact, Amber Gooch.

2. We acknowledge our receipt of a Motion for Judicial Notice filed by defense counsel on 20 April 2023, asking this Court to take judicial notice of the judgments entered against Gooch by the Superior Court, Moore County, on 19 March 2021. This Court can, of course, consider any determination that has been reached within the state judicial system to the extent that it is relevant to this Court's proceedings. We have considered these judgments to the extent that we have determined that they are relevant.

STATE OF NORTH CAROLINA
v.
MONTEZ GIBBS

No. 402A21

Filed 16 June 2023

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 2021-NCCOA-607 (unpublished), reversing in part a judgment entered on 24 September 2019 by Judge Joshua W. Willey Jr. in Superior Court, New Hanover County. On 1 March 2023, the Supreme Court allowed the State's petition for writ of certiorari as to additional issues. Heard in the Supreme Court on 26 April 2023.

Joshua H. Stein, Attorney General, by Zachary K. Dunn, Assistant Attorney General, for the State-appellant.

Glenn Gerding, Appellate Defender, by Wyatt Orsbon, Assistant Appellate Defender, for defendant-appellee.

PER CURIAM.

Defendant Montez Gibbs was indicted on 14 January 2019 with one count each of trafficking opiates by possession, possession with intent to sell or distribute a Schedule II controlled substance, and possession of drug paraphernalia; and two misdemeanor counts of resisting, delaying, or obstructing a public officer. The charges arose out of an incident that occurred on 7 April 2018 when police officers observed Mr. Gibbs moving in between the buildings of the Hillcrest housing community in Wilmington, North Carolina, and ultimately found a white powdery substance in a backpack he was carrying. At the close of the evidence during the trial, the trial court dismissed one misdemeanor count of resisting, delaying, or obstructing a public officer. Mr. Gibbs was found guilty of the remaining charges. The trial court consolidated the convictions for sentencing and sentenced Mr. Gibbs to an active term of seventy to ninety-three months of imprisonment. He appealed to the Court of Appeals.

In a divided, unpublished opinion, the Court of Appeals reversed the conviction for trafficking by possession of an opiate on the grounds that the trial court abused its discretion in ruling that the State's expert was qualified to testify that fentanyl is an opiate. *State v. Gibbs*, 2021-NCCOA-607, ¶¶ 16–21. The State appealed based on the dissent

which would have held that it was not an abuse of discretion to allow the expert to testify that fentanyl is an opiate. *Id.* at ¶ 35 (Stroud, C.J., dissenting). The dissent also noted that the Court of Appeals recently held that "fentanyl 'does indeed qualify as an opiate' as a matter of statutory interpretation." *Id.* ¶ 42 (quoting *State v. Garrett*, 277 N.C. App. 493, 2021-NCCOA-214, ¶ 16). *Garrett* involved the version of the trafficking statute that was in place in 2016, which did not recognize opioids as a class of controlled substances and listed fentanyl as an opiate. *See* N.C.G.S. § 90-90(2) (2015). With the 2018 amendments in effect at the time of the relevant events at issue in this case, the statute was changed to recognize fentanyl as either an "opiate[ ] or opioid[ ]."[1] *See* N.C.G.S. § 90-90(2) (2019).

The Court of Appeals received supplemental briefing on the impact of *Garrett* on this case but did not decide whether fentanyl was an opiate as a matter of statutory interpretation under the version of the trafficking statute that was in place in 2018, N.C.G.S. § 90-95(h)(4) (2017). The trial court erred in concluding that whether fentanyl is an opiate is a question of fact. Instead, whether fentanyl was an opiate for purposes of the trafficking statute in 2018 is a question of law. Because it is a legal question of statutory interpretation, it was not necessary to have expert testimony to establish whether fentanyl is an opiate and it was not necessary to have what otherwise may have been appropriate discovery by the defense of the basis for the expert's opinion on that question.

We vacate the opinion of the Court of Appeals and remand to that court for consideration of whether fentanyl was an opiate as defined by the statutes in effect at the time of Mr. Gibbs's actions that are the basis for the conviction and sentence in this case.

VACATED AND REMANDED.

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

1. To be clear, N.C.G.S. § 90-95(h)(4), which prohibits the trafficking of opium and opiates, remained the same between 2016 and the date of Mr. Gibbs's offense.

STATE OF NORTH CAROLINA
v.
CORDERO DEON NEWBORN

No. 330PA21

Filed 16 June 2023

Indictment and Information—possession of a firearm by a felon—charged with other offenses—single indictment—sufficiency of notice

Defendant's indictment for possession of a firearm by a felon, which also charged defendant with two related offenses, was not fatally defective for violating N.C.G.S. § 14-415.1(c) (which requires a separate indictment for possession of a firearm by a felon) and did not deprive the trial court of jurisdiction over that offense because the facts alleged in the indictment were sufficient to put defendant on notice regarding the essential elements of each individual offense and to allow defendant to prepare a defense. The Supreme Court expressly overruled *State v. Wilkins*, 225 N.C. App. 492 (2013), which improperly elevated form over substance when interpreting the requirements of section 14-415.1(c).

Justice MORGAN dissenting.

Justice EARLS joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 279 N.C. App. 42, 864 S.E.2d 752 (2021), vacating in part a judgment entered on 25 October 2019 by Judge Thomas H. Lock in Superior Court, Haywood County. Heard in the Supreme Court on 26 April 2023.

Joshua H. Stein, Attorney General, by Kristin J. Uicker, Assistant Attorney General, for the State-appellant.

Joseph P. Lattimore for defendant-appellee.

NEWBY, Chief Justice.

In this case we determine whether a single indictment charging defendant with possession of a firearm by a felon and two related

offenses in violation of N.C.G.S. § 14-415.1(c), which requires separate indictments, is fatally defective. The Court of Appeals vacated defendant's conviction for possession of a firearm by a felon because the State failed to obtain a separate indictment for that offense under the unambiguous, mandatory language of N.C.G.S. § 14-415.1(c). This Court's well-established precedent provides, however, that a violation of a mandatory separate indictment provision is not fatally defective. We follow our long-standing principle of substance over form when analyzing the sufficiency of an indictment. Because the indictment here alleged facts to support the essential elements of the crimes with which defendant was charged such that defendant had sufficient notice to prepare his defense, the indictment is valid. Accordingly, we reverse the decision of the Court of Appeals.

On 25 April 2018, while patrolling U.S. Highway 19, Sergeant Ryan Flowers of the Maggie Valley Police Department ran a Division of Motor Vehicles (DMV) record search of defendant's license plate. DMV records revealed that defendant's driver's license had been permanently revoked and that he had four pending counts of misdemeanor driving while license revoked–not impaired revocation. Sergeant Flowers stopped defendant's vehicle. While communicating with defendant and the passenger, Sergeant Flowers smelled marijuana emanating from defendant's vehicle. Sergeant Flowers asked defendant where the marijuana was located in the vehicle; defendant replied that there was none in the vehicle but admitted that he and the passenger had smoked marijuana "a little earlier." Sergeant Flowers also asked defendant if there were any firearms in the vehicle, and defendant responded no.

Based on the smell of marijuana and defendant's admission that he had recently smoked marijuana, Sergeant Flowers decided to search defendant's vehicle and called Sergeant Jeff Mackey for backup. During the search, Sergeant Mackey located a small firearm beneath the passenger seat and arrested the passenger for carrying a concealed weapon in violation of N.C.G.S. § 14-269(a). *See* N.C.G.S. § 14-269(a) (2021). Sergeant Flowers asked defendant if there were other firearms in the vehicle, and defendant stated there were not. The officers' further search of the vehicle, however, revealed a second firearm located between the center console and the driver's seat. Accordingly, Sergeant Flowers arrested defendant for misdemeanor carrying a concealed weapon in violation of N.C.G.S. § 14-269(a). A dispatcher later informed the officers that defendant was a convicted felon.

On 6 August 2018, in a single indictment, defendant was indicted for possession of a firearm by a felon, possession of a firearm with an

altered or removed serial number, and carrying a concealed weapon. Defendant did not challenge the indictment before the trial court. The jury found defendant guilty of all three offenses. Defendant appealed.

On appeal, the Court of Appeals vacated defendant's conviction for possession of a firearm by a felon because the State failed to obtain a separate indictment for that offense in violation of N.C.G.S. § 14-415.1(c). *State v. Newborn*, 279 N.C. App. 42, 47, 864 S.E.2d 752, 757 (2021); *see* N.C.G.S. § 14-415.1(c) (2021). In vacating defendant's conviction, the Court of Appeals relied on its previous decision in *State v. Wilkins*, 225 N.C. App. 492, 737 S.E.2d 791 (2013), in which it held that N.C.G.S. § 14-415.1(c) unambiguously "mandates that a charge of [p]ossession of a [f]irearm by a [f]elon be brought in a separate indictment from charges related to it." *Wilkins*, 225 N.C. App. at 497, 737 S.E.2d at 794. The State, however, urged the Court of Appeals to rely on this Court's decision in *State v. Brice*, 370 N.C. 244, 806 S.E.2d 32 (2017). In that case this Court held that a similar special indictment statute for habitual offender crimes was not jurisdictional in nature, and a failure to obtain a separate indictment did not deprive the trial court of jurisdiction. *Brice*, 370 N.C. at 253, 806 S.E.2d at 38. The Court of Appeals declined to follow *Brice*, reasoning that *Brice* involved a completely different special indictment statute, not the statute at issue in the present case. *Newborn*, 279 N.C. App. at 47, 864 S.E.2d at 757. Instead, the Court of Appeals applied its own precedent from *Wilkins* because that case dealt with the same statute. *Id.* Thus, the Court of Appeals held that "the State's failure to obtain a separate indictment for the offense of possession of a firearm by a felon, as mandated by N.C.G.S. § 14-415.1(c), rendered the indictment fatally defective and invalid as to that charge." *Id.*

The State petitioned this Court for discretionary review to determine whether the Court of Appeals erred by not following this Court's decision in *Brice*. We allowed the State's petition.

This Court reviews the sufficiency of an indictment de novo. *State v. White*, 372 N.C. 248, 250, 827 S.E.2d 80, 82 (2019). Defendant failed to challenge the facial validity of the indictment at the trial court. Defendant argues, however, that because the indictment violates the statutory mandate in N.C.G.S. § 14-415.1(c), it is fatally defective, and thus the trial court lacks subject matter jurisdiction over the offense. It is well-settled that a defendant can raise a claim that the trial court lacked subject matter jurisdiction at any time. *See State v. Campbell*, 368 N.C. 83, 86, 772 S.E.2d 440, 443 (2015). Therefore, we must determine whether the indictment charging defendant with possession of a firearm by a felon, plus two related offenses, is fatally defective under N.C.G.S. § 14-415.1(c), depriving the trial court of jurisdiction.

Section 14-415.1 prohibits felons from possessing or purchasing firearms. N.C.G.S. § 14-415.1(a) (2021). Subsection 14-415.1(c) requires that "[t]he indictment charging the defendant under the terms of this section shall be separate from any indictment charging him with other offenses related to or giving rise to a charge under this section." N.C.G.S. § 14-415.1(c). In other words, when a defendant is charged with possession of a firearm by a felon *in addition to* a separate related offense, such as carrying a concealed weapon, N.C.G.S. § 14-415.1(c) requires that the State obtain a separate indictment for the possession of a firearm by a felon offense.

Generally, the purpose of an indictment is to put the defendant on notice of the crime being charged and to protect the defendant from double jeopardy. *State v. Sturdivant*, 304 N.C. 293, 311, 283 S.E.2d 719, 731 (1981). Therefore, to determine the facial validity of an indictment, "the traditional test" is whether the indictment alleges facts supporting the essential elements of the offense to be charged. *Brice*, 370 N.C. at 249–50, 806 S.E.2d at 36–37; *see also* N.C.G.S. § 15A-924(a)(5) (2021) (mandating that an indictment must include "[a] plain and concise factual statement in each count which . . . asserts facts supporting every element of a criminal offense . . . with sufficient precision clearly to apprise the defendant . . . of the conduct which is the subject of the accusation"). Accordingly, "a defendant can obtain sufficient notice of the exact nature of the charge that has been lodged against him or her through compliance with the traditional [pleading] requirements set out in N.C.G.S. § 15A-924(a)(5) without the necessity for compliance with the separate indictment provisions of N.C.G.S. § [14-415.1(c)]." *Id.* at 253, 806 S.E.2d at 38. Additionally, obtaining a separate indictment under N.C.G.S. § 14-415.1(c) "is not absolutely necessary to ensure the absence of prejudice to defendant." *Id.*

Moreover, it is well-established that a court should not quash an indictment due to a defect concerning a "mere informality" that does not "affect the merits of the case." *State v. Brady*, 237 N.C. 675, 679, 75 S.E.2d 791, 793 (1953). Indeed, this Court opined forty-five years ago in *State v. House*, 295 N.C. 189, 244 S.E.2d 654 (1978), that to quash an indictment because of an informality would "paramount mere form over substance," which this Court explicitly declined to do. *House*, 295 N.C. at 203, 244 S.E.2d at 662. This Court in *House* further explained the principle of substance over form, stating that "provisions which are a mere matter of form, or which are not material, do not affect any substantial right, and do not relate to the essence of the thing to be done . . . are considered to be directory." *Id.* at 203, 244 S.E.2d at 661–62 (quoting 73 Am. Jur. 2d *Statutes* § 19 (1974)). In other words, failure to comply with

statutory requirements regarding the form of an indictment rather than its substance is not prejudicial to a defendant. *See State v. Russell*, 282 N.C. 240, 248, 192 S.E.2d 294, 299 (1972).

This Court's decision in *Brice* held that failure to comply with a separate indictment provision is a mere informality that does not render an indictment fatally defective. *See Brice*, 370 N.C. at 252–53, 806 S.E.2d at 38. In that case, the defendant was indicted for habitual misdemeanor larceny. *Id.* at 244–45, 806 S.E.2d at 33. The defendant challenged the indictment's validity because the form of the indictment failed to comply with the statutory requirements under N.C.G.S. § 15A-928. *Id.* at 245, 806 S.E.2d at 33. Thus, the defendant argued that the indictment was fatally defective and that the trial court lacked jurisdiction over the habitual misdemeanor larceny offense. *Id.*

The statute at issue in *Brice*, N.C.G.S. § 15A-928, governs habitual offenders and prescribes the process by which a prosecutor should present a defendant's previous convictions. It specifically mandates that

> [a]n indictment or information for the offense must be accompanied by a special indictment or information, filed with the principal pleading, charging that the defendant was previously convicted of a specified offense. At the prosecutor's option, the special indictment or information may be incorporated in the principal indictment as a separate count.

N.C.G.S. § 15A-928(b) (2021). After examining the statute's purpose and language, this Court determined that noncompliance with the statute does not constitute a jurisdictional defect. *Brice*, 370 N.C. at 253, 806 S.E.2d at 38. Significantly, this Court explained that "[a]lthough the separate indictment provisions contained in N.C.G.S. § 15A-928 are couched in mandatory terms, that fact, standing alone, does not make them jurisdictional in nature." *Id.* In other words, "noncompliance with the relevant statutory provisions [does not] constitute[ ] a jurisdictional defect" such that the trial court does not have authority over the charge at issue. *Id.* at 252–53, 806 S.E.2d at 38. Therefore, this Court, relying on *House* and its principle of substance over form, held that the statutory requirements were not jurisdictional. *Id.* at 253, 806 S.E.2d at 38. Because the defect did not implicate jurisdictional concerns, nor did it affect the facial validity of the indictment, the defendant was required to raise the statutory indictment issue to the trial court. *Id.* Otherwise, review of that issue was waived. *Id.* Under *Brice*, indictments that fail to comply with mandatory separate indictment statutes are not fatally defective and thus do not deprive the trial court of jurisdiction.

Here, because the indictment includes the offense of possession of a firearm by a felon along with two related offenses, the indictment fails to comply with the mandatory separate indictment provision of N.C.G.S. § 14-415.1(c). Just as in *Brice*, however, that defect is a "mere informality" that does not "affect the merits of the case." *Brady*, 237 N.C. at 679, 75 S.E.2d at 793. Applying the principle of substance over form, it is clear that the indictment here gave defendant sufficient notice of the crimes with which he was being charged such that he was able to prepare his defense. Moreover, the State's failure to obtain a separate indictment for the possession of a firearm by a felon offense did not prejudice defendant because the indictment sufficiently alleged facts supporting the essential elements of the crimes with which defendant was charged. Therefore, we hold that although the statute here is "couched in mandatory terms," *Brice*, 370 N.C. at 253, 806 S.E.2d at 38, the statute's separate indictment requirement is not jurisdictional, and failure to comply with the requirement does not render the indictment fatally defective.

The Court of Appeals in the present case erroneously applied its precedent in *Wilkins*. Although the Court of Appeals in *Wilkins* dealt specifically with N.C.G.S. § 14-415.1(c), that case was wrongly decided in light of this Court's precedent adopting a substance-over-form approach. *See House*, 295 N.C. at 203, 244 S.E.2d at 661–62. Despite this Court's precedent recognizing that substance should prevail over form, as well as Court of Appeals decisions applying the same principle, the Court of Appeals reversed track in *Wilkins* and demanded strict compliance with the form of an indictment while overlooking its substance.[1] Accordingly, *Wilkins* is hereby specifically overruled.

This Court's decision in *Brice* correctly adhered to the principle of substance over form and reaffirmed this Court's long-standing practice of declining to quash an indictment over a defect that amounts to a mere informality. Therefore, *Brice* controls the outcome of this case. Because

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1. Notably, before *Wilkins*, the Court of Appeals held on three separate occasions that an indictment was not fatally defective for failing to comply with mandatory formalities under N.C.G.S. § 14-415.1(c). In each case, the Court of Appeals relied on this Court's decision in *House* to adhere to the principle of substance over form. *See State v. Boston*, 165 N.C. App. 214, 218, 598 S.E.2d 163, 166 (2004) ("[T]he provision of [N.C.G.S.] § 14-415.1(c) that requires the indictment to state the penalty for the prior offense is not material and does not affect a substantial right[, and] . . . hold[ing] otherwise would permit form to prevail over substance."); *State v. Inman*, 174 N.C. App. 567, 571, 621 S.E.2d 306, 309 (2005) (holding that the indictment was not fatally defective for failing to include the date of the defendant's previous conviction because "this omission is not material and does not affect a substantial right"); *State v. Taylor*, 203 N.C. App. 448, 454, 691 S.E.2d 755, 761 (2010) (holding that the indictment was not fatally defective for a discrepancy in the date of the defendant's prior felony offense).

the Court of Appeals in the present case declined to follow this Court's precedent established in *House* and reaffirmed in *Brice*, and instead relied on its erroneous decision in *Wilkins*, we reverse the decision of the Court of Appeals and instruct that court to reinstate the judgment of the trial court.

REVERSED.

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

Justice MORGAN dissenting.

In dissenting from my learned colleagues in the majority, I would affirm the decision of the Court of Appeals which held that "[w]hen the charge of possession of a firearm by a felon is brought in an indictment containing other related offenses, the indictment for that charge is rendered fatally defective and invalid, thereby depriving a trial court of jurisdiction over it." *State v. Newborn*, 279 N.C. App. 42, 43 (2021). While the majority correctly identifies the issue in this case as "whether a single indictment charging defendant with possession of a firearm by a felon and two related offenses is fatally defective under N.C.G.S. § 14-415.1(c), depriving the trial court of jurisdiction over the offense," the reasoning of the majority is fatally defective itself through the majority's unconvincing departure from this Court's entrenched principles governing proper statutory interpretation and the majority's exacerbation of this flawed preface through its misunderstanding of the applicable appellate caselaw precedent. Due to this misguided analysis of the intersection between the relevant statutory law and the appropriate governing appellate caselaw, I respectfully dissent.

Subsection 14-415.1(a) of the General Statutes of North Carolina states, in pertinent part: "It shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm . . . ." N.C.G.S. § 14-415.1(a) (2021). Pursuant to this statutory provision which establishes the offense, N.C.G.S. § 14-415.1(c) states, again in pertinent part: "The indictment charging the defendant under the terms of this section *shall be separate from any indictment charging him with other offenses* . . . ." *Id.* § 14-415.1(c) (emphasis added).

In this case, defendant was charged with the criminal offenses of possession of a firearm with an altered or removed serial number,

carrying a concealed weapon, and possession of a firearm by a felon. All three of defendant's charges were lodged in a sole indictment. The combination of defendant's charged offense of possession of a firearm by a felon with the other two charged offenses constituted an obvious lack of the State's compliance with the unequivocal mandate of N.C.G.S. § 14-415.1(c), which clearly requires that an indictment charging an individual—such as defendant here—with a violation of the statute "shall be separate from any indictment charging him with other offenses." *Id.*

"When the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts *must* give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *In re Banks*, 295 N.C. 236, 239 (1978) (emphasis added) (citing *State v. Camp*, 286 N.C. 148 (1974)). "It is well established that the word 'shall' is generally imperative or mandatory when used in our statutes." *Morningstar Marinas/Eaton Ferry, LLC v. Warren Cnty.*, 368 N.C. 360, 365 (2015) (extraneity omitted). In the instant case, it is evident that the indictment was defective in that it did not conform with the statute's clear and unambiguous language which must be given its plain and definite meaning. In my view, the Court of Appeals followed the requirement imposed upon the state's forums, as we opined in *In re Banks*, to construe N.C.G.S. § 14-415.1(c) literally without taking additional liberties with the statute's unmistakable terms. Therefore, I agree with the lower appellate court's determination to vacate defendant's conviction for the offense of possession of a firearm by a felon because the State's lack of compliance with the separate indictment requirement of N.C.G.S. § 14-415.1(c) rendered the charging instrument at issue here to be defective.

Despite the clear and unambiguous language of N.C.G.S. § 14-415.1(c) which requires a separate indictment for the offense of possession of a firearm by a felon, nonetheless the majority has sadly opted to forsake a rudimentary principle easily understood in legal circles; namely, with regard to statutory interpretation, to ascribe to words their plain and simple meaning. However, the majority chose to build upon this faulty foundation by not merely ignoring basic rules of statutory construction but also by trampling upon our stated principle in *In re Banks* that the courts "are without power to interpolate, or superimpose, provisions and limitations not contained" in statutes with operative words which have a plain and definite meaning. *In re Banks*, 295 N.C. at 239. Yet here, the majority has decided to grant itself a dispensation in order to depart from this cardinal principle as well, opting to create such authority for itself. And in doing so, the majority incredibly manages to execute a

third misfortune in the area of statutory interpretation by obfuscating the clear application of N.C.G.S. § 14-415.1(c) and the pointedly relevant case of *State v. Wilkins*, 225 N.C. App. 492 (2013), with the strained application of N.C.G.S. § 15A-928 and the tangentially relevant case of *State v. Brice*, 370 N.C. 244 (2017). The majority's awkward adaptation here of N.C.G.S. § 15A-928 and *Brice* to blunt the direct effect of N.C.G.S. § 14-415.1(c) and *Wilkins* signals a precarious uncertainty for the reliability of statutory interpretation, the sanctity of legal precedent, and the stability of the area of criminal law.

To illustrate the extent to which the majority is willing to contort itself with regard to my observation, it is worthy of note that the majority acutely relies upon the criminal *procedure* statute of N.C.G.S. § 15A-928 to offset the criminal *law* statute of N.C.G.S. § 14-415.1. As a criminal law statute, N.C.G.S. § 14-415.1 establishes the criminal offense of possession of a firearm by a felon and designates the manner in which the specific offense must be charged; as a criminal procedure statute, N.C.G.S. § 15A-928 does not establish *any* criminal offense and designates the manner in which, according to the statute's title, there is to be "[a]llegation and proof of previous convictions in superior court." N.C.G.S. § 15A-928, as a criminal procedure statute, has general application; N.C.G.S. § 14-415.1, as a criminal law statute establishing a criminal offense, has a specific application as to the identified crime. While the majority trumpets the applicability of N.C.G.S. § 15A-928 to the present case in a manner which reduces the appropriate direct impact of N.C.G.S. § 14-415.1, the majority exemplifies yet a *fourth* method of wrongful statutory interpretation. "One canon of construction is that when one statute deals with a particular subject matter in detail, and another statute deals with the same subject matter in general and comprehensive terms, the more specific statute will be construed as controlling." *Piedmont Publ'g Co. v. City of Winston-Salem*, 334 N.C. 595, 598 (1993). Because the majority elevates and expands the general criminal procedure statute of N.C.G.S. § 15A-928 above and beyond the applicability of the specific criminal law statute of N.C.G.S. § 14-415.1, which should totally govern the analysis and resulting outcome of this case, the majority has elected to abrogate another fundamental standard of prioritizing the operation of a specific statute over a general statute by instead relying here on the general criminal procedure statute of N.C.G.S. § 15A-928 and its subservient relevance when compared to N.C.G.S. § 14-415.1 and its prioritized relevance as the specific criminal law statute.

With these four glaring missteps by the majority which have shunned elementary statutory interpretation principles which are firmly ensconced in our legal jurisprudence, it reasonably follows that

the majority's heavy reliance on *Brice*, with the case's major focus on N.C.G.S. § 15A-928 which conveniently fits the majority's unsound approach to the present case, is misplaced. In like fashion, the majority stretches to cobble together various appellate caselaw principles regarding double jeopardy, sufficient notice, and "form over substance" references to indictment considerations in an exhausting exercise to strengthen its brittle decision. Meanwhile, the lower appellate court, in the opinion which it issued here, rendered a sound and comprehensible decision based upon its own precedent of *Wilkins*. Unlike *Brice* and its tangential relevance to the present case by virtue of its focus on the general criminal procedure statute, N.C.G.S. § 15A-928, *Wilkins* (1) addressed the same specific criminal law statute at issue here—N.C.G.S. § 14-415.1—which should have fully controlled the outcome of the instant case; (2) analyzed the same issue as the matter presented here concerning the combination of the charged criminal offense of possession of a firearm by a felon and another charged offense in one indictment; (3) examined the requirement regarding N.C.G.S. § 14-415.1 and proper statutory interpretation that "where the language of the statute is clear and unambiguous, there is no room for judicial construction"; (4) determined that "[d]efendant should not have been charged with both offenses in the same indictment"; and (5) ultimately concluded that the indictment charging defendant with possession of a firearm by a felon was fatally defective and thus invalid because the charge was not brought in a separate indictment. *Wilkins*, 225 N.C. App. at 496–97 (citation omitted).

While this Court is not bound by decisions of the Court of Appeals, I deem it to be much more fathomable to implement a solid outcome rendered by the lower appellate court which is based upon well-reasoned analysis spawned by well-established principles that are rooted in directly relevant law rather than to manufacture a shallow outcome which is based upon an ill-fitting analysis driven by unbridled approaches that are rooted in conveniently available opportunities.

I respectfully dissent.

Justice EARLS joins in this dissenting opinion.

IN RE C.H.

[384 N.C. 666 (2023)]

IN THE MATTER OF

C.H.

From N.C. Court of Appeals
22-476

From Durham
21SPC2564

No. 40P23

ORDER

This matter is before this Court on respondent's petition for discretionary review of a decision of the Court of Appeals affirming the trial court's order involuntarily committing respondent. In reaching this outcome, the Court of Appeals failed to consider this Court's opinion in *In re R.S.H.*, 383 N.C. 334, 881 S.E.2d 760 (2022). As such, this case is remanded to the Court of Appeals for reconsideration in light of this Court's decision in *In re R.S.H.*, consistent with this order. If the Court of Appeals determines that respondent preserved his confrontation right and that his confrontation right was violated, it should also consider whether respondent was prejudiced by the violation of his right to confrontation.

The portion of the Court of Appeals' decision reviewing the trial court's order finding that respondent's due process rights were not violated by the State's lack of participation in the hearing, consistent with this Court's decision in *In re J.R.*, 383 N.C. 273, 881 S.E.2d 522 (2022), remains undisturbed.

By order of the Court in Conference, this the 14th day of June 2023.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 16th day of June 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

McKNIGHT v. WAKEFIELD MISSIONARY BAPTIST CHURCH, INC.

[384 N.C. 667 (2023)]

CHARLOTTE MCKNIGHT AND AUDREY FOSTER, IN THEIR OFFICIAL CAPACITY AS TRUSTEES FOR AND ON BEHALF OF WAKEFIELD MISSIONARY BAPTIST CHURCH, AN UNINCORPORATED ASSOCIATION, PLAINTIFFS

v.

WAKEFIELD MISSIONARY BAPTIST CHURCH, INC., BARBARA WILLIAMS, APRIL HIGH, ALTON HIGH, EKERE ETIM, ROSALIND ETIM, HOUSTON HINSON, NATALIE HARRIS, AND DARRYL HIGH, DEFENDANTS

WAKEFIELD MISSIONARY BAPTIST CHURCH, INC., COUNTERCLAIM PLAINTIFF

v.

CHARLOTTE MCKNIGHT, AUDREY FOSTER, LEROY JEFFREYS AND JULIUS MONTAGUE IN THEIR OFFICIAL CAPACITY AS TRUSTEES AND/OR OFFICERS FOR AND ON BEHALF OF WAKEFIELD MISSIONARY BAPTIST CHURCH, AN UNINCORPORATED ASSOCIATION, COUNTERCLAIM DEFENDANTS

From N.C. Business Court
21CVS8299

From Wake
21CVS8299

No. 290A22

ORDER

Defendants and counterclaim plaintiff's motion to dismiss appeal is allowed in part and denied in part as follows. Pursuant to N.C. R. App. P. 3(d), the motion is allowed as to all issues arising from the trial court's 18 February 2022 order of summary judgment. The motion is denied as to all issues arising from the trial court's 2 June 2022 permanent injunction and final judgment order and denied as to all issues arising from the trial court's 2 June 2022 order on motion for award of costs.

By order of the Court in Conference, this the 14th day of June 2023.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 16th day of June 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

STATE v. SIMS

[384 N.C. 669 (2023)]

STATE OF NORTH CAROLINA	From N.C. Court of Appeals 17-45
v.	
ANTWAUN KYRAL SIMS	From Onslow 01CRS2993-95

No. 297PA18

ORDER

Defendant's motion for leave to file supplemental briefing based upon the trial court's 23 January 2022 order on his gender discrimination claim is granted. Defendant is allowed sixty days to file supplemental briefing on this claim, with the State to file its supplemental briefing within sixty days of defendant's filing. Additionally, defendant's request to further hold his resentencing appeal in abeyance is denied, and the portion of this Court's 17 October 2019 order holding his appeal in abeyance is rescinded.

By order of the Court in Conference, this the 14th day of June 2023.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 16th day of June 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

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

16 JUNE 2023

5P23	State v. Xavier Jamel Underwood	Def's PDR Under N.C.G.S. § 7A-31 (COA22-268)	Denied
10A23	Latoya Canteen and Pamela Phillips v. Charlotte Metro Credit Union	1. Plt's (Pamela Phillips) Notice of Appeal Based Upon a Dissent (COA22-59) 2. Plt's (Pamela Phillips) PDR as to Additional Issues 3. Plt's (Pamela Phillips) Motion to Admit Vess A. Miller Pro Hac Vice	1. --- 2. Denied 3. Allowed **Dietz, J., recused**
13P23-2	Dianne G. Nickles v. Tabitha Gwynn	1. Plt's Pro Se Motion for Extension of Time to File Response 2. Plt's Pro Se Motion for Relief from Dismissal Order	1. Dismissed as moot 2. Denied
14P23	MidFirst Bank v. Betty J. Brown and Michelle Anderson	Plt's PDR Under N.C.G.S. § 7A-31 (COA22-283)	Allowed
18P23	In the Matter of E.B.	Respondent's PDR Under N.C.G.S. § 7A-31 (COA21-694)	Denied
20P23	State v. Kenneth Lee Bailey	Def's PDR Under N.C.G.S. § 7A-31 (COA22-196)	Denied
21P23	State v. Quartez Travon Moore	1. Def's Pro Se Motion for PDR (COAP22-630) 2. Def's Pro Se Motion for Notice of Appeal of Right 3. Def's Pro Se Motion for Suspension of the Rules	1. Dismissed 2. Dismissed 3. Dismissed
27P23	State v. Kevin Flake Johnson	Def's PDR Under N.C.G.S. § 7A-31 (COA22-128)	Denied **Dietz, J., recused**
31PA19-2	Eve Gyger v. Quintin Clement	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA22-81) 2. Plt's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied **Dietz, J., recused**
35PA21	In the Matter of A.J.L.H., C.A.L.W., M.J.L.H.	Respondent-Parents' Petition for Rehearing	Denied **05/17/2023**
36P23	State v. Ausban Monroe, III	Def's PDR Under N.C.G.S. § 7A-31 (COA20-839)	Denied

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

16 JUNE 2023

40P23	In the Matter of C.H.	Respondent's PDR Under N.C.G.S. § 7A-31 (COA22-476)	Special Order
41P23	State v. Michael Paul Nelson	1. Def's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA22-332) 2. Def's Pro Se PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Dismissed 3. Allowed
43P23	State v. Glenn Spencer Boyette, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA21-612)	Allowed
45P23	Smith v. Wisniewski	1. Plt's Pro Se Motion for Temporary Stay 2. Plt's Pro Se Petition for Writ of Supersedeas 3. Plt's Pro Se Notice of Appeal Based Upon a Constitutional Question 4. Plt's Pro Se PDR Under N.C.G.S. § 7A-31	1. Allowed **02/02/2023** Dissolved 2. Denied 3. Dismissed *ex mero motu* 4. Denied
46P23	State v. David Raeford Tripp, Jr.	1. Def's Motion for Temporary Stay 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 **02/02/2023** Dissolved 2. Dismissed as moot 3. --- 4. Denied 5. Allowed
49P23	State v. Damian R. Taylor	Def's PDR Under N.C.G.S. § 7A-31 (COA22-243)	Denied
50P23	State v. Charles David Hall	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA21-496) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed **Dietz, J., recused**
51P23	State v. Quency Andre McVay	Def's PDR Under N.C.G.S. § 7A-31 (COA22-241)	Denied

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52A23	Bradshaw, et al. v. Maiden, et al.	1. Def's (SS&C Technologies, Inc.) Motion to Admit Robert A. Atkins Pro Hac Vice 2. Def's (SS&C Technologies, Inc.) Motion to Admit Jeffrey J. Recher Pro Hac Vice	1. Allowed 2. Allowed **Dietz, J., recused**
60P23	State v. Timothy Ronald Cox, II	Def's PDR Under N.C.G.S. § 7A-31 (COA22-628)	Denied
73P23	State v. Tyrone Sequine Reynolds	1. Def's Pro Se Motion to Dismiss Allegations 2. Def's Pro Se Motion to Dismiss - Grounds Applicable to All Criminal Proceedings 3. Def's Pro Se Motion to Dismiss - Grounds Applicable to Indictments	1. Dismissed 2. Dismissed 3. Dismissed
75P23	In the Matter of L.L.J.	Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA22-386)	Denied
76P23	State v. Daniel Jeremiah Minton	Def's PDR Under N.C.G.S. § 7A-31 (COA22-306)	Denied
77P23	State v. Daryl Spencer Scott	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA22-326) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
82P23	Paula Carol Denton v. Steven Louis Baumohl	1. Def's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA22-500) 2. Def's Pro Se PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
84P15-6	State v. Curtis Louis Sangster	Def's Petition for Writ of Certiorari to Review Order of the COA	Dismissed as moot
93P23	State v. Jerry L. Sharpe	Def's Pro Se Motion for Default Judgment	Dismissed
94P23	State v. Kenyatta Lindsey	1. Def's Pro Se Petition for Writ of Habeas Corpus 2. Def's Pro Se Motion to Appoint Counsel	1. Denied **04/05/2023** 2. Dismissed as moot **04/05/2023**
96P23	State v. Keayone Lamont Murphy	Def's Pro Se Motion for Case Review	Dismissed

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97P23	State v. Casey Adam Haney	Def's Pro Se Motion for Appeal	Dismissed
98P23	State v. Tiffany Adonnis Campbell	Def's Motion for Temporary Stay (COA22-634)	Allowed **04/11/2023**
99P23	Danielle Wheeler v. City of Charlotte, a North Carolina Municipal Corporation, and 300 Park Avenue Homeowners' Association, Inc.	Plt's PDR Under N.C.G.S. § 7A-31 (COA22-570)	Denied
102P13-7	State v. Charles Anthony Ball	1. Def's Pro Se Motion for PDR 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed **05/16/2023** 2. Allowed **05/16/2023**
102A20-3	Taylor, et al. v. Bank of America, N.A.	Plts' Motion to Admit Caitlyn Miller and Chelsie Warner Pro Hac Vice	Allowed **04/20/2023** **Berger, J., recused**
102P23	Demarcus Tyron Davis and Jamille Rasheen King v. Lavonte Reon Jackson	Plt's (Demarcus Tyron Davis) Pro Se Motion for Appeal	Dismissed
103P23	Darrick Lorenzo Fuller v. Teresa Jordan, Doug Newton, Warden, Foothills Correctional Institution	1. Def's Pro Se Motion for Notice of Appeal 2. Def's Pro Se Petition for Writ of Habeas Corpus	1. Dismissed **04/14/2023** 2. Denied **04/14/2023**
104P23	State v. Markus Odon McCormick	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **04/17/2023**
105A22	State v. Connor Orion Bradley	Def's Motion for Judicial Notice	Allowed
109P01-2	State v. William Dawson	Def's Pro Se Petition for Writ of Mandamus	Denied **04/05/2023** **Dietz, J., recused**
109P23	State v. Keylan Johnson	Def's Motion for Temporary Stay (COA22-363)	Allowed **04/26/2023**

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111P23	Becky Ann Chappell v. John Daniel Chappell	1. Def's Motion for Temporary Stay (COA22-607) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/26/2023** Dissolved 2. Denied 3. Denied
113P23	State v. David Henderson	1. Def's Pro Se Petition for Writ of Habeas Corpus 2. Def's Pro Se Motion for Evidentiary Hearing 3. Def's Pro Se Motion for Assignment of Counsel 4. Def's Pro Se Motion for Subpoena *Duces Tecum*	1. Denied **04/27/2023** 2. Dismissed **04/27/2023** 3. Dismissed **04/27/2023** 4. Dismissed **04/27/2023**
116P23	State v. Angel Marie Sawyer	Def's PDR Under N.C.G.S. § 7A-31 (COA22-397)	Denied
119A23	State v. Jason William King	1. State's Motion for Temporary Stay (COA22-469) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent	1. Dismissed as moot **05/08/2023** 2. Allowed **05/08/2023** 3. ---
123P23	State v. Tevin Q. Williams	1. Def's Pro Se Motion for Racial Justice Act and False Claim Act Relief 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
124P23	State v. Jeffery Dean Tucker	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Catawba County 2. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
125P23	State v. Amaechi Osmond Nwakuche	Def's Pro Se Motion for Notice of Appeal Re: Application for Writ of Habeas Corpus	Denied **05/25/2023**
131P16-27	State v. Somchai Noonsab	1. Def's Pro Se Motion for Complaint 2. Def's Pro Se Motion for Direct Attack on Quo Warranto Writ	1. Dismissed **05/01/2023** 2. Dismissed **05/01/2023**
132P23	State v. Karim Anthony Brown	Def's Pro Se Motion for Superseding Indictment	Dismissed

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134P23	State v. Torrian Kane Faggart	1. Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-798) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Denied 2. Allowed
137P23	State v. Juan Manuel Castaneda-Rojas	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Guilford County 2. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
138A23	State v. Joshua David Reber	State's Motion for Temporary Stay (COA22-130)	Allowed **06/02/2023**
139P23	Robert Brewer, Employee v. Rent-A-Center, Employer, Travelers Insurance Co. (Sedgwick Claims Services, Third-Party Administrator), Carrier	Defs' Motion for Temporary Stay (COA22-296)	Allowed **06/08/2023**
142A23	In the Matter of K.C.	1. Petitioner's Motion for Temporary Stay (COA22-396) 2. Petitioner's Petition for Writ of Supersedeas 3. Petitioner's Notice of Appeal Based Upon a Dissent	1. Dismissed as moot **06/08/2023** 2. Allowed **06/08/2023** 3. ---

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143P22	Bio-Medical Applications of North Carolina, Inc. d/b/a BMA of South Greensboro and Fresenius Kidney Care West Johnston, Petitioner v. NC Department of Health and Human Services, Division of Health Service Regulation, Health Care Planning & Certificate of Need Section, Respondent and Total Renal Care of North Carolina, LLC, d/b/a Central Greensboro Dialysis and Clayton Dialysis, Respondent-Intervenor	1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COA21-318) 2. North Carolina Specialty Hospital, LLC's Motion for Leave to File Amicus Brief Supporting PDR	1. Denied 2. Dismissed as moot
158P08-3	State v. Lenin Javier Flores-Matamoros	1. Def's Pro Se Motion to Stay Lower Court Orders 2. Def's Pro Se Motion for Emergency Application for Writ of Injunction 3. Def's Pro Se Petition for Writ of Mandamus	1. Denied **06/07/2023** 2. Dismissed **06/07/2023** 3. Denied **06/07/2023**
172PA22	In the Matter of S.R.	Respondent's Petition for Writ of Certiorari to Review Decision of the COA (COA21-633)	Dismissed as moot **05/01/2023**
173P21-3	State v. Aaron Lance Stephen	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 Motion to Procure Jury Trial Transcript 4. Def's Pro Se Motion for Hearing Seeking New Trial 5. Def's Pro Se Motion in the Alternative for Leave of Appeal	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed 5. Dismissed
193A94-2	State v. Samuel Griffin	Def's Pro Se Motion for Petition for New Trial	Dismissed

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200P07-11	State v. Kenneth E. Robinson	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Halifax County	Dismissed
202PA21	State v. Scott Warren Flow	Def's Motion to File Reply Brief	Dismissed as moot **05/02/2023**
230P22	State v. Jermaine Lydell Sanders	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA21-358) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Mooresville's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
256P22	State v. William Moses Hooker	1. Def's PDR Under N.C.G.S. § 7A-31 (COAP22-119) 2. Def's Petition for Writ of Certiorari to Review Order of the COA 3. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Cabarrus County	1. Dismissed 2. Denied 3. Denied
264A21	State v. Isaiah Scott Beck	State's Motion to Continue Oral Argument	Denied **06/14/2023**
273P22-2	Amy M. Black v. Andrew T. Black	1. Plt's Pro Se Motion for Notice of Appeal (COAP22-175) 2. Plt's Pro Se Motion for Notice of Appeal 3. Plt's Pro Se Motion for PDR 4. Plt's Pro Se Petition in the Alternative for Writ of Certiorari to Review Order of the COA 5. Plt's Pro Se Motion for Petition for Stay of Orders 6. Plt's Pro Se Motion to Proceed *In Forma Pauperis* 7. Plt's Pro Se Motion for Extension 8. Plt's Pro Se Motion for Consideration of Brief 9. Plt's Pro Se Motion for Proposed Record on Appeal 10. Plt's Pro Se Motion for Consolidation of Actions on Appeal	1. Dismissed 2. Dismissed 3. Dismissed 4. Denied 5. Dismissed 6. Allowed 7. Dismissed 8. Dismissed 9. Dismissed 10. Dismissed
274A22	In the Matter of R.A.F., R.G.F.	Respondent-Mother's Petition for Writ of Certiorari to Review Order of District Court, Henderson County	Dismissed as moot **04/28/2023**

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277PA22	Gray v. Eastern Carolina Medical Services, PLLC, et al.	1. Defs' (Eastern Carolina Medical Services, PLLC and Mark Cervi, M.D.) Motion to Withdraw Appeal 2. Def's (Donna McLean, D.N.P., F.N.P.-B.C.) Motion to Withdraw Appeal 3. Def's (Garry Leonhardt, M.D.) Motion to Withdraw Appeal 4. Defs' (Carol Lee Keech/Oxendine, Charles Ray Faulkner, RN, Kimberly Jordan, RN, and Jacqueline Lymon, L.P.N.) Motion to Withdraw Appeal	1. Allowed **04/06/2023** 2. Allowed **05/17/2023** 3. Allowed **05/17/2023** 4. Allowed **05/17/2023**
281P06-13	Joseph E. Teague, Jr., P.E., C.M. v. N.C. Department of Transportation, J.E. Boyette, Secretary	1. Plt's Pro Se Motion to Rehear 2. Plt's Pro Se Motion to Rehear to Consider Additional Authority	1. Dismissed 2. Dismissed
290A22	McKnight, et al. v. Wakefield Missionary Baptist Church, Inc., et al.	Defs' and Counterclaim Plt's Motion to Dismiss Appeal	Special Order
297PA18	State v. Antwaun Sims	Def's Motion for Leave to File Supplemental Briefs	Special Order
315A22	State v. Kahleighia Rogers	1. Def's Notice of Appeal Based Upon a Dissent 2. Def's Conditional Petition for Writ of Certiorari to Review Order of the COA (COAP22-388) 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
323P11-3	State v. Ricky Dean Norman	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **04/21/2023**
331P22	Michael Keith Sulier v. Tina Bastian Veneskey	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA21-506) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
332PA14-3	State v. Gregory Aldon Perkins	Def's PDR Under N.C.G.S. § 7A-31 (COA20-572)	Denied
332P22	Michael Keith Sulier v. Tina Bastian Veneskey	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA21-523) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied

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333A22	Digital Realty Trust, Inc.; Digital Realty Trust, L.P.; and DLR, LLC v. Peter Sprygada	Plts' Motion to Dismiss Appeal	Denied
340P22	The North Carolina State Bar v. Patrick Michael Megaro, Attorney	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-135)	Denied **Dietz, J., recused**
362P22	State v. Timothy Gerard Walker	Def's PDR Under N.C.G.S. § 7A-31 (COA22-260)	Denied **Dietz, J., recused**
363P22-2	State v. Jamaal Gittens	Def's Pro Se Motion to Reconsider	Dismissed **Dietz, J., recused**
370P04-20	State v. Anthony Leon Hoover	Def's Pro Se Motion for Mandamus Writ of Errors Waiver of Contractual Rights	Dismissed
370P22	State v. Priscilla Anne Modlin	Def's PDR Under N.C.G.S. § 7A-31 (COA22-132)	Denied **Dietz, J., recused**
380P22	A & M Real Estate Dev. Co. LLC v. G-Force Cheer, LLC	1. Def's PDR Under N.C.G.S. § 7A-31 (COA22-212) 2. Def's Petition in the Alternative for Writ of Certiorari to Review Decision of the COA	1. Dismissed 2. Denied
424A21	Cryan, et al. v. National Council of Young Men's Christian Associations of the United States of America, et al.	Def's (Kernersville Family YMCA) Motion to Dismiss Appeal	Denied

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554P07-3	State v. Percy Allen Williams, Jr.	1. Def's Pro Se Motion for Order to Show Cause	1. Dismissed as moot **05/26/2023**
		2. Def's Pro Se Motion for Temporary Restraining Order/Injunctive Relief	2. Dismissed as moot **05/26/2023**
		3. Def's Pro Se Motion for Notice of Appeal	3. Dismissed *ex mero motu* **05/26/2023**
		4. Def's Pro Se Motion for Notice of Appeal	4. Dismissed *ex mero motu* **05/26/2023**
		5. Def's Pro Se Motion for Notice of Appeal	5. Dismissed *ex mero motu* **05/26/2023**
		6. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA	6. Denied **05/26/2023**
		7. Def's Pro Se Motion for Notice of Appeal (COAP23-231)	7. Dismissed *ex mero motu* **05/26/2023**
		8. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA	8. Denied **05/26/2023** **Dietz, J., recused**
580P05-28	In re David Lee Smith	1. Def's Pro Se Petition for Writ of Mandamus	1. Denied
		2. Def's Pro Se Petition for Writ of Mandamus	2. Denied
		3. Def's Pro Se Petition for Writ of Mandamus	3. Denied
		4. Def's Pro Se Petition for Writ of Mandamus En Banc	4. Denied
		5. Def's Pro Se Petition for Writ of Mandamus or Alternatively Demand or Remand for Calendar of Declaratory Default Hearing	5. Denied
		6. Def's Pro Se Petition for Writ of Mandamus	6. Denied
		7. Def's Pro Se Petition for Writ of Mandamus	7. Denied
584P99-6	State v. Harry James Fowler	Def's Pro Se Motion for Petition for Judicial Review	Dismissed

APPENDIXES

INVESTITURE CEREMONY OF JUSTICE ALLEN

ORDER CONCERNING CITATION FORM

ORDER CONCERNING APPELLATE DIVISION STAFF

GENERAL RULES OF PRACTICE

GENERAL RULES OF PRACTICE

RULES OF APPELLATE PROCEDURE

DISCIPLINE AND DISABILITY OF ATTORNEYS

PROCEDURES FOR ADMINISTRATIVE COMMITTEE

PREPAID LEGAL SERVICES PLANS

RULES OF PROFESSIONAL CONDUCT

STATE BAR STANDING COMMITTEES AND BOARDS

IOLTA

STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS

RULES OF MEDIATION FOR FARM NUISANCE DISPUTES

RULES OF MEDIATION FOR MATTERS IN DISTRICT CRIMINAL COURT

RULES FOR SETTLEMENT PROCEDURES IN DISTRICT COURT FAMILY FINANCIAL CASES

RULES FOR MEDIATED SETTLEMENT CONFERENCES AND OTHER SETTLEMENT PROCEDURES IN SUPERIOR COURT CIVIL ACTIONS

RULES OF MEDIATION FOR MATTERS BEFORE THE CLERK OF SUPERIOR COURT

CONTINUING LEGAL EDUCATION

INVESTITURE

OF

Curtis H. ("Trey") Allen III

ASSOCIATE JUSTICE

SUPREME COURT OF NORTH CAROLINA

Law and Justice Building
Raleigh, North Carolina

January 4, 2023
2:00 p.m.

Chief Justice Newby and Members of the Court, Distinguished Guests, Family, and Friends:

Article I, Section 2, of the North Carolina Constitution declares: "All government of right originates from the people, is founded on their will only, and is instituted solely for the good of the whole." For more than 200 years, the people of North Carolina have entrusted this Court with final authority to interpret our State's laws. It is the honor of my life to join the ranks of this Court's past and present members. I am grateful beyond words to my fellow citizens for this opportunity to serve. Before proceeding, I would also like to express my gratitude to Almighty God, the author of all good things.

In the book of Galatians in the New Testament, St Paul writes, "[I]f any one thinks he is something, when he is nothing, he deceives himself." I could not have arrived at this moment without the support of more people than I can adequately thank in these brief remarks. Many —but certainly not all—of them have gathered in this building or in the State Capitol. To everyone whose efforts made today a reality, I say, "Thank you! I will strive to be worthy of your faith in me."

There are a few individuals whom I would like to recognize individually. Betse Hamilton, our Clerk of Court Grant Buckner, Liz Henderson, and Lucy Harrill devoted many hours to planning and executing today's events. My family and I appreciate their hard work and the efforts of everyone else who helped.

My parents, Curtis and Elaine Allen, brought me up in rural Robeson County to love God, family, and our great country. My father, a veteran of the United States Air Force, is the hardest working person I have ever known. More times than I can count, his example has motivated me to keep going during tough times. My mother's career was taking care of my father, my brother, and me. (Talk about a big job!) By never accepting anything from me but my best, she taught me to demand my best from myself. I am thrilled that they are both here to witness this ceremony.

My brother, Clint Allen, is a decorated Army veteran who fought in Afghanistan. I admire his courage and dedication to our country and thank him for his love and friendship.

My in-laws, Terry and Emily Smith, have been huge sources of encouragement and guidance since I married their daughter 22 years ago. I am especially grateful for their steadfast support over the last two years.

My brother-in-law, Ryan Smith, and his family have been steadfast friends during challenging times. My family and I treasure the affection and fun they always bring with them.

I have been fortunate to enjoy the love and support of many other relatives, some of whom are here, but some of whom have already left us. In particular, I would like to recognize the huge impact on my life of my departed aunt, Joan Lassiter, and her husband, Michael Lassiter. The example they set of kindness and generosity is one that I will always remember and hope to emulate.

Throughout my legal career, I have worked alongside some excellent lawyers who influenced me both professionally and personally. As a judge advocate in the United States Marine Corps, I served with officers distinguished by their sense of duty and their ability as lawyers. One who stands out is Colonel Brian Palmer, a truly outstanding officer and one of the finest lawyers I have ever known. Working for him made me a better officer and attorney.

Chief Justice Newby, in 2005, after leaving the Marine Corps, I had the privilege of clerking for you when you were the junior justice on our court. It is no exaggeration to say that that experience put me on the path to today. Thank you for your example, your encouragement, and your friendship over the years. I am delighted to begin my service on this Court with you as our Chief Justice.

I spent my time in private practice in Raleigh at the law firm of Tharrington Smith, which was—and still is—filled with superb attorneys. The aptly named Ann Majestic was the head of the education law section back then and the most respected education lawyer in the State. Her high standards brought out the best in me as a lawyer. Practicing law with her and other colleagues at the firm was a learning experience in the most positive sense of the term.

In 2013 I left the practice of law to join the faculty at the UNC School of Government, where my teaching, research, and writing were geared towards meeting the needs of local government officials. Thanks to Dean Mike Smith for hiring and promoting me. My success as a faculty member at the SOG owes much to the mentoring that I received from longtime professors Frayda Bluestein, David Owens, Chuck Szypszak, and Bob Joyce. I also want to express appreciation to the municipal and county clerks whose instructor I was for several years. They inspired me by their deep commitment to their communities.

For the past two years, I assisted the judges, clerks of court, and magistrates of our Judicial Branch as General Counsel for the North Carolina Administrative Office of the Courts. It was a privilege to support the dedicated individuals who make our justice system function daily. Thanks to Judge Andrew Heath, Director of the Administrative Office of Courts, for allowing me to serve in that capacity and to Deputy Director Ryan Boyce for being such a terrific colleague. Thanks also to

the attorneys in the Office of General Counsel for their exemplary work during my time with them.

Of course, the individuals who have had the biggest impact on my life and work are my wife, Teryn Melissa Smith Allen, and our children, Thomas, Isham, Michael, Mary, and John. My children continually dazzle me with their intelligence, wit, talent, and, most of all, their goodness. Being their father is not merely the most important thing that I will ever do, it is an absolute joy. As for my wife, words fail me. We started dating in high school. A life without her is as unthinkable to me as a life without air. Anything meaningful that I have accomplished bears the stamp of her sustaining love. When I think of her, the words of Proverbs 31:29 come to mind: "Many women have done excellently, but you surpass them all."

I would like to end with a few words about the role of the courts in our constitutional system. In Federalist 78, Alexander Hamilton pointed out that, in terms of raw power, the judiciary is the weakest branch of government. The executive branch "wields the sword of the community[.]" The courts rely on it to enforce their judgments. The legislature possesses the power of the purse and writes the rules under which we all live. On the other hand, according to Hamilton, the judiciary has "neither force nor will but merely judgment[.]"

Hamilton's observations about the relative weakness of the judiciary lead me to ask on what the authority of the courts ultimately rests. Put differently, why do the other branches of government, why does the public at-large, honor court judgments? It seems to me that, in the final analysis, the willingness of our society to abide by judicial decisions flows from people's confidence in the impartiality and fairness of our courts. In general, we trust judges to decide cases based on the law and the facts, not the judges' personal views. We trust judges to apply the law the same way in similar cases; to judge persons based on what they have done and not who they are or whom they know; and, as required by Article I, Section 18, of our State constitution, to administer right and justice "without favor, denial, or delay." For as long as I am privileged to serve on this Court, I will do my utmost to live up to these high expectations.

ORDER RESCINDING "ADMINISTRATIVE ORDER CONCERNING THE FORMATTING OF OPINIONS AND THE ADOPTION OF A UNIVERSAL CITATION FORM"

This Court's order entitled "ADMINISTRATIVE ORDER CONCERNING THE FORMATTING OF OPINIONS AND THE ADOPTION OF A UNIVERSAL CITATION FORM" dated 4 December 2019, which is attached hereto, is hereby rescinded effective 1 February 2023.

Ordered by the Court in Conference, this the 11th day of January 2023.

/s/ Allen, J.
For the Court

Justice Morgan and Justice Earls dissent from this order.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 13th day of January 2023.

s/Grant E. Buckner

GRANT E. BUCKNER
Clerk of the Supreme Court

ADMINISTRATIVE ORDER CONCERNING THE FORMATTING OF OPINIONS AND THE ADOPTION OF A UNIVERSAL CITATION FORM

Effective 1 January 2021, an opinion number and paragraph numbers will appear in every opinion filed by the Supreme Court of North Carolina and the North Carolina Court of Appeals. Like a docket number or a party's name, these opinion and paragraph numbers will be native to the text of the opinion and may therefore appear across mediums of publication. Accordingly, opinions filed on or after 1 January 2021 will have an immediate, permanent, and medium-neutral ("universal") citation the moment they are issued.

Because a universal citation is medium-neutral, it does not point to an official publication of the opinion. The *North Carolina Reports* and the *North Carolina Court of Appeals Reports* remain the official reports of the opinions of the Supreme Court of North Carolina and of the North Carolina Court of Appeals, respectively.

Opinions of the Supreme Court of North Carolina and the North Carolina Court of Appeals that are filed on or after 1 January 2021 should be cited using this format: [Case Name], [Traditional Citation to the Bound Volume and Page Number of the Court's Official Reporter], [Universal Citation to the Year, Court, and Opinion Number], [Pinpoint Paragraph Number].

e.g., *State v. Smith*, 375 N.C. 152, 2020-NCSC-45, ¶ 16.

State v. Smith, 255 N.C. App. 43, 2020-NCCOA-118, ¶ 23.

By virtue of this administrative order, the Appellate Reporter, the Director of Appellate Division Computing, and the Supreme Court's Administrative Counsel are hereby instructed to implement this formatting and citation form and to promote its use by the stakeholders in our legal and judicial communities, subject to further orders of the Court.

Ordered by the Court in Conference, this the 4th day of December, 2019.

s/Earls, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 4th day of December, 2019.

s/Amy L. Funderburk

AMY L. FUNDERBURK
Clerk of the Supreme Court

ORDER RESCINDING "ORDER ESTABLISHING THE OFFICE OF APPELLATE DIVISION STAFF"

This Court's order entitled "Order Establishing the Office of Appellate Division Staff" and dated 19 December 2018, which appears on the following page, is hereby rescinded.

Ordered by the Court in Conference, this the 11th day of January 2023.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 11th day of January 2023.

s/Grant E. Buckner

GRANT E. BUCKNER
Clerk of the Supreme Court

IN THE SUPREME COURT OF NORTH CAROLINA

****

ORDER ESTABLISHING THE OFFICE OF APPELLATE DIVISION STAFF

The Office of Staff Counsel at the North Carolina Court of Appeals is hereby converted into the Office of Appellate Division Staff, which shall provide support to the Supreme Court of North Carolina and the North Carolina Court of Appeals.

Ordered by the Court in Conference, this the 19th day of December, 2018.

Michael R. Morgan

For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 19 day of December, 2018.

Amy L. Funderburk

AMY L. FUNDERBURK

Clerk of the Supreme Court

ORDER AMENDING THE GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

Pursuant to section 7A-34 of the General Statutes of North Carolina, the Court hereby amends Rule 5 and Rule 5.1 of the General Rules of Practice for the Superior and District Courts.

* * *

Rule 5. Filing of Pleadings and Other Documents in Counties with *Odyssey*

(a) **Scope.** This rule applies only in those counties that have implemented *Odyssey*, the Judicial Branch's new electronic-filing and case-management system. The Administrative Office of the Courts maintains a list of the counties with *Odyssey* at https://www.nccourts.gov/ecourts. In a county without *Odyssey*, a person must proceed under Rule 5.1 of these rules.

(b) Electronic Filing in *Odyssey*.

(1) **Registration**. A person must register for a user account to file documents electronically. The Administrative Office of the Courts must ensure that the registration process includes security procedures consistent with N.C.G.S. § 7A-49.5(b1).

(2) **Requirement**. An attorney must file pleadings and other documents electronically. A person who is not represented by an attorney is encouraged to file pleadings and other documents electronically but is not required to do so.

(3) **Signing a Document Electronically**. A person who files a document electronically may sign ~~a~~the document electronically by typing his or her name in the document preceded by "/s/." If the document requires additional signatures, then the filer may type the name of each signatory preceded by "/s/" or scan a document that includes all of the necessary signatures. By filing a document with multiple signatures, the filer certifies that each of the other signatories has expressly agreed to the form and substance of the document and that the filer has authority to submit the document on each signatory's behalf.

(4) **Time**.

a. **When Filed**. A document is filed when it is received by the court's electronic-filing system, as evidenced by the file stamp on the face of the document.

b. **Deadline**. If a document is due on a date certain, then the document must be filed by 5:00 p.m. Eastern Time on that date.

(5) **Relief if Emergency Prevents Timely Filing**. If an *Odyssey* service outage, natural disaster, or other emergency prevents an attorney from filing a document in a timely manner by use of the electronic-filing system, then the attorney may file a motion in paper that asks the court for permission to file the document in paper or for any other relief that is permitted by law. The attorney must attach the document that he or she was prevented from filing to the motion.

(6) **Withdrawal of a Document by Filer**. After a person files a document electronically, the person may withdraw the document in *Odyssey* up until the point at which the clerk of superior court or the judicial official who is authorized by law to accept the document begins processing it. If withdrawn, the document will be treated as if it had never been filed with the court.

(7) **Acceptance or Rejection of a Document by Court**. When processing a document that has been filed electronically, the clerk of superior court or the judicial official who is authorized by law to accept the document will accept it unless:

a. the document is prohibited by order, statute, or rule from being filed with the court;

b. the filer, after being contacted by the clerk's office, has submitted a rejection request in writing to the clerk who is processing the document; or

c. the document cannot be opened by the court because it is corrupted or the document has been quarantined in *Odyssey* for containing a virus or other malicious software.

If the clerk or judicial official rejects the document for one of the reasons specified above, then (i) the document will be treated as if it had never been filed with the

court and (ii) the clerk or judicial official will notify the filer that it has been rejected and specify the reason it was rejected.

~~(6)~~(8) **Orders, Judgments, Decrees, and Court Communications**. ~~The court may sign an order, judgment, decree, or other document electronically and may file a document electronically.~~Barring exceptional circumstances, the court must sign and file its orders, judgments, decrees, and other documents electronically in *Odyssey*. A document filed by the court in *Odyssey* is filed when it is electronically file-stamped by the clerk of superior court or by another judicial official who is authorized by law to accept the document. The court may ~~also~~ send notices and other communications to a person ~~by use of the electronic-filing system~~in *Odyssey*.

(c) **Paper Filing**. Documents filed in paper with the court should be unfolded and firmly bound with no manuscript cover. They must be letter size (8 ½" x 11"), except for wills and exhibits. The clerk of superior court may require a party to refile a document that does not conform to these requirements.

In civil actions, special proceedings, and estates, documents filed in paper with the court must include a cover sheet that summarizes the critical elements of the document in a format that the Administrative Office of the Courts prescribes. The clerk of superior court may not reject the filing of a document that does not include a cover sheet. Instead, the clerk must file the document, notify the party of the omission, and grant the party no more than five days to file the cover sheet. Other than dismissing the case, the court should not act on the document before the cover sheet is filed.

A document filed in paper is filed when it is file-stamped by the clerk of superior court or by another judicial official who is authorized by law to accept the document.

(d) **Service.** Service of pleadings and other documents must be made as provided by the General Statutes. A Notification of Service generated by the court's electronic-filing system is an "automated certificate of service" under Rule 5(b1) of the Rules of Civil Procedure.

(e) **Private Information**. A person should omit or redact nonpublic and unneeded sensitive information in a document before filing it with the court.

(f) **Business Court Cases**. The filing of documents with the North Carolina Business Court is governed by the North Carolina Business Court Rules. This rule defines how a person must file a document "with the Clerk of Superior Court in the county of venue" under Rule 3.11 of the North Carolina Business Court Rules in counties with *Odyssey*.

Comment

The North Carolina Judicial Branch ~~will implement~~is implementing *Odyssey*, a statewide electronic-filing and case-management system, ~~beginning in July 2021~~. The system will be made available across the state in phases ~~over a five-year period~~.

Rule 5 of the General Rules of Practice defines filing in those counties with *Odyssey*. Rule 5.1 defines filing in those counties without *Odyssey*.

Subsection (b)(2) of Rule 5 requires an attorney to file pleadings and other documents electronically in *Odyssey*. An attorney who seeks relief from this filing requirement for a particular document should be prepared to show the existence of an exceptional circumstance. In an exceptional circumstance, the attorney should exercise due diligence to file the document electronically before the attorney asks the court for relief.

Subsection (b)(4) of Rule 5 indicates that a document is filed when it is received by the court's electronic-filing system, not when it is processed by the clerk's office. The file stamp on the face of the document will therefore reflect the date and time of receipt. Subsection (b)(4) also implements a 5:00 p.m. filing deadline on the due date for a document. If a document is filed on its due date, then it is timely if it is filed by 5:00 p.m. and late if it is filed after 5:00 p.m.

Subsection (b)(5) of Rule 5 describes the process of asking the court for relief if an emergency prevents an attorney from filing a document electronically in a timely manner. Subsection (b)(5) should not be construed to expand the court's authority to extend time or periods of limitation. The court will provide relief only as permitted by law.

Subsection (b)(6) of Rule 5 indicates that a person may withdraw a document that has been filed electronically. The functionality for withdrawing a document is built into the filer's *Odyssey* interface and is available until the clerk of superior court or the judicial official who is authorized by law to accept the document begins processing it.

Subsection (b)(7) of Rule 5 specifies the reasons the clerk of superior court or another judicial official who is authorized by law to accept a document may nevertheless reject it. The first category permits the clerk or judicial official to reject a document if there is an order, a statute, or a rule that prohibits the document from being filed. For example, a clerk may reject a document if a gatekeeper order directs the clerk not to accept it, if a document is ordered null and void pursuant to N.C.G.S. § 14-118.6 because it is a false lien or encumbrance, or if a document is not permitted to be filed under Rule 5(d) of the Rules of Civil Procedure (e.g., a discovery request or response, an offer of settlement, or a document submitted to the court for in camera review). The second category permits the clerk or judicial official to reject a document if the filer submits a rejection request in writing to the clerk who is processing the document. This category gives the clerk's office an opportunity

to inform the filer of potential issues with a document so that the filer can correct mistakes and make changes to the document before it is accepted and added to the case file. The final category permits the clerk or judicial official to reject a document that is either unviewable due to corruption or potentially harmful because of a virus or other malicious software. If a document is rejected, the rule requires the clerk or judicial official to notify the filer that the document has been rejected and specify the reason it was rejected.

The North Carolina Business Court currently accepts filings through *eFlex*, a legacy electronic-filing and case-management system. Until *Odyssey* is implemented both in the Business Court and in the county of venue, duplicate filings in Business Court cases will still be required (see Rule 3.11 of the North Carolina Business Court Rules). Subsection (f) of Rule 5 of the General Rules of Practice clarifies that in Business Court cases, Rule 5 governs filings "with the Clerk of Superior Court in the county of venue."

As *Odyssey* is implemented, litigants should expect the General Rules of Practice, the North Carolina Business Court Rules, and the Supplemental Rules of Practice and Procedure for the North Carolina eFiling Pilot Project to undergo change.

* * *

Rule 5.1. Filing of Pleadings and Other Documents in Counties without *Odyssey*

(a) **Scope**. This rule applies only in those counties that have not yet implemented *Odyssey*, the Judicial Branch's new electronic-filing and case-management system. In a county with *Odyssey*, a person must proceed under Rule 5 of these rules.

(b) **Electronic Filing**. Electronic filing is available only in (i) cases that are either designated "complex business" or assigned to a Business Court judge under Rule 2.1 of these rules and (ii) cases subject to the legacy North Carolina eFiling Pilot Project. The procedure for filing documents electronically in those cases is governed by the North Carolina Business Court Rules and by the Supplemental Rules of Practice and Procedure for the North Carolina eFiling Pilot Project, respectively. In all other cases, only paper filing is available.

(c) **Paper Filing**. Documents filed in paper with the court should be unfolded and firmly bound with no manuscript cover. They must be letter size (8 ½" x 11"), except for wills and exhibits. The clerk of superior court may require a party to refile a document that does not conform to these requirements.

In civil actions, special proceedings, and estates, documents filed in paper with the court must include a cover sheet that summarizes the critical elements of the document in a format that the Administrative Office of the Courts prescribes. The clerk of superior court may not reject the

filing of a document that does not include a cover sheet. Instead, the clerk must file the document, notify the party of the omission, and grant the party no more than five days to file the cover sheet. Other than dismissing the case, the court should not act on the document before the cover sheet is filed.

A document filed in paper is filed when it is file-stamped by the clerk of superior court or by another judicial official who is authorized by law to accept the document.

Comment

The North Carolina Judicial Branch ~~will implement~~is implementing *Odyssey*, a statewide electronic-filing and case-management system, ~~beginning in July 2021~~. The system will be made available across the state in phases ~~over a five-year period~~.

Rule 5 of the General Rules of Practice defines filing in those counties with *Odyssey*. Rule 5.1 defines filing in those counties without *Odyssey*.

Subsection (b) of Rule 5.1 lists those contexts in which electronic filing exists in the counties without *Odyssey*.

As *Odyssey* is implemented, litigants should expect the General Rules of Practice, the North Carolina Business Court Rules, and the Supplemental Rules of Practice and Procedure for the North Carolina eFiling Pilot Project to undergo change.

* * *

These amendments to the General Rules of Practice for the Superior and District Courts become effective on 13 February 2023.

These amendments shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 1st day of February 2023.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of February 2023.

s/Grant E. Buckner

GRANT E. BUCKNER
Clerk of the Supreme Court

ORDER AMENDING THE GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

Pursuant to section 7A-34 and subsection 7A-49.5(e) of the General Statutes of North Carolina, the Court hereby adopts Rule 29 of the General Rules of Practice for the Superior and District Courts.

* * *

Rule 29. Definition of "Seal."

In all cases in which the seal of any court or judicial office is required by law to be affixed to any paper issuing from a court or office, the word "seal" shall be construed to include an impression of the official seal, made upon the paper alone, an impression made by means of a wafer or of wax affixed thereto, or an electronic image adopted as the official seal affixed thereto. The Administrative Office of the Courts may prescribe the format and appearance of an electronic image adopted for use as an official seal.

* * *

This amendment to the General Rules of Practice for the Superior and District Courts becomes effective on 13 February 2023.

This amendment shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 9th day of February 2023.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 9th day of February 2023.

s/Grant E. Buckner

GRANT E. BUCKNER
Clerk of the Supreme Court

ORDER AMENDING THE RULES OF APPELLATE PROCEDURE

Pursuant to Article IV, Section 13(2), of the Constitution of North Carolina, the Court hereby amends Rule 26 of the North Carolina Rules of Appellate Procedure.

* * *

Rule 26. Filing and Service

(a) **Filing**. Counsel must file documents in the appellate courts electronically~~. The electronic-filing site for the appellate courts is located~~ at https://www.ncappellatecourts.org. If a technical failure prevents counsel from filing a document by use of the electronic-filing site, then the clerk of the appellate court may permit the document to be filed in paper by hand delivery, mail, or fax. Counsel may file copies of oversized documents and non-documentary items electronically if permitted to do so by the electronic-filing site, but otherwise by hand delivery or mail.

A person who is not represented by counsel is encouraged to file items in the appellate courts electronically but is not required to do so. A person not represented by counsel may file items by hand delivery or mail.

An item is filed in the appellate court electronically when it is received by the electronic-filing site. An item is filed in paper when it is received by the clerk, except that motions, responses to petitions, the record on appeal, and briefs filed by mail are deemed filed on the date of mailing as evidenced by the proof of service.

(b) **Service Required**. Copies of all items filed by any party~~ and not required by these rules to be served by the clerk~~ shall, at or before the time of filing, be served on all other parties to the appeal.

(c) **Manner of Service**. Service of any item may be made upon a party's attorney of record or upon a party in the manner provided for service and return of process in Rule 4 of the Rules of Civil Procedure ~~and may be so made upon a party or upon its attorney of record~~. Service of any item may ~~also~~alternatively be made upon a ~~party or its attorney of record~~party's attorney of record or upon a party by delivering a copy to either or by mailing a copy to the recipient's last known address, or if no address is known, by filing it in the office of the clerk with whom the original item is filed. Delivery of a copy within this rule means handing it to the attorney or to the party~~,~~ or leaving it at the attorney's office with a partner or employee. Service by mail is complete upon deposit of the item enclosed in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United

States Postal Service, or, for those having access to such services, upon deposit with the State Courier Service or Inter-Office Mail. ~~When a document is filed electronically to the electronic filing site, service also may be accomplished electronically by use of the other counsel's correct and current e-mail address(es), or service may be accomplished in the manner described previously in this subsection.~~

If the item to be served is filed electronically in the appellate courts using the appellate courts' electronic-filing site, then service may alternatively be made upon a party's attorney of record by e-mail to the attorney's correct and current e-mail address. If the item to be served is filed with the clerk of superior court using *Odyssey*, the trial court's electronic-filing system, then service may alternatively be made using the service feature in that system.

(d) **Proof of Service**. Items presented for filing shall contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. Proof of service shall appear on or be affixed to the items filed. But if the item is filed with the clerk of superior court and served using *Odyssey*, then a Notification of Service generated by that system satisfies the requirements of this subsection.

(e) **Joint Appellants and Appellees**. Any item required by these rules to be served on a party is properly served upon all parties joined in the appeal by service upon any one of them.

(f) **Numerous Parties to Appeal Proceeding Separately**. When there are unusually large numbers of appellees or appellants proceeding separately, the trial tribunal, upon motion of any party or on its own initiative, may order that any items required by these rules to be served by a party on all other parties need be served only upon parties designated in the order, and that the filing of such an item and service thereof upon the parties designated constitutes due notice of it to all other parties. A copy of every such order shall be served upon all parties to the action in such manner and form as the court directs.

(g) **Formatting of Documents Filed with Appellate Courts**.

(1) **Form of Documents**. Documents composed for an appeal and presented to either appellate court for filing shall be letter size (8½ x 11"). Documents shall be prepared using a proportionally spaced font with serifs that is no smaller than 12-point and no larger than 14-point in size. Examples of proportionally spaced fonts with serifs include, but are not limited to, Constantia and Century typeface as described in Appendix B to these rules. The

body of text shall be presented with double spacing between each line of text. Lines of text shall be no wider than 6½ inches, leaving a margin of approximately one inch on each side. The format of all documents presented for filing shall follow the additional instructions found in the appendixes to these rules. The format of briefs shall follow the additional instructions found in Rule 28(j).

(2) **Index Required**. Documents composed for an appeal and presented to either appellate court, other than records on appeal, which in this respect are governed by Rule 9, shall, unless they are less than ten pages in length, be preceded by a subject index of the matter contained therein, with page references, and a table of authorities, i.e., cases (alphabetically arranged), constitutional provisions, statutes, and textbooks cited, with references to the pages where they are cited.

(3) **Closing**. The body of a document composed for an appeal shall at its close bear the printed name, post office address, telephone number, State Bar number, and e-mail address of counsel of record, and in addition, at the appropriate place, the signature of counsel of record.

* * *

These amendments to the North Carolina Rules of Appellate Procedure are effective 13 February 2023 and apply to cases that are appealed on or after that date.

These amendments shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 1st day of March 2023, *nunc pro tunc* 13 February 2023.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of March 2023.

s/Grant E. Buckner

GRANT E. BUCKNER
Clerk of the Supreme Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES GOVERNING THE DISCIPLINE & DISABILITY OF ATTORNEYS

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 October 21, 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. 01B, Section .0100, *Discipline and Disability of Attorneys*, be amended as shown in the following attachment:

ATTACHMENT 1: 27 N.C.A.C. 01B, Section .0100, Rule .0119, *Effect of a Finding of Guilt in Any Criminal Case*

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 October 21, 2022.

Given over my hand and the Seal of the North Carolina State Bar, this the 3rd day of February, 2023.

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 1st day of March, 2023.

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 1st day of March, 2023.

s/Allen, J.
For the Court

SUBCHAPTER 1B – DISCIPLINE AND DISABILITY RULES

SECTION .0100 – DISCIPLINE AND DISABILITY OF ATTORNEYS

27 NCAC 01B .0119 EFFECT OF A FINDING OF GUILT IN ANY CRIMINAL CASE

(a) Conclusive Evidence of Guilt - A certified copy of the conviction of ~~an attorney~~ **a member** for any crime or a certified copy of a judgment entered against ~~an attorney where~~ **a member in which** a plea of guilty, *nolo contene**n**dre*, or no contest has been accepted by a court will be conclusive evidence of guilt of that crime in any disciplinary proceeding instituted against a member. For purposes of any disciplinary proceeding against a member, such conviction or judgment ~~shall~~ conclusively establish**es** all elements of the criminal offense and ~~shall~~ conclusively establishes all facts set out in the document charging the member with the criminal offense.

. . .

(c) When Conviction is Expunged, Overturned or Otherwise Eliminated -

(1) Any request for relief as a result of an expunction of any kind shall be made under the provisions of this rule, including but not limited to expunctions of convictions, expunctions from dismissals of charges or findings of not guilty, and expunctions related to prayer for judgment continued and conditional discharges.

(2) Definitions.

(A) "Expunged action" refers to the thing expunged, which may include but is not limited to a conviction, a judgment entered against a member in which the member is adjudged guilty of a criminal offense, a judgment entered against a member in which a plea of guilty, *nolo contendere*, or no contest was accepted by the court, a charge dismissed or otherwise resolved pursuant to a prayer for judgment disposition, or a charge dismissed pursuant to a conditional discharge disposition.

(B) An order of discipline or other disciplinary action issued by the Grievance Committee or the commission ("the discipline") is based solely upon a conviction or other expunged action when there is no evidence in the record before the body that issued

the discipline other than documentation of the conviction or expunged action.

(C) Any admissions of the member contained in a consent order of discipline entered by the commission and signed by the member or an affidavit surrendering the member's law license constitute evidence in the record other than documentation of the conviction or expunged action.

(3) Discipline Based Solely Upon Conviction or Expunged Action.

(A) If discipline was imposed upon a member based solely upon a conviction or expunged action and the conviction or expunged action is reversed, vacated, expunged, or otherwise eliminated, the discipline shall be vacated.

(B) The State Bar may initiate another disciplinary proceeding against the member alleging rule violations and seeking imposition of discipline based upon the facts or events underlying the conviction or expunged action.

(4) Discipline Based in Part Upon Conviction or Expunged Action. If discipline was imposed upon a member based in part upon a conviction or expunged action and the conviction or expunged action is reversed, vacated, expunged, or otherwise eliminated, the member may petition the body that issued the discipline for one of the following forms of relief:

(A) Redaction. All references to the conviction, charges, and/or expunged action redacted from the original discipline.

(B) Substituted Discipline. All references to the conviction, charges, and/or expunged action omitted in a substituted discipline identical in all other respects to the original discipline. Substituted discipline will be entered *nunc pro tunc* to the date of entry of the original discipline and will have the same effective date as the original discipline. Substituted discipline will reflect the filing date on which the substituted discipline is entered.

(C) Modified Discipline. When the original discipline was not a consent order of discipline entered by the

commission and signed by the member, the member may seek an order replacing the original discipline with modified discipline imposing a different disposition and omitting all references to the conviction, charges, and/or expunged action. Modified discipline will be entered *nunc pro tunc* to the date of entry of the original discipline and will have the same effective date as the original discipline. Modified discipline will reflect the filing date on which the modified discipline is entered.

(5) Procedures.

(A) A member may petition the body that issued the original discipline for relief under this section. The petition must be served simultaneously upon the counsel. If the action that eliminated the conviction is sealed or otherwise not public record, the member may file the petition under seal without seeking leave to do so. The petition shall be accompanied by documentation of the action that eliminated the conviction or expunged action, and shall specify which form of relief the member seeks. If the member seeks relief under section (c)(4)(A) or (c)(4)(B) above, the petition shall include proposed redacted or substituted discipline.

(B) The State Bar shall have thirty days from receipt of the petition to file a written response, which must be served simultaneously upon the member. If the petition was filed under seal, the response shall be filed under seal. If the member seeks relief under section (c)(4)(A) or (c)(4)(B) above, the response (i) shall indicate whether the State Bar consents to the redacted or substituted discipline proposed by the member or (ii) shall include redacted or substituted discipline proposed by the State Bar.

(C) When the original discipline was issued by the Grievance Committee, the counsel shall forward to the Grievance Committee within forty days of the date of service of the petition upon the counsel (i) the member's petition for relief and accompanying supporting documentation, (ii) the State Bar's response, and (iii) the evidence considered by the Grievance Committee when it issued the original discipline.

(D) When the original discipline was issued by the commission after a hearing, the member shall obtain a transcript of the hearing at the member's sole expense. The member shall provide official copies of the transcript to the commission and to the counsel within ninety days of the date of the petition. For good cause shown, the commission may enlarge the time for provision of the transcript. If the member does not timely provide official copies of the transcript to the commission and to the counsel, the member will be ineligible for the relief described in section (c)(4)(C).

(E) Consideration and Action.

(i) Grievance Committee - The Grievance Committee will not consider new evidence. The committee will take action on the petition at its next available quarterly meeting occurring at least two weeks after the materials required by section (c)(5)(C) above were forwarded to the committee. The Grievance Committee will consider the matter, determine whether the discipline was based in whole or in part upon the conviction or expunged action, and take action as set forth in sections (c)(3) and (c)(4) above.

(ii) Commission - The commission will not consider new evidence. Upon receipt of the petition and response, the chairperson of the commission will appoint a hearing panel. If the original discipline was issued after a hearing, within thirty days of appointment of the hearing panel the clerk will ensure the hearing panel has the exhibits that were entered into evidence and a list of witnesses who testified at the original hearing. In a case to which (c)(5)(D) applies, the hearing panel will not consider the petition until the member has provided the transcript to the hearing panel and to the counsel or until the time has run for the transcript to be provided. The hearing panel will consider the matter, determine whether the discipline was based in whole or in part upon the conviction or expunged action, and will take action as set forth in sections (c)(3) and (c)(4) above.

The hearing panel will enter an order containing findings of fact and conclusions of law and ordering the action to be taken. The order will be entered under seal if the petition seeking relief was filed under seal.

(F) Expunged Action Referenced in Public Commission Records. Upon relief granted by the commission as set forth above, the commission shall also redact from all public commission records any reference to the expunged action.

History Note: *Authority G.S. 84-23; 84-28;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: November 7, 1996; March 6, 1997; December 30, 1998; February 3, 2000; September 22, 2016; March 1, 2023.

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 October 21, 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 .0902, *Reinstatement from 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 October 21, 2022.

Given over my hand and the Seal of the North Carolina State Bar, this the 3rd day of February, 2023.

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 1st day of March, 2023.

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 1st day of March, 2023.

s/Allen, 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 .0902 REINSTATEMENT FROM INACTIVE STATUS

(a) Eligibility to Apply for Reinstatement

. . .

(c) Requirements for Reinstatement

(1) Completion of Petition.

. . . .

. . .

(5) Bar Exam and MPRE Requirement If Inactive Seven or More Years.

(A) . . . .

(B) A member may offset the inactive status period for the purpose of calculating the seven years necessary to actuate the requirements of paragraph (A) as follows:

(1) . . . .

. . .

(3) Federal Court Judicial Service. Each calendar year in which an inactive member served in the federal judiciary, whether for the entire calendar year or some portion thereof, shall offset one year of inactive status for the purpose of calculating the seven years necessary to actuate the requirements of paragraph (A). Such service shall also satisfy the CLE requirements set forth in paragraph (c)(4) for each year, or portion thereof, that the member served as a federal judge.

(6) Payment of Fees, Assessments and Costs.

. . .

(d) . . . .

. . .

History Note: *Authority G.S. 84-23;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: September 7, 1995; March 7, 1996; March 5, 1998; March 3, 1999; February 3, 2000; March 6, 2002; February 27, 2003; March 3, 2005; March 10, 2011; August 25, 2011; March 8, 2012; March 8, 2013; March 6, 2014; October 2, 2014; September 22, 2016; September 20, 2018; September 25, 2020; December 14, 2021; March 1, 2023.

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES CONCERNING PREPAID LEGAL SERVICES PLANS

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 October 21, 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. 01E, Section .0300, *Rules Concerning Prepaid Legal Services Plans*, be amended as shown in the following attachment:

ATTACHMENT 3: 27 N.C.A.C. 01E, Section .0300, Rule .0301, *Definitions*

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 October 21, 2022.

Given over my hand and the Seal of the North Carolina State Bar, this the 3rd day of February, 2023.

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 1st day of March, 2023.

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 1st day of March, 2023.

s/Allen, J.
For the Court

SUBCHAPTER 1E - REGULATIONS FOR ORGANIZATIONS PRACTICING LAW

SECTION .0300 - RULES CONCERNING PREPAID LEGAL SERVICES PLANS

27 NCAC 01E .0301 DEFINITIONS

The following words and phrases when used in this subchapter shall have the meanings given to them in this rule:

(a) . . . .

. . .

(c) Prepaid Legal Services Plan or Plan – any arrangement by which a person or entity, not authorized to engage in the practice of law, in exchange for any valuable consideration, offers to arrange the provision of specified legal services that are paid for in advance of any immediate need for the specified legal services ("covered services"). ~~In addition to covered services, a plan may arrange the provision of specified legal services at fees that are less than what a non-member of the plan would normally pay.~~ The North Carolina legal services arranged by a plan must be provided by a North Carolina licensed attorney who is not an employee, director, or owner of the plan. A plan does not include the sale of an identified, limited legal service, such as drafting a will, for a fixed, one-time fee.

History Note: *Authority G.S. 84-23; 84-23.1;*
Approved by the Supreme Court: February 5, 2002;
Amendments Approved by the Supreme Court: August 23, 2007; September 25, 2020; March 1, 2023;
Rule was transferred from 27 NCAC 01E .0303 on September 25, 2020.

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 was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 21, 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*, and Section .0400, *Transactions with Persons Other Than Clients*, be amended as shown in the following attachments:

ATTACHMENT 4 - A: 27 N.C.A.C. 02, Section .0100, Rule 1.15-1, *Definitions*

ATTACHMENT 4 - B: 27 N.C.A.C. 02, Section .0100, Rule 1.15-2, *General Rules*

ATTACHMENT 4 - C: 27 N.C.A.C. 02, Section .0100, Rule 1.15-3, *Records and Accountings*

ATTACHMENT 4 - D: 27 N.C.A.C. 02, Section .0400, Rule 4.1, *Truthfulness in Statements to Others*

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 October 21, 2022.

Given over my hand and the Seal of the North Carolina State Bar, this the 3rd day of February, 2023.

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 1st day of March, 2023.

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 1st day of March, 2023.

s/Allen, J.
For the Court

CHAPTER 02 - RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR

27 NCAC 02 RULE 1.15-1 DEFINITIONS

For purposes of this Rule 1.15, the following definitions apply:

(a) "Administrative ledger" denotes a written or computerized register, maintained for lawyer or firm funds deposited into a general or dedicated trust account or fiduciary account pursuant to Rule 1.15-2(g)(1) that lists, in chronological order, every deposit into and each disbursement from the trust account or fiduciary account of such funds, and shows the current balance of funds after each such transaction.

(~~a~~**b**) "Bank" denotes a bank savings and loan association, or credit union chartered under North Carolina or federal law.

(~~b~~**c**) "Client" denotes a person, firm, or other entity for whom a lawyer performs, or is engaged to perform, any legal services.

(d) "Client ledger" denotes a written or computerized register, maintained for each client (person or entity) whose funds are deposited into a trust account that lists, in chronological order, every deposit into and each disbursement from the trust account for the client, and shows the current balance of funds after each such transaction.

(~~c~~**e**) "Dedicated trust account" denotes a trust account that is maintained for the sole benefit of a single client or with respect to a single transaction or series of integrated transactions.

(~~d~~**f**) "Demand deposit" denotes any account from which deposited funds can be withdrawn at any time without notice to the depository institution.

(~~e~~**g**) "Electronic transfer" denotes a paperless transfer of funds.

(~~f~~**h**) "Entrusted property" denotes trust funds, fiduciary funds and other property belonging to someone other than the lawyer which is in the lawyer's possession or control in connection with the performance of legal services or professional fiduciary services.

(~~g~~**i**) "Fiduciary account" denotes an account, designated as such, maintained by a lawyer solely for the deposit of fiduciary funds or other entrusted property of a particular person or entity.

(~~h~~**j**) "Fiduciary funds" denotes funds belonging to someone other than the lawyer that are received by or placed under the control of the lawyer in connection with the performance of professional fiduciary services.

(~~i~~**k**) "Funds" denotes any form of money, including cash, payment instruments such as checks, money orders, or sales drafts, and receipts from electronic fund transfers.

(l) "General ledger" denotes a written or computerized register, maintained for each general and dedicated trust account and each fiduciary account, that lists in chronological order every deposit into and each disbursement from the account, and shows the current balance of funds after each such transaction.

(~~j~~**m**) "General trust account" denotes any trust account other than a dedicated trust account.

(~~k~~**n**) "Item" denotes any means or method by which funds are credited to or debited from an account; for example: a check, substitute check, remotely created check, draft, withdrawal order, automated clearinghouse (ACH) or electronic transfer, electronic or wire funds transfer, electronic image of an item and/or information in electronic form describing an item, or instructions given in person or by telephone, mail, or computer.

(~~l~~**o**) "Legal services" denotes services (other than professional fiduciary services) rendered by a lawyer in a client-lawyer relationship.

(~~m~~**p**) "Professional fiduciary services" denotes compensated services (other than legal services) rendered by a lawyer as a trustee, guardian, personal representative of an estate, attorney-in-fact, or escrow agent, or in any other fiduciary role customary to the practice of law.

(q) "Subsidiary ledger" denotes a client ledger or administrative ledger.

(~~n~~**r**) "Trust account" . . . .

(~~o~~**s**) "Trust funds" denotes funds belonging to someone other than the lawyer that are received by or placed under the control of the lawyer in connection with the performance of legal services.

History Note: *Authority G.S. 84-23;*
Approved by the Supreme Court: July 24, 1997;
Amendments Approved by the Supreme Court: May 4, 2000; March 1, 2003; March 6, 2008; October 8, 2009; August 23, 2012; June 9, 2016; April 5, 2018; March 1, 2023.

CHAPTER 02 - RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR

27 NCAC 02 RULE 1.15-2 GENERAL RULES

(a) . . . .

(b) Deposit of Trust Funds. . . . General trust accounts are to be administered in accordance with the Rules of Professional Conduct and the provisions of 27 NCAC Chapter 1, Subchapter D, Sections .1300.

. . .

(e) Location of Accounts. . . . .

(f) ~~(f)~~ **Bank Directive. Every lawyer maintaining a trust account or fiduciary account with demand deposit at a bank or other financial institution shall file with the bank or other financial institution a written directive requiring the bank or other financial institution to report to the executive director of the North Carolina State Bar when an instrument drawn on the account is presented for payment against insufficient funds. No trust account or fiduciary account shall be maintained in a bank or other financial institution that does not agree to make such reports.**

(**f**~~f~~**g**) Funds in Accounts. A trust or fiduciary account may only hold entrusted property. Third party funds that are not received by or placed under the control of the lawyer in connection with the performance of legal services or professional fiduciary services may not be deposited or maintained in a trust or fiduciary account. Additionally, no funds belonging to ~~a~~ the lawyer shall be deposited or maintained in a trust account or fiduciary account of the lawyer except:

. . . .

(**g**~~g~~**h**) Mixed Funds Deposited Intact. . . . .

(~~h~~**i**) Items Payable to Lawyer. . . . .

(~~i~~**j**) No Bearer Items. . . . .

(~~j~~**k**) Debit Cards Prohibited. . . . .

(~~k~~**l**) No Benefit to Lawyer or Third Party. . . . .

~~(l)~~

(m) Notification of Receipt. . . . .

. . .

(p) Duty to Report Misappropriation. A lawyer who discovers or reasonably believes that entrusted property has been misappropriated or misapplied shall promptly inform the Trust Account Compliance Counsel (TACC) in the North Carolina State Bar Office of Counsel. Discovery of intentional theft or fraud must be reported to the TACC immediately. When an accounting or bank error results in an unintentional and inadvertent use of one client's trust funds to pay the obligations of another client, the event must be reported unless the misapplication is discovered and rectified on or before the next quarterly reconciliation required by Rule 1.15-3(d)**(2)**~~(1)~~. This rule requires disclosure of information otherwise protected by Rule 1.6 if necessary to report the misappropriation or misapplication.

. . . .

History Note: *Authority G.S. 84-23;*
Approved by the Supreme Court: July 24, 1997;
Amendments Approved by the Supreme Court: March 1, 2003; March 6, 2008; February 5, 2009; August 23, 2012; June 9, 2016; April 5, 2018; March 1, 2023.

CHAPTER 02 - RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR

27 NCAC 02 RULE 1.15-3 RECORDS AND ACCOUNTINGS

(a) Check Format. . . . .

. . .

(d) Reconciliations of General Trust Accounts.

(~~2~~**1**) **Monthly Reconciliations. Each month, the balance of the trust account as shown on the lawyer's records shall be reconciled with the current bank statement balance for the trust account.**

(~~1~~**2**) Quarterly Reconciliations. For each general trust account, a reconciliation report shall be prepared at least quarterly. Each reconciliation report shall show all of the following balances and verify that they are identical:

. . . .

(3) The lawyer shall review, sign, date, and retain a copy of the reconciliations of the general trust account for a period of six years in accordance with Rule 1.15-3**(h)**~~(g)~~.

(~~i~~**e**) Reviews.

(1) Each month, for each general trust account, dedicated trust account, and fiduciary account, the lawyer shall review the bank statement and cancelled checks for the month covered by the bank statement.

(2) Each quarter, for each general trust account and dedicated trust account, the lawyer shall review the statement of costs and receipts, client ledger, and cancelled checks of a random sample of representative transactions completed during the quarter to verify that the disbursements were properly made. The transactions reviewed must involve multiple disbursements unless no such transactions are processed through the account, in which case a single disbursement is considered a transaction for the purpose of this paragraph. A sample of three representative transactions shall satisfy this requirement, but a larger sample may be advisable.

(3) Each quarter, for each fiduciary account, the lawyer shall engage in a review as described in Rule 1.15-3~~(i)~~ (e)(2); however, if the lawyer manages more than ten fiduciary accounts, the lawyer may perform reviews on a random sample of at least ten fiduciary accounts in lieu of performing reviews on all such accounts.

(4) The lawyer shall take the necessary steps to investigate, identify, and resolve within ten days any discrepancies discovered during the monthly and quarterly reviews.

(5) A report of each monthly and quarterly review, including a description of the review, the transactions sampled, and any remedial action taken, shall be prepared. The lawyer shall sign, date, and retain a copy of the report and associated documentation for a period of six years in accordance with Rule 1.15-3(h)~~(g)~~.

(~~e~~**f**) Accountings for Trust Funds. . . . .

(~~f~~**g**) Accountings for Fiduciary Property. . . . .

(~~g~~**h**) Minimum Record Keeping Period. . . . .

(~~j~~i) Retention of Records in Electronic Format. Records required by Rule 1.15-3 may be created, updated, and maintained electronically, provided:

(1) the records otherwise comply with Rule 1.15-3, to wit: electronically created reconciliations and reviews that are not printed must be reviewed by the lawyer and electronically signed using a "digital signature" as defined in 21 CFR 11.3(b)(5);

(2) printed and electronic copies of the records in industry-standard formats can be made on demand; and

(3) the records are regularly backed up by an appropriate storage device.

(~~h~~**j**) Audit by State Bar. . . . .

History Note: *Authority G.S. 84-23;*
Adopted by the Supreme Court: July 24, 1997;
Amendments Approved by the Supreme Court: March 1, 2003; October 6, 2004; March 6, 2008; June 9, 2016; April 5, 2018; March 1, 2023.

CHAPTER 02 - RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR

27 NCAC 02 RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person.

COMMENT

. . .

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortuious misrepresentation.

. . . .

History Note: *Authority G.S. 84-23;*
Approved by the Supreme Court July 24, 1997;
Amendments Approved by the Supreme Court: February 27, 2003; March 1, 2023.

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES GOVERNING STANDING COMMITTEES OF THE COUNCIL

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 January 20, 2023.

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 .0700, *Standing Committees of the Council*, be amended as shown in the following attachment:

ATTACHMENT 5: 27 N.C.A.C. 01A, Section .0700, Rule .0701, *Standing Committees and Boards*

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 January 20, 2023.

Given over my hand and the Seal of the North Carolina State Bar, this the 3rd day of February, 2023.

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 1st day of March, 2023.

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 1st day of March, 2023.

s/Allen, J.
For the Court

SUBCHAPTER 1A – ORGANIZATION OF THE NORTH CAROLINA STATE BAR

SECTION .0700 – STANDING COMMITTEES OF THE COUNCIL

27 NCAC 01A .0701 STANDING COMMITTEES AND BOARDS

(a) Standing Committees. Promptly after his or her election, the president shall appoint members to the standing committees identified below to serve for one year beginning January 1 of the year succeeding his or her election. Members of the committees need not be councilors, except to the extent expressly required by these rules, and may include non-lawyers. Unless otherwise directed by resolution of the council, all members of a standing committee, whether councilors or non-councilors, shall be entitled to vote as members of the standing committee or any subcommittee or panel thereof.

(1) Executive Committee. It shall be the duty of the Executive Committee to receive reports and recommendations from standing committees, boards, and special committees; to nominate individuals for appointments made by the council; to make long range plans for the State Bar; and to perform such other duties and consider such other matters as the council or the president may designate.

. . .

(9) Access to Justice Committee. It shall be the duty of the Access to Justice Committee to study and to recommend to the council programs and initiatives that respond to the profession's responsibility, set forth in the Preamble to the Rules of Professional Conduct, "to ensure equal access to our system of justice for all those who, because of economic or social barriers, cannot afford or secure adequate legal counsel." 27 N.C. Admin. Code 2.0.1, *Preamble*.

(b) Boards. . . . .

. . . .

History Note: *Authority G.S. 84-22; G.S. 84-23;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: June 12, 1996; February 3, 2000; October 6, 2004; November 16, 2006; March 8, 2007; March 11, 2010; October 7, 2010; September 22, 2016; April 5, 2018; September 25, 2019; March 1, 2023.

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES GOVERNING THE ADMINISTRATION OF THE PLAN FOR INTEREST ON LAWYERS' TRUST ACCOUNTS (IOLTA)

The following amendments 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 January 20, 2023.

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 .1300, *Rules Governing the Administration of the Plan for Interest on Lawyers' Trust Accounts (IOLTA)*, be amended as shown in the following attachments:

ATTACHMENT 7 - A: 27 N.C.A.C. 01D, Section .1300, Rule .1306, *Appointment of Members; When; Removal*

ATTACHMENT 7 - B: 27 N.C.A.C. 01D, Section .1300, Rule .1313, *Fiscal Responsibility*

ATTACHMENT 7 - C: 27 N.C.A.C. 01D, Section .1300, Rule .1314, *Meetings*

ATTACHMENT 7 - D: 27 N.C.A.C. 01D, Section .1300, Rule .1316, *IOLTA Accounts*

ATTACHMENT 7 - E: 27 N.C.A.C. 01D, Section .1300, Rule .1319, *Certification*

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 January 20, 2023.

Given over my hand and the Seal of the North Carolina State Bar, this the 3rd day of February, 2023.

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 1st day of March, 2023.

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 1st day of March, 2023.

s/Allen, J.
For the Court

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1300 - RULES GOVERNING THE ADMINISTRATION OF THE PLAN FOR INTEREST ON LAWYERS' TRUST ACCOUNTS (IOLTA)

27 NCAC 01D .1306 APPOINTMENT OF MEMBERS; WHEN; REMOVAL

The members of the board shall be appointed by the Council of the North Carolina State Bar. **The council will make appointments for upcoming vacancies occurring at the end of a member's term prior to the term ending on August 31.**~~The July quarterly meeting is when the appointments are made~~. Vacancies occurring by reason of death, resignation or removal shall be filled by appointment of the council at the next quarterly meeting following the event giving rise to the vacancy, and the person so appointed shall serve for the balance of the vacated term. Any member of the board may be removed at any time by an affirmative vote of a majority of the members of the council in session at a regularly called meeting.

History Note: *Authority G.S. 84-23;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: March 1, 2023.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1300 - RULES GOVERNING THE ADMINISTRATION OF THE PLAN FOR INTEREST ON LAWYERS' TRUST ACCOUNTS (IOLTA)

27 NCAC 01D .1313 FISCAL RESPONSIBILITY

All funds of the board shall be considered funds of the North Carolina State Bar, with the beneficial interest in those funds being vested in the board for grants to qualified applicants in the public interest, less administrative costs. . . . .

(a) Maintenance of Accounts: Audit - The funds of the IOLTA program shall be maintained in a separate account from funds of the North Carolina State Bar such that the funds and expenditures therefrom can be readily identified. The accounts of the board shall be audited on an annual basis. The audit will be conducted after the books are closed at a time determined by the auditors, but not later than ~~March 31~~ **April 30** of the year following the year for which the audit is to be conducted.

. . . .

History Note: *Authority G.S. 84-23;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: September 28, 2017; March 1, 2023.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1300 - RULES GOVERNING THE ADMINISTRATION OF THE PLAN FOR INTEREST ON LAWYERS' TRUST ACCOUNTS (IOLTA)

27 NCAC 01D .1314 MEETINGS

The board by resolution may set regular meeting dates and places. Special meetings of the board may be called at any time upon notice given by the chairperson, the vice chairperson or any two members of the board. Notice of **the** meeting shall be given **to all members of the board** at least two days prior to the meeting **as directed by the board.** ~~by mail, telegram, facsimile transmission, or telephone.~~ **Notice shall also be provided as required by any statutory provision regulating notice of public meetings of agencies of the state**. A quorum of the board for conducting its official business shall be a majority of the total membership of the board.

History Note: *Authority G.S. 84-23;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: March 1, 2023.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1300 - RULES GOVERNING THE ADMINISTRATION OF THE PLAN FOR INTEREST ON LAWYERS' TRUST ACCOUNTS (IOLTA)

27 NCAC 01D .1316 IOLTA ACCOUNTS

(a) IOLTA Account Defined. . . . Additionally, pursuant to G.S. 45A-9, a settlement agent who maintains a trust or escrow account for the purposes of receiving and disbursing closing funds and loan funds shall direct that any interest earned on funds held in that account be paid to the N**orth** C**arolina** State Bar to be used for the purposes authorized under the Interest on Lawyers**'** Trust Account Program according to Section .1316(d) below. . . . .

(b) Eligible Banks. Lawyers may **only** maintain **an** ~~one or more~~ IOLTA Account~~(s) only~~ at banks and savings and loan associations chartered under North Carolina or federal law, as required by Rule 1.15 of the Rules of Professional Conduct, that offer and maintain IOLTA Accounts that comply with the requirements set forth in this Subchapter (Eligible Banks). . . . .

(c) Notice Upon Opening or Closing IOLTA Account. . . . Such notice shall include (i) the name of the bank where the account is maintained, (ii) the name of the account, (iii) the account number, and (iv) the name**s** and bar number**s** of the lawyer~~(s)~~ in the firm and/or the name~~(s)~~ of any non-lawyer settlement agent~~(s)~~ maintaining the account. The North Carolina State Bar shall furnish to each lawyer/law firm or settlement agent maintaining an IOLTA Account a ~~suitable plaque~~ **notice to clients** explaining the program, which ~~plaque~~ shall be exhibited in the office **of** the lawyer/law firm or settlement agent.

(d) Directive to Bank. Every lawyer/**law firm** or ~~law firm and every~~ settlement agent maintaining a North Carolina IOLTA Accounts shall direct any bank in which an IOLTA Account is maintained to:

(1) . . . ;

(2) transmit with each remittance to NC IOLTA a statement showing for each account: (i) the name of the **lawyer**/law firm ~~/lawyer~~ or settlement agent maintaining the account, . . . ; and

(3) transmit to the **lawyer**/law firm~~/lawyer~~ or settlement agent maintaining the account a report showing the amount remitted to NC IOLTA, the earnings period, and the rate of interest applied in computing the remittance.

(e) Allowable Reasonable Service Charges. . . . All service charges other than allowable reasonable service charges assessed against an IOLTA Account are the responsibility of and shall be paid by the lawyer/~~ or~~ law firm **or settlement agent**. . . . .

History Note: *Authority G.S. 84-23;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: March 6, 2008; February 5, 2009; January 28, 2010; March 8, 2012; August 23, 2012; March 1, 2023.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1300 - RULES GOVERNING THE ADMINISTRATION OF THE PLAN FOR INTEREST ON LAWYERS' TRUST ACCOUNTS (IOLTA)

27 NCAC 01D .1319 CERTIFICATION

Every lawyer admitted to practice in North Carolina shall certify annually on or before June 30 to the North Carolina State Bar that all general trust accounts maintained by the lawyer or his or her law firm are established and maintained as IOLTA accounts as prescribed by Rule 1.15 of the Rules of Professional Conduct and Rule .1316 of this subchapter or that the lawyer ~~is exempt from this provision because he or she~~ does not maintain any general trust account(s) for North Carolina client funds. Any lawyer acting as a settlement agent who maintains a trust or escrow account used for the purpose of receiving and disbursing closing and loan funds shall certify annually on or before June 30 to the North Carolina State Bar that such accounts are established and maintained as IOLTA accounts as prescribed by G.S. 45A-9 and Rule .1316 of this subchapter.

History Note: *Authority - Order of the N.C. Supreme Court;*
Approved by the Supreme Court: March 6, 2008;
Amendments Approved by the Supreme Court: February 5, 2009;
Recodified from Rule .1318 Eff. July 1, 2010;
Amendments Approved by the Supreme Court: March 8, 2012; March 1, 2023.

ORDER AMENDING THE STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS

Pursuant to subsection 7A-38.2(a) of the General Statutes of North Carolina, the Court hereby adopts Standard 9 of the Standards of Professional Conduct for Mediators.

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Standard 9. Unlawful Discrimination Prohibited

A mediator shall not engage in unlawful discriminatory conduct within the mediation process.

A mediator shall not engage in conduct within the mediation process that the mediator knows, or reasonably should know, discriminates against a person on an unlawful basis. This standard does not limit the prerogative of a mediator to accept, decline, or withdraw from a matter in accordance with these standards.

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This amendment to the Standards of Professional Conduct for Mediators becomes effective on 1 May 2023.

This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 4th day of April 2023.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 4th day of April 2023.

s/Grant E. Buckner

GRANT E. BUCKNER
Clerk of the Supreme Court

ORDER AMENDING THE RULES OF MEDIATION FOR FARM NUISANCE DISPUTES

Pursuant to subsection 7A-38.3(e) of the General Statutes of North Carolina, the Court hereby amends Rule 3 and Rule 5 of the Rules of Mediation for Farm Nuisance Disputes.

* * *

Rule 3. Selection of the Mediator

(a) **Time Period for Selection**. The parties to the dispute shall have twenty-one days from the date of the filing of the Request Form to select a mediator to conduct their mediation and to file an Appointment of Mediator in Prelitigation Farm Nuisance Dispute, Form AOC-CV-821 (Appointment Form).

(b) **Selection of the Certified Mediator by Agreement**. The clerk of superior court shall provide each party to the dispute with a list of certified superior court mediators serving the judicial district encompassing the county in which the Request Form was filed. If the parties are able to agree on a mediator from that list to conduct their mediation, then the party who filed the Request Form shall notify the clerk of superior court by filing an Appointment Form. The Appointment Form shall state: (i) the name, address, and telephone number of the certified mediator selected; (ii) the rate of compensation to be paid to the mediator; and (iii) that the mediator and the parties to the dispute have agreed on the selection and the rate of compensation.

(c) **Court Appointment of the Mediator**. If the parties to the dispute cannot agree on the selection of a certified superior court mediator, then the party who filed the Request Form shall file an Appointment Form with the clerk of superior court, moving the senior resident superior court judge to appoint a certified superior court mediator. The Appointment Form shall be filed with the clerk of superior court within twenty-one days of the date of the filing of the Request Form. The Appointment Form shall state whether any party prefers the mediator to be a certified attorney mediator or a certified nonattorney mediator. If the parties state a preference, then the senior resident superior court judge shall appoint a mediator in accordance with that preference. If no preference is expressed, then the senior resident superior court judge may appoint any certified superior court mediator.

As part of the application or annual certification renewal process, all mediators shall designate those judicial districts for which they are

willing to accept court appointments. Each designation shall be deemed to be a representation that the designating mediator has read and will abide by the local rules for, and will accept appointments from, the designated district, and will not charge for travel time and expenses incurred in carrying out his or her duties associated with those appointments. A mediator's refusal to accept an appointment in a judicial district designated by the mediator may be grounds for removal from that district's court appointment list by the Dispute Resolution Commission (Commission), or by the senior resident superior court judge.

The Commission shall provide the senior resident superior court judge of each judicial district a list of those certified superior court mediators requesting appointments in that district. The list shall contain each mediator's name, address, and telephone number. The list shall be provided to the senior resident superior court judge electronically through the Commission's website at https://www.ncdrc.gov.

The Commission shall promptly notify the senior resident superior court judge of any disciplinary action taken with respect to a mediator on the list of certified mediators for the judicial district.

(d) **Mediator Information Directory**. To assist parties in learning more about the qualifications and experience of certified mediators, the Commission shall post a list of certified superior court mediators on its website at https://www.ncdrc.gov, accompanied by each mediator's contact ~~and biographical~~ information, ~~availability~~the judicial districts in which each mediator is available to serve, and whether ~~the~~each mediator is willing to mediate farm nuisance disputes. If a mediator has supplied it to the Commission, the list shall also provide the mediator's designated attendance method and the mediator's biographical information, including information about the mediator's education, professional experience, and mediation training and experience.

* * *

Rule 5. Authority and Duties of the Mediator

(a) **Authority of the Mediator**.

(1) **Control of the Mediation**. The mediator shall at all times be in control of the mediation and the procedures to be followed. The mediator's conduct shall be governed by the Standards of Professional Conduct for Mediators.

(2) **Private Consultation**. The mediator may communicate privately with any participant prior to, and during, the

mediation. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the mediation.

(3) **Scheduling the Mediation**. The mediator shall make a good faith effort to schedule the mediation at a time that is convenient to the participants, attorneys, and mediator. In the absence of agreement, the mediator shall select the date for the mediation.

(b) **Duties of the Mediator**.

(1) **Informing the Parties**. At the beginning of the mediation, the mediator shall define and describe for the parties:

a. the process of mediation;

b. the differences between mediation and other forms of conflict resolution;

c. the costs of mediation;

d. the fact that mediation is not a trial, that the mediator is not a judge, and that the parties may pursue their dispute in court if mediation is not successful;

e. the circumstances under which the mediator may meet and communicate privately with any of the parties, or with any other person;

f. whether, and under what conditions, communications with the mediator will be held in confidence during the mediation;

g. the inadmissibility of conduct and statements as provided by N.C.G.S. § 7A-38.1(*l*);

h. the duties and responsibilities of the mediator and the participants; ~~and~~

i. the fact that any agreement reached will be reached by mutual consent.~~;~~

j. the fact that subsection (b)(5) of this rule prohibits any recording of the mediation; and

k. the fact that the parties may be subject to sanctions for violating these rules.

(2) **Disclosure**. The mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice, or partiality.

(3) **Declaring Impasse**. It is the duty of the mediator to determine timely when an impasse exists and when the mediation should end.

(4) **Scheduling and Holding the Mediation**. It is the duty of the mediator to schedule and conduct the mediation within the time frame established by Rule 4. The mediator shall strictly observe Rule 4 unless an extension has been granted in writing by the senior resident superior court judge.

(5) **No Recording**. There shall be no stenographic, audio, or video recording of the mediation process by any participant. This prohibition includes recording either surreptitiously or with the agreement of the parties.

* * *

These amendments to the Rules of Mediation for Farm Nuisance Disputes become effective on 1 May 2023.

This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 4th day of April 2023.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 4th day of April 2023.

s/Grant E. Buckner

GRANT E. BUCKNER
Clerk of the Supreme Court

ORDER AMENDING THE RULES OF MEDIATION FOR MATTERS IN DISTRICT CRIMINAL COURT

Pursuant to subsection 7A-38.3D(d) of the General Statutes of North Carolina, the Court hereby amends Rule 6 of the Rules of Mediation for Matters in District Criminal Court.

* * *

Rule 6. Authority and Duties of the Mediator

(a) **Authority of the Mediator**.

(1) **Control of the Mediation**. The mediator shall at all times be in control of the mediation process and the procedures to be followed. The mediator's conduct shall be governed by the Standards of Professional Conduct for Mediators.

(2) **Private Consultation**. The mediator may communicate privately with any participant or counsel prior to, and during, the mediation. The fact that a private communication has occurred with a participant shall be disclosed to all other participants at the beginning of the mediation.

(3) **Inclusion and Exclusion of Participants at the Mediation**. In the mediator's discretion, the mediator may encourage or allow persons other than the parties or their attorneys to attend and participate in the mediation, provided that the mediator has determined the presence of such persons to be helpful in resolving the dispute or addressing an issue underlying it. Mediators may also exclude persons other than the parties and their attorneys whose presence the mediator deems would likely be, or which has been, counterproductive.

(4) **Scheduling the Mediation**. The mediator or community mediation center staff involved in scheduling, shall make a good faith effort to schedule the mediation at a time that is convenient to the parties and any parent, guardian, or attorney who will be attending. In the absence of agreement, the mediator or staff member shall select the date for the mediation and notify those who will be participating. Parties are to cooperate with the mediator in scheduling the mediation, including providing information as required by Rule 5(a)(4).

(b) **Duties of the Mediator**.

(1) **Informing the Parties.** At the beginning of the mediation, the mediator shall define and describe for the parties:

a. the process of mediation;

b. the fact that mediation is not a trial and that the mediator is not a judge, attorney, or therapist;

c. the fact that the mediator is present only to assist the parties in reaching their own agreement;

d. the circumstances under which the mediator may meet and communicate privately with the parties or with any other person;

e. whether, and under what conditions, communications with the mediator will be held in confidence during the mediation;

f. the inadmissibility of conduct and statements as provided in N.C.G.S. § 7A-38.3D(i);

g. the duties and responsibilities of the mediator and the participants;

h. the fact that any agreement reached will be by mutual consent;

i. the fact that, if the parties are unable to agree and the mediator declares an impasse, the parties and the case will return to court; ~~and~~

j. the fact that, if an agreement is reached in mediation and the parties agree to request a dismissal of the charges pending in the case, the defendant shall pay a dismissal fee in accordance with N.C.G.S. § 7A-38.7 and N.C.G.S. § 7A-38.3D(m), unless: (i) the court, in its discretion, has waived the fee for good cause; or (ii) the parties agree to some other apportionment. Payment of the dismissal fee shall be made to the clerk of superior court in the county where the case was filed, and the community mediation center must provide the district attorney with a dismissal form and proof that the defendant has paid the dispute resolution fee before the charges can be dismissed~~.~~;

k. the fact that Rule 4(e) prohibits any recording of the mediation; and

l. the fact that the parties may be subject to sanctions for violating these rules.

(2) **Disclosure**. Consistent with the Standards of Professional Conduct for Mediators, the mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice, or partiality.

(3) **Declaring Impasse**. Consistent with the Standards of Professional Conduct for Mediators, it is the duty of the mediator to determine timely when an impasse exists and when the mediation should end. The mediator shall inquire of and consider the desires of the parties to cease or continue the mediation.

(4) **Reporting Results of the Mediation**. The mediator or community mediation center shall report the outcome of mediation to the court in writing on a NCAOC form by the date the case is next calendared. If the criminal case is scheduled for court on the same day as the mediation, then the mediator shall inform the attending district attorney of the outcome of the mediation before the close of court on that date, unless alternative arrangements are approved by the district attorney.

(5) **Scheduling and Holding the Mediation**. It is the duty of the mediator and the community mediation center to schedule and conduct the mediation prior to any deadline set by the court. Deadlines shall be strictly observed by the mediator and the community mediation center, unless the deadline is extended by the court.

* * *

These amendments to the Rules of Mediation for Matters in District Criminal Court become effective on 1 May 2023.

This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 4th day of April 2023.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 4th day of April 2023.

s/Grant E. Buckner

GRANT E. BUCKNER
Clerk of the Supreme Court

ORDER AMENDING THE RULES FOR SETTLEMENT PROCEDURES IN DISTRICT COURT FAMILY FINANCIAL CASES

Pursuant to subsection 7A-38.4A(k) and subsection 7A-38.4A(*o*) of the General Statutes of North Carolina, the Court hereby amends the Rules for Settlement Procedures in District Court Family Financial Cases. This order affects Rules 2, 4, 6, 8, and 9.

* * *

Rule 2. Designation of the Mediator

(a) **Designation of a Mediator by Agreement of the Parties**. By agreement, the parties may designate a family financial mediator certified under these rules by filing a Designation of Mediator in Family Financial Case, Form AOC-CV-825 (Designation Form), with the court at the scheduling and discovery conference. The Designation Form shall state: (i) the name, address, and telephone number of the designated mediator; (ii) the rate of compensation of the mediator; (iii) that the mediator and opposing counsel have agreed upon the designation and rate of compensation; and (iv) that the mediator is certified under these rules.

A copy of each form submitted to the court and the court's order requiring a mediated settlement conference shall be delivered to the mediator by the parties.

(b) **Appointment of a Mediator by the Court**. If the parties cannot agree on the designation of a certified mediator, then the parties shall notify the court by filing a Designation Form requesting that the court appoint a certified mediator. The Designation Form shall be filed at the scheduling and discovery conference and state that the attorneys for the parties have discussed the designation of a mediator and have been unable to agree on a mediator. Upon receipt of a Designation Form requesting the appointment of a mediator, or upon the parties' failure to file a Designation Form with the court, the court shall appoint a family financial mediator certified under these rules who has expressed a willingness to mediate disputes within the judicial district.

In appointing a mediator, the court shall rotate through a list of available certified mediators. Appointments shall be made without regard to race, gender, religious affiliation, or whether the mediator is a licensed attorney. The court shall retain discretion to depart from a strict rotation of mediators when, in the court's discretion, there is good cause in a case to do so.

As part of the application or certification renewal process, all mediators shall designate the judicial districts in which they are willing to accept court appointments. Each designation is a representation that the designating mediator has read and will abide by the local rules for, and will accept appointments from, the designated district and will not charge for travel time and expenses incurred in carrying out his or her duties associated with those appointments. A mediator's refusal to accept an appointment in a judicial district designated by the mediator may be grounds for the mediator's removal from the district's appointment list by the Dispute Resolution Commission (Commission) or the chief district court judge.

The Commission shall provide the district court judges in each judicial district a list of certified family financial mediators requesting appointments in that district. The list shall contain each mediator's name, address, and telephone number. The list shall be provided to the judges electronically through the Commission's website at https://www.ncdrc.gov.

The Commission shall promptly notify the district court of any disciplinary action taken with respect to a mediator on the list of certified mediators for the judicial district.

(c) **Mediator Information Directory**. To assist the parties in designating a mediator, the Commission shall assemble, maintain, and post a list of certified family financial mediators on its website at https://www.ncdrc.gov, accompanied by each mediator's contact information and the judicial districts in which each mediator is available to serve. ~~When~~If a mediator has supplied it to the Commission, the list shall also provide the mediator's designated attendance method and the mediator's biographical information, including information about the mediator's education, professional experience, and mediation training and experience.

(d) **Withdrawal or Disqualification of the Mediator**.

(1) Any party may move the chief district court judge of the judicial district where the case is pending for an order disqualifying the mediator using a Notice of Withdrawal/Disqualification of Mediator and Order for Substitution of Mediator, Form AOC-DRC-20. For good cause, an order disqualifying the mediator shall be entered.

(2) A mediator who wishes to withdraw from a case may file a Notice of Withdrawal/Disqualification of Mediator and Order for Substitution of Mediator, Form AOC-DRC-20,

with the chief district court judge of the judicial district where the case is pending.

(3) If a mediator withdraws or is disqualified, then a substitute mediator shall be designated or appointed under this rule. A mediator who has withdrawn or been disqualified shall not be entitled to receive an administrative fee, unless the mediation has been commenced.

* * *

Rule 4. Duties of Parties, Attorneys, and Other Participants in Mediated Settlement Conferences

(a) **Attendance**.

(1) **Persons Required to Attend.** The following persons shall attend a mediated settlement conference:

a. The parties.

b. At least one counsel of record for each party whose counsel has appeared in the case.

~~(2) **Attendance Required Through the Use of Remote Technology**. Any party or person required to attend a mediated settlement conference shall attend the conference using remote technology; for example, by telephone, videoconference, or other electronic means. The conference shall conclude when an agreement is reduced to writing and signed, as provided in subsection (c) of this rule, or when an impasse is declared. Notwithstanding this remote attendance requirement, the conference may be conducted in person if:~~

~~a. the mediator and all parties and persons required to attend the conference agree to conduct the conference in person and to comply with all federal, state, and local safety guidelines that have been issued; or~~

~~b. the court, upon motion of a party and notice to the mediator and to all parties and persons required to attend the conference, so orders.~~

(2) **Attendance Method**.

a. **Determination**.

1. All parties and persons required to attend a mediated settlement conference may agree to conduct the conference in person, using

remote technology, or using a hybrid of in-person attendance and remote technology.

2. If all parties and persons required to attend the conference do not agree on an attendance method and the mediator has designated in the Mediator Information Directory that he or she will conduct conferences only using remote technology, then the conference shall be conducted using remote technology.

3. If all parties and persons required to attend the conference do not agree on an attendance method and the mediator has not selected remote technology as his or her designated attendance method in the Mediator Information Directory, then the conference shall be conducted in person.

b. **Order by Court; Mediator Withdrawal**. The chief district court judge, upon motion of a party and notice to the mediator and to all other parties and persons required to attend the mediated settlement conference, may order that the conference be conducted in person, using remote technology, or using a hybrid of in-person attendance and remote technology.

If the method of attendance ordered by the judge is contrary to the attendance method the mediator has designated in the Mediator Information Directory, then the mediator may withdraw from the case under Rule 2(d).

(3) **Excusing the Attendance Requirement**. Any party or person may be excused from the requirement to attend a mediated settlement conference with the consent of all parties and persons required to attend the conference and the mediator.

(4) **Safety Compliance**. The mediator and all parties and persons required to attend a mediated settlement conference shall comply with all federal, state, and local safety guidelines that are in place for trial court proceedings at the time of the conference.

(b) **Scheduling**. Participants required to attend the mediated settlement conference shall promptly notify the mediator, after selection

or appointment, of any significant problems that they may have with the dates for mediated settlement conference sessions before the completion deadline, and shall inform the mediator of any problems that arise before an anticipated conference session is scheduled by the mediator. If a scheduling conflict in another court proceeding arises after a conference session has been scheduled by the mediator, then participants shall promptly attempt to resolve the conflict under Rule 3.1 of the General Rules of Practice for the Superior and District Courts, or, if applicable, the Guidelines for Resolving Scheduling Conflicts adopted by the State-Federal Judicial Council of North Carolina on 20 June 1985.

(c) **Finalizing Agreement**.

(1) If an agreement is reached at the mediated settlement conference, then the parties shall reduce the essential terms of the agreement to writing.

a. If the parties conclude the mediated settlement conference with a written document containing all of the terms of their agreement for property distribution and do not intend to submit their agreement to the court for approval, then the agreement shall be signed by all parties and formally acknowledged as required by N.C.G.S. § 50-20(d). If the parties conclude the conference with a written document containing all of the terms of their agreement and intend to submit their agreement to the court for approval, then the agreement shall be signed by all parties, but need not be formally acknowledged. In all cases, the mediator shall report a settlement to the court and include in the report the name of the person responsible for filing closing documents with the court.

b. If the parties reach an agreement at the mediated settlement conference regarding property distribution and do not intend to submit their agreement to the court for approval, but are unable to complete a final document reflecting their settlement or have it signed and acknowledged as required by N.C.G.S. § 50-20(d), then the parties shall produce a written summary of their understanding and use it to guide them in writing any agreements as may be required to give legal effect to their understanding. If the parties intend to submit their agreement to the court

for approval, then the agreement must be in writing and signed by the parties, but need not be formally acknowledged. The mediator shall facilitate the production of the summary and shall either:

1. report to the court that the matter has been settled and include in the report the name of the person responsible for filing closing documents with the court; or
2. declare, in the mediator's discretion, a recess of the mediated settlement conference.

If a recess is declared, then the mediator may schedule another session of the conference if the mediator determines that it would assist the parties in finalizing a settlement.

(2) In all cases where an agreement is reached after being ordered to mediation, whether prior to, or during, the mediation, or during a recess, the parties shall file a consent judgment or voluntary dismissal with the court within thirty days of the agreement or before the expiration of the mediation deadline, whichever is later. The mediator shall report to the court that the matter has been settled and who reported the settlement.

(3) An agreement regarding the distribution of property, reached at a proceeding conducted under this section or during a recess of the mediated settlement conference, which has not been approved by a court, shall not be enforceable unless it has been reduced to writing, signed by the parties, and acknowledged as required under N.C.G.S. § 50-20(d).

(d) **Payment of the Mediator's Fee**. The parties shall pay the mediator's fee as provided by Rule 7.

(e) **No Recording**. There shall be no stenographic, audio, or video recording of the mediation process by any participant. This prohibition includes recording either surreptitiously or with the agreement of the parties.

Comment

Comment to Rule 4(a). Rule 4(a)(2)(a) describes the attendance methods used for mediated settlement conferences. If a conference is conducted using remote technology, then the mediator should ensure that the

parties are able to fully communicate with all other participants and videoconferencing is encouraged.

Comment to Rule 4(c). Consistent with N.C.G.S. § 7A-38.4A(j), no settlement shall be enforceable unless it has been reduced to writing and signed by the parties. When a settlement is reached during a mediated settlement conference, the mediator shall ensure that the terms of the agreement are reduced to writing and signed by the parties and their attorneys before ending the conference.

Cases in which an agreement on all issues has been reached should be disposed of as expeditiously as possible. This assures that the mediator and the parties move the case toward disposition while honoring the private nature of the mediation process and the mediator's duty of confidentiality. If the parties wish to keep the terms of the settlement confidential, then they may timely file closing documents with the court, as long as those documents do not contain confidential terms (e.g., a voluntary dismissal or consent judgment resolving all claims). Mediators will not be required by local rules to submit agreements to the court.

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Rule 6. Authority and Duties of the Mediator

(a) **Authority of the Mediator.**

(1) **Control of the Mediated Settlement Conference**. The mediator shall at all times be in control of the mediated settlement conference and the procedures to be followed. The mediator's conduct shall be governed by the Standards of Professional Conduct for Mediators.

(2) **Private Consultation**. The mediator may communicate privately with any participant during the mediated settlement conference. However, there shall be no ex parte communication before or outside the conference between the mediator and any counsel or party regarding any aspect of the proceeding, except about scheduling matters. Nothing in this rule prevents the mediator from engaging in ex parte communications with the consent of the parties for the purpose of assisting settlement negotiations.

(b) **Duties of the Mediator.**

(1) **Informing the Parties**. At the beginning of the mediated settlement conference, the mediator shall define and describe for the parties:

a. the process of mediation;

b. the differences between mediation and other forms of conflict resolution;

c. the costs of the mediated settlement conference;

d. the fact that the mediated settlement conference is not a trial, that the mediator is not a judge, and that the parties retain their right to a trial if they do not reach settlement;

e. the circumstances under which the mediator may meet and communicate privately with any of the parties, or with any other person;

f. whether, and under what conditions, communications with the mediator will be held in confidence during the mediated settlement conference;

g. the inadmissibility of conduct and statements as provided by N.C.G.S. § 7A-38.4A(j);

h. the duties and responsibilities of the mediator and the participants; ~~and~~

i. the fact that any agreement reached will be reached by mutual consent.~~;~~

j. the fact that Rule 4(e) prohibits any recording of the mediated settlement conference; and

k. the fact that the parties may be subject to sanctions for violating these rules.

(2) **Disclosure**. The mediator has a duty to be impartial and to disclose to all participants any circumstance bearing on possible bias, prejudice, or partiality.

(3) **Declaring Impasse**. It is the duty of the mediator to determine in a timely manner that an impasse exists and that the mediated settlement conference should end. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the conference.

(4) **Reporting Results of the Mediated Settlement Conference**.

a. The mediator shall report the results of the mediated settlement conference and any settlement reached by the parties prior to, or during, a recess of the conference to the court. Mediators shall also report the results of mediations held in other district

court family financial cases in which a mediated settlement conference was not ordered by the court. The report shall be filed on a Report of Mediator in Family Financial Case, Form AOC-CV-827, within ten days of the conclusion of the conference or within ten days of being notified of the settlement, and shall include the names of the persons who attended the conference, if a conference was held. If a partial agreement was reached at the conference, then the report shall state the issues that remain for trial. Local rules shall not require the mediator to send a copy of the parties' agreement to the court.

b. If an agreement upon all issues was reached at the mediated settlement conference, then the mediator's report shall state whether the dispute will be resolved by a consent judgment or voluntary dismissal, and the name, address, and telephone number of the person designated by the parties to file the consent judgment or dismissal with the court, as required under Rule 4(c)(2). The mediator shall advise the parties that, consistent with Rule 4(c)(2), their consent judgment or voluntary dismissal is to be filed with the court within thirty days of the conference or before the expiration of the mediation deadline, whichever is later. The mediator's report shall indicate that the parties have been so advised.

c. The Commission or the North Carolina Administrative Office of the Courts (NCAOC) may require the mediator to provide statistical data for evaluation of the mediated settlement conference program.

d. A mediator who fails to report as required by this rule shall be subject to sanctions by the court. The sanctions shall include, but are not limited to, fines or other monetary penalties, decertification as a mediator, and any other sanctions available through the court's contempt power. The court shall notify the Commission of any sanction imposed against a mediator under this section.

(5) **Scheduling and Holding the Mediated Settlement Conference**. The mediator shall schedule and conduct the mediated settlement conference prior to the

conference completion deadline set out in the court's order. The mediator shall make an effort to schedule the conference at a time that is convenient to all participants. In the absence of agreement, the mediator shall select a date and time for the conference. The deadline for completion of the conference shall be strictly observed by the mediator, unless the deadline is changed by written order of the court.

A mediator selected by agreement of the parties shall not delay scheduling or conducting the conference because one or more of the parties has not paid an advance fee deposit as required by the agreement.

* * *

Rule 8. Mediator Certification and Decertification

(a) The Commission may receive and approve applications for certification of persons to be appointed as mediators for family financial matters in district court. In order to be certified, an applicant must satisfy the requirements of this subsection.

(1) The applicant for certification must have a basic understanding of North Carolina family law and have completed the requirements of this subsection prior to taking the forty hours of Commission-certified family and divorce mediation training or the sixteen hours of Commission-certified supplemental family and divorce mediation training under subsection (a)(2)(b) of this rule. Applicants should be able to demonstrate that they have completed at least twelve hours of basic family law education by:

a. attending workshops or programs on topics such as separation and divorce, alimony and postseparation support, equitable distribution, child custody and support, and domestic violence;

b. completing an independent study on these topics, such as viewing or listening to video or audio programs on family law topics; or

c. having equivalent North Carolina family law experience, including work experience that satisfies one of the categories set forth in the Commission's policy on interpreting Rule 8(a)(1) (e.g., the applicant is an experienced family law judge or a North Carolina State Bar board certified family law ~~attorney~~specialist).

(2) The applicant for certification must:

a. have ~~an~~been designated a Family Mediator Advanced Practitioner ~~Designation from~~by the Association for Conflict Resolution (ACR) and have earned an undergraduate degree from an accredited four-year college or university; or

b. have completed either (i) forty hours of Commission-certified family and divorce mediation training; or (ii) forty hours of Commission-certified trial court mediation training and sixteen hours of Commission-certified supplemental family and divorce mediation training; and be

1. a member in good standing of the North Carolina State Bar or a member similarly in good standing of the bar of another state and eligible to apply for admission to the North Carolina State Bar under Chapter 1, Subchapter C, of the North Carolina State Bar Rules and the Rules Governing the Board of Law Examiners and the Training of Law Students, 27 N.C. Admin. Code 1C.0105, with at least five years of experience after the date of licensure as a judge, practicing attorney, law professor, or mediator, or must possess equivalent experience;

2. a licensed psychiatrist under N.C.G.S. § 90-9.1, with at least five years of experience in the field after the date of licensure;

3. a licensed psychologist under N.C.G.S. §§ 90-270.1 to -270.22, with at least five years of experience in the field after the date of licensure;

4. a licensed marriage and family therapist under N.C.G.S. §§ 90-270.45 to -270.63, with at least five years of experience in the field after the date of licensure;

5. a licensed clinical social worker under N.C.G.S. § 90B-7, with at least five years of experience in the field after the date of licensure;

6. a licensed professional counselor under N.C.G.S. §§ 90-329 to -345, with at least five years of experience in the field after the date of licensure; or

7. an accountant certified in North Carolina, with at least five years of experience in the field after the date of certification.

~~c. Any person who has not been certified as a mediator pursuant to these rules may be certified without compliance with subsection (a)(2)(b) and subsection (a)(5) of this rule if~~

~~1. the applicant for certification is a member in good standing of the North Carolina State Bar or a member similarly in good standing of the bar of another state and eligible to apply for admission to the North Carolina State Bar under Chapter 1, Subchapter C, of the North Carolina State Bar Rules and the Rules Governing the Board of Law Examiners and the Training of Law Students, 27 N.C. Admin. Code 1C.0105, with at least five years of experience after the date of licensure as a judge, practicing attorney, law professor, or mediator, or must possess equivalent experience; and meets the following additional requirements:~~

~~i. the applicant applies for certification within one year from 10 June 2020;~~

~~ii. the applicant has, by selection of the parties, mediated at least ten family financial settlement cases in the North Carolina District Court within the last five years, as shown by proof satisfactory to the Commission staff; and~~

~~iii. the applicant has taken a sixteen-hour supplemental family and divorce mediation training program approved by the Commission wherein the statutes, program rules, advisory opinions, and ethics, including the Standards of Professional Conduct for Mediators, are discussed;~~

~~or~~

~~2. the applicant for certification is a nonattorney who meets one of the required licensures set forth in subsection (a)(2)(b)(2) through subsection (a)(2)(b)(7) of this rule, and meets the following additional requirements:~~

~~i. the applicant applies for certification within one year from 10 June 2020;~~

~~ii. the applicant has, by selection of the parties, mediated at least fifteen family financial settlement cases in the North Carolina District Court within the last five years, as shown by proof satisfactory to the Commission staff; and~~

~~iii. the applicant has taken a forty-hour family and divorce mediation training course and the six-hour training on North Carolina legal terminology, court structure, and civil procedure course approved by the Commission.~~

(3) If the applicant is not licensed to practice law in one of the United States, then the applicant must have, as a prerequisite for the forty hours of Commission-certified family and divorce mediation training under subsection (a)(2)(b) of this rule, completed six hours of training on North Carolina legal terminology, court structure, and civil procedure, provided by a Commission-certified trainer. An attorney licensed to practice law in a state other than North Carolina shall satisfy this requirement by completing a self-study course, as directed by Commission staff.

(4) If the applicant is not licensed to practice law in North Carolina, then the applicant must provide three letters of reference to the Commission about the applicant's good character, including at least one letter from a person with knowledge of the applicant's professional practice and experience qualifying the applicant under subsection (a) of this rule.

(5) The applicant must have observed, as a neutral observer and with the permission of the parties, two mediations involving a custody or family financial issue conducted by a mediator who (i) is certified under these rules, (ii) has an Advanced Practitioner Designation from the ACR, or (iii) is a mediator certified by the NCAOC for custody matters. Mediations eligible for observation shall also include mediations conducted in matters prior to litigation of family financial disputes that are mediated by agreement of the parties and incorporate these rules.

If the applicant is not an attorney licensed to practice law in one of the United States, then the applicant must observe three additional mediations involving civil or family-related

disputes, or disputes prior to litigation that are conducted by a Commission-certified mediator and are conducted pursuant to a court order or an agreement of the parties incorporating the mediation rules of a North Carolina state or federal court.

All mediations shall be observed from their beginning until settlement, or until the point that an impasse has been declared, and shall be reported by the applicant on a Certificate of Observation - Family Financial Settlement Conference Program, Form AOC-DRC-08. All observers shall conform their conduct to the Commission's policy on *Guidelines for Observer Conduct*.

(6) The applicant must demonstrate familiarity with the statutes, rules, standards of practice, and standards of conduct governing mediated settlement conferences conducted in North Carolina.

(7) The applicant must be of good moral character and adhere to the Standards of Professional Conduct for Mediators when acting under these rules. On his or her application(s) for certification or application(s) for certification renewal, an applicant shall disclose any:

a. pending criminal charges;

b. criminal convictions;

c. restraining orders issued against him or her;

d. failures to appear;

e. closed grievances or complaints filed with a professional licensing, certifying, or regulatory body, whether in North Carolina, another state, or another country;

f. disciplinary action taken against him or her by a professional licensing, certifying, or regulatory body, whether in North Carolina, another state, or another country, including, but not limited to, disbarment, revocation, decertification, or suspension of any professional license or certification, including the suspension or revocation of any license, certification, registration, or qualification to serve as a mediator in another state or country, even if stayed;

g. judicial sanctions imposed against him or her in any jurisdiction;

h. civil judgments, tax liens, or bankruptcy filings that occurred within the ten years preceding the date that

the initial or renewal application was filed with the Commission; or

i. pending grievances or complaints filed with a professional licensing, certifying, or regulatory body, whether in North Carolina, another state, or another country.

If a matter listed in subsections (a)(7)(a) through (a)(7)(h) of this rule arises after a mediator submits his or her initial or renewal application for certification, then the mediator shall report the matter to the Commission no later than thirty days after receiving notice of the matter.

If a pending grievance or complaint described in subsection (a)(7)(i) of this rule is filed after a mediator submits his or her initial or renewal application for certification, then the mediator shall report the matter to the Commission no later than thirty days after receiving notice of the matter or, if a response to the grievance or complaint is permitted by the professional licensing, certifying, or regulatory body, no later than thirty days after the due date for the response.

As referenced in this subsection, criminal charges or convictions (excluding infractions) shall include felonies, misdemeanors, or misdemeanor traffic violations (including driving while impaired) under the law of North Carolina or another state, or under the law of a federal, military, or foreign jurisdiction, regardless of whether adjudication was withheld (prayer for judgment continued) or the imposition of a sentence was suspended.

(8) The applicant must submit proof of the qualifications set out in this rule on a form provided by the Commission.

(9) The applicant must pay all administrative fees established by the NCAOC upon the recommendation of the Commission.

(10) The applicant must agree to accept the fee ordered by the court under Rule 7 as payment in full of a party's share of the mediator's fee.

(11) The applicant must comply with the requirements of the Commission for completing and reporting continuing mediator education or training.

(12) The applicant must agree, once certified, to make reasonable efforts to assist applicants for mediator certification in completing their observation requirements.

(b) No mediator who held a professional license and relied upon that license to qualify for certification under subsection (a)(2)(b) of this rule shall be decertified or denied recertification because the mediator's license lapses, is relinquished, or becomes inactive; provided, however, that this subsection shall not apply to a mediator whose professional license is revoked, suspended, lapsed, or relinquished, or whose professional license becomes inactive due to disciplinary action, or the threat of disciplinary action, from the mediator's licensing authority. Any mediator whose professional license is revoked, suspended, lapsed, relinquished, or whose professional license becomes inactive shall report the matter to the Commission.

(c) A mediator's certification may be revoked or not renewed at any time if it is shown to the satisfaction of the Commission that a mediator no longer meets the qualifications set out in this rule or has not faithfully observed these rules or those of any judicial district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible for certification under this rule. No application for certification renewal shall be denied on the ground that the mediator's training and experience does not satisfy a training and experience requirement promulgated after the date of the mediator's original certification.

Comment

Comment to Rule 8(a)(3). Commission staff has discretion to waive the requirements set out in Rule 8(a)(3) if an applicant can demonstrate sufficient familiarity with North Carolina legal terminology, court structure, and civil procedure.

* * *

Rule 9. Certification of Mediation Training Programs

(a) Certified training programs for mediators who are seeking certification under Rule 8(a)(2)(b) shall consist of a minimum of forty hours of instruction. The curriculum of such programs shall include the following topics:

(1) Conflict resolution and mediation theory.

(2) Mediation process and techniques, including the process and techniques of mediating family and divorce matters in district court.

(3) Communication and information gathering.

(4) Standards of conduct for mediators, including, but not limited to, the Standards of Professional Conduct for Mediators.

(5) Statutes, rules, and practices governing mediated settlement conferences for family financial matters in district court.

(6) Demonstrations of mediated settlement conferences, both with and without attorney involvement.

(7) Simulations of mediated settlement conferences, involving student participation as the mediator, attorneys, and disputants, which shall be supervised, observed, and evaluated by program faculty.

~~(8) An overview of North Carolina law as it applies to child custody and visitation, equitable distribution, alimony, child support, and postseparation support.~~

~~(9)~~(8) An overview of family dynamics, the effect of divorce on children and adults, and child development.

~~(10)~~(9) Protocols for screening cases for issues involving domestic violence and substance abuse.

~~(11)~~(10) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules, and practices governing settlement procedures for family financial matters in district court.

~~(12)~~(11) Technology and how to effectively utilize technology during a mediation.

(b) Certified training programs for mediators certified under Rule 8(a) shall consist of a minimum of sixteen hours of instruction and the curriculum shall include the topics listed in subsection (a) of this rule. There shall be at least two simulations as required by subsection (a)(7) of this rule.

(c) A training program must be certified by the Commission before a mediator's attendance at the program may be used to satisfy the training requirement under Rule 8(a). Certification does not need to be given in advance of attendance. Training programs attended prior to the promulgation of these rules, attended in other states, or approved by the ACR may be approved by the Commission if they are in substantial compliance with the standards set forth in this rule. The Commission may require attendees of an ACR-approved program to demonstrate compliance with the requirements of subsections (a)(5) ~~and (a)(8)~~ of this rule.

(d) To complete certification, a training program shall pay all administrative fees required by the NCAOC, in consultation with the Commission.

* * *

These amendments to the Rules for Settlement Procedures in District Court Family Financial Cases become effective on 1 May 2023.

This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 4th day of April 2023.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 4th day of April 2023.

s/Grant E. Buckner

GRANT E. BUCKNER
Clerk of the Supreme Court

ORDER AMENDING THE RULES FOR MEDIATED SETTLEMENT CONFERENCES AND OTHER SETTLEMENT PROCEDURES IN SUPERIOR COURT CIVIL ACTIONS

Pursuant to subsection 7A-38.1(c) of the General Statutes of North Carolina, the Court hereby amends the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions. This order affects Rules 2, 4, 6, 8, and 11.

* * *

Rule 2. Designation of the Mediator

(a) **Designation of a Mediator by Agreement of Parties**. Within twenty-one days of the court's order, the parties may, by agreement, designate a mediator who is certified under these rules. A Designation of Mediator in Superior Court Civil Action, Form AOC-CV-812 (Designation Form), must be filed with the court within twenty-one days of the court's order. The plaintiff's attorney should file the Designation Form; however, any party may file the Designation Form. The party filing the Designation Form shall serve a copy on all parties and the mediator designated to conduct the mediated settlement conference. The Designation Form shall state: (i) the name, address, and telephone number of the mediator; (ii) the rate of compensation of the mediator; (iii) that the mediator and opposing counsel have agreed upon the designation and rate of compensation; and (iv) that the mediator is certified under these rules.

(b) **Appointment of a Mediator by the Court.** If the parties cannot agree on the designation of a mediator, then the plaintiff or the plaintiff's attorney shall notify the court by filing a Designation Form, requesting, on behalf of the parties, that the senior resident superior court judge appoint a mediator. The Designation Form must be filed within twenty-one days of the court's order and shall state that the attorneys for the parties have discussed the designation of a mediator and have been unable to agree.

Upon receipt of a Designation Form requesting the appointment of a mediator, or in the event that the parties fail to file a Designation Form with the court within twenty-one days of the court's order, the senior resident superior court judge shall appoint a mediator certified under these rules who has expressed a willingness to mediate actions within the senior resident superior court judge's district.

In appointing a mediator, the senior resident superior court judge shall rotate through a list of available certified mediators. Appointments shall be made without regard to race, gender, religious affiliation, or whether

the mediator is a licensed attorney. The senior resident superior court judge shall retain discretion to depart from a strict rotation of mediators when, in the judge's discretion, there is good cause in a case to do so.

As part of the application or annual certification renewal process, all mediators shall designate the judicial districts in which they are willing to accept court appointments. Each designation is a representation that the designating mediator has read and will abide by the local rules for, and will accept appointments from, the designated district and will not charge for travel time and expenses incurred in carrying out his or her duties associated with those appointments. A mediator's refusal to accept an appointment in a judicial district designated by the mediator may be grounds for removal from the district's appointment list by the Dispute Resolution Commission (Commission) or the senior resident superior court judge.

The Commission shall provide the senior resident superior court judge of each judicial district a list of certified superior court mediators requesting appointments in that district. The list shall contain each mediator's name, address, and telephone number. The list shall be available on the Commission's website at https://www.ncdrc.gov.

The Commission shall promptly notify the senior resident superior court judge of any disciplinary action taken with respect to a mediator on the list of certified mediators for the judicial district.

(c) **Mediator Information Directory**. To assist the parties in designating a mediator, the Commission shall post a list of certified superior court mediators on its website at https://www.ncdrc.gov, accompanied by each mediator's contact information and the judicial districts in which each mediator is available to serve. If a mediator has supplied it to the Commission, the list shall also provide the mediator's designated attendance method and the mediator's biographical information, including information about the mediator's education, professional experience, and mediation training and experience.

(d) **Withdrawal or Disqualification of the Mediator.**

(1) Any party may move the senior resident superior court judge of the judicial district where the action is pending for an order disqualifying the mediator using a Notice of Withdrawal/Disqualification of Mediator and Order for Substitution of Mediator, Form AOC-DRC-20. For good cause, an order disqualifying the mediator shall be entered.

(2) A mediator who wishes to withdraw from a case may file a Notice of Withdrawal/Disqualification of Mediator and Order for Substitution of Mediator, Form AOC-DRC-20, with the senior resident superior court judge of the judicial district where the action is pending.

(3) If a mediator withdraws or is disqualified, then a substitute mediator shall be designated or appointed under this rule. A mediator who has withdrawn or been disqualified shall not be entitled to receive an administrative fee, unless the mediation has been commenced.

* * *

Rule 4. Duties of Parties, Attorneys, and Other Participants in Mediated Settlement Conferences

(a) **Attendance.**

(1) **Persons Required to Attend.** The following persons shall attend a mediated settlement conference:

a. Parties to the action, to include the following:

1. All individual parties.

2. Any party that is a nongovernmental entity shall be represented at the mediated settlement conference by an officer, employee, or agent who is not the entity's outside counsel and who has been authorized to decide whether, and on what terms, to settle the action on behalf of the entity, or who has been authorized to negotiate on behalf of the entity and can promptly communicate during the conference with persons who have decision-making authority to settle the action; provided, however, that if a specific procedure is required by law (e.g., a statutory pre-audit certificate) or the entity's governing documents (e.g., articles of incorporation, bylaws, partnership agreement, articles of organization, or operating agreement) to approve the terms of the settlement, then the representative shall have the authority to negotiate and make recommendations to the applicable approval authority in accordance with that procedure.

3. Any party that is a governmental entity shall be represented at the mediated settlement conference by an employee or agent who is not the entity's outside counsel and who: (i) has authority to decide on behalf of the entity whether and on what terms to settle the action; (ii) has been authorized to negotiate on behalf of the entity and can promptly communicate during the conference with persons who have decision-making authority to settle the action; or (iii) has authority to negotiate on behalf of the entity and to make a recommendation to the entity's governing board, if under applicable law the proposed settlement terms can be approved only by the entity's governing board.

Notwithstanding anything in these rules to the contrary, any agreement reached which involves a governmental entity may be subject to the provisions of N.C.G.S. § 159-28(a).

b. A representative of each liability insurance carrier, uninsured motorist insurance carrier, and underinsured motorist insurance carrier, which may be obligated to pay all or part of any claim presented in the action. Each carrier shall be represented at the mediated settlement conference by an officer, employee, or agent, other than the carrier's outside counsel, who has the authority to make a decision on behalf of the carrier, or who has been authorized to negotiate on behalf of the carrier, and can promptly communicate during the conference with persons who have decision-making authority.

c. At least one counsel of record for each party or other participant whose counsel has appeared in the action.

~~(2)~~ **~~Attendance Required Through the Use of Remote Technology.~~** ~~Any party or person required to attend a mediated settlement conference shall attend the conference using remote technology; for example, by telephone, videoconference, or other electronic means. The conference shall conclude when an agreement is reduced to writing and signed, as provided in subsection (c) of this~~

~~rule, or when an impasse is declared. Notwithstanding this remote attendance requirement, the conference may be conducted in person if:~~

~~a. the mediator and all parties and persons required to attend the conference agree to conduct the conference in person and to comply with all federal, state, and local safety guidelines that have been issued; or~~

~~b. the senior resident superior court judge, upon motion of a party and notice to the mediator and to all parties and persons required to attend the conference, so orders.~~

(2) **Attendance Method.**

a. **Determination.**

1. All parties and persons required to attend a mediated settlement conference may agree to conduct the conference in person, using remote technology, or using a hybrid of in-person attendance and remote technology.

2. If all parties and persons required to attend the conference do not agree on an attendance method and the mediator has designated in the Mediator Information Directory that he or she will conduct conferences only using remote technology, then the conference shall be conducted using remote technology.

3. If all parties and persons required to attend the conference do not agree on an attendance method and the mediator has not selected remote technology as his or her designated attendance method in the Mediator Information Directory, then the conference shall be conducted in person.

b. **Order by Court; Mediator Withdrawal**. The senior resident superior court judge, upon motion of a party and notice to the mediator and to all other parties and persons required to attend the mediated settlement conference, may order that the conference be conducted in person, using remote technology, or using a hybrid of in-person attendance and remote technology.

If the method of attendance ordered by the judge is contrary to the attendance method the mediator has designated in the Mediator Information Directory, then the mediator may withdraw from the case under Rule 2(d).

(3) **Scheduling**. Participants required to attend the mediated settlement conference shall promptly notify the mediator after designation or appointment of any significant problems that they may have with the dates for conference sessions before the completion deadline, and shall inform the mediator of any problems that arise before an anticipated mediated settlement conference session is scheduled by the mediator. If a scheduling conflict in another court proceeding arises after a conference session has been scheduled by the mediator, then the participants shall promptly attempt to resolve the conflict under Rule 3.1 of the General Rules of Practice for the Superior and District Courts, or, if applicable, the Guidelines for Resolving Scheduling Conflicts adopted by the State-Federal Judicial Council of North Carolina on 20 June 1985.

(4) **Excusing the Attendance Requirement**. Any party or person may be excused from the requirement to attend a mediated settlement conference with the consent of all parties and persons required to attend the conference and the mediator.

(5) **Safety Compliance**. The mediator and all parties and persons required to attend a mediated settlement conference shall comply with all federal, state, and local safety guidelines that are in place for trial court proceedings at the time of the conference.

(b) **Notifying Lienholders**. Any party or attorney who has received notice of a lien, or other claim upon proceeds recovered in the action, shall notify the lienholder or claimant of the date, time, and location of the mediated settlement conference, and shall request that the lienholder or claimant attend the conference or make a representative available with whom to communicate during the conference.

(c) **Finalizing Agreement**.

(1) If an agreement is reached at the mediated settlement conference, then the parties shall reduce the terms of

the agreement to writing and sign the writing, along with their counsel. By stipulation of the parties and at the parties' expense, the agreement may be electronically recorded. If the agreement resolves all issues in the dispute, then a consent judgment or one or more voluntary dismissals shall be filed with the court by such persons as the parties shall designate.

(2) If the agreement resolves all issues at the mediated settlement conference, then the parties shall give a copy of the signed agreement, consent judgment, or voluntary dismissal to the mediator and to all parties at the conference, and shall file the consent judgment or voluntary dismissal with the court within thirty days of the conference, or within ninety days if the State or a political subdivision of the State is a party to the action, or before expiration of the mediation deadline, whichever is later. In all cases, a consent judgment or voluntary dismissal shall be filed prior to the scheduled trial.

(3) If an agreement that resolves all issues in the dispute is reached prior to the mediated settlement conference, or is finalized while the conference is in recess, then the parties shall reduce the terms of the agreement to writing and sign the writing, along with their counsel, and shall file a consent judgment or voluntary dismissal disposing of all issues with the court within thirty days of the conference, or within ninety days if the State or a political subdivision of the State is a party to the action, or before expiration of the mediation deadline, whichever is later.

(4) A designee may sign the agreement on behalf of a party only if the party does not attend the mediated settlement conference and the party provides the mediator with a written verification that the designee is authorized to sign the agreement on the party's behalf.

(5) When an agreement is reached upon all issues, all attorneys of record must notify the senior resident superior court judge within four business days of the settlement and advise who will file the consent judgment or voluntary dismissal.

(d) **Payment of the Mediator's Fee**. The parties shall pay the mediator's fee as provided by Rule 7.

(e) **Related Cases**. Upon application of any party or person, the senior resident superior court judge may order that an attorney of record or a party in a pending superior court civil action, or a representative of an insurance carrier that may be liable for all or any part of a claim pending in superior court, shall, upon reasonable notice, attend a mediation conference that may be convened in another pending case, regardless of the forum in which the other case may be pending, provided that all parties in the other pending case consent to the attendance ordered under this rule. Any attorney, party, or representative of an insurance carrier that properly attends a mediation conference under this rule shall not be required to pay any of the mediation fees or costs related to that mediation conference. Any disputed issue concerning an order entered under this rule shall be determined by the senior resident superior court judge who entered the order.

(f) **No Recording**. There shall be no stenographic, audio, or video recording of the mediation process by any participant. This prohibition includes recording either surreptitiously or with the agreement of the parties.

Comment

Comment to Rule 4(a). Parties subject to Chapter 159 of the General Statutes of North Carolina—which provides, among other things, that if an obligation is evidenced by a contract or agreement requiring the payment of money or by a purchase order for supplies and materials, then the contract, agreement, or purchase order shall include on its face a certificate stating that the instrument has been pre-audited to assure compliance with N.C.G.S. § 159-28(a) and that an obligation incurred in violation of N.C.G.S. § 159-28(a) or (a1) is invalid and may not be enforced—should, as appropriate, inform all participants at the beginning of the mediation of the preaudit requirement and the consequences for failing to preaudit under N.C.G.S. § 159-28.

Rule 4(a)(2)(a) describes the attendance methods used for mediated settlement conferences. If a conference is conducted using remote technology, then the mediator should ensure that the parties are able to fully communicate with all other participants and videoconferencing is encouraged.

Comment to Rule 4(c). Consistent with N.C.G.S. § 7A-38.1(*l*), if a settlement is reached during a mediated settlement conference, then the mediator shall ensure that the terms of the settlement are reduced to writing and signed by the parties, or by the parties' designees, and by the parties' attorneys before ending the conference. No settlement shall be enforceable unless it has been reduced to writing and signed by the parties or by the parties' designees.

Cases in which an agreement upon all issues has been reached should be disposed of as expeditiously as possible. This assures that the mediator and the parties move the case toward disposition while honoring the private

nature of the mediation process and the mediator's duty of confidentiality. If the parties wish to keep the terms of the settlement confidential, then they may timely file with the court closing documents that do not contain confidential terms (e.g., voluntary dismissal or a consent judgment resolving all claims). Mediators will not be required by local rules to submit agreements to the court.

Comment to Rule 4(e). Rule 4(e) clarifies a senior resident superior court judge's authority to order a party, attorney of record, or representative of an insurance carrier to attend proceedings in another forum that are related to the superior court civil action. For example, when there are workers' compensation claims being asserted in a case before North Carolina Industrial Commission, there are typically additional claims asserted in superior court against a third-party tortfeasor. Because of the related nature of the claims, it may be beneficial for a party, attorney of record, or representative of an insurance carrier in the superior court civil action to attend the North Carolina Industrial Commission mediation conference in order to resolve the pending claims. Rule 4(e) specifically authorizes a senior resident superior court judge to order a party, attorney of record, or representative of an insurance carrier to attend a proceeding in another forum, provided that all parties in the related matter consent and the persons ordered to attend receive reasonable notice of the proceeding. The *North Carolina Industrial Commission Rules for Mediated Settlement and Neutral Evaluation Conferences* contain a similar provision, which provides that persons involved in a North Carolina Industrial Commission case may be ordered to attend a mediated settlement conference in a related matter.

* * *

Rule 6. Authority and Duties of the Mediator

(a) **Authority of the Mediator.**

(1) **Control of the Mediated Settlement Conference**. The mediator shall at all times be in control of the mediated settlement conference and the procedures to be followed. The mediator's conduct shall be governed by the Standards of Professional Conduct for Mediators.

(2) **Private Consultation**. The mediator may communicate privately with any participant prior to, and during, the mediated settlement conference. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the conference.

(b) **Duties of the Mediator**.

(1) **Informing the Parties**. At the beginning of the mediated settlement conference, the mediator shall define and describe for the parties:

a. the process of mediation;

b. the differences between mediation and other forms of conflict resolution;

c. the costs of the mediated settlement conference;

d. the fact that the mediated settlement conference is not a trial, that the mediator is not a judge, and that the parties retain their right to a trial if they do not reach settlement;

e. the circumstances under which the mediator may meet and communicate privately with any of the parties, or with any other person;

f. whether, and under what conditions, communications with the mediator will be held in confidence during the mediated settlement conference;

g. the inadmissibility of conduct and statements as provided by N.C.G.S. § 7A-38.1;

h. the duties and responsibilities of the mediator and the participants; ~~and~~

i. the fact that any agreement reached will be reached by mutual consent~~.~~;

j. the fact that Rule 4(f) prohibits any recording of the mediated settlement conference; and

k. the fact that the parties may be subject to sanctions for violating these rules.

(2) **Disclosure**. The mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice, or partiality.

(3) **Declaring Impasse**. It is the duty of the mediator to determine in a timely manner that an impasse exists and that the mediated settlement conference should end. The mediator shall inquire of and consider the desires of the parties to cease or continue the conference.

(4) **Reporting Results of the Mediated Settlement Conference.**

a. The mediator shall report to the court the results of the mediated settlement conference and any settlement reached by the parties prior to, or during, a

recess of the conference. Mediators shall also report the results of mediations held in other superior court civil cases in which a conference was not ordered by the court. The report shall be filed on a Report of Mediator in Superior Court Civil Action, Form AOC-CV-813, within ten days of the conclusion of the conference or within ten days of the mediator being notified of the settlement, and shall include the names of the persons who attended the conference, if a conference was held. If a partial agreement was reached at the conference, then the report shall state the claims for relief that were resolved and the names of any parties that have no claims remaining for trial. Local rules shall not require the mediator to send a copy of the parties' agreement to the court.

b. If an agreement upon all issues is reached prior to or at the mediated settlement conference, or during a recess of the conference, then the mediator's report shall state whether the action will be concluded by consent judgment or voluntary dismissal and state the name, address, and telephone number of the person designated by the parties to file the consent judgment or dismissal with the court. The mediator shall advise the parties that Rule 4(c) requires them to file the consent judgment or voluntary dismissal with the court within thirty days of the conference, or within ninety days if the State or a political subdivision of the State is a party to the action, or before expiration of the mediation deadline, whichever is later. The mediator shall indicate on the report that the parties have been so advised.

c. The Commission or the North Carolina Administrative Office of the Courts (NCAOC) may require the mediator to provide statistical data for evaluation of the mediated settlement conference program.

d. A mediator who fails to report as required by this rule shall be subject to sanctions by the senior resident superior court judge. The sanctions shall include, but are not limited to, fines or other monetary penalties, decertification as a mediator, and

any other sanction available through the court's contempt power. The senior resident superior court judge shall notify the Commission of any action taken against a mediator under this subsection.

(5) **Scheduling and Holding the Mediated Settlement Conference**. It is the duty of the mediator to schedule and conduct the mediated settlement conference prior to the conference completion deadline set out in the court's order. The mediator shall make an effort to schedule the conference at a time that is convenient to all participants. In the absence of agreement, the mediator shall select a date and time for the conference. The deadline for completion of the conference shall be strictly observed by the mediator, unless the deadline is changed by written order of the senior resident superior court judge.

A mediator selected by agreement of the parties shall not delay scheduling or holding a conference because one or more of the parties has not paid an advance fee deposit as required by the agreement.

Comment

Parties subject to Chapter 159 of the General Statutes of North Carolina—which provides, among other things, that if an obligation is evidenced by a contract or agreement requiring the payment of money or by a purchase order for supplies and materials, then the contract, agreement, or purchase order shall include on its face a certificate stating that the instrument has been pre-audited to assure compliance with N.C.G.S. § 159-28(a) and that an obligation incurred in violation of N.C.G.S. § 159-28(a) or (a1) is invalid and may not be enforced—should, as appropriate, inform all participants at the beginning of the mediation of the preaudit requirement and the consequences for failing to preaudit under N.C.G.S. § 159-28.

* * *

Rule 8. Mediator Certification and Decertification

(a) The Commission may receive and approve applications for certification of persons to be appointed as superior court mediators. In order to be certified, an applicant must satisfy the requirements of this subsection.

(1) The applicant must complete: (i) at least forty hours of Commission-certified trial court mediation training, or (ii) at least forty hours of Commission-certified

family and divorce mediation training and a sixteen-hour Commission-certified supplemental trial court mediation training.

(2) The applicant must have the following training, experience, and qualifications:

a. An attorney-applicant may be certified if he or she:

1. is a member in good standing of the North Carolina State Bar; or

2. is a member similarly in good standing of the bar of another state and eligible to apply for admission to the North Carolina State Bar under Chapter 1, Subchapter C, of the North Carolina State Bar Rules and the Rules Governing the Board of Law Examiners and the Training of Law Students, 27 N.C. Admin. Code 1C.0105; demonstrates familiarity with North Carolina court structure, legal terminology, and civil procedure; provides to the Commission three letters of reference about the applicant's good character, including at least one letter from a person with knowledge of the applicant's professional practice; and possesses the experience required by this subsection; and

3. has at least five years of experience after date of licensure as a judge, practicing attorney, law professor, or mediator, or has equivalent experience.

b. A nonattorney-applicant may be certified if he or she:

1. has, as a prerequisite for the forty hours of Commission-certified trial court mediation training, completed a six-hour training provided by a Commission-certified trainer on North Carolina court organization, legal terminology, civil court procedure, the attorney–client privilege, the unauthorized practice of law, and the common legal issues arising in superior court civil actions;

2. has provided to the Commission three letters of reference as to the applicant's good character, including at least one letter from a person

with knowledge of the applicant's experience qualifying the applicant under subsection (a)(2)(b)(3) of this rule; and

3. has completed ~~either~~one of the following:

i. a minimum of twenty hours of basic mediation training provided by a trainer acceptable to the Commission and, after completing the twenty-hour training, has mediated at least thirty disputes over the course of at least three years, or has equivalent experience, and possesses a four-year college degree from an accredited institution, and has four years of a high or relatively high level of professional or management experience of an executive nature in a professional, business, or governmental entity; ~~or~~

ii. ten years of a high or relatively high level of professional or management experience of an executive nature in a professional, business, or governmental entity, and possesses a four year college degree from an accredited institution.; or

iii. a master's degree or doctoral degree in alternative dispute resolution studies from an accredited institution and possesses five years of a high or relatively high level of professional or management experience of an executive nature in a professional, business, or governmental entity.

Any current or former attorney who is disqualified by the attorney licensing authority of any state shall be ineligible for certification under subsections (a)(2)(a) and (a)(2)(b) of this rule.

(3) The applicant must complete the following observations:

a. **All Applicants**. All applicants for certification shall observe two mediated settlement conferences, at least one of which shall be of a superior court civil action.

b. **Nonattorney-Applicants**. Nonattorney-applicants for certification shall observe three mediated settlement conferences, in addition to those required under subsection (a)(3)(a) of this rule, that are conducted by at least two different mediators. At least one of the additional observations shall be of a superior court civil action.

c. **Conferences Eligible for Observation**. Conferences eligible for observation under subsection (a)(3) of this rule shall be those in cases pending before the North Carolina superior courts, the North Carolina Court of Appeals, the North Carolina Industrial Commission, the North Carolina Office of Administrative Hearings, or the federal district courts in North Carolina that are ordered to mediation or conducted by an agreement of the parties which incorporates the rules of mediation of one of those entities.

Conferences eligible for observation shall also include those conducted in disputes prior to litigation that are mediated by an agreement of the parties and incorporate the rules for mediation of one of the entities named above.

All conferences shall be conducted by a certified superior court mediator under rules adopted by one of the above entities and shall be observed from their beginning to settlement or when an impasse is declared. Observations shall be reported on a Certificate of Observation – Mediated Settlement Conference Program, Form AOC-DRC-07.

All observers shall conform their conduct to the Commission's policy on *Guidelines for Observer Conduct*.

(4) The applicant must demonstrate familiarity with the statutes, rules, and practices governing mediated settlement conferences in North Carolina.

(5) The applicant must be of good moral character and adhere to the Standards of Professional Conduct for Mediators when acting under these rules. On his or her

application(s) for certification or application(s) for certification renewal, an applicant shall disclose any:

a. pending criminal charges;

b. criminal convictions;

c. restraining orders issued against him or her;

d. failures to appear;

e. closed grievances or complaints filed with a professional licensing, certifying, or regulatory body, whether in North Carolina, another state, or another country;

f. disciplinary action taken against him or her by a professional licensing, certifying, or regulatory body, whether in North Carolina, another state, or another country, including, but not limited to, disbarment, revocation, decertification, or suspension of any professional license or certification, including the suspension or revocation of any license, certification, registration, or qualification to serve as a mediator in another state or country, even if stayed;

g. judicial sanctions imposed against him or her in any jurisdiction;

h. civil judgments, tax liens, or bankruptcy filings that occurred within the ten years preceding the date that the initial or renewal application was filed with the Commission; or

i. pending grievances or complaints filed with a professional licensing, certifying, or regulatory body, whether in North Carolina, another state, or another country.

If a matter listed in subsections (a)(5)(a) through (a)(5)(h) of this rule arises after a mediator submits his or her initial or renewal application for certification, then the mediator shall report the matter to the Commission no later than thirty days after receiving notice of the matter.

If a pending grievance or complaint described in subsection (a)(5)(i) of this rule is filed after a mediator submits his or her initial or renewal application

for certification, then the mediator shall report the matter to the Commission no later than thirty days after receiving notice of the matter or, if a response to the grievance or complaint is permitted by the professional licensing, certifying, or regulatory body, no later than thirty days after the due date for the response.

As referenced in this subsection, criminal charges or convictions (excluding infractions) shall include felonies, misdemeanors, or misdemeanor traffic violations (including driving while impaired) under the law of North Carolina or another state, or under the law of a federal, military, or foreign jurisdiction, regardless of whether the adjudication was withheld (prayer for judgment continued) or the imposition of a sentence was suspended.

(6) The applicant must submit proof of qualifications set out in this rule on a form provided by the Commission.

(7) The applicant must pay all administrative fees established by the NCAOC upon the recommendation of the Commission.

(8) The applicant must agree to accept the fee ordered by the court under Rule 7 as payment in full of a party's share of the mediator's fee.

(9) The applicant must comply with the requirements of the Commission for completing and reporting continuing mediator education or training.

(10) The applicant must agree, once certified, to make reasonable efforts to assist applicants for mediator certification in completing their observation requirements.

(b) No mediator who held a professional license and relied upon that license to qualify for certification under subsections (a)(2)(a) or (a)(2)(b) of this rule shall be decertified or denied recertification because that mediator's license lapses, is relinquished, or becomes inactive; provided, however, that this subsection shall not apply to any mediator whose professional license is revoked, suspended, lapsed, relinquished, or whose professional license becomes inactive due to disciplinary action or the threat of disciplinary action from his or her licensing authority. Any mediator whose professional license is revoked, suspended, lapsed,

or relinquished, or whose professional license becomes inactive, shall report the matter to the Commission.

(c) A mediator's certification may be revoked or not renewed at any time it is shown to the satisfaction of the Commission that a mediator no longer meets the qualifications set out in this rule or has not faithfully observed these rules or those of any district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible for certification under this rule. No application for certification renewal shall be denied on the grounds that the mediator's training and experience does not meet the training and experience required under rules which were promulgated after the date of the applicant's original certification.

Comment

Comment to Rule 8(a)(2). Commission staff has discretion to waive the requirements set out in Rule 8(a)(2)(a)(2) and Rule 8(a)(2)(b)(1), if the applicant can demonstrate sufficient familiarity with North Carolina legal terminology, court structure, and procedure.

Comment to Rule 8(a)(2)(b)(3). Administrative, secretarial, and paraprofessional experience will not generally qualify as "a high or relatively high level of professional or management experience of an executive nature."

* * *

Rule 11. Rules for Neutral Evaluation

(a) **Nature of Neutral Evaluation**. Neutral evaluation is an informal, abbreviated presentation of the facts and issues by the parties to a neutral at an early stage of the case. The neutral is responsible for evaluating the strengths and weaknesses of the case, providing a candid assessment of liability, the settlement value, and a dollar value or range of potential awards if the case proceeds to trial. The neutral is also responsible for identifying areas of agreement and disagreement and suggesting necessary and appropriate discovery.

(b) **When the Neutral Evaluation Conference Is to Be Held**. As a guiding principle, the neutral evaluation conference should be held at an early stage of the case after the time for the filing of answers has expired, but in advance of the expiration of the discovery period.

(c) **Preconference Submissions**. No later than twenty days prior to the date established for the neutral evaluation conference to begin, each party shall provide the neutral with written information about the

case and shall certify to the neutral that they provided a copy of such summary to all other parties in the case. The information provided to the neutral and the other parties shall be a summary of the significant facts and issues in the party's case, shall not be more than five pages in length, and shall have attached to it copies of any documents supporting the parties' summary. Information provided to the neutral and to the other parties under this paragraph shall not be filed with the court.

(d) **Replies to Preconference Submissions**. No later than ten days prior to the date set for the neutral evaluation conference to begin, any party may, but is not required to, send additional information to the neutral in writing, not exceeding three pages in length, responding to a question from an opposing party. The response shall be served on all other parties, and the party sending the response shall certify such service to the neutral, but the response need not be filed with the court.

(e) **Neutral Evaluation Conference Procedure**. Prior to a neutral evaluation conference, the neutral may request additional information in writing from any party. At the conference, the neutral may address questions to the parties and give the parties an opportunity to complete their summaries with a brief oral statement.

(f) **Modification of Procedure**. Subject to the approval of the neutral, the parties may agree to modify the procedures required by these rules for neutral evaluation.

(g) **Neutral's Duties**.

(1) **Neutral's Opening Statement**. At the beginning of the neutral evaluation conference, in addition to the matters set out in Rule 10(c)(2)(b), the neutral shall define and describe for the parties:

a. the fact that the neutral evaluation conference is not a trial, that the neutral is not a judge, that the neutral's opinions are not binding on any party, and that the parties retain the right to a trial if they do not reach a settlement; and

b. the fact that any settlement reached will be only by mutual consent of the parties.

(2) **Oral Report to Parties by Neutra**l. In addition to the written report to the court required under these rules, at the conclusion of the neutral evaluation conference, the neutral shall issue an oral report to the parties advising

them of the neutral's opinion about the case. The opinion shall include a candid assessment of liability, an estimated settlement value, and the strengths and weaknesses of each party's claims in the event that the case proceeds to trial. The oral report shall also contain a suggested settlement or disposition of the case and the reason for the neutral's suggestion. The neutral shall neither reduce his or her oral report to writing nor inform the court of the oral report.

(3) **Report of Neutral to Court**. Within ten days after the completion of the neutral evaluation conference, the neutral shall file a written report with the court using a Report of Neutral Conducting Settlement Procedure Other Than Mediated Settlement Conference or Arbitration in Superior Court Civil Action, Form AOC-CV-817. The neutral's report shall inform the court when and where the conference was held, the names of those who attended, and the name of any party, attorney, or representative of an insurance carrier known to the neutral to have been absent from the conference without permission. The report shall also inform the court whether an agreement upon all issues was reached by the parties and, if so, state the name of the person designated to file the consent judgment or voluntary dismissal with the court. If a partial agreement was reached at the conference, then the report shall state the claims for relief that were resolved and the names of any parties that have no claims remaining for trial. Local rules shall not require the neutral to send a copy of any agreement reached by the parties to the court.

(h) **Neutral's Authority to Assist Negotiations**. If all parties to the neutral evaluation conference request and agree, then a neutral may assist the parties in settlement discussions.

* * *

These amendments to the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions become effective on 1 May 2023.

This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 4th day of April 2023.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 4th day of April 2023.

s/Grant E. Buckner

GRANT E. BUCKNER
Clerk of the Supreme Court

ORDER AMENDING THE RULES OF MEDIATION FOR MATTERS BEFORE THE CLERK OF SUPERIOR COURT

Pursuant to subsection 7A-38.3B(b) of the General Statutes of North Carolina, the Court hereby amends the Rules of Mediation for Matters Before the Clerk of Superior Court. This order affects Rules 2, 4, and 6.

* * *

Rule 2. Designation of the Mediator

(a) **Designation of a Mediator by Agreement of the Parties**. By agreement, the parties may designate a mediator certified by the Commission within the time period set out in the clerk's order. However, in estate and guardianship matters, the parties may designate only those mediators who are certified under these rules for estate and guardianship matters.

A Designation of Mediator in Matter Before Clerk of Superior Court, Form AOC-G-302 (Designation Form), must be filed within the time period set out in the clerk's order. The petitioner should file the Designation Form; however, any party may file the Designation Form. The party filing the Designation Form shall serve a copy on all parties and the mediator designated to conduct the mediation. The Designation Form shall state: (i) the name, address, and telephone number of the mediator designated; (ii) the rate of compensation of the mediator; (iii) that the mediator and the persons ordered to attend the mediation have agreed on the designation and the rate of compensation; and (iv) under which rules the mediator is certified.

(b) **Appointment of a Mediator by the Clerk**. In the event that a Designation Form is not filed with the clerk within the time period for filing stated in the clerk's order, the clerk shall appoint a mediator certified by the Commission. The clerk shall appoint only those mediators certified under these rules for estate and guardianship matters to those matters. The clerk may appoint any certified mediator who has expressed a desire to be appointed to mediate all other matters within the jurisdiction of the clerk.

Except for good cause, mediators shall be appointed by the clerk by rotation from a list of those certified mediators who wish to be appointed for matters within the clerk's jurisdiction, without regard to occupation, race, gender, religion, national origin, disability, or whether the mediator is an attorney.

As part of the application or annual certification renewal process, all mediators shall designate those counties for which they are willing

to accept court appointments. Each designation shall be deemed to be a representation that the designating mediator has read and will abide by the local rules for, and will accept appointments from, the designated county and will not charge for travel time and expenses incurred in carrying out his or her duties associated with those appointments. A mediator's refusal to accept an appointment in a county designated by the mediator may be grounds for removal from that county's court-appointment list by the Commission or by the clerk of that county.

The Commission shall provide to the clerk of each county a list of superior court mediators requesting appointments in that county who are certified in estate and guardianship proceedings, and those certified in other matters before the clerk. The list shall contain each mediator's name, address, and telephone number. The list shall be provided to the clerks electronically on the Commission's website at https://www.ncdrc.gov. The Commission shall promptly notify the clerk of any disciplinary action taken with respect to a mediator on the list of certified mediators for the county.

(c) **Mediator Information Directory**. ~~The Commission shall maintain for~~For the consideration of the clerks~~,~~ and those designating mediators for matters within the clerk's jurisdiction, ~~a directory~~the Commission shall post a list of certified mediators who request appointments in those matters and ~~a directory of mediators who~~ are certified under these rules on its website at https://www.ncdrc.gov. If a mediator has supplied it to the Commission, the list shall also provide the mediator's designated attendance method and the mediator's biographical information, including information about the mediator's education, professional experience, and mediation training and experience.~~The directory shall be provided to the clerks on the Commission's website at https://www.ncdrc.gov.~~

~~(d) **Disqualification of the Mediator**. Any person ordered to attend a mediation under these rules may move the clerk of the county in which the matter is pending for an order disqualifying the mediator. For good cause, an order disqualifying the mediator shall be entered. If the mediator is disqualified, a replacement mediator shall be designated or appointed under this rule. Nothing in this subsection shall preclude a mediator from disqualifying himself or herself.~~

(d) **Withdrawal or Disqualification of the Mediator.**

(1) Any person ordered to attend a mediation under these rules may move the clerk of the county in which the matter is pending for an order disqualifying the mediator using

a Notice of Withdrawal/Disqualification of Mediator and Order for Substitution of Mediator, Form AOC-DRC-20. For good cause, an order disqualifying the mediator shall be entered.

(2) A mediator who wishes to withdraw from a case may file a Notice of Withdrawal/Disqualification of Mediator and Order for Substitution of Mediator, Form AOC-DRC-20, with the clerk.

(3) If a mediator withdraws or is disqualified, then a substitute mediator shall be designated or appointed under this rule. A mediator who has withdrawn or been disqualified shall not be entitled to receive an administrative fee, unless the mediation has been commenced.

* * *

Rule 4. Duties of Parties, Attorneys, and Other Participants in Mediations

(a) **Attendance**.

~~(1) All persons ordered by the clerk to attend a mediation conducted under these rules shall attend the mediation using remote technology; for example, by telephone, videoconference, or other electronic means. The mediation shall conclude when an agreement is reduced to writing and signed, as provided in subsection (b) of this rule, or when an impasse is declared. Notwithstanding this remote attendance requirement, the mediation may be conducted in person if:~~

~~a. the mediator and all persons required to attend the mediation agree to conduct the mediation in person and to comply with all federal, state, and local safety guidelines that have been issued; or~~

~~b. the clerk, upon motion of a person required to attend the mediation and notice to the mediator and to all other persons required to attend the mediation, so orders.~~

~~(2) Any nongovernmental entity ordered to attend a mediation conducted under these rules shall be represented at the mediation by an officer, employee, or agent who is not the entity's outside counsel and who has authority to decide on behalf of the entity whether, and on what terms, to settle the matter.~~

~~(3) Any governmental entity ordered to attend a mediation conducted under these rules shall be represented at the mediation by an employee or agent who is not the entity's outside counsel and who has authority to decide on behalf of the entity whether, and on what terms, to settle the matter; provided, however, that if proposed settlement terms can be approved only by a governing board, the employee or agent shall have authority to negotiate on behalf of the governing board.~~

~~(4) An attorney ordered to attend a mediation under these rules has satisfied the attendance requirement when at least one counsel of record for any person ordered to attend has attended the mediation.~~

~~(5) Other persons may participate in a mediation at the discretion of the mediator.~~

~~(6) Persons ordered to attend a mediation shall promptly notify the mediator, after selection or appointment, of any significant problems they have with the dates for mediation sessions before the completion deadline, and shall inform the mediator of any problems that arise before an anticipated mediation session is scheduled by the mediator.~~

~~(7) Any person may be excused from the requirement to attend a mediation with the consent of all persons required to attend the mediation and the mediator.~~

(1) **Persons Required to Attend**. The following persons shall attend a mediation:

a. Any person ordered by the clerk to attend.

b. Any nongovernmental entity ordered to attend a mediation conducted under these rules shall be represented at the mediation by an officer, employee, or agent who is not the entity's outside counsel and who has authority to decide on behalf of the entity whether, and on what terms, to settle the matter.

c. Any governmental entity ordered to attend a mediation conducted under these rules shall be represented at the mediation by an employee or agent who is not the entity's outside counsel and who has authority to decide on behalf of the entity whether, and on what terms, to settle the matter; provided,

however, that if proposed settlement terms can be approved only by a governing board, the employee or agent shall have authority to negotiate on behalf of the governing board.

d. An attorney ordered to attend a mediation under these rules has satisfied the attendance requirement when at least one counsel of record for any person ordered to attend has attended the mediation.

e. Other persons may participate in a mediation at the discretion of the mediator.

(2) **Attendance Method**.

a. **Determination**.

1. All parties and persons required to attend a mediation may agree to conduct the mediation in person, using remote technology, or using a hybrid of in-person attendance and remote technology.

2. If all parties and persons required to attend the mediation do not agree on an attendance method and the mediator has designated in the Mediator Information Directory that he or she will conduct mediations only using remote technology, then the mediation shall be conducted using remote technology.

3. If all parties and persons required to attend the mediation do not agree on an attendance method and the mediator has not selected remote technology as his or her designated attendance method in the Mediator Information Directory, then the mediation shall be conducted in person.

b. **Order by Clerk; Mediator Withdrawal**. The clerk, upon motion of a party and notice to the mediator and to all other parties and persons required to attend the mediation, may order that the mediation be conducted in person, using remote technology, or using a hybrid of in-person attendance and remote technology.

If the method of attendance ordered by the clerk is contrary to the attendance method the

mediator has designated in the Mediator Information Directory, then the mediator may withdraw from the case under Rule 2(d).

(3) **Scheduling**. Persons ordered to attend a mediation shall promptly notify the mediator, after selection or appointment, of any significant problems that they may have with the dates for mediation sessions before the completion deadline, and shall inform the mediator of any problems that arise before an anticipated mediation session is scheduled by the mediator.

(4) **Excusing the Attendance Requirement**. Any person may be excused from the requirement to attend a mediation with the consent of all persons required to attend the mediation and the mediator.

(5) **Safety Compliance**. The mediator and all parties and persons required to attend a mediation shall comply with all federal, state, and local safety guidelines that are in place for trial court proceedings at the time of the mediation.

(b) **Finalizing Agreement**.

(1) If an agreement is reached at the mediation, in matters that, as a matter of law, may be resolved by the parties by agreement, then the parties to the agreement shall reduce the terms of the agreement to writing and sign the writing along with their counsel. The parties shall designate a person who will file a consent judgment or a voluntary dismissal with the clerk, and that person shall sign the mediator's report. If an agreement is reached prior to or during a recess of the mediation, then the parties shall inform the mediator and the clerk that the matter has been settled and, within ten calendar days of the agreement, file a consent judgment or voluntary dismissal with the court.

A designee may sign the agreement on behalf of a party only if the party does not attend the mediation and the party provides the mediator with a written verification that the designee is authorized to sign the agreement on the party's behalf.

(2) In all other matters, including guardianship and estate matters, if an agreement is reached upon some or all of

the issues at the mediation, then the persons ordered to attend the mediation shall reduce the terms of the agreement to writing and sign the writing along with their counsel, if any. Such agreements are not binding upon the clerk, but may be offered into evidence at the hearing of the matter and may be considered by the clerk for a just and fair resolution of the matter. Evidence of statements made and conduct occurring in a mediation where an agreement is reached is admissible under N.C.G.S. § 7A-38.3B(g)(3).

All written agreements reached in such matters shall include the following language in a prominent location in the document: "This agreement is not binding on the clerk but will be presented to the clerk as an aid to reaching a just resolution of the matter."

(c) **Payment of the Mediator's Fee**. The persons ordered to attend the mediation shall pay the mediator's fee as provided by Rule 7.

(d) **No Recording**. There shall be no stenographic, audio, or video recording of the mediation process by any participant. This prohibition includes recording either surreptitiously or with the agreement of the parties.

Comment

Comment to Rule 4(a)(2). The rule describes the attendance methods used for mediations. If a mediation is conducted using remote technology, then the mediator should ensure that the parties are able to fully communicate with all other participants and videoconferencing is encouraged.

* * *

Rule 6. Authority and Duties of the Mediator

(a) **Authority of the Mediator**.

(1) **Control of the Mediation**. The mediator shall at all times be in control of the mediation and the procedures to be followed. The mediator's conduct shall be governed by the Standards of Professional Conduct for Mediators.

(2) **Private Consultation**. The mediator may communicate privately with any participant or counsel prior to, during, and after the mediation. The fact that private communications have occurred with a participant before the conference shall be disclosed to all other participants at the beginning of the mediation.

(b) **Duties of the Mediator**.

(1) **Informing the Parties**. At the beginning of the mediation, the mediator shall define and describe for the parties:

a. the process of mediation;

b. the costs of mediation and the circumstances in which participants will not be assessed the costs of mediation;

c. the fact that the mediation is not a trial, that the mediator is not a judge, and that the parties retain the right to a hearing if they do not reach a settlement;

d. the circumstances under which the mediator may meet and communicate privately with the parties or with any other person;

e. whether, and under what conditions, communications with the mediator will be held in confidence during the conference;

f. the inadmissibility of conduct and statements under N.C.G.S. § 7A-38.3B;

g. the duties and responsibilities of the mediator and the participants; ~~and~~

h. the fact that any agreement reached will be reached by mutual consent and reported to the clerk under subsection (b)(4) of this rule~~.~~;

i. the fact that Rule 4(d) prohibits any recording of the mediation; and

j. the fact that the parties may be subject to sanctions for violating these rules.

(2) **Disclosure**. The mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice, or partiality.

(3) **Declaring Impasse**. It is the duty of the mediator to determine in a timely manner when an impasse exists and when the mediation should end. The mediator shall inquire of and consider the desires of the parties to cease or continue the mediation.

(4) **Reporting Results of the Mediation**.

a. The mediator shall report to the court in writing on a form prescribed by the North Carolina Administrative Office of the Courts (NCAOC) within five days of completing the mediation whether the mediation resulted in settlement or whether an impasse was declared. If settlement occurred prior to or during a recess of the mediation, then the mediator shall file the report of settlement within five days of receiving notice of the settlement and, in addition to the other information required, report on who informed the mediator of the settlement.

b. The mediator's report shall identify those persons attending the mediation, the time spent conducting the mediation and fees charged for the mediation, and the names and contact information of the persons designated by the parties to file a consent judgment or dismissal with the clerk, as required by Rule 4(b). Mediators shall provide statistical data for evaluation of the mediation program as required from time to time by the Commission or the NCAOC. Mediators shall not be required to send agreements reached in mediation to the clerk, except in estate and guardianship matters and other matters which may be resolved only by order of the clerk.

c. Mediators who fail to report as required under this rule shall be subject to the contempt power of the court and sanctions.

(5) **Scheduling and Holding the Mediation**. It is the duty of the mediator to schedule and conduct the mediation prior to the mediation completion deadline set out in the clerk's order. The mediator shall make an effort to schedule the mediation at a time that is convenient to all participants. In the absence of agreement, the mediator shall select a date and time for the mediation. The deadline for completion of the mediation shall be strictly observed by the mediator, unless the deadline is changed by a written order of the clerk.

* * *

These amendments to the Rules of Mediation for Matters Before the Clerk of Superior Court become effective on 1 May 2023.

This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 4th day of April 2023.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 4th day of April 2023.

s/Grant E. Buckner

GRANT E. BUCKNER
Clerk of the Supreme Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

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 21, 2023.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 01D, Section .1500, *Rules Governing the Administration of the Continuing Legal Education Program*, be amended as shown in the following attachments:

ATTACHMENT 2-A: 27 N.C.A.C. 01D, Section .1500, Rule .1502, *Jurisdiction: Authority*

ATTACHMENT 2-B: 27 N.C.A.C. 01D, Section .1500, Rule .1503, *Operational Responsibility*

ATTACHMENT 2-C: 27 N.C.A.C. 01D, Section .1500, Rule .1504, *Size of Board*

ATTACHMENT 2-D: 27 N.C.A.C. 01D, Section .1500, Rule .1505, *Lay Participation*

ATTACHMENT 2-E: 27 N.C.A.C. 01D, Section .1500, Rule .1506, *Appointment of Members; When; Removal*

ATTACHMENT 2-F: 27 N.C.A.C. 01D, Section .1500, Rule .1507, *Term of Office*

ATTACHMENT 2-G: 27 N.C.A.C. 01D, Section .1500, Rule .1508, *Staggered Terms*

ATTACHMENT 2-H: 27 N.C.A.C. 01D, Section .1500, Rule .1509, *Succession*

ATTACHMENT 2-I: 27 N.C.A.C. 01D, Section .1500, Rule .1510, *Appointment of Chairperson*

ATTACHMENT 2-J: 27 N.C.A.C. 01D, Section .1500, Rule .1511, *Appointment of Vice-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 April 21, 2023.

Given over my hand and the Seal of the North Carolina State Bar, this the 5th day of May, 2023.

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 14th day of June, 2023.

s/ Paul Newby
Paul 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 14th day of June, 2023.

s/Allen, J.
For the Court

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1500 – RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

27 NCAC 01D .1502 JURISDICTION: AUTHORITY

The Council of the North Carolina State Bar hereby establishes the Board of Continuing Legal Education (~~board~~Board) as a standing committee of the ~~council~~Council, which ~~board~~Board shall have authority to establish regulations governing a continuing legal education program ~~and a law practice assistance program~~ for ~~attorneys~~ lawyers licensed to practice law in this state.

History Note: *Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: June 14, 2023.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .0100 – PROCEDURES FOR RULING ON QUESTIONS OF LEGAL ETHICS

SECTION .1500 – RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

27 NCAC 01D .1503 OPERATIONAL RESPONSIBILITY

The responsibility for operating the continuing legal education program ~~and the law practice assistance program~~ shall rest with the ~~board~~Board, subject to the statutes governing the practice of law, the authority of the ~~council~~Council, and the rules of governance of the ~~board~~Board.

History Note: *Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: June 14, 2023.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1500 – RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

27 NCAC 01D .1504 SIZE OF BOARD

The ~~board~~Board shall have nine members, all of whom must be ~~attorneys~~ lawyers in good standing and authorized to practice in the state of North Carolina.

History Note: *Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: June 14, 2023.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1500 – RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

27 NCAC 01D .1505 LAY PARTICIPATION

The ~~board~~Board shall have no members who are not licensed ~~attorneys~~ lawyers.

History Note: *Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: June 14, 2023.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1500 – RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

27 NCAC 01D .1506 APPOINTMENT OF MEMBERS; WHEN; REMOVAL

The members of the ~~board~~Board shall be appointed by the ~~council~~ Council. ~~The first members of the board shall be appointed as of the quarterly meeting of the council following the creation of the board. Thereafter, members shall be appointed annually as of the same quarterly meeting.~~ Vacancies occurring by reason of death, resignation, or removal shall be filled by appointment of the ~~council~~Council at the next quarterly meeting following the event giving rise to the vacancy, and the person so appointed shall serve for the balance of the vacated term. Any member of the ~~board~~Board may be removed at any time by an affirmative vote of a majority of the members of the ~~council~~Council in session at a regularly called meeting.

History Note: *Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: June 14, 2023.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1500 – RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

27 NCAC 01D .1507 TERM OF OFFICE

Each member who is appointed to the ~~board~~Board shall serve for a term of three years beginning as of the first day of the month following the date on which the appointment is made by the ~~council~~Council. ~~See, however, Rule .1508 of this Section.~~

History Note: *Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: June 14, 2023.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1500 – RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

27 NCAC 01D .1508 STAGGERED TERMS

~~It is intended that members~~Members of the ~~board~~Board shall be elected to staggered terms such that three members are appointed in each year. ~~Of the initial board, three members shall be elected to terms of one year, three members shall be elected to terms of two years, and three members shall be elected to terms of three years. Thereafter, three members shall be elected each year.~~

History Note: *Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: June 14, 2023.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1500 – RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

27 NCAC 01D .1509 SUCCESSION

Each member of the ~~board~~Board shall be entitled to serve for one full three-year term and to succeed himself or herself for one additional three-year term. Thereafter, no person may be reappointed without having been off the ~~board~~Board for at least three years.

History Note: *Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: June 14, 2023.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1500 – RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

27 NCAC 01D .1510 APPOINTMENT OF CHAIRPERSON

The chairperson of the ~~board~~Board shall be appointed from time to time as necessary by the ~~council~~Council. The term of such individual as chairperson shall be one year. The chairperson may be reappointed thereafter during his or her tenure on the ~~board~~Board. The chairperson shall preside at all meetings of the ~~board~~Board, shall prepare and present to the ~~council~~Council the annual report of the ~~board~~Board, and generally shall represent the ~~board~~Board in its dealings with the public.

History Note: *Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: June 14, 2023.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1500 – RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

27 NCAC 01D .1511 APPOINTMENT OF VICE-CHAIRPERSON

The vice-chairperson of the ~~board~~Board shall be appointed from time to time as necessary by the ~~council~~Council. The term of such individual as vice-chairperson shall be one year. The vice-chairperson may be reappointed thereafter during tenure on the ~~board~~Board. The vice-chairperson shall preside at and represent the ~~board~~Board in the absence of the chairperson and shall perform such other duties as may be assigned to him or her by the chairperson or by the ~~board~~Board.

History Note: *Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: June 14, 2023.

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

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 21, 2023.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 01D, Section .1500, *Rules Governing the Administration of the Continuing Legal Education Program*, be amended as shown in the following attachments:

ATTACHMENT 3-A: 27 N.C.A.C. 01D, Section .1500, Rule .1512, *Source of Fund*s

ATTACHMENT 3-B: 27 N.C.A.C. 01D, Section .1500, Rule .1513, *Fiscal Responsibility*

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 April 21, 2023.

Given over my hand and the Seal of the North Carolina State Bar, this the 5th day of June, 2023.

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 14th day of June, 2023.

s/Paul Newby
Paul 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 14th day of June, 2023.

s/Allen, J.
For the Court

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1500 – RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

27 NCAC 01D .1512 SOURCE OF FUNDS

(a) Funding for the program carried out by the ~~board~~Board shall come from ~~sponsor's fees and attendee's fees~~ an annual CLE attendance fee and program application fees as provided below, as well as from duly assessed penalties for noncompliance and from reinstatement fees.

(1) Annual CLE Attendance Fee – all members, except those who are exempt from these requirements under Rule .1517, shall pay an annual CLE fee in an amount set by the Board and approved by the Council. Such fee shall accompany the member's annual membership fee. Annual CLE fees are non-refundable. Any member who fails to pay the required Annual CLE fee by the last day of June of each year shall be subject to (i) a late fee in an amount determined by the Board and approved by the Council, and (ii) administrative suspension pursuant to Rule .0903 of this Subchapter. ~~Registered sponsors located in North Carolina (for programs offered in or outside North Carolina), registered sponsors not located in North Carolina (for programs offered in North Carolina), and all other sponsors located in or outside of North Carolina (for programs offered in North Carolina) shall, as a condition of conducting an approved program, agree to remit a list of North Carolina attendees and to pay a fee for each active member of the North Carolina State Bar who attends the program for CLE credit. The sponsor's fee shall be based on each credit hour of attendance, with a proportional fee for portions of a program lasting less than an hour. The fee shall be set by the board upon approval of the council. Any sponsor, including a registered sponsor, that conducts an approved program which is offered without charge to attendees shall not be required to remit the fee under this section. Attendees who wish to receive credit for attending such an approved program shall comply with paragraph (a)(2) of this rule.~~

(2) Program Application Fee – The sponsor of a CLE program shall pay a program application fee due when filing an application for program accreditation pursuant to Rule .1520(b). Program application fees are non-refundable. A member

submitting an application for a previously unaccredited program for individual credit shall pay a reduced fee. ~~The board shall fix a reasonably comparable fee to be paid by individual attorneys who attend for CLE credit approved continuing legal education programs for which the sponsor does not submit a fee under Rule .1512(a)(1) above. Such fee shall accompany the member's annual affidavit. The fee shall be set by the board upon approval of the council.~~

(3) Fee Review – The Board will review the level of fees at least annually and adjust the fees as necessary to maintain adequate finances for prudent operation of the Board in a nonprofit manner. The Council shall annually review the assessments for the Chief Justice's Commission on Professionalism and the North Carolina Equal Access to Justice Commission and adjust them as necessary to maintain adequate finances for the operation of the commissions.

(4) Uniform Application and Financial Responsibility – Fees shall be applied uniformly without exceptions or other preferential treatment for a sponsor or member.

~~(b) Funding for a law practice assistance program shall be from user fees set by the board upon approval of the council and from such other funds as the council may provide.~~

~~(c) No Refunds for Exemptions and Record Adjustments.~~

~~(1) Exemption Claimed. If a credit hour of attendance is reported to the board, the fee for that credit hour is earned by the board regardless of an exemption subsequently claimed by the member pursuant to Rule .1517 of this subchapter. No paid fees will be refunded and the member shall pay the fee for any credit hour reported on the annual report form for which no fee has been paid at the time of submission of the member's annual report form.~~

~~(2) Adjustment of Reported Credit Hours. When a sponsor is required to pay the sponsor's fee, there will be no refund to the sponsor or to the member upon the member's subsequent adjustment, pursuant to Rule .1522(a) of this subchapter, to credit hours reported on the annual report form. When the member is required to pay the attendee's fee, the member shall pay the fee for any credit hour reported after any adjustment by the member to credit hours reported on the annual report form.~~

History Note: *Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: September 22, 2016; April 5, 2018; September 25, 2019; June 14, 2023.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1500 – RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

27 NCAC 01D .1513 FISCAL RESPONSIBILITY

All funds of the ~~board~~Board shall be considered funds of the North Carolina State Bar and shall be administered and disbursed accordingly.

(a) Maintenance of Accounts: Audit. ~~-~~ The North Carolina State Bar shall maintain a separate account for funds of the ~~board~~Board such that such funds and expenditures therefrom can be readily identified. The accounts of the ~~board~~Board shall be audited on an annual basis in connection with the audits of the North Carolina State Bar.

(b) Investment Criteria. ~~-~~ The funds of the ~~board~~Board shall be handled, invested and reinvested in accordance with investment policies adopted by the ~~council~~Council for the handling of dues, rents, and other revenues received by the North Carolina State Bar in carrying out its official duties.

(c) Disbursement. ~~-~~ Disbursement of funds of the ~~board~~Board shall be made by or under the direction of the ~~secretary-treasurer~~Secretary of the North Carolina State Bar pursuant to authority of the ~~council~~Council. The members of the ~~board~~Board shall serve on a voluntary basis without compensation, but may be reimbursed for the reasonable expenses incurred in attending meetings of the ~~board~~Board or its committees.

(d) All revenues resulting from the CLE program~~, including fees received from attendees and sponsors, late filing penalties, late compliance fees, reinstatement fees, and interest on a reserve fund~~ shall be applied first to the expense of administration of the CLE program including an adequate reserve fund; provided, however, that a portion of each ~~sponsor or attendee fee,~~ annual CLE fee and program application fee, in an amount to be determined by the ~~council~~Council, shall be paid to the Chief Justice's Commission on Professionalism and to the North Carolina Equal Access to Justice Commission for administration of the activities of these commissions. Excess funds may be expended by the ~~council~~Council on lawyer competency programs approved by the ~~council~~Council.

History Note: *Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: December 30, 1998; November 5, 2015; June 14, 2023.

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

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 21, 2023.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 01D, Section .1500, *Rules Governing the Administration of the Continuing Legal Education Program*, be amended as shown in the following attachments:

ATTACHMENT 4-A: 27 N.C.A.C. 01D, Section .1500, Rule .1514, *Meetings*

ATTACHMENT 4-B: 27 N.C.A.C. 01D, Section .1500, Rule .1515, *Annual Report*

ATTACHMENT 4-C: 27 N.C.A.C. 01D, Section .1500, Rule .1516, *Powers, Duties, and Organization of the Board*

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 April 21, 2023.

Given over my hand and the Seal of the North Carolina State Bar, this the 5th day of June, 2023.

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 14th day of June, 2023.

s/Paul Newby
Paul 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 14th day of June, 2023.

s/Allen, J.
For the Court

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1500 – RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

27 NCAC 01D .1514 MEETINGS

The Board shall meet at least annually.~~annual meeting of the board shall be held in October of each year in connection with the annual meeting of the North Carolina State Bar.~~ The ~~board~~Board by resolution may set regular meeting dates and places. Special meetings of the ~~board~~Board may be called at any time upon notice given by the chairperson, the vice-chairperson, or any two members of the ~~board~~Board. Notice of meeting shall be given at least two days prior to the meeting by mail, electronic mail, ~~telegram, facsimile transmission~~ or telephone. A quorum of the ~~board~~Board for conducting its official business shall be a majority of the members serving at a particular time.

History Note: *Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: June 14, 2023.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1500 – RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

27 NCAC 01D .1515 ANNUAL REPORT

The ~~board~~Board shall prepare at least annually a report of its activities and shall present the same to the ~~council~~Council ~~one month~~ prior to its annual meeting.

History Note: *Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: June 14, 2023.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1500 – RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

27 NCAC 01D .1516 POWERS, DUTIES, AND ORGANIZATION OF THE BOARD

(a) The ~~board~~Board shall have the following powers and duties:

(1) to exercise general supervisory authority over the administration of these rules;

(2) to adopt and amend regulations consistent with these rules with the approval of the ~~council~~Council;

(3) to establish an office or offices and to employ such persons as the ~~board~~Board deems necessary for the proper administration of these rules, and to delegate to them appropriate authority, subject to the review of the ~~council~~Council;

(4) to report annually on the activities and operations of the ~~board~~ Board to the ~~council~~Council and make any recommendations for changes in ~~the~~ fee amounts, rules, or methods of operation of the continuing legal education program; and

(5) to submit an annual budget to the ~~council~~Council for approval and to ensure that expenses of the ~~b~~Board do not exceed the annual budget approved by the ~~council;~~Council.

~~(6) to administer a law office assistance program for the benefit of lawyers who request or are required to obtain training in the area of law office management.~~

(b) The ~~board~~Board shall be organized as follows:

(1) Quorum. ~~Five members~~A majority of members serving shall constitute a quorum of the ~~board~~Board.

(2) ~~The~~ Executive Committee. ~~-~~The Board may establish an executive committee. The executive committee of the ~~b~~Board shall be comprised of the chairperson, ~~a~~ the vice-chairperson, ~~elected by the members of the board,~~ and a member to be appointed by the chairperson. Its purpose is to conduct all necessary business of the ~~board~~Board that may arise between meetings of the full ~~board~~Board. In such matters it shall have complete authority to act for the ~~board~~Board.

(3) Other Committees. ~~–~~The chairperson may appoint committees as established by the ~~board~~Board for the purpose of considering and deciding matters submitted to them by the ~~board~~Board.

(c) Appeals. ~~–~~Except as otherwise provided, the ~~board~~Board is the final authority on all matters entrusted to it under ~~Section .1500 and Section .1600 of~~ this subchapter. Therefore, any decision by a committee of the ~~board~~Board pursuant to a delegation of authority may be appealed to the full ~~board~~Board and will be heard by the ~~board~~Board at its next scheduled meeting. A decision made by the staff pursuant to a delegation of authority may also be reviewed by the full ~~board~~Board but should first be appealed to any committee of the ~~board~~Board having jurisdiction on the subject involved. All appeals shall be in writing. The ~~board~~Board has the discretion to, but is not obligated to, grant a hearing in connection with any appeal regarding the accreditation of a program.

History Note: *Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: March 3, 2005; June 14, 2023.

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

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 21, 2023.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 01D, Section .1500, *Rules Governing the Administration of the Continuing Legal Education Program*, be amended as shown in the following attachment:

ATTACHMENT 5: 27 N.C.A.C. 01D, Section .1500, Rule .1517, *Exemptions*

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 21, 2023.

Given over my hand and the Seal of the North Carolina State Bar, this the 5th day of June, 2023.

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 14th day of June, 2023.

s/Paul Newby
Paul Newby, Chief Justice

On this date, the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was entered upon the minutes of the

Supreme Court. The amendment shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 14th day of June, 2023.

s/Allen, J.
For the Court

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1500 – RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

27 NCAC 01D .1517 EXEMPTIONS

(a) Notification of Board. To qualify for an exemption, ~~for a particular calendar year,~~ a member shall notify the ~~board~~Board of the exemption ~~in~~during the annual membership renewal process or in another manner as directed by the Board ~~report for that calendar year sent to the member pursuant to Rule .1522 of this subchapter.~~ All active members who are exempt are encouraged to attend and participate in legal education programs.

(b) Government Officials and Members of Armed Forces. The governor, the lieutenant governor, and all members of the council of state, members of the United States Senate, members of the United States House of Representatives, members of the North Carolina General Assembly, full-time principal chiefs and vice-chiefs of any Indian tribe officially recognized by the United States or North Carolina state governments, and members of the United States Armed Forces on full-time active duty are exempt from the requirements of these rules for any calendar year in which they serve some portion thereof in such capacity.

(c) Judiciary and Clerks. Members of the state judiciary who are required by virtue of their judicial offices to take ~~an average of (twelve) 12 or more hours of~~ continuing judicial or other legal education ~~annually~~ and all members of the federal judiciary are exempt from the requirements of these rules for any calendar year in which they serve some portion thereof in such judicial capacities. Additionally, ~~A~~a full-time law clerk for a member of the federal or state judiciary is exempt from the requirements of these rules for any calendar year in which the clerk serves some portion thereof in such capacity, provided, however, that

(1) the exemption shall not exceed two consecutive calendar years; and, ~~further provided, that~~

(2) the clerkship begins within one year after the clerk graduates from law school or passes the bar examination for admission to the North Carolina State Bar whichever occurs later.

(d) Nonresidents. The Board may exempt an active member from the continuing legal education requirements if, for at least six consecutive months immediately prior to requesting an exemption, (i) the member

resides outside of North Carolina, (ii) the member does not practice law in North Carolina, and (iii) the member does not represent North Carolina clients on matters governed by North Carolina law. ~~Any active member residing outside of North Carolina who does not practice in North Carolina for at least six (6) consecutive months and does not represent North Carolina clients on matters governed by North Carolina law shall be exempt from the requirements of these rules.~~

(e) Law Teachers. An exemption from the requirements of these rules shall be given to any active member who does not practice in North Carolina or represent North Carolina clients on matters governed by North Carolina law and who is:

(1) A full-time teacher at the School of Government ~~(formerly the Institute of Government)~~ of the University of North Carolina;

(2) A full-time teacher at a law school in North Carolina that is accredited by the American Bar Association; or

(3) A full-time teacher of law-related courses at a graduate level professional school accredited by its respective professional accrediting agency.

(f) Special Circumstances Exemptions. The ~~board~~Board may exempt an active member from the continuing legal education requirements for a period of not more than one year at a time upon a finding by the ~~board~~Board of special circumstances unique to that member constituting undue hardship or other reasonable basis for exemption.~~, or for a longer period upon a finding of a permanent disability.~~

(g) Pro Hac Vice Admission. Nonresident ~~attorneys~~lawyers from other jurisdictions who are temporarily admitted to practice in a particular case or proceeding pursuant to the provisions of G.S. 84-4.1 shall not be subject to the requirements of these rules.

(h) Senior ~~Status~~ Exemption. The ~~board~~Board may exempt an active member from the continuing legal education requirements if

(1) the member is sixty-five years of age or older; and

(2) the member does not render legal advice to or represent a client unless ~~the member associates with~~under the supervision of another active member who assumes responsibility for the advice or representation.

(i) Bar Examiners. Members of the North Carolina Board of Law Examiners are exempt from the requirements of these rules for any calendar year in which they serve some portion thereof in such capacity.

~~CLE Record During Exemption Period. During a calendar year in which the records of the board indicate that an active member is exempt from the requirements of these rules, the board shall not maintain a record of such member's attendance at accredited continuing legal education programs. Upon the termination of the member's exemption, the member may request carry over credit up to a maximum of twelve (12) credits for any accredited continuing legal education program attended during the calendar year immediately preceding the year of the termination of the exemption. Appropriate documentation of attendance at such programs will be required by the board.~~

~~(j) Permanent Disability. Attorneys who have a permanent disability that makes attendance at CLE programs inordinately difficult may file a request for a permanent substitute program in lieu of attendance and shall therein set out continuing legal education plans tailored to their specific interests and physical ability. The board shall review and approve or disapprove such plans on an individual basis and without delay.~~

(~~k~~j) Application for Substitute Compliance and Exemptions. Other requests for substitute compliance, partial waivers, and/or other exemptions for hardship or extenuating circumstances may be granted by the ~~board~~Board on ~~a~~an annual ~~yearly~~ basis upon written application of the ~~attorney~~ member.

~~(l) Bar Examiners. Credit is earned through service as a bar examiner of the North Carolina Board of Law Examiners. The board will award 12 hours of CLE credit for the preparation and grading of a bar examination by a member of the North Carolina Board of Law Examiners.~~

(k) Effect of Annual Exemption on CLE Requirements. Exemptions are granted on an annual basis and must be claimed each year. An exempt member's new reporting period will begin on March 1 of the year for which an exemption is not granted. No credit from prior years may be carried forward following an exemption.

(l) Exemptions from Professionalism Requirement for New Members.

(1) Licensed in Another Jurisdiction. A newly admitted member who is licensed by a United States jurisdiction other than North Carolina for five or more years prior to admission to practice in North Carolina is exempt from the PNA program requirement and must notify the Board of the exemption during the annual membership renewal process or in another manner as directed by the Board.

(2) Inactive Status. A newly admitted member who is transferred to inactive status in the year of admission to the North Carolina State Bar is exempt from the PNA program requirement but, upon the entry of an order transferring the member back to active status, must complete the PNA program in the reporting period that the member is subject to the requirements set forth in Rule .1518(b) unless the member qualifies for another exemption in this rule.

(3) Other Rule .1517 Exemptions. A newly admitted active member who qualifies for an exemption under Rules .1517(a) through (i) of this subchapter shall be exempt from the PNA program requirement during the period of the Rule .1517 exemption. The member shall notify the Board of the exemption during the annual membership renewal process or in another manner as directed by the Board. The member must complete the PNA program in the reporting period the member no longer qualifies for the Rule .1517 exemption.

History Note: *Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: February 12, 1997; October 1, 2003; March 3, 2005; October 7, 2010; October 2, 2014; June 9, 2016; September 22, 2016; September 25, 2019; June 14, 2023.

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

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 21, 2023.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 01D, Section .1500, *Rules Governing the Administration of the Continuing Legal Education Program*, be amended as shown in the following attachment:

ATTACHMENT 6: 27 N.C.A.C. 01D, Section .1500, Rule .1518, *Continuing Legal Education Requirements*

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 21, 2023.

Given over my hand and the Seal of the North Carolina State Bar, this the 5th day of June, 2023.

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 14th day of June, 2023.

s/Paul Newby
Paul Newby, Chief Justice

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

This the 14th day of June, 2023.

s/Allen, J.
For the Court

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1500 – RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

27 NCAC 01D .1518 CONTINUING LEGAL EDUCATION REQUIREMENTS

(a) Reporting period. Except as provided in Paragraphs (1) and (2) below, the reporting period for the continuing legal education requirements shall be two years, beginning March 1 through the last day of February:

(1) New admittees. The reporting period for newly admitted members shall begin on March 1 of the calendar year of admission.

(2) Reinstated members.

(A) A member who is transferred to and subsequently reinstated from inactive or suspended status before the end of the reporting period in effect at the time of the original transfer shall retain the member's original reporting period and these Rules shall be applied as though the transfer had not occurred.

(B) Except as provided in Subparagraph (A) above, the first reporting period for reinstated members shall be the same as if the member was newly admitted pursuant to Paragraph (1) above.

(~~a~~b) ~~Annual~~ Hours ~~Requirement~~requirement. Each active member subject to these rules shall complete ~~12~~24 hours of approved continuing legal education during each ~~calendar year beginning January 1, 1988~~ reporting period, as provided by these rules. ~~and the regulations adopted thereunder.~~

Of the ~~12~~24 hours:

(1) at least ~~2~~four hours shall be devoted to ~~the areas of professional responsibility or professionalism or any combination thereof~~ ethics as defined in Rule .1501(c)(8) of this Subchapter;

(2) at least one hour shall be devoted to technology training as defined in Rule .1501(c)(~~17~~19) of this subchapter. This credit must be completed in at least one-hour increments; and ~~further explained in Rule .1602(e) of this subchapter; and~~

(3) ~~effective January 1, 2002, at least once every three calendar years, each member shall complete an hour of continuing legal education~~ at least one hour shall be devoted to programs ~~instruction~~ on professional well-being ~~substance abuse and debilitating mental conditions~~ as defined in Rule .1501(c)(18) of this subchapter.~~1602 (a).~~ This credit must be completed in at least one-hour increments. ~~This hour shall be credited to the annual 12-hour requirement but shall be in addition to the annual professional responsibility/professionalism requirement. To satisfy the requirement, a member must attend an accredited program on substance abuse and debilitating mental conditions that is at least one hour long.~~

(~~b~~c) Carryover credit. Members may carry over up to 12 credit hours from one reporting period to the next reporting period. Carryover hours will count towards a member's total hours requirement but may not be used to satisfy the requirements listed in Paragraphs (b)(1)-(3) of this Rule. ~~carry over up to 12 credit hours earned in one calendar year to the next calendar year, which may include those hours required by paragraph (a)(1) above. Additionally, a newly admitted active member may include as credit hours which may be carried over to the next succeeding year any approved CLE hours earned after that member's graduation from law school.~~

(d) The Board shall determine the process by which credit hours are allocated to lawyers' records to satisfy deficits from prior reporting years. The allocation shall be applied uniformly to the records of all affected lawyers and may not be appealed by an affected lawyer.

(~~c~~e) Professionalism Requirement for New Members. Except as provided in Rule .1517*(l)*, ~~paragraph (d)(1),~~ each newly admitted active member ~~admitted to~~ of the North Carolina State Bar ~~after January 1, 2011,~~ must complete ~~the~~ an approved ~~North Carolina State Bar~~ Professionalism for New Attorneys ~~P~~program (PNA ~~P~~program) as described in Rule .1525 ~~in~~during the member's first reporting period.~~year the member is first required to meet the continuing legal education requirements as set forth in Rule .1526(b) and (c) of this subchapter.~~ It is strongly recommended that newly admitted members complete the PNA program within their first year of admission. CLE credit for the PNA ~~P~~program shall be applied to the ~~annual~~ mandatory continuing legal education requirements set forth in ~~p~~Paragraph (~~a~~b) above.

(1) ~~Content and Accreditation. The State Bar PNA Program shall consist of 12 hours of training in subjects designated by the State Bar including, but not limited to, professional~~

responsibility, professionalism, and law office management. The chairs of the Ethics and Grievance Committees, in consultation with the chief counsel to those committees, shall annually establish the content of the program and shall publish the required content on or before January 1 of each year. To be approved as a PNA Program, the program must be provided by a sponsor registered under Rule .1603 of this subchapter and a sponsor must satisfy the annual content requirements, and submit a detailed description of the program to the board for approval at least 45 days prior to the program. A registered sponsor may not advertise a PNA Program until approved by the board. PNA Programs shall be specially designated by the board and no program that is not so designated shall satisfy the PNA Program requirement for new members.

(2) Timetable and Partial Credit. The PNA Program shall be presented in two six-hour blocks (with appropriate breaks) over two days. The six-hour blocks do not have to be attended on consecutive days or taken from the same provider; however, no partial credit shall be awarded for attending less than an entire six-hour block unless a special circumstances exemption is granted by the board. The board may approve an alternative timetable for a PNA program upon demonstration by the provider that the alternative timetable will provide an enhanced learning experience or for other good cause; however, no partial credit shall be awarded for attending less than the entire 12-hour program unless a special circumstances exemption is granted by the board.

(3) Online and Prerecorded Programs. The PNA Program may be distributed over the Internet by live web streaming (webcasting) but no part of the program may be taken online (via the Internet) on demand. The program may also be taken as a prerecorded program provided the requirements of Rule .1604(d) of this subchapter are satisfied and at least one hour of each six-hour block consists of live programming.

(d) Exemptions from Professionalism Requirement for New Members.

(1) Licensed in Another Jurisdiction. A member who is licensed by a United States jurisdiction other than North Carolina for five or more years prior to admission to practice in North Carolina is exempt from the PNA Program requirement and must notify the board of the exemption in the first annual report sent to the member pursuant to Rule .1522 of this subchapter.

(2) Inactive Status. A newly admitted member who is transferred to inactive status in the year of admission to the State Bar is exempt from the PNA Program requirement but, upon the entry of an order transferring the member back to active status, must complete the PNA Program in the year that the member is subject to the requirements set forth in paragraph (a) above unless the member qualifies for the exemption under paragraph (d)(1) of this rule.

(3) Exemptions Under Rule .1517. A newly admitted active member who qualifies for an exemption under Rule .1517 of this subchapter shall be exempt from the PNA Program requirement during the period of the Rule .1517 exemption. The member shall notify the board of the exemption in the first annual report sent to the member pursuant to Rule .1522 of this subchapter. The member must complete the PNA Program in the year the member no longer qualifies for the Rule .1517 exemption or the next calendar year unless the member qualifies for the exemption under paragraph (d)(1) of this rule.

(e) The board shall determine the process by which credit hours are allocated to lawyers' records to satisfy deficits. The allocation shall be applied uniformly to the records of all affected lawyers and may not be appealed by an affected lawyer.

History Note: *Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: February 12, 1997; December 30, 1998; March 3, 1999; November 6, 2001; October 1, 2003; March 11, 2010; August 25, 2011; March 6, 2014; March 5, 2015; June 9, 2016; April 5, 2018; September 20, 2018; September 25, 2019; June 14, 2023.

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

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 21, 2023.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 01D, Section .1500, *Rules Governing the Administration of the Continuing Legal Education Program*, be amended as shown in the following attachment:

ATTACHMENT 7: 27 N.C.A.C. 01D, Section .1500, Rule .1519, *Accreditation Standards*

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 21, 2023.

Given over my hand and the Seal of the North Carolina State Bar, this the 5th day of June, 2023.

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 14th day of June, 2023.

s/Paul Newby
Paul Newby, Chief Justice

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

This the 14th day of June, 2023.

s/Allen, J.
For the Court

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1500 – RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

27 NCAC 01D .1519 ACCREDITATION STANDARDS

The ~~board~~Board shall approve continuing legal education programs that meet the following standards and provisions.

(a) They shall have significant intellectual or practical content and the primary objective shall be to increase the participant's professional competence and proficiency as a lawyer.

(b) They shall constitute an organized program of learning dealing with matters directly related to the practice of law, professional responsibility, professionalism, or ethical obligations of lawyers.

(c) Participation in an online or on-demand program must be verified as provided in Rule .1520(d).~~Credit may be given for continuing legal education programs where live instruction is used or mechanically or electronically recorded or reproduced material is used, including videotape, satellite transmitted, and online programs.~~

(d) Continuing legal education materials are to be prepared, and programs conducted, by an individual or group qualified by practical or academic experience. Credit shall not be given for any continuing legal education program taught or presented by a disbarred lawyer except ~~a~~ programs on professional responsibility (~~including a program on the effects of substance abuse and chemical dependency, or debilitating mental conditions on a lawyer's professional responsibilities~~)and professional well-being programs taught by a disbarred lawyer whose disbarment date is at least ~~five years (~~60 months~~)~~ prior to the date of the program. The advertising for the program shall disclose the lawyer's disbarment.

(e) Live continuing legal education programs shall be conducted in a setting physically suitable to the educational nature of the program. ~~and, when appropriate, equipped with suitable writing surfaces or sufficient space for taking notes.~~

(f) Thorough, high quality, and carefully prepared ~~written~~ materials should be distributed to all attendees at or before the time the program is presented., unless ~~These may include written materials printed from a website or computer presentation. A written agenda or outline for a~~

~~program satisfies this requirement when written~~ materials are not suitable or readily available for a particular subject. ~~The absence of written materials for distribution should, however, be the exception and not the rule.~~

(g) A sponsor of an approved program must timely remit fees as required ~~in Rule .1606~~ and keep and maintain attendance records of each continuing legal education program sponsored by it, which shall be timely furnished to the ~~board~~Board in accordance with Rule .1520(g). ~~regulations. Participation in an online program must be verified as provided in Rule .1601(d).~~

(h) Except as provided in Rule~~s~~ .1523(d) ~~.1501 and.1602(h)~~ of this ~~subchapter~~Subchapter, in-house continuing legal education and self-study shall not be approved or accredited. ~~for the purpose of complying with Rule .1518 of this subchapter.~~

(i) Programs that cross academic lines, such as accounting-tax seminars, may be considered for approval by the ~~board~~Board. However, the ~~board~~Board must be satisfied that the content of the program would enhance legal skills or the ability to practice law.

History Note: *Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: March 1, 2001; October 1, 2003; February 5, 2009; March 11, 2010; April 5, 2018; September 25, 2019; December 14, 2021; June 14, 2023.

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

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 21, 2023.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 01D, Section .1500, *Rules Governing the Administration of the Continuing Legal Education Program*, be amended as shown in the following attachment:

ATTACHMENT 8: 27 N.C.A.C. 01D, Section .1500, Rule .1520, *Requirements for Program Approval*

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 21, 2023.

Given over my hand and the Seal of the North Carolina State Bar, this the 5th day of June, 2023.

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 14th day of June, 2023.

s/ Paul Newby
Paul Newby, Chief Justice

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

This the 14th day of June, 2023.

s/Allen, J.
For the Court

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1500 – RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

27 NCAC 01D .1520 REQUIREMENTS FOR PROGRAM APPROVAL ~~REGISTRATION OF SPONSORS AND PROGRAM APPROVAL~~

(a) Approval. CLE programs may be approved upon the application of a sponsor or an active member on an individual program basis. An application for such CLE program approval shall meet the following requirements:

(1) The application shall be submitted in the manner directed by the Board.

(2) The application shall contain all information requested by the Board and include payment of any required application fees.

(3) The application shall be accompanied by a program outline or agenda that describes the content in detail, identifies the teachers, lists the time devoted to each topic, and shows each date and location at which the program will be offered.

(4) The application shall disclose the cost to attend the program, including any tiered costs,

(5) The application shall include a detailed calculation of the total CLE hours requested, including whether any hours satisfy one of the requirements listed in Rules .1518(b) and .1518(d) of this Subchapter, and Rule 1.15-2(s)(3) of the Rules of Professional Conduct.

(b) Program Application Deadlines and Fee Schedule.

(1) Program Application and Processing Fees. Program applications submitted by sponsors shall comply with the deadlines and Fee Schedule set by the Board and approved by the Council, including any additional processing fees for late or expedited applications.

(2) Free Programs. Sponsors offering programs without charge to all attendees, including non-members of any membership organization, shall pay a reduced application fee.

(3) Member Applications. Members may submit a program application for a previously unapproved program after the program is completed, accompanied by a reduced application fee.

(4) On-Demand CLE Programs. Approved on-demand programs are valid for three years. After the initial three-year term, programs may be renewed annually in a manner approved by the Board that includes a certification that the program content continues to meet the accreditation standards in Rule .1519 and the payment of a program renewal fee.

(5) Repeat Programs. Sponsors seeking approval for a repeat program that was previously approved by the Board within the same CLE year (March 1 through the end of February) shall pay a reduced application fee.

(c) Program Quality and Materials. The application and materials provided shall reflect that the program to be offered meets the requirements of Rule .1519 of this Subchapter. Sponsors and active members seeking credit for an approved program shall furnish, upon request of the Board, a copy of all materials presented and distributed at a CLE program. Any sponsor that expects to conduct a CLE program for which suitable materials will not be made available to all attendees may be required to show why materials are not suitable or readily available for such a program.

(d) Online and On-Demand CLE. The sponsor of an online or on-demand program must have an approved method for reliably and actively verifying attendance and reporting the number of credit hours earned by each participant. Applications for any online or on-demand program must include a description of the sponsor's attendance verification procedure.

(e) Notice of Application Decision. Sponsors shall not make any misrepresentations concerning the approval of a program for CLE credit by the Board. The Board will provide notice of its decision on CLE program approval requests pursuant to the schedule set by the Board and approved by the Council. A program will be deemed approved if the notice is not timely provided by the Board pursuant to the schedule. This automatic approval will not operate if the sponsor contributes to the delay by failing to provide the complete information requested by the Board or if the Board timely notifies the sponsor that the matter has been delayed.

(f) Denial of Applications. Failure to provide the information required in the program application will result in denial of the program application. Applicants denied approval of a program may request reconsideration of such a decision by submitting a letter of appeal to the Board within 15 days of receipt of the notice of denial. The decision by the Board on an appeal is final.

(g) Attendance Records. Sponsors shall timely furnish to the Board a list of the names of all North Carolina attendees together with their North

Carolina State Bar membership numbers in the manner and timeframe prescribed by the Board.

(h) Late Attendance Reporting. Absent good cause shown, a sponsor's failure to timely furnish attendance reports pursuant to this rule will result in (i) a late reporting fee in an amount set by the Board and approved by the Council, and (ii) the denial of that sponsor's subsequent program applications until the attendance is reported and the late fee is paid.

~~(a) Registration of Sponsors. An organization desiring to be designated as a registered sponsor of programs may apply to the board for registered sponsor status. The board shall register a sponsor if it is satisfied that the sponsor's programs have met the accreditation standards set forth in Rule .1519 of this subchapter and the application requirements set forth in Rule .1603 of this subchapter.~~

~~(1) Duration of Status. Registered sponsor status shall be granted for a period of five years. At the end of the five-year period, the sponsor must apply to renew its registration pursuant to Rule .1603(b) of this subchapter.~~

~~(2) Accredited Sponsors. A sponsor that was previously designated by the board as an "accredited sponsor" shall, on the effective date of paragraph (a)(1) of this rule, be re-designated as a "registered sponsor." Each such registered sponsor shall subsequently be required to apply for renewal of registration according to a schedule to be adopted by the board. The schedule shall stagger the submission date for such applications over a three-year period after the effective date of this paragraph (a)(2).~~

~~(b) Program Approval for Registered Sponsors.~~

~~(1) Once an organization is approved as a registered sponsor, the continuing legal education programs sponsored by that organization are presumptively approved for credit; however, application must still be made to the board for approval of each program. At least 50 days prior to the presentation of a program, a registered sponsor shall file an application, on a form prescribed by the board, notifying the board of the dates and locations of presentations of the program and the sponsor's calculation of the CLE credit hours for the program.~~

~~(2) The board shall evaluate a program presented by a registered sponsor and, upon a determination that the program does not satisfy the requirements of Rule .1519, notify the registered~~

~~sponsor that the program is not approved for credit. Such notice shall be sent by the board to the registered sponsor within 45 days after the receipt of the application. If notice is not sent to the registered sponsor within the 45-day period, the program shall be presumed to be approved. The registered sponsor may request reconsideration of an unfavorable accreditation decision by submitting a letter of appeal to the board within 15 days of receipt of the notice of disapproval. The decision by the board on an appeal is final.~~

~~(c) Sponsor Request for Program Approval.~~

~~(1) Any organization not designated as a registered sponsor that desires approval of a program shall apply to the board. Applicants denied approval of a program for failure to satisfy the accreditation standards in Rule .1519 of this subchapter may request reconsideration of such a decision by submitting a letter of appeal to the board within 15 days of receipt of the notice of disapproval. The decision by the board on an appeal is final.~~

~~(2) The board may at any time decline to accredit CLE programs offered by a sponsor that is not registered for a specified period of time, as determined by the board, for failure to comply with the requirements of Rule .1512, Rule .1519, and Section .1600 of this subchapter.~~

~~(d) Member Request for Program Approval. An active member desiring approval of a program that has not otherwise been approved shall apply to the board. Applicants denied approval of a program for failure to satisfy the accreditation standards in Rule .1519 of this subchapter may request reconsideration of such a decision by submitting a letter of appeal to the board within 15 days of the receipt of the notice of disapproval. The decision by the board on an appeal is final.~~

History Note: *Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: February 27, 2003; March 3, 2005; October 7, 2010; March 6, 2014; April 5, 2018; September 25, 2019; June 14, 2023.

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

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 21, 2023.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 01D, Section .1500, *Rules Governing the Administration of the Continuing Legal Education Program*, be amended as shown in the following attachment:

ATTACHMENT 9: 27 N.C.A.C. 01D, Section .1500, Rule .1521, *Noncompliance*

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 21, 2023.

Given over my hand and the Seal of the North Carolina State Bar, this the 5th day of June, 2023.

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 14th day of June, 2023.

s/ Paul Newby
Paul Newby, Chief Justice

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

This the 14th day of June, 2023.

s/Allen, J.
For the Court

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1500 – RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

27 NCAC 01D .1521~~3~~ NONCOMPLIANCE

(a) Failure to Comply with Rules May Result in Suspension. A member who ~~is required to file a report of CLE credits and does not do so or who~~ fails to meet the minimum requirements of these rules, including the payment of duly assessed penalties and ~~attendee~~ fees, may be suspended from the practice of law in ~~the state of~~ North Carolina.

(b) Late Compliance. Any member who fails to complete his or her required hours by the end of the member's reporting period (i) shall be assessed a late compliance fee in an amount set by the Board and approved by the Council, and (ii) shall complete any outstanding hours within 60 days following the end of the reporting period. Failure to comply will result in a suspension order pursuant to Paragraph (c) below.

(~~b~~c) ~~Notice of~~ Suspension Order for Failure to Comply. 60 days following the end of the reporting period, ~~The~~the ~~board~~Council shall ~~notify~~ issue an order suspending any member who ~~appears to have failed~~fails to meet the requirements of these rules within 45 days after the service of the order, ~~that the member will be suspended from the practice of law in this state,~~ unless (i) the member shows good cause in writing why the suspension should not take effect; ~~be made~~ or (ii) the member ~~shows in writing that he or she has complied with~~ meets the requirements within the 30 ~~-day~~days ~~period~~ after service of the ~~notice~~ order. The order shall be entered and served as set forth in Rule .0903(d) of this subchapter. Additionally, the member shall be assessed a non-compliance fee as described in Paragraph (d) below. Notice shall be served on the member by mailing a copy thereof by registered or certified mail or designated delivery service (such as Federal Express or UPS), return receipt requested, to the last known address of the member according to the records of the North Carolina State Bar or such later address as may be known to the person attempting service. Service of the notice may also be accomplished by (i) personal service by a State Bar investigator or by any person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process, or (ii) email sent to the email address of the member contained in the records of the North Carolina State Bar if the member sends an email from that same email address to the State bar acknowledging such service.

(d) Non-Compliance Fee. A member to whom a suspension order is issued pursuant to Paragraph (c) above shall be assessed a non-compliance fee in an amount set by the Board and approved by the Council; provided, however, upon a showing of good cause as determined by the Board as described in Paragraph (g)(2) below, the fee may be waived. The non-compliance fee is in addition to the late compliance fee described in Paragraph (b) above.

(~~c~~e) Effect of Non-compliance with Suspension Order. ~~Entry of Order of Suspension Upon Failure to Respond to Notice to Show Cause.~~ If a member fails to meet the requirements during the 45-day period after service of the suspension order under Paragraph (c) above, the member shall be suspended from the practice of law subject to the obligations of a disbarred or suspended member to wind down the member's law practice as set forth in Rule .0128 of Subchapter 1B. ~~written response attempting to show good cause is not postmarked or received by the board by the last day of the 30-day period after the member was served with the notice to show cause upon the recommendation of the board and the Administrative Committee, the council may enter an order suspending the member from the practice of law. The order shall be entered and served as set forth in Rule .0903(d) of this Subchapter.~~

~~(f) Suspended members must petition for reinstatement to active status.~~

(~~d~~f) Procedure Upon Submission of ~~a Timely Response to a Notice to Show Cause~~ Evidence of Good Cause.

(1) Consideration by the Board. If the member files a timely ~~written~~ response to the ~~notice,~~suspension order attempting to show good cause for why the suspension should not take effect, the suspension order shall be stayed and the ~~board~~ Board shall consider the matter at its next ~~regularly scheduled~~ meeting. ~~or may delegate consideration of the matter to a duly appointed committee of the board. If the matter is delegated to a committee of the board and the committee determines that good cause has not been shown, the member may file an appeal to the board. The appeal must be filed within 30 calendar days of the date of the letter notifying the member of the decision of the committee.~~ The ~~board~~Board shall review all evidence presented by the member to determine whether good cause has been shown. ~~or to determine whether the member has complied with the requirements of these rules within the 30-day period after service of the notice to show cause.~~

(2) Recommendation of the Board. The ~~board~~Board shall determine whether the member has shown good cause as to why

the member should not be suspended.- If the ~~board~~Board determines that good cause has not been shown, the member's suspension shall become effective 15 calendar days after the date of the letter notifying the member of the decision of the Board. The member may request a hearing by the Administrative Committee within the 15-day period after the date of the Board's decision letter. The member's suspension shall be stayed upon a timely request for a hearing. ~~or that the member has not shown compliance with these rules within the 30-day period after service of the notice to show cause, then the board shall refer the matter to the Administrative Committee that the member be suspended.~~

(3) ~~Consideration by and Recommendation of~~ Hearing Before the Administrative Committee. The Administrative Committee shall consider the matter at its next regularly scheduled meeting. The burden of proof shall be upon the member to show cause by clear, cogent, and convincing evidence why the member should not be suspended from the practice of law for ~~the apparent~~ failure to comply with the rules governing the continuing legal education program. ~~Except as set forth above, the procedure for such hearing shall be as set forth in Rule .0903(d)(1) and (2) of this Subchapter.~~

(4) Administrative Committee Decision. If the Administrative Committee determines that the member has not met the burden of proof, the member's suspension shall become effective immediately. The decision of the Administrative Committee is final. ~~Order of Suspension. Upon the recommendation of the Administrative Committee, the council may determine that the member has not complied with these rules and may enter an order suspending the member from the practice of law. The order shall be entered and served as set forth in Rule .0903(d)(3) of this Subchapter.~~

~~(e) Late Compliance Fee. Any member to whom a notice to show cause is issued pursuant to Paragraph (b) above shall pay a late compliance fee as set forth in Rule .1522(d) of this Subchapter; provided, however, upon a showing of good cause as determined by the board as described in Paragraph (d)(2) above, the fee may be waived.~~

(g) Reinstatement. Suspended members must petition for reinstatement to active status pursuant to Rule .0904(b)-(h) of this Subchapter.

History Note: *Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: August 23, 2012; October 9, 2008; October 1, 2003; February 3, 2000; March 6, 1997; March 7, 1996; June 14, 2023;
Rule transferred from 27 N.C. Admin. Code 01D.1523 on June 14, 2023.

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

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 21, 2023.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 01D, Section .1500, *Rules Governing the Administration of the Continuing Legal Education Program*, be amended as shown in the following attachment:

ATTACHMENT 10: 27 N.C.A.C. 01D, Section .1500, Rule .1522, *Reserved*

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 21, 2023.

Given over my hand and the Seal of the North Carolina State Bar, this the 5th day of June, 2023.

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 14th day of June, 2023.

s/Paul Newby
Paul Newby, Chief Justice

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

This the 14th day of June, 2023.

s/Allen, J.
For the Court

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1500 – RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

~~27 NCAC 01D .1524 REINSTATEMENT~~ 27 NCAC 01D .1522 RESERVED

~~(a) Reinstatement Within 30 Days of Service of Suspension Order~~
~~A member who is suspended for noncompliance with the rules governing the continuing legal education program may petition the secretary for an order of reinstatement of the member's license at any time up to 30 days after the service of the suspension order upon the member. The secretary shall enter an order reinstating the member to active status upon receipt of a timely written request and satisfactory showing by the member that the member cured the continuing legal education deficiency for which the member was suspended. Such member shall not be required to file a formal reinstatement petition or pay a $250 reinstatement fee.~~

~~(b) Procedure for Reinstatement More that 30 Days After Service of the Order of Suspension~~
~~Except as noted below, the procedure for reinstatement more than 30 days after service of the order of suspension shall be as set forth in Rule .0904(c) and (d) of this subchapter, and shall be administered by Administrative Committee.~~

~~(c) Reinstatement Petition~~
~~At any time more than 30 days after service of an order of suspension on a member, a member who has been suspended for noncompliance with the rules governing the continuing legal education program may seek reinstatement by filing a reinstatement petition with the secretary. The secretary shall transmit a copy of the petition to each member of the board. The reinstatement petition shall contain the information and be in the form required by Rule .0904(c) of this subchapter. If not otherwise set forth in the petition, the member shall attach a statement to the petition in which the member shall state with particularity the accredited legal education programs that the member has attended and the number of credit hours obtained in order to cure any continuing legal education deficiency for which the member was suspended.~~

~~(d) Reinstatement Fee~~
~~In lieu of the $125.00 reinstatement fee required by Rule .0904(c)(4)(A), the petition shall be accompanied by a reinstatement fee payable to the board, in the amount of $250.00.~~

~~(e) Determination of Board; Transmission to Administrative Committee~~
~~Within 30 days of the filing of the petition for reinstatement with the secretary, the board shall determine whether the deficiency has been cured. The board's written determination and the reinstatement petition shall be transmitted to the secretary within five days of the determination by the board. The secretary shall transmit a copy of the petition and the board's recommendation to each member of the Administrative Committee.~~

~~(f) Consideration by Administrative Committee~~
~~The Administrative Committee shall consider the reinstatement petition, together with the board's determination, pursuant to the requirements of Rule .0902(c)-(f) of this subchapter.~~

~~(g) Hearing Upon Denial of Petition for Reinstatement~~
~~The procedure for hearing upon the denial by the Administrative Committee of a petition for reinstatement shall be as provided in Section .1000 of this subchapter.~~

History Note: *Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: March 7, 1996; March 6, 1997; February 3, 2000; March 3, 2005; September 25, 2019; June 14, 2023;
Rule transferred from 27 N.C. Admin. Code 1D .1524 on June 14, 2023.

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

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 21, 2023.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 01D, Section .1500, *Rules Governing the Administration of the Continuing Legal Education Program*, be amended as shown in the following attachment:

ATTACHMENT 11: 27 N.C.A.C. 01D, Section .1500, Rule .1523, *Credit for Non-Traditional Programs and Activities*

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 21, 2023.

Given over my hand and the Seal of the North Carolina State Bar, this the 5th day of June, 2023.

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 14th day of June, 2023.

s/Paul Newby
Paul Newby, Chief Justice

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

This the 14th day of June, 2023.

s/Allen, J.
For the Court

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1500 – RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

27 NCAC 01D .~~1602~~1523 ~~COURSE CONTENT REQUIREMENTS~~ CREDIT FOR NON-TRADITIONAL PROGRAMS AND ACTIVITIES

~~(a) Professional Responsibility Programs on Stress, Substance Abuse, Chemical Dependency, and Debilitating Mental Conditions - Accredited professional responsibility programs on stress, substance abuse, chemical dependency, and debilitating mental conditions shall concentrate on the relationship between stress, substance abuse, chemical dependency, debilitating mental conditions, and a lawyer's professional responsibilities. Such programs may also include (1) education on the prevention, detection, treatment and etiology of stress, substance abuse, chemical dependency, and debilitating mental conditions, and (2) information about assistance for chemically dependent or mentally impaired lawyers available through lawyers' professional organizations. No more than three hours of continuing education credit will be granted to any one such program or segment of a program.~~

(~~b~~a) Law School Courses. ~~-~~ Courses offered by an ABA accredited law school with respect to which academic credit may be earned may be approved programs. Computation of CLE credit for such courses shall be as prescribed in Rule .1524.~~1605(a)~~ of this subchapter. ~~No more than 12 CLE hours in any year may be earned by such courses.~~ No credit is available for law school courses attended prior to becoming an active member of the North Carolina State Bar.

(b) Service to the Profession Training. A program or segment of a program presented by a bar organization may be granted up to three hours of credit if the bar organization's program trains volunteer lawyers in service to the profession.

(c) Teaching Law Courses.

(1) Law School Courses. If a member is not a full-time teacher at a law school in North Carolina who is eligible for the exemption in Rule .1517(e) of this subchapter, the member may earn CLE credit for teaching a course or a class in a quarter or semester-long course at an ABA accredited law school.

(2) Graduate School Courses. A member may earn CLE credit by teaching a course on substantive law or a class on substantive law in a quarter or semester-long course at a graduate school of an accredited university.

(3) Courses at Paralegal Schools or Programs. A member may earn CLE credit by teaching a paralegal or substantive law course or a class in a quarter or semester-long course at an ABA approved paralegal school or program.

(4) Other Law Courses. The Board, in its discretion, may give CLE credit to a member for teaching law courses at other schools or programs.

(5) Credit Hours. Credit for teaching described in this paragraph may be earned without regard to whether the course is taught online or in a classroom. Credit will be calculated according to the following formula:

(A) Teaching a Course. 3.5 Hours of CLE credit for every quarter hour of credit assigned to the course by the educational institution, or 5.0 Hours of CLE credit for every semester hour of credit assigned to the course by the educational institution. (For example: a 3-semester hour course will qualify for 15 hours of CLE credit.)

(B) Teaching a Class. 1.0 Hour of CLE credit for every 50 – 60 minutes of teaching.

~~(c) Law Practice Management Programs - A CLE accredited program on law practice management must satisfy the accreditation standards set forth in Rule .1519 of this subchapter with the primary objective of increasing the participant's professional competence and proficiency as a lawyer. The subject matter presented in an accredited program on law practice management shall bear a direct relationship to either substantive legal issues in managing a law practice or a lawyer's professional responsibilities, including avoidance of conflicts of interest, protecting confidential client information, supervising subordinate lawyers and nonlawyers, fee arrangements, managing a trust account, ethical legal advertising, and malpractice avoidance. The following are illustrative, non-exclusive examples of subject matter that may earn CLE credit: employment law relating to lawyers and law practice; business law relating to the formation and operation of a law firm; calendars, dockets and tickler systems; conflict screening and avoidance systems; law office disaster planning; handling of client files; communicating with clients; and trust accounting. If appropriate, a law practice management program may qualify for professional responsibility (ethics) CLE credit. The following are illustrative, non-exclusive examples of~~

~~subject matter that will NOT receive CLE credit: marketing; networking/rainmaking; client cultivation; increasing productivity; developing a business plan; improving the profitability of a law practice; selling a law practice; and purchasing office equipment (including computer and accounting systems).~~

~~(d) Skills and Training Programs- A program that teaches a skill specific to the practice of law may be accredited for CLE if it satisfies the accreditation standards set forth in Rule .1519 of this subchapter with the primary objective of increasing the participant's professional competence and proficiency as a lawyer. The following are illustrative, non-exclusive examples of subject matter that may earn CLE credit: legal writing; oral argument; courtroom presentation; and legal research. A program that provides general instruction in non-legal skills shall NOT be accredited. The following are illustrative, non-exclusive examples of subject matter that will NOT receive CLE credit: learning to use software for an application that is not specific to the practice of law (e.g. word processing); learning to use office equipment (except as permitted by paragraph (e) of this rule); public speaking; speed reading; efficiency training; personal money management or investing; career building; marketing; and general office management techniques.~~

~~(e) Technology Training Programs – A technology training program must have the primary objective of enhancing a lawyer's proficiency as a lawyer or improving law office management and must satisfy the requirements of paragraphs (c) and (d) of this rule as applicable. Such programs include, but are not limited to, education on the following: a) an IT tool, process, or methodology designed to perform tasks that are specific or uniquely suited to the practice of law; b) using a generic IT tool, process, or methodology to increase the efficiency of performing tasks necessary to the practice of law; c) the investigation, collection, and introduction of social media evidence; d) e-discovery; e) electronic filing of legal documents; f) digital forensics for legal investigation or litigation; g) practice management software; and h) a cybersecurity tool, process, or methodology specifically applied to the needs of the practice of law or law practice management. A program that provides general instruction on an IT tool, process, or methodology but does not include instruction on the practical application of the IT tool, process, or methodology to the practice of law shall not be accredited. The following are illustrative, non-exclusive examples of subject matter that will NOT receive CLE credit: generic education on how to use a tablet computer, laptop computer, or smart phone; training programs on Microsoft Office, Excel, Access, Word, Adobe, etc.; and instruction in the use of a particular desktop or mobile operating system. No credit will be given to a program that is sponsored by a manufacturer, distributor, broker, or~~

~~merchandiser of an IT tool, process, or methodology unless the program is solely about using the IT tool, process, or methodology to perform tasks necessary or uniquely suited to the practice of law and information about purchase arrangements is not included in the accredited segment of the program. A sponsor may not accept compensation from a manufacturer, distributor, broker, or merchandiser of an IT tool, process, or methodology in return for presenting a CLE program about the IT tool, process, or methodology.~~

~~(f) Activities That Shall Not Be Accredited CLE credit will not be given for general and personal educational activities. The following are illustrative, non-exclusive examples of subject matter that will NOT receive CLE credit:~~

- ~~(1) courses within the normal college curriculum such as English, history, social studies, and psychology;~~
- ~~(2) courses that deal with the individual lawyer's human development, such as stress reduction, quality of life, or substance abuse unless a course on substance abuse or mental health satisfies the requirements of Rule .1602(c);~~
- ~~(3) courses designed primarily to sell services or products or to generate greater revenue, such as marketing or advertising (as distinguished from programs dealing with development of law office procedures and management designed to raise the level of service provided to clients).~~

~~(g) Service to the Profession Training - A program or segment of a program presented by a bar organization may be granted up to three hours of credit if the bar organization's program trains volunteer attorneys in service to the profession, and if such program or segment meets the requirements of Rule .1519(b)-(g) and Rule .1601(b), (c), and (g) of this subchapter; if appropriate, up to three hours of professional responsibility credit may be granted for such program or program segment.~~

(~~h~~d) In-House CLE and Self-Study. No approval will be provided for in-house CLE or self-study by ~~attorneys~~lawyers, except, in the discretion of the Board, as follows:

- (1) programs ~~exempted by the board under Rule .1501(c)(9) of this subchapter~~ to be conducted by public or quasi-public organizations or associations for the education of their employees or members; ~~and~~
- (2) programs to be concerned with areas of legal education not generally offered by sponsors of programs attended by lawyers engaged in the private practice of law; or

(~~2~~3) live ethics programs ~~on professional responsibility, professionalism, or professional negligence/malpractice~~ presented by a person or organization that is not affiliated with the lawyers attending the program or their law firms and that has demonstrated qualification to present such programs through experience and knowledge.

(~~i~~e) Bar Review/Refresher Course. Programs designed to review or refresh recent law school graduates or ~~attorneys~~ lawyers in preparation for any bar exam shall not be approved for CLE credit.

(f) CLE credit will not be given for (i) general and personal educational activities; (ii) courses designed primarily to sell services; or (iii) courses designed to generate greater revenue.

History Note: *Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: March 6, 1997; March 5, 1998; March 3, 1999; March 1, 2001; June 7, 2001; March 3, 2005; March 2, 2006; March 8, 2007; October 9, 2008; March 6, 2014; June 9, 2016; September 20, 2018; September 25, 2019; June 14, 2023;
Rule transferred from 27 N.C. Admin. Code 01D .1602 on June 14, 2023.

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

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 21, 2023.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 01D, Section .1500, *Rules Governing the Administration of the Continuing Legal Education Program*, be amended as shown in the following attachment:

ATTACHMENT 12: 27 N.C.A.C. 01D, Section .1500, Rule .1524, *Computation of Credit*

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 21, 2023.

Given over my hand and the Seal of the North Carolina State Bar, this the 5th day of June, 2023.

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 14th day of June, 2023.

s/Paul Newby
Paul Newby, Chief Justice

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

This the 14th day of June, 2023.

s/Allen, J.
For the Court

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1500 – RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

27 NCAC 01D .~~1605~~1524 COMPUTATION OF CREDIT

(a) Computation Formula - Credit ~~CLE and professional responsibility~~ hours shall be computed by the following formula:

Sum of the total minutes of actual instruction / 60 = Total Hours

For example, actual instruction totaling 195 minutes would equal 3.25 hours toward CLE.

(b) Actual Instruction - Only actual education shall be included in computing the total hours of actual instruction. The following shall not be included:

(1) introductory remarks;

(2) breaks;

(3) business meetings;

(4) speeches in connection with banquets or other events which are primarily social in nature; and

(5) unstructured question and answer sessions at a ratio in excess of 15 minutes per CLE hour. ~~and programs less than 30 minutes in length provided, however, that the limitation on question and answer sessions shall not limit the length of time that may be devoted to participatory CLE.~~

(c) Computation of Teaching Credit - ~~As a contribution to professionalism, credit~~Credit may be earned for teaching in an approved continuing legal education program or a continuing paralegal education program held in North Carolina and approved pursuant to ~~Section .0200 of Subchapter G of these rules. Programs accompanied by thorough, high quality, readable, and carefully prepared written materials will qualify for CLE credit on the basis of~~ these rules at a ratio of three hours of CLE credit ~~for~~ per each ~~thirty~~30 minutes of presentation. Repeat programs qualify for one-half of the credits available for the initial program. For example, an initial presentation of 45 minutes would qualify for 4.5 hours of credit, and the repeat program would qualify for 2.25 hours of credit.

~~(d) Teaching Law Courses~~

~~(1) Law School Courses. If a member is not a full-time teacher at a law school in North Carolina who is eligible for the exemption in Rule .1517(b) of this subchapter, the member may earn CLE credit for teaching a course or a class in a quarter or semester-long course at an ABA accredited law school. A member may also earn CLE credit by teaching a course or a class at a law school licensed by the Board of Governors of the University of North Carolina, provided the law school is actively seeking accreditation from the ABA. If ABA accreditation is not obtained by a law school so licensed within three years of the commencement of classes, CLE credit will no longer be granted for teaching courses at the school.~~

~~(2) Graduate School Courses. Effective January 1, 2012, a member may earn CLE credit by teaching a course on substantive law or a class on substantive law in a quarter or semester-long course at a graduate school of an accredited university.~~

~~(3) Courses at Paralegal Schools or Programs. Effective January 1, 2006, a member may earn CLE credit by teaching a paralegal or substantive law course or a class in a quarter or semester-long course at an ABA approved paralegal school or program.~~

~~(4) Credit Hours. Credit for teaching described in Rule .1605(d)(1) – (3) above may be earned without regard to whether the course is taught online or in a classroom. Credit will be calculated according to the following formula:~~

~~(A) Teaching a Course. 3.5 Hours of CLE credit for every quarter hour of credit assigned to the course by the educational institution, or 5.0 Hours of CLE credit for every semester hour of credit assigned to the course by the educational institution. (For example: a 3-semester hour course will qualify for 15 hours of CLE credit).~~

~~(B) Teaching a Class. 1.0 Hour of CLE credit for every 50 – 60 minutes of teaching.~~

~~(5) Other Requirements. The member shall also complete the requirements set forth in Rule .1518(b) of this subchapter.~~

History Note: *Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711;*
Readopted Eff. December 8, 1994;

Amendments Approved by the Supreme Court: March 3, 1999; October 1, 2003; November 16, 2006; August 23, 2012; September 25, 2019; June 14, 2023; Rule transferred from 27 N.C. Admin. Code 01D .1605 on June 14, 2023.

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

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 21, 2023.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 01D, Section .1500, *Rules Governing the Administration of the Continuing Legal Education Program*, be amended as shown in the following attachment:

ATTACHMENT 13: 27 N.C.A.C. 01D, Section .1500, Rule .1525,
Professionalism Requirement for New Members (PNA)

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 21, 2023.

Given over my hand and the Seal of the North Carolina State Bar, this the 5th day of June, 2023.

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 14th day of June, 2023.

s/Paul Newby
Paul Newby, Chief Justice

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

This the 14th day of June, 2023.

s/Allen, J.
For the Court

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1500 – RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

27 NCAC 01D .1525 ~~CONFIDENTIALITY~~PROFESSIONALISM REQUIREMENT FOR NEW MEMBERS (PNA)

(a) Content and Accreditation. The State Bar PNA program shall consist of 12 hours of training in subjects designated by the State Bar including, but not limited to, professional responsibility, professionalism, and law office management. The chairs of the Ethics and Grievance Committees, in consultation with the chief counsel to those committees, shall annually establish the content of the program and shall publish any changes to the required content on or before January 1 of each year. To be approved as a PNA program, the program must satisfy the annual content requirements, and a sponsor must submit a detailed description of the program to the Board for approval. A sponsor may not advertise a PNA program until approved by the Board. PNA programs shall be specially designated by the Board and no program that is not so designated shall satisfy the PNA program requirement for new members.

(b) Timetable and Partial Credit. The PNA program shall be presented in two six-hour blocks (with appropriate breaks) over two days. The six-hour blocks do not have to be attended on consecutive days or taken from the same provider; however, no partial credit shall be awarded for attending less than an entire six-hour block unless a special circumstances exemption is granted by the Board. The Board may approve an alternative timetable for a PNA program upon demonstration by the provider that the alternative timetable will provide an enhanced learning experience or for other good cause; however, no partial credit shall be awarded for attending less than the entire 12-hour program unless a special circumstances exemption is granted by the Board.

(c) Online programs. The PNA program may be distributed over the internet by live streaming, but no part of the program may be taken on-demand unless specifically authorized by the Board.

(d) PNA Requirement. Except as provided in Rule .1517(*l*), each newly admitted active member of the North Carolina State Bar must complete the PNA program during the member's first reporting period. It is strongly recommended that newly admitted members complete the PNA program within their first year of admission.

History Note: *Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: March 3, 1999; June 14, 2023.

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

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 21, 2023.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 01D, Section .1500, *Rules Governing the Administration of the Continuing Legal Education Program*, be amended as shown in the following attachment:

ATTACHMENT 14: 27 N.C.A.C. 01D, Section .1500, Rule .1526, *Procedures to Effectuate Rule Changes*

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 21, 2023.

Given over my hand and the Seal of the North Carolina State Bar, this the 5th day of June, 2023.

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 14th day of June, 2023.

s/Paul Newby
Paul Newby, Chief Justice

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

This the 14th day of June, 2023.

s/Allen, J.
For the Court

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1500 – RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

27 NCAC 01D .1526 ~~EFFECTIVE DATE~~PROCEDURES TO EFFECTUATE RULE CHANGES

(a) ~~The effective date of these Rules shall be January 1, 1988.~~ Subject to approval by the Council, the Board may adopt administrative policies and procedures to effectuate the rule changes approved by the Supreme Court on June 14, 2023, in order to:

(1) create staggered initial reporting periods;

(2) provide for a smooth transition into the new rules beginning March 1, 2024; and

(3) maintain historically consistent funding for the Chief Justice's Commission on Professionalism and the Equal Access to Justice Commission.

(b) Carryover hours earned pursuant to the rules in effect at the time the hours are earned will carry over as total hours to the first reporting period under the amended rules. ~~Active members licensed prior to July 1 of any calendar year shall meet the continuing legal education requirements of these Rules for such year.~~

~~(c) Active members licensed after June 30 of any calendar year must meet the continuing legal education requirements of these Rules for the next calendar year.~~

History Note: *Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: June 14, 2023.

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

REGULATIONS GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

The following amendments 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 21, 2023.

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 .1600, *Regulations Governing the Administration of the Continuing Legal Education Program*, be amended as shown in the following attachments:

ATTACHMENT 15-A: 27 N.C.A.C. 01D, Section .1600, Rule .1601, Reserved

ATTACHMENT 15-B: 27 N.C.A.C. 01D, Section .1600, Rule .1602, Reserved

ATTACHMENT 15-C: 27 N.C.A.C. 01D, Section .1600, Rule .1603, Reserved

ATTACHMENT 15-D: 27 N.C.A.C. 01D, Section .1600, Rule .1604, Reserved

ATTACHMENT 15-E: 27 N.C.A.C. 01D, Section .1600, Rule .1605, Reserved

ATTACHMENT 15-F: 27 N.C.A.C. 01D, Section .1600, Rule .1606, Reserved

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 21, 2023.

Given over my hand and the Seal of the North Carolina State Bar, this the 5th day of June, 2023.

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 14th day of June, 2023.

s/Paul Newby
Paul Newby, Chief Justice

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

This the 14th day of June, 2023.

s/Allen, J.
For the Court

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1600 – REGULATIONS GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

27 NCAC 01D .1601 ~~GENERAL REQUIREMENTS FOR PROGRAM APPROVAL~~RESERVED

~~(a) Approval. CLE programs may be approved upon the written application of a sponsor, including a registered sponsor, or of an active member on an individual program basis. An application for such CLE program approval shall meet the following requirements:~~

~~(1) If advance approval is requested by a sponsor, the application and supporting documentation, including one substantially complete set of the written materials to be distributed at the program, shall be submitted at least 50 days prior to the date on which the program is scheduled. If advance approval is requested by an active member, the application need not include a complete set of written materials.~~

~~(2) In all other cases, the application and supporting documentation shall be submitted by the sponsor not later than 50 days after the date the program was presented or prior to the end of the calendar year in which the program was presented, whichever is earlier. Active members requesting credit must submit the application and supporting documentation within 50 days after the date the program was presented or, if the 50 days have elapsed, as soon as practicable after receiving notice from the board that the program accreditation request was not submitted by the sponsor.~~

~~(3) The application shall be submitted on a form furnished by the board.~~

~~(4) The application shall contain all information requested on the form.~~

~~(5) The application shall be accompanied by a program outline or brochure that describes the content, identifies the teachers, lists the time devoted to each topic, and shows each date and location at which the program will be offered.~~

~~(6) The application shall include a detailed calculation of the total CLE hours and hours of professional responsibility.~~

~~(b) Program Quality and Materials. The application and materials provided shall reflect that the program to be offered meets the requirements of Rule .1519 of this subchapter. Sponsors, including registered sponsors, and active members seeking credit for an approved program shall furnish, upon request of the board, a copy of all materials presented and distributed at a CLE program. Written materials consisting merely of an outline without citation or explanatory notations generally will not be sufficient for approval. Any sponsor, including a registered sponsor, that expects to conduct a CLE program for which suitable written materials will not be made available to all attendees may obtain approval for that program only by application to the board at least 50 days in advance of the program showing why written materials are not suitable or readily available for such a program.~~

~~(c) Facilities. Sponsors must provide a facility conductive to learning with sufficient space for taking notes.~~

~~(d) Online CLE. The sponsor of an online program must have a reliable method for recording and verifying attendance. A participant may periodically log on and off of an online program provided the total time spent participating in the program is equal to or exceeds the credit hours assigned to the program. A copy of the record of attendance must be forwarded to the board within 30 days after a member completes his or her participation in the program.~~

~~(e) Records. Sponsors, including registered sponsors, shall within 30 days after the program is concluded~~

- ~~(1) furnish to the board a list of the names of all North Carolina attendees together with their North Carolina State Bar membership numbers; the list shall be in alphabetical order and in a format prescribed by the board;~~
- ~~(2) remit to the board the appropriate sponsor fee; and, if payment is not received by the board within 30 days after the program is concluded, interest at the legal rate shall be incurred; provided, however, the board may waive such interest upon a showing of good cause by a sponsor; and~~
- ~~(3) furnish to the board a complete set of all written materials distributed to attendees at the program.~~

~~(f) Announcement. Sponsors that have advanced approval for programs may include in their brochures or other program descriptions the information contained in the following illustration:~~

~~This program has been approved by the Board of Continuing Legal Education of the North Carolina State Bar for continuing legal education credit in the amount of ____ hours, of which ____ hours will also apply in the area of professional responsibility.~~

~~(g) Notice. Sponsors not having advanced approval shall make no representation concerning the approval of the program for CLE credit by the board. The board will mail a notice of its decision on CLE program approval requests within 45 days of their receipt when the request for approval is submitted before the program and within 45 days when the request is submitted after the program. Approval thereof will be deemed if the notice is not timely mailed. This automatic approval will not operate if the sponsor contributes to the delay by failing to provide the complete information requested by the board or if the board timely notifies the sponsor that the matter has been tabled and the reason therefor.~~

History Note: *Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: October 1, 2003; March 3, 2005; March 6, 2008; October 7, 2010; April 5, 2018; September 25, 2019; June 14, 2023.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1600 – REGULATIONS GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

27 NCAC 01D .1602 ~~COURSE CONTENT REQUIREMENTS~~ RESERVED

~~(a) Professional Responsibility Programs on Stress, Substance Abuse, Chemical Dependency, and Debilitating Mental Conditions - Accredited professional responsibility programs on stress, substance abuse, chemical dependency, and debilitating mental conditions shall concentrate on the relationship between stress, substance abuse, chemical dependency, debilitating mental conditions, and a lawyer's professional responsibilities. Such programs may also include (1) education on the prevention, detection, treatment and etiology of stress, substance abuse, chemical dependency, and debilitating mental conditions, and (2) information about assistance for chemically dependent or mentally impaired lawyers available through lawyers' professional organizations. No more than three hours of continuing education credit will be granted to any one such program or segment of a program.~~

~~(b) Law School Courses - Courses offered by an ABA accredited law school with respect to which academic credit may be earned may be approved programs. Computation of CLE credit for such courses shall be as prescribed in Rule .1605(a) of this subchapter. No more than 12 CLE hours in any year may be earned by such courses. No credit is available for law school courses attended prior to becoming an active member of the North Carolina State Bar.~~

~~(c) Law Practice Management Programs - A CLE accredited program on law practice management must satisfy the accreditation standards set forth in Rule .1519 of this subchapter with the primary objective of increasing the participant's professional competence and proficiency as a lawyer. The subject matter presented in an accredited program on law practice management shall bear a direct relationship to either substantive legal issues in managing a law practice or a lawyer's professional responsibilities, including avoidance of conflicts of interest, protecting confidential client information, supervising subordinate lawyers and nonlawyers, fee arrangements, managing a trust account, ethical legal advertising, and malpractice avoidance. The following are illustrative, non-exclusive examples of subject matter that may earn CLE credit:~~

~~employment law relating to lawyers and law practice; business law relating to the formation and operation of a law firm; calendars, dockets and tickler systems; conflict screening and avoidance systems; law office disaster planning; handling of client files; communicating with clients; and trust accounting. If appropriate, a law practice management program may qualify for professional responsibility (ethics) CLE credit. The following are illustrative, non-exclusive examples of subject matter that will NOT receive CLE credit: marketing; networking/rainmaking; client cultivation; increasing productivity; developing a business plan; improving the profitability of a law practice; selling a law practice; and purchasing office equipment (including computer and accounting systems).~~

~~(d) Skills and Training Programs- A program that teaches a skill specific to the practice of law may be accredited for CLE if it satisfies the accreditation standards set forth in Rule .1519 of this subchapter with the primary objective of increasing the participant's professional competence and proficiency as a lawyer. The following are illustrative, non-exclusive examples of subject matter that may earn CLE credit: legal writing; oral argument; courtroom presentation; and legal research. A program that provides general instruction in non-legal skills shall NOT be accredited. The following are illustrative, non-exclusive examples of subject matter that will NOT receive CLE credit: learning to use software for an application that is not specific to the practice of law (e.g. word processing); learning to use office equipment (except as permitted by paragraph (e) of this rule); public speaking; speed reading; efficiency training; personal money management or investing; career building; marketing; and general office management techniques.~~

~~(e) Technology Training Programs – A technology training program must have the primary objective of enhancing a lawyer's proficiency as a lawyer or improving law office management and must satisfy the requirements of paragraphs (c) and (d) of this rule as applicable. Such programs include, but are not limited to, education on the following: a) an IT tool, process, or methodology designed to perform tasks that are specific or uniquely suited to the practice of law; b) using a generic IT tool, process, or methodology to increase the efficiency of performing tasks necessary to the practice of law; c) the investigation, collection, and introduction of social media evidence; d) e-discovery; e) electronic filing of legal documents; f) digital forensics for legal investigation or litigation; g) practice management software; and h) a cybersecurity tool, process, or methodology specifically applied to the needs of the practice of law or law practice management. A program that provides general instruction on an IT tool, process, or methodology but does not include instruction on the practical application of the IT tool, process, or~~

methodology to the practice of law shall not be accredited. The following are illustrative, non-exclusive examples of subject matter that will NOT receive CLE credit: generic education on how to use a tablet computer, laptop computer, or smart phone; training programs on Microsoft Office, Excel, Access, Word, Adobe, etc.; and instruction in the use of a particular desktop or mobile operating system. No credit will be given to a program that is sponsored by a manufacturer, distributor, broker, or merchandiser of an IT tool, process, or methodology unless the program is solely about using the IT tool, process, or methodology to perform tasks necessary or uniquely suited to the practice of law and information about purchase arrangements is not included in the accredited segment of the program. A sponsor may not accept compensation from a manufacturer, distributor, broker, or merchandiser of an IT tool, process, or methodology in return for presenting a CLE program about the IT tool, process, or methodology.

(f) Activities That Shall Not Be Accredited CLE credit will not be given for general and personal educational activities. The following are illustrative, non-exclusive examples of subject matter that will NOT receive CLE credit:

(1) courses within the normal college curriculum such as English, history, social studies, and psychology;

(2) courses that deal with the individual lawyer's human development, such as stress reduction, quality of life, or substance abuse unless a course on substance abuse or mental health satisfies the requirements of Rule .1602(c);

(3) courses designed primarily to sell services or products or to generate greater revenue, such as marketing or advertising (as distinguished from programs dealing with development of law office procedures and management designed to raise the level of service provided to clients).

(g) Service to the Profession Training - A program or segment of a program presented by a bar organization may be granted up to three hours of credit if the bar organization's program trains volunteer attorneys in service to the profession, and if such program or segment meets the requirements of Rule .1519(b)-(g) and Rule .1601(b), (c), and (g) of this subchapter; if appropriate, up to three hours of professional responsibility credit may be granted for such program or program segment.

(h) In-House CLE and Self-Study. No approval will be provided for in-house CLE or self-study by attorneys, except as follows:

~~(1) programs exempted by the board under Rule .1501(c)(9) of this subchapter; and~~

~~(2) live programs on professional responsibility, professionalism, or professional negligence/malpractice presented by a person or organization that is not affiliated with the lawyers attending the program or their law firms and that has demonstrated qualification to present such programs through experience and knowledge.~~

~~(i) Bar Review/Refresher Course. Programs designed to review or refresh recent law school graduates or attorneys in preparation for any bar exam shall not be approved for CLE credit.~~

History Note: *Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: March 6, 1997; March 5, 1998; March 3, 1999; March 1, 2001; June 7, 2001; March 3, 2005; March 2, 2006; March 8, 2007; October 9, 2008; March 6, 2014; June 9, 2016; September 20, 2018; September 25, 2019; June 14, 2023;
Rule transferred to 27 N.C. Admin. Code. 01D .1523 on June 14, 2023.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1600 – REGULATIONS GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

27 NCAC 01D .1603 ~~REGISTERED SPONSORS~~RESERVED

~~(a) Application for Registered Sponsor Status. To be designated as a registered sponsor of programs under Rule .1520(a) of this subchapter, a sponsor must satisfy the following requirements:~~

~~(1) File a completed application for registered sponsor status on a form furnished by the board.~~

~~(2) During the three years prior to application, present at least five original programs that were approved for CLE credit by the board.~~

~~(3) During the three years prior to application, substantially comply with the requirements in Rule .1601(a) and (e) of this subchapter on application for program approval, remitting sponsor fees, and reporting attendance for every program approved for credit.~~

~~(b) Renewal of Registration. To retain registered sponsor status, a sponsor must apply for renewal every five years, as required by Rule .1520(a)(1), and must satisfy the requirements of paragraphs (a) of this rule. To facilitate staggered renewal applications, at the time that this rule becomes effective, any sponsor previously designated as an "accredited sponsor" shall be designated a registered sponsor and shall be assigned an initial renewal year which shall be not more than three years later.~~

~~(c) Revocation of Registered Sponsor Status. The board may at any time revoke the registration of a registered sponsor for failure to satisfy the requirements of Section .1500 and Section .1600 of this subchapter.~~

History Note: *Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: April 5, 2018; September 25, 2019; June 14, 2023.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1600 – REGULATIONS GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

27 NCAC 01D .1604 ~~**ACCREDITATION OF PRERECORDED SIMULTANEOUS BROADCAST, AND COMPUTER-BASED PROGRAMS**~~**RESERVED**

History Note: *Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: March 6, 1997; March 3, 2005; March 2, 2006; March 6, 2008; March 6, 2014; June 14, 2023.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1600 – REGULATIONS GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

27 NCAC 01D .1605 ~~COMPUTATION OF CREDIT~~RESERVED

~~(a) Computation Formula - CLE and professional responsibility hours shall be computed by the following formula:~~

~~Sum of the total minutes of actual instruction / 60 = Total Hours~~

~~For example, actual instruction totaling 195 minutes would equal 3.25 hours toward CLE.~~

~~(b) Actual Instruction - Only actual education shall be included in computing the total hours of actual instruction. The following shall not be included:~~

~~(1) introductory remarks;~~

~~(2) breaks;~~

~~(3) business meetings;~~

~~(4) speeches in connection with banquets or other events which are primarily social in nature;~~

~~(5) question and answer sessions at a ratio in excess of 15 minutes per CLE hour and programs less than 30 minutes in length provided, however, that the limitation on question and answer sessions shall not limit the length of time that may be devoted to participatory CLE.~~

~~(c) Teaching - As a contribution to professionalism, credit may be earned for teaching in an approved continuing legal education program or a continuing paralegal education program held in North Carolina and approved pursuant to Section .0200 of Subchapter G of these rules. Programs accompanied by thorough, high quality, readable, and carefully prepared written materials will qualify for CLE credit on the basis of three hours of credit for each thirty minutes of presentation. Repeat programs qualify for one-half of the credits available for the initial program. For example, an initial presentation of 45 minutes would qualify for 4.5 hours of credit.~~

~~(d) Teaching Law Courses~~

~~(1) Law School Courses. If a member is not a full-time teacher at a law school in North Carolina who is eligible for the exemption in Rule .1517(b) of this subchapter, the member may earn CLE credit for teaching a course or a class in a quarter or semester-long course at an ABA accredited law school. A member may also earn CLE credit by teaching a course or a class at a law school licensed by the Board of Governors of the University of North Carolina, provided the law school is actively seeking accreditation from the ABA. If ABA accreditation is not obtained by a law school so licensed within three years of the commencement of classes, CLE credit will no longer be granted for teaching courses at the school.~~

~~(2) Graduate School Courses. Effective January 1, 2012, a member may earn CLE credit by teaching a course on substantive law or a class on substantive law in a quarter or semester-long course at a graduate school of an accredited university.~~

~~(3) Courses at Paralegal Schools or Programs. Effective January 1, 2006, a member may earn CLE credit by teaching a paralegal or substantive law course or a class in a quarter or semester-long course at an ABA approved paralegal school or program.~~

~~(4) Credit Hours. Credit for teaching described in Rule .1605(d)(1) – (3) above may be earned without regard to whether the course is taught online or in a classroom. Credit will be calculated according to the following formula:~~

~~(A) Teaching a Course. 3.5 Hours of CLE credit for every quarter hour of credit assigned to the course by the educational institution, or 5.0 Hours of CLE credit for every semester hour of credit assigned to the course by the educational institution. (For example: a 3-semester hour course will qualify for 15 hours of CLE credit).~~

~~(B) Teaching a Class. 1.0 Hour of CLE credit for every 50 – 60 minutes of teaching.~~

~~(5) Other Requirements. The member shall also complete the requirements set forth in Rule .1518(b) of this subchapter.~~

History Note: *Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: March 3, 1999; October 1, 2003; November 16, 2006; August 23, 2012; September 25, 2019; June 14, 2023;
Rule transferred to 27 N.C. Admin. Code. 01D .1524 on June 14, 2023.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1600 – REGULATIONS GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

27 NCAC 01D .1606 ~~FEES~~RESERVED

~~(a) Sponsor Fee - The sponsor fee, a charge paid directly by the sponsor, shall be paid by all sponsors of approved programs presented in North Carolina and by registered sponsors located in North Carolina for approved programs wherever presented, except that no sponsor fee is required where approved programs are offered without charge to attendees. In any other instance, payment of the fee by the sponsor is optional. The amount of the fee, per approved CLE hour per active member of the North Carolina State Bar in attendance, is $3.50. This amount shall be allocated as follows: $1.25 to the Board of Continuing Legal Education to administer the CLE program; $1.00 to the Chief Justice's Commission on Professionalism; $1.00 to the North Carolina Equal Access to Justice Commission; and $.25 to the State Bar to administer the funds distributed to the commissions. The fee is computed as shown in the following formula and example which assumes a 6-hour program attended by 100 North Carolina lawyers seeking CLE credit:~~

~~Fee: $3.50 x Total Approved CLE Hours (6) x Number of NC Attendees (100) = Total Sponsor Fee ($2,100)~~

~~(b) Attendee Fee - The attendee fee is paid by the North Carolina attorney who requests credit for a program for which no sponsor fee was paid. An attorney will be invoiced for any attendees fees owed following the submission of the attorney's annual report form pursuant to Rule .1522(a) of this subchapter. Payment shall be remitted within 30 (thirty) days of the date of the invoice. The amount of the fee, per approved CLE hour for which the attorney claims credit, is $3.50. This amount shall be allocated as follows: $1.25 to the Board of Continuing Legal Education to administer the CLE program; $1.00 to the Chief Justice's Commission on Professionalism; $1.00 to the North Carolina Equal Access to Justice Commission; and $0.25 to the State Bar to administer the funds distributed to the commissions. It is computed as shown in the following formula and example which assumes that the attorney attended a program approved for 3 hours of CLE credit:~~

~~Fee: $3.50 x Total Approved CLE hours (3.0) = Total Attendee Fee ($10.50)~~

~~(c) Fee Review - The board will review the level of the fee at least annually and adjust it as necessary to maintain adequate finances for prudent operation of the board in a nonprofit manner. The council shall annually review the assessments for the Chief Justice's Commission on Professionalism and the North Carolina Equal Access to Justice Commission and adjust them as necessary to maintain adequate finances for the operation of the commissions.~~

~~(d) Uniform Application and Financial Responsibility - The fee shall be applied uniformly without exceptions or other preferential treatment for a sponsor or attendee. The board shall make reasonable efforts to collect the sponsor fee from the sponsor of a CLE program when appropriate under Rule .1606(a) above. However, whenever a sponsor fee is not paid by the sponsor of a program, regardless of the reason, the lawyer requesting CLE credit for the program shall be financially responsible for the fee.~~

~~(e) Failure to Timely Pay Sponsor Fee - A sponsor's failure to pay sponsor fees within ninety (90) days following the completion of a program will result in the denial of that sponsor's subsequent program applications until fees are paid.~~

History Note: *Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: December 30, 1998; October 1, 2003; February 5, 2009; October 8, 2009; November 5, 2015; April 5, 2018; September 25, 2019; December 14, 2021; June 14, 2023.

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CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

Adjudication—neglect—siblings of abused child—parents' unwillingness to remedy the injurious environment—Where the trial court properly adjudicated respondents' nine-year-old daughter as abused and neglected based on respondents' cruel and grossly inappropriate discipline of her, the trial court did not err by also adjudicating respondents' two younger children (then three years old and six months old) as neglected based on respondents' refusal to acknowledge that the discipline of the nine-year-old was inappropriate and their inability to make a commitment that they would not repeat the discipline, creating a substantial risk that the two younger children would be harmed if they stayed in the home. **In re A.J.L.H., 45.**

Appellate review—role of appellate court—various procedural postures—In a child abuse case, where the Court of Appeals vacated and remanded the adjudication order with respect to all children involved, that court should not have addressed the disposition phase, and its instruction that the trial court must "order generous and increasing visitation between Margaret and her mother" was improper. On remand from the Supreme Court's decision holding that the trial court's adjudications were not erroneous (reversing the Court of Appeals' decision), the Court of Appeals was reminded to apply the abuse of discretion standard to the disposition order. If the trial court's order meets the high bar for abuse of discretion, the remedy is to vacate the disposition order and remand—without expressing an opinion as to the ultimate result of the best interests determination on remand, which is a decision that belongs to the trial court. **In re A.J.L.H., 45.**

Neglect—injurious environment—death of sibling from suspected neglect—other siblings in DSS custody—ultimate findings—The trial court properly adjudicated a minor child as neglected based on its ultimate findings that the minor child lived in an environment injurious to her welfare and did not receive proper care or supervision pursuant to N.C.G.S. § 7B-101(15), including that the minor child lived with her mother, who had previously been convicted of misdemeanor child abuse; the minor child's older siblings had previously been adjudicated abused, neglected, and dependent; and the minor child's younger sibling had died from asphyxiation after the mother left him alone for three hours in his crib with blankets, even though the parents had previously been instructed on proper sleeping arrangements for infants. Therefore, the Court of Appeals erred by reversing the trial court's order for failure to make a specific written finding of a substantial risk of impairment. Further, the Supreme Court clarified that the term "ultimate fact" means "a finding supported by other evidentiary facts reached by natural reasoning," and overturned prior caselaw that did not adhere to this definition. **In re G.C., 62.**

Permanency planning—ceasing reunification efforts—constitutionally protected status as parents—issue not preserved for appellate review—In an abuse and neglect matter, in which two children were removed from the home due to unexplained life-threatening injuries that the younger child experienced when she was six weeks old, and where the trial court removed reunification with the parents from the permanent plan on grounds that the parents—who were found to be the only ones who could have caused their child's injuries—neither accepted blame for the abuse nor provided plausible explanations for the injuries, the Supreme Court reversed the Court of Appeals' decision holding that the trial court erred by preconditioning reunification on an admission of fault by the parents without first finding that the parents were unfit or had acted inconsistently with their constitutionally protected status as parents. Neither parent had raised the constitutional issue before the trial court, and therefore it had not been preserved for appellate review. **In re J.M., 584.**

CONSTITUTIONAL LAW—Continued

under which the statute passed constitutional muster because the conditions placed on felons related to a legitimate government interest—ensuring that felons take responsibility for their crimes and exercise their voting rights responsibly. **Cmty. Success Initiative v. Moore, 194.**

North Carolina—equal protection—facial challenge to state law—analytical framework—A facial challenge to a state law under the Equal Protection Clause of the state constitution will overcome the presumptive validity of an act of the General Assembly only upon proof beyond a reasonable doubt that the legislature enacted the law with discriminatory intent and that the law actually produces a meaningful disparate impact along racial lines. **Holmes v. Moore, 426.**

North Carolina—equal protection—voter ID law—discriminatory intent—disparate impact—On rehearing of a facial challenge to a voter ID law, the trial court abused its discretion when it acted under a misapprehension of the law—by using an incorrect legal standard and improperly shifting the burden of proof of constitutional validity to the legislature—to conclude that the voter ID law was unconstitutional in that it violated the Equal Protection Clause of the state constitution. Under the proper framework for evaluating a facial challenge under the state constitution, plaintiffs did not provide sufficient evidence to meet their burden of proving beyond a reasonable doubt that the legislature enacted the law with discriminatory intent and that the law actually provides disparate impact along racial lines by disproportionately impeding black voters from voting; therefore, plaintiffs failed to overcome the presumption of validity that attaches to legislative acts. The prior opinion issued in this case was withdrawn, the trial court's order was reversed, and the matter was remanded for entry of an order dismissing plaintiffs' claim with prejudice. **Holmes v. Moore, 426.**

North Carolina—equal protection—voter ID law—presumption of legislative good faith—In a facial challenge to a voter ID law, the trial court erred by concluding that the law was unconstitutional on the basis that it was enacted with discriminatory intent and that it therefore violated the Equal Protection Clause of the state constitution, and by permanently enjoining implementation of the law. Although the trial court applied the federal framework set forth in *Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977), which is not binding on state courts interpreting the constitutionality of a state law under a state constitution, plaintiffs' claim failed under even this analysis because the trial court relied too heavily on past discrimination in the historical record and its own speculation regarding additional measures the legislature could have taken during the legislative process rather than on the presumption of legislative good faith, and thus improperly shifted the burden of proving constitutional validity to the General Assembly. **Holmes v. Moore, 426.**

North Carolina—facial challenge—felon voting rights statute—discriminatory intent—disparate impact—In a declaratory action challenging the facial constitutionality of N.C.G.S. § 13-1 (regarding felon voting rights, in particular for convicted felons on felony supervision), the trial court erred by failing to apply the presumption of legislative good faith and by assuming that past discrimination infected the legislative process that led to the enactment of the current law, which led it to erroneously conclude that the legislature enacted the law with discriminatory intent; therefore, the court's findings made under these misapprehensions of the law were not binding on appellate review. The trial court reached its decision by

EASEMENTS—Continued

by the parties' practice over many years in seeking permission from Duke to build shoreline structures over and into the submerged property. **Duke Energy Carolinas, LLC v. Kiser, 275.**

ELECTIONS

Legislative redistricting—claims of partisan gerrymandering—equal protection clause—not applicable—Plaintiffs' claims that partisan gerrymandering will diminish the electoral power of members of a particular political party did not implicate the equal protection clause in the state constitution's Declaration of Rights (Article I, Section 19). Partisan gerrymandering has no impact upon the right to vote on equal terms under the one-person, one-vote standard; therefore, partisan gerrymandering claims do not trigger review under the state's equal protection clause. **Harper v. Hall, 292.**

Legislative redistricting—claims of partisan gerrymandering—free elections clause—not applicable—The free elections clause in the state constitution's Declaration of Rights—"All elections shall be free." (Article I, Section 10)—does not limit or prohibit partisan gerrymandering, or even address redistricting at all. Based on its plain meaning, its historical context, and our Supreme Court's precedent, the free elections clause means that voters are free to vote according to their consciences without interference or intimidation. **Harper v. Hall, 292.**

Legislative redistricting—claims of partisan gerrymandering—free speech and freedom of assembly clauses—not applicable—The free speech and freedom of assembly clauses in the state constitution's Declaration of Rights (Article I, Sections 12 and 14) do not limit the General Assembly's presumptively constitutional authority to engage in partisan gerrymandering. Nothing in the history of the clauses or the applicable case law supported plaintiffs' expanded interpretation of them. **Harper v. Hall, 292.**

Legislative redistricting—claims of partisan gerrymandering—petition for rehearing—previous opinions overruled and withdrawn—It was proper for the Supreme Court to allow the legislative defendants' petition for rehearing pursuant to Appellate Procedure Rule 31 to revisit the issue of whether claims of partisan gerrymandering are justiciable under the state constitution, where the four-justice majority in *Harper v. Hall* (*Harper I*), 380 N.C. 317 (2022), expedited the consideration of the matter over the strong dissent of the other three justices, with no jurisprudential reason for doing so, and where *Harper I* and the same four-justice majority's opinion in *Harper v. Hall* (*Harper II*), 383 N.C. 89 (2022), were wrongly decided. Furthermore, *Harper I* did not meet any criteria for adhering to stare decisis. Upon rehearing, *Harper I* was overruled, and *Harper II* was withdrawn. **Harper v. Hall, 292.**

Legislative redistricting—claims of partisan gerrymandering—political questions—nonjusticiable—Claims of partisan gerrymandering present political questions and therefore are nonjusticiable under the state constitution. Plaintiffs' claims of partisan gerrymandering were nonjusticiable political questions because: The state constitution explicitly and exclusively commits redistricting authority to the General Assembly subject only to express limitations, leaving only a limited role for judicial review; the state constitution provides no judicially discernible or manageable standards for determining how much partisan gerrymandering is too much; and any attempt to adjudicate claims regarding partisan gerrymandering would

ELECTIONS—Continued

require the judiciary to make numerous policy determinations for which the state constitution provides no guidance. Each factor on its own would be sufficient to render the claims nonjusticiable. Accordingly, the Supreme Court overruled *Harper v. Hall* (*Harper I*), 380 N.C. 317 (2022), withdrew *Harper v. Hall* (*Harper II*), 383 N.C. 89 (2022), and dismissed plaintiffs' claims with prejudice. **Harper v. Hall, 292.**

Legislative redistricting—claims of partisan gerrymandering—prior opinions overruled and withdrawn—racially polarized voting analysis—In a redistricting case, the Supreme Court overruled a prior opinion issued by a four-justice majority in *Harper v. Hall* (*Harper I*), 380 N.C. 317 (2022), and withdrew the same majority's subsequent opinion in *Harper v. Hall* (*Harper II*), 383 N.C. 89 (2022). The Court also specifically overruled the holding from *Harper I* that required the General Assembly to perform a racially polarized voting (RPV) analysis before drawing any legislative districts. **Harper v. Hall, 292.**

Legislative redistricting—claims of partisan gerrymandering—prior opinions overruled and withdrawn—remedy—Upon rehearing a redistricting case and concluding that plaintiffs' claims of partisan gerrymandering were nonjusticiable—thus overruling and withdrawing prior opinions in the matter—the Supreme Court addressed the appropriate remedy. The Court granted the legislative defendants the opportunity to enact a new set of legislative and congressional redistricting plans, guided by federal law, the objective constraints in the state constitution located in Sections 3 and 5 of Article II, and this opinion. Neither the original redistricting plans nor the remedial plans, which were created during the course of the litigation and used in the 2022 election cycle, were "established" within the meaning of Article II, Sections 3(4) and 5(4), because both plans were a product of a misapprehension of North Carolina law, and the original plans were never used in an election. **Harper v. Hall, 292.**

Legislative redistricting—standard of review—presumption of constitutionality—political question doctrine—Legislation passed by the General Assembly, which serves as the "agent of the people for enacting laws," is presumed constitutional, and the judiciary may declare an act of the General Assembly in violation of the state constitution only when the act directly conflicts with an express provision of the constitution. Therefore, when considering the constitutionality of redistricting plans drawn by the General Assembly, the judiciary must presume the plans' constitutionality and ask whether the plans violate an express provision of the constitution beyond a reasonable doubt. When the judiciary cannot locate an express textual limitation on the legislature, the issue may present a political question that is inappropriate for resolution by the judiciary. To respect the separation of powers, courts must refrain from adjudicating a claim where there is: a textually demonstrable commitment of the matter to another branch of government, a lack of judicially discoverable and manageable standards, or the impossibility of deciding the case without making a policy determination of a kind clearly suited for nonjudicial discretion. **Harper v. Hall, 292.**

HOMICIDE

Second-degree murder—malice—jury verdict—sentencing—In defendant's trial for second-degree murder, where the jury indicated on the verdict sheet its finding that all three forms of malice supported defendant's conviction—actual malice (a B1 felony), "condition of mind" malice (a B1 felony), and "depraved-heart" malice

JUVENILES—Continued

contained sufficient facts to support each essential element of misdemeanor sexual battery, in particular the element of force, which was clearly inferable from allegations that the juvenile willfully engaged in sexual conduct with a classmate by touching her vaginal area against her will for the purpose of sexual gratification. **In re J.U., 618.**

TERMINATION OF PARENTAL RIGHTS

Amendment of juvenile petition—additional allegations—harmless error— In a termination of parental rights proceeding, where the trial court properly terminated a mother's rights to her daughter on the ground of willful failure to make reasonable progress, any error by the trial court in allowing the department of social services to amend the juvenile petition during the termination hearing in order to add allegations in support of a different ground (that the parent's rights to another child had been involuntarily terminated and the parent lacked the ability or willingness to establish a safe home) was harmless. **In re H.B., 484.**

Best interests of the child—statutory factors—bond between mother and child—The trial court did not abuse its discretion in the disposition phase of a termination of parental rights proceeding by concluding that termination of a mother's parental rights to her daughter was in the daughter's best interests. The court's findings reflected its consideration of the relevant statutory factors contained in N.C.G.S. § 7B-1110(a), including its finding that there was no bond between the mother and her daughter, and the findings were supported by competent evidence. Any discrepancies in the evidence were within the trial court's province to resolve based on its assessment of the credibility and weight to be given to the evidence. **In re H.B., 484.**

Findings of fact—reference to timeline report—independent determination of credibility and reliability—The trial court's order terminating respondent mother's rights to her daughter based on willful failure to make reasonable progress was supported by sufficient findings of fact, including the court's finding that it relied on and accepted into evidence a timeline that was introduced by the department of social services without objection, which was signed and notarized by a social worker and which summarized the department's interactions with respondent. The finding was more than a mere recitation of the evidence and constituted a proper evidentiary finding reflecting the court's independent evaluation of the evidence where the court stated specifically that it determined the timeline to be "both credible and reliable." **In re H.B., 484.**

Grounds for termination—neglect—willful abandonment—sufficiency of evidence—In a private termination of parental rights action, the trial court's determination that grounds were not established to terminate respondent father's parental rights to his daughter based on neglect or willful abandonment (N.C.G.S. § 7B-1111(a)(1), (7)) was affirmed where there was no record evidence demonstrating that respondent had previously neglected the child, that there was a likelihood of future neglect if she were to be placed in his care, or that respondent showed an intention to give up all parental rights to her, particularly where there was evidence that petitioner mother actively prevented respondent from forming a relationship with the child. **In re S.R., 516.**

Grounds for termination—willful failure to pay child support—sufficiency of findings—correct standard of review—In a private termination of parental rights action, the trial court's determination that grounds were not established to