386 N.C.—No. 3 Pages 580-665

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

JANUARY 13, 2025

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

THE SUPREME COURT

OF

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SUPREME COURT OF NORTH CAROLINA

CASES REPORTED

FILED 18 OCTOBER 2024

ORDERS

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

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SCHEDULE FOR HEARING APPEALS DURING 2025

NORTH CAROLINA SUPREME COURT

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

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

COWPERTHWAIT v. SALEM BAPTIST CHURCH, INC.

[386 N.C. 580 (2024)]

IAN COWPERTHWAIT, WILLIAM COWPERTHWAIT,
AND CATHERINE COWPERTHWAIT
v.
SALEM BAPTIST CHURCH, INC.

No. 263A23

Filed 18 October 2024

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 290 N.C. App. 262 (2023), affirming in part and reversing in part an order entered on 24 September 2021 by Judge Susan E. Bray in Superior Court, Forsyth County, and remanding the case. Heard in the Supreme Court on 19 September 2024.

Fox Rothschild, LLP, by Elizabeth Brooks Scherer and Nathan W. Wilson, and Smith Law Group, PLLC, by Steven D. Smith, for plaintiffs-appellees.

Bovis Kyle Burch & Medlin, LLC, by Alicia L. Bray and Camilla F. DeBoard, for defendant-appellant.

PER CURIAM.

In a divided opinion, the Court of Appeals affirmed in part the trial court's order vacating plaintiffs' Rule 41(a)(1) voluntary dismissal, reversed the portion of the trial court's order dismissing the case with prejudice, and remanded for the trial court to further consider which sanction short of dismissal with prejudice would be appropriate for plaintiffs' failure to prosecute. *Cowperthwait v. Salem Baptist Church, Inc.*, 290 N.C. App. 262 (2023). Defendant appealed based on the dissent. For the reasons stated in the dissenting opinion, the decision of the Court of Appeals is reversed.

REVERSED.

Justice BARRINGER concurring in part and dissenting in part.

I concur with my esteemed colleagues of the majority that the decision of the Court of Appeals should be reversed when applying the applicable standard of review—abuse of discretion. I write this dissent to clarify that the relevant time period to be considered is the "period of

time between the filing of the complaint and the ruling on [d]efendant's . . . motion." *Cowperthwait v. Salem Baptist Church, Inc.*, 290 N.C. App. 262, 271 (2023) (Stroud, C.J., concurring in result only in part, dissenting in part).

The judiciary has no role in deciding the soundness of public policy codified by the legislature. Applicable here, our legislature has decided that a plaintiff "who is [within the age of 18 years] at the time the cause of action accrued" is entitled to bring his or her action "within three years" after achieving the age of majority. N.C.G.S. § 1-17(a) (2023).

I am troubled by the trial court's finding that defendants "had been attempting to obtain the requested medical records of Ian Cowperthwait since at least 2014"—referencing a time period six years before the lawsuit was timely filed. Further concerning is the trial court's consideration that this case was "unusually old by virtue of the tolling of the statute of limitations applicable," therefore concluding that the "additional year-long delay" in prosecuting the action prejudiced the defendant. *Cowperthwait*, 290 N.C. App. at 267 (Stroud, C.J., concurring in result only in part, dissenting in part).

In my view, on these facts, the only time frame that is appropriately considered is after the claim was timely filed. Under the presumption of regularity, I must presume that the trial court did not inappropriately consider the period during which the statute of limitations was tolled. The Court of Appeals dissent stated, "[T]he trial court properly relied on the period of time between the filing of the complaint and the ruling on [d]efendant's . . . motion." *Id.* at 271. On its face, this is within the trial court's discretion.

Further, in accordance with judicial restraint, it is not necessary to reach the issue of whether "the claims of William and Catherine Cowperthwait were clearly barred by the statute of limitations." *Id.* at 269. Therefore, I do not concur with the majority on this issue.

Justice EARLS dissenting.

I would modify and affirm the decision of the Court of Appeals in this matter. I agree that the appropriate standard of review of the trial court's decision to dismiss the complaint with prejudice is abuse of discretion. However, I find that the trial court applied the wrong legal standard in assessing the relevant factors under *Wilder v. Wilder*, 146 N.C. App. 574 (2001). Because a trial court's error of law also constitutes an

abuse of discretion, and because questions of law are reviewed de novo, *In re Custodial Law Enf't Recording*, 383 N.C. 261, 268 (2022), I would hold that the trial court's order here was an abuse of discretion.

I. Facts & Procedural History

On 9 July 2020, Ian Cowperthwait and his parents, William and Catherine Cowperthwait (Cowperthwaits), commenced a negligence action against Salem Baptist Church, Inc. (Salem Baptist) in Superior Court, Forsyth County. This action stems from a June 2011 incident when Ian, who was a minor at the time, was allegedly injured while attending an overnight camp on a property owned and managed by Salem Baptist. Because Ian was eleven years old at the time of the incident, the statute of limitations was tolled as to his claims until three years after his eighteenth birthday pursuant to N.C.G.S. § 1-17(a). Therefore, the statute of limitations expired for Ian's claims on 9 July 2020.

Since at least 2014, Brotherhood Mutual Insurance Company (Insurance Company), Salem Baptist's liability insurer, had been communicating with Ian's parents to obtain Ian's medical records to resolve the claim.[1] Two weeks before the Cowperthwaits filed suit, the Insurance Company made a request for Ian's medical records for the purpose of evaluating the Cowperthwaits' claims. The Cowperthwaits' attorney assured the Insurance Company that he would provide the documents promptly. After the Cowperthwaits filed their complaint, the Insurance Company renewed its request for the medical documents. The Cowperthwaits' attorney did not consistently respond to these requests, but in December 2020, he again stated that he would try to obtain the medical records. The Cowperthwaits, however, did not produce the documents.

Based upon an agreement between the parties, Salem Baptist filed its answer in a document dated 4 January 2021, six months after the action was initiated.[2] On the same day, the Insurance Company's attorney served interrogatories and a formal request for production of documents. The

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1. The trial court's findings of fact specify that the Insurance Company and the Cowperthwaits had been in communication since at least 2014. However, there is no evidence in the record of any correspondence between the Insurance Company and the Cowperthwaits before June 2020.

2. Before the action was commenced, counsel for the Cowperthwaits agreed to an extension of time for Salem Baptist to file an answer "to allow time for records review and possible case resolution." No further details regarding this extension are in the record other than the fact it was agreed to.

parties agreed to extend the deadline for the Cowperthwaits to respond. But the Cowperthwaits failed to respond to the interrogatories and discovery requests by the 5 March 2021 deadline. In a 12 March 2021 e-mail, Salem Baptist's counsel asked that opposing counsel complete the discovery requests by 19 March 2021 and added that otherwise, "the matter [would] be ripe for a motion to compel and possible additional relief." On 19 March 2021, the Cowperthwaits' attorney informed Salem Baptist's counsel for the first time of "severe communication issues" with Ian due to his inpatient treatment for addiction issues. Despite this setback, the Cowperthwaits' attorney said he believed he could provide verified responses to the discovery requests by the next week. Nonetheless, by 16 June 2021, the discovery requests remained unanswered.

Because of the repeated delays, on 16 June 2021, Salem Baptist filed a motion to dismiss under Rule 41(b) or, in the alternative, a motion to compel discovery. One month after this motion was filed, on 15 July 2021, the Cowperthwaits finally responded to the discovery requests and interrogatories. In total, fifty-nine pages of medical records were produced; however, these medical records were incomplete, and no school records were provided.

After hearing the matter on 10 August and 8 September 2021, the trial court dismissed the Cowperthwaits' action for failure to prosecute. In its written order, the trial court applied the three-part test set forth in *Wilder*, 146 N.C. App. at 578, and made the following findings and conclusions:

> 2. The Court finds that the Plaintiffs have unreasonably delayed this matter. Although Ian Cowperthwait has been admitted to [addiction] treatment facilities since April of 2021, no explanation was given for the more than eight months that passed since the filing of the complaint before April of 2021. Moreover, the Court notes that Ian's parents, William and Catherine Cowperthwait[,] are named Plaintiffs. No explanation has been offered for their failure to prosecute the action.
>
> 3. The Court finds that the delay has prejudiced the Defendant. The case is already unusually old by virtue of the tolling of the statute of limitations applicable to Ian Cowperthwait due to his minor status (age 11) at the time of the incident. That incident occurred more than ten (10) years ago. The additional year-long delay in prosecuting this action has

> prejudiced the Defendant by exacerbating the inordinate amount of time since the incident, during which witnesses have moved and witness memories have inevitably faded.
>
> 4. Sanctions short of dismissal would be insufficient because the adverse effects of witness unavailability and faded memories that inevitably accompany lengthy periods of time cannot be reversed. Additionally, the court should not be expected to carry a personal injury action over multiple terms due to failure in prosecution.

The Cowperthwaits filed a timely notice of appeal to the Court of Appeals.

A divided panel of the Court of Appeals held that the trial court abused its discretion by dismissing the matter with prejudice. *Cowperthwait v. Salem Baptist Church, Inc.*, 290 N.C. App. 262, 269 (2023). The Court of Appeals reasoned that the trial court improperly considered the time during which the statute of limitations was tolled, opining that the tolling of the statute of limitations is "not a valid discretionary basis on which the trial court may dismiss the action for failure to prosecute." *Id.* at 268. Thus, the trial court abused its discretion when it dismissed the claim. *Id.* Chief Judge Stroud dissented in part, concluding that the plain language of the order reflected that the order was premised solely on the additional one-year delay caused by the Cowperthwaits' failure to obtain and provide the necessary records. *Id.* at 270–71 (Stroud, C.J., concurring in result only in part and dissenting in part). Chief Judge Stroud concluded that there was no abuse of discretion and accordingly that the dismissal should have been affirmed. *Id.* at 272.

The majority further concluded that it would be improper to address whether the statute of limitations applied to the parents. *Id.* at 265 n.1. Chief Judge Stroud also dissented from this point. *Id.* at 269–70 (Stroud, C.J., concurring in result only in part and dissenting in part). Salem Baptist filed a timely notice of appeal based on Chief Judge Stroud's dissent.

II. Analysis

Salem Baptist challenges two aspects of the Court of Appeals' decision: (1) whether the Court of Appeals erred by not reviewing the applicability of the statute of limitations; and (2) whether the Court of Appeals erred by holding that the trial court abused its discretion. Regarding the first issue, I agree that it was not raised at the trial court

and is therefore not properly before this Court. *See Value Health Sols., Inc. v. Pharm Rsch. Assocs.*, 385 N.C. 250, 272 (2023). To raise an issue on appeal, parties must present their arguments to the trial court by making a timely request, motion, or objection, and thereafter obtaining a ruling on that issue. *Id.*; *see also* N.C. R. App. P. 10(a)(1). Merely pleading a statute of limitations defense is insufficient to preserve the issue for appeal. *See Value Health Sols.*, 385 N.C. at 272 ("While defendants did plead that some or all of plaintiffs' claims are time barred, this argument was not presented to the trial court and no ruling was obtained. Therefore, we decline to reach the issue . . . ."). The record contains no evidence that Salem Baptist made a request, motion, or objection challenging some of the claims as time barred, nor does the record contain a ruling on any such issues.

A. The Court of Appeals Did Not Err When It Held the Trial Court Abused Its Discretion.

Salem Baptist's core contention is that the Court of Appeals erred by holding that the trial court abused its discretion when it dismissed the Cowperthwaits' claims with prejudice for failure to prosecute. Under Rule 41(b) of the North Carolina Rules of Civil Procedure, a defendant may move for dismissal of an action for "failure of the plaintiff to prosecute." N.C.G.S. § 1A-1, Rule 41(b) (2023). Unless otherwise specified, a dismissal for failure to prosecute constitutes an adjudication upon the merits. *Id.* But the rule does not define a "failure to prosecute." Therefore, the Court of Appeals relied upon its precedent in *Wilder*, 146 N.C. App. at 578, which prescribes a three-part analysis that trial courts must conduct before dismissing an action for failure to prosecute. Under *Wilder*, a trial court must consider the following factors before dismissing for failure to prosecute: "(1) whether the plaintiff acted in a manner which deliberately or unreasonably delayed the matter; (2) the amount of prejudice, if any, to the defendant; and (3) the reason, if one exists, that sanctions short of dismissal would not suffice." *Id.* As explained below, the trial court abused its discretion in applying each of the three *Wilder* factors. Therefore, the Court of Appeals did not err in reaching this conclusion. Moreover, we should formally adopt the *Wilder* factors; they are analogous to the standards applied under federal rules governing these circumstances.

1. Standard of Review

A trial court's involuntary dismissal under Rule 41(b) is a discretionary ruling. *Whedon v. Whedon*, 313 N.C. 200, 213 (1985). Discretionary rulings are reviewed for an abuse of discretion. *Orlando Residence*,

Ltd. v. All. Hosp. Mgmt. LLC, 375 N.C. 140, 154 (2020). A trial court's conclusions of law that are unsupported by competent findings of fact constitute an abuse of discretion. *See State v. Corbett*, 376 N.C. 799, 819, 820 (2021) (reasoning that the trial court abused its discretion when its conclusions of law were unsupported by competent findings of fact). A trial court's error of law is an abuse of discretion, and questions of law are reviewed de novo. *In re Custodial Law Enf't Recording*, 383 N.C. at 268.

***2. The Court of Appeals did not err in ruling that the trial court abused its discretion in applying* Wilder.**

As noted above, before dismissing a case under Rule 41(b) for failure to prosecute, the trial court must address the three *Wilder* factors: "(1) whether the plaintiff acted in a manner which deliberately or unreasonably delayed the matter; (2) the amount of prejudice, if any, to the defendant; and (3) the reason, if one exists, that sanctions short of dismissal would not suffice." 146 N.C. App. at 578. The trial court's determination of these factors must be supported by findings of fact, and failure to do so is grounds for reversal. *See id.* ("[T]he conclusion that there was prejudice to the defendant is insufficiently supported by factual findings, and must be vacated.").

a. The trial court misapprehended the law, and therefore abused its discretion, in finding that the Cowperthwaits caused an unreasonable delay.

As is implicit with the "failure to prosecute" designation, the *Wilder* test requires that the plaintiff have "acted in a manner which deliberately or unreasonably delayed the matter." *Id.* The delay must be caused by the plaintiff herself, and delays caused by counsel do not give cause to dismiss under *Wilder*. *Simmons v. Tuttle*, 70 N.C. App. 101, 105–06 (1984) (vacating trial court's dismissal under Rule 41(b) for failure to prosecute because the delay was not personally caused by the plaintiff). A plaintiff unreasonably delays a matter by failing to diligently and responsibly prosecute it. *Cf. Spencer v. Albemarle Hosp.*, 156 N.C. App. 675, 678–79 (2003) (reasoning that there was not an unreasonable delay because no evidence suggested that the plaintiff was not diligently prosecuting his case). No minimum or maximum passage of time defines a delay, and the Court of Appeals has held lapses of time as short as fifteen months to be sufficient to satisfy the delay prong of *Wilder*. *See, e.g.*, *Cohen v. McLawhorn*, 208 N.C. App. 492, 498–99, 505 (2010) (concluding that the plaintiff's failure to participate in fifteen months of proceedings constituted an unreasonable delay).

Unfortunately, North Carolina case law provides no clear guidance on what specifically constitutes a delay under *Wilder* beyond a failure to "diligent[ly] and responsibl[y]" prosecute the case. *Spencer*, 156 N.C. App. at 679. Nonetheless, the Fourth Circuit's decision in *Smink* is helpful for our understanding of this issue.[3] *Smink v. Comm'r*, No. 95-2158, 1996 WL 240026 (4th Cir. May 9, 1996) (per curiam) (unpublished). In examining whether the plaintiffs delayed proceedings through their conduct, the Fourth Circuit focused on their failure to meet discovery deadlines—which occurred over a relatively small two-month portion of a total eleven months of pretrial preparation. *See id.* at *2 ("[T]he Sminks failed to comply . . . with the Commissioner's discovery requests . . . . Further, the Sminks canceled or ignored appointments and ignored deadlines, document requests, and interrogatories."). Thus, it would be appropriate to frame our understanding of delay in this case by examining the extent of the Cowperthwaits' failure to meet discovery deadlines, as in *Smink*. *See id.*

In the instant case, the Cowperthwaits were served with interrogatories and a request for documents on 4 January 2021. The deadline to respond to these requests was 5 March 2021. These discovery requests were not responded to until 15 July 2021. However, the trial court excused delays after April 2021 because of Ian Cowperthwait's enrollment in in-patient treatment for addiction. Thus, the time frame during which the Cowperthwaits failed to diligently prosecute the action by failing to meet requisite deadlines is approximately one month. *See id.* (reasoning that the delay caused by failure to meet discovery deadlines was a contributing factor in the overall pattern of delay leading to dismissal of the action).

Here, the trial court found that the Cowperthwaits unreasonably delayed the matter for over *eight months*. But there were no discovery deadlines between July 2020 and March 2021, and so the Cowperthwaits could not cause a delay without deadlines to ignore. As this Court has recognized, a dismissal with prejudice is a "harsh sanction" that is "warranted only in extreme circumstances." *Whedon*, 313 N.C. at 215 (cleaned up). A one-month delay is not the extreme circumstance that

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3. Because of the lack of case law from this state, federal precedent is "pertinent for guidance and enlightenment as we develop the philosophy of our Rules of Civil Procedure." *Slattery v. Appy City, LLC*, 385 N.C. 726, 736 n.12 (2024) (cleaned up). Furthermore, Fourth Circuit case law is particularly persuasive because North Carolina is located in the Fourth Circuit and *Wilder* is partly based on the Fourth Circuit's test. *Wilder*, 146 N.C. App. at 577–78 (quoting the factors set forth in *Hillig v. Comm'r*, 916 F.2d 171, 174 (4th Cir. 1990)).

should qualify as unreasonable, especially in light of the severity of a dismissal with prejudice. *See id.* The trial court misapprehended what constitutes a delay under *Wilder*—a delay is, at minimum, a disregard of deadlines designed to ensure a timely resolution of the action.[4] *See Smink*, 1996 WL 240026, at *2 (reasoning that the plaintiffs caused delay by *inter alia* failing to meet discovery deadlines).

Although the trial court misapprehended the law, the Court of Appeals held that it did so in a different manner. In applying its *Wilder* analysis, the court below concluded that the trial court's order mistook the law by considering the time during which the statute of limitations was tolled.[5] *See Cowperthwait*, 290 N.C. App. at 268. The plain language of the order, however, focuses on "[t]he additional year-long delay" from the filing of the suit to the time of dismissal, not the ten-year delay from the tolling of the statute of limitations. As Chief Judge Stroud correctly wrote in her dissent, "the trial court properly relied on the period of time between the filing of the complaint and the ruling on Defendant's Rule 41 motion." *Id.* at 271 (Stroud, C.J., concurring in result only in part and dissenting in part).

Although the Court of Appeals' reasoning was erroneous, the trial court nonetheless misapprehended the law in applying *Wilder* to find the one-month delay unreasonable. Because the trial court misapprehended the delay element of *Wilder*, it abused its discretion. *See In re*

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4. This is not to say that a delay always requires the disregard of deadlines. The Court of Appeals has held that protracted and wholesale inaction can qualify as a delay. *See*, *e.g.*, *Greenshields, Inc. v. Travelers Prop. Cas. Co. of Am.*, 245 N.C. App. 25, 33 (2016) (concluding that over four years of complete inaction in a matter constitutes an unreasonable delay). But this case does not involve total inaction; it centers around dilatory but active proceedings and the "wholesale inaction" approach to the delay element of *Wilder* is not applicable here.

5. On this point, the Court of Appeals concluded that, as a matter of law, it is improper to weigh the delay caused by the tolling of the statute of limitations under the *Wilder* analysis. Neither the Cowperthwaits nor the Court of Appeals identifies case law supporting the proposition that *Wilder* forbids consideration of delays or prejudice stemming from the tolling of the statute of limitations. Nonetheless, I agree with the Court of Appeals. The General Assembly has made a policy choice regarding the time a minor's negligence action may be tolled, and this decision should be respected. *See* N.C.G.S. § 1-17(a)(1) (2023) (allowing tort claims to be tolled for minors until their twenty-first birthday). Punishing the plaintiff for benefiting from the General Assembly's policy choices regarding the statute of limitations is also inconsistent with the requirement that the plaintiff be personally responsible for any delays—the General Assembly, not the plaintiff, authorized a ten-year delay between the alleged negligence and initiation of the action. *See Simmons*, 70 N.C. App. at 105–06 (vacating trial court's dismissal under Rule 41(b) for failure to prosecute because the delay was not personally caused by the plaintiff).

Custodial Law Enf't Recording, 383 N.C. at 268 (explaining that a misapprehension of law is an abuse of discretion).

b. The trial court abused its discretion in finding that Salem Baptist was prejudiced by the delay because there were no findings of fact to support this conclusion.

No specific form of harm or prejudice is necessary to satisfy the second prong of *Wilder*, and prejudice has been found in a variety of contexts. *See Meabon v. Elliott*, 278 N.C. App. 77, 83–84 (noting that if witnesses die or move away, prejudice is obvious), *disc. rev. denied*, 379 N.C. 151 (2021); *Lentz v. Phil's Toy Store*, 228 N.C. App 416, 424 (2013) (concluding that cost of defending unnecessarily protracted litigation was sufficient to satisfy prejudice prong of *Wilder*); *Cohen*, 208 N.C. App. at 503–04 (concluding that harm to attorney's reputation from a protracted malpractice suit is prejudice that satisfies *Wilder*). Yet as with any conclusion of law, a finding of prejudice must be supported by competent findings of fact. *See Lauziere v. Stanley Martin Cmtys., LLC*, 271 N.C. App. 220, 227–28 (2020), *aff'd per curiam*, 376 N.C. 789 (2021).

Here, the trial court concluded that Salem Baptist was prejudiced by the delay because the delay "exacerbat[ed] the inordinate amount of time since the incident, during which witnesses have moved and witness memories have inevitably faded." But no findings of fact support this conclusion. Looking at the record, the only scintilla of evidence regarding prejudice comes from the August 2021 hearing. At that hearing, Salem Baptist referred to the unavailability of witnesses and their fading memories as justifications to dismiss but gave no specific examples. Again, the trial court did not make any findings of fact on this point. Nor is there evidence in the record to support such a finding.

The present case is very comparable to *Lauziere*. In that case, the Court of Appeals reversed a dismissal for failure to prosecute because "[n]o competent evidence in the Record support[ed] [the conclusion] that Defendants have been materially prejudiced." *Id.* at 224. As the court explained, no competent evidence supported the contention "that Defendants were prejudiced by the delay, were wrongfully deprived of a right to direct care, were burdened with substantial monetary expenses or were unable to recoup the same." *Id.* at 227. Here, as in *Lauziere*, no competent evidence in the record suggests that Salem Baptist was prejudiced by the delay. The allegations of witness unavailability and memory loss are unsupported by the record. For example, there is no evidence of any particular witness who became unavailable as a result of the month that discovery requests were delayed, and no findings of fact regarding other evidence that was destroyed during that period.

Because the trial court's conclusion of prejudice is unsupported by competent findings of fact, the trial court abused its discretion in finding that Salem Baptist was prejudiced by the delay. *See Corbett*, 376 N.C. at 820.

c. The trial court abused its discretion in finding that alternative sanctions were insufficient because that conclusion was unsupported by findings of fact.

All that is necessary under the third prong of *Wilder* is that the trial court at least consider "the reason, if one exists, that sanctions short of dismissal would not suffice." 146 N.C. App. at 578; *Ray v. Greer*, 212 N.C. App. 358, 364 ("The trial court is not required to impose lesser sanctions, but only to *consider* lesser sanctions." (quoting *In re Pedestrian Walkway Failure*, 173 N.C. App. 237, 251 (2005) (first emphasis omitted))), *cert. denied*, 365 N.C. 362 (2011). A trial court's consideration of alternative sanctions will be affirmed when "it may be inferred from the record that the trial court considered all available sanctions and the sanctions imposed were appropriate in light of [the party's] actions in th[e] case." *In re Pedestrian Walkway*, 173 N.C. App. at 251 (2005) (quoting *Hursey v. Homes by Design, Inc.*, 121 N.C. App. 175, 179 (1995) (cleaned up)).

Here, the trial court explained that "[s]anctions short of dismissal would be insufficient because the adverse effects of witness unavailability and faded memories that inevitably accompany lengthy periods of time cannot be reversed. Additionally, the [trial court] should not be expected to carry a personal injury action over multiple terms due to failure in prosecution." Although it is clear the trial court considered lesser sanctions and found them to be futile, no findings of fact support this proffered reason for dismissal. There is no evidence that witnesses were unavailable or had lost memories. Therefore, without competent findings of prejudice, the proffered reason for dismissal is an abuse of discretion, *see Corbett*, 376 N.C. at 820, and the purported logistical burden to the trial court is not enough to justify the extreme sanction of dismissal, *see In re Pedestrian Walkway*, 173 N.C. App. at 251 (explaining that affirmance of an order is proper if "the sanctions imposed were appropriate in light of [the party's] actions" during the litigation (cleaned up)).

3. The Court of Appeals did not err in holding that the trial court abused its discretion, and its holding should be modified and affirmed.

As explained above, the trial court abused its discretion in its application of *Wilder*. The Court of Appeals reached the same conclusion,

albeit for different reasons. *See Cowperthwait*, 290 N.C. App. at 268–69. Given this difference in reasoning but congruence in outcome, I would modify and affirm the decision of the Court of Appeals. *Cf. D.V. Shah Corp. v. VroomBrands, LLC*, 385 N.C. 402, 403–05 (2023) (modifying and affirming the decision of the Court of Appeals when this Court reached the same conclusion but for different reasons).

B. This Court Should Adopt the *Wilder* Test Because It Is Strongly Supported by Federal Case Law.

Although the trial court abused its discretion under *Wilder*, it would be prudent to consider if the *Wilder* test is the correct analysis to apply in resolving whether to dismiss for a failure to prosecute. We are not bound by *Wilder*. *See N. Nat'l Life Ins. Co. v. Lacy J. Miller Mach. Co.*, 311 N.C. 62, 76 (1984) ("This Court is not bound by precedents established by the Court of Appeals."). This Court has never expressly adopted the *Wilder* test to determine when a party fails to prosecute a claim.[6] This Court, not the Court of Appeals, has the final say over the laws of North Carolina. *Lea Co. v. N.C. Bd. of Transp.*, 308 N.C. 603, 610 (1983). In light of the substantial interests at stake, we should bring clarity and finality to how trial courts weigh dismissals for failure to prosecute. *See id.*

Rule 41 of North Carolina's Rules of Civil Procedure is analogous to Rule 41 of the Federal Rules of Civil Procedure. *Compare* N.C.G.S. § 1A-1, Rule 41(b) ("For failure of the plaintiff to prosecute . . . a defendant may move for dismissal of an action or of any claim therein against him.") *with* Fed. R. Civ. P. 41(b) ("If the plaintiff fails to prosecute . . . a defendant may move to dismiss the action or any claim against it."). Thus, in considering whether *Wilder* is the appropriate approach, we should rely on federal precedent because such case law is "pertinent for guidance and enlightenment as we develop the philosophy of our Rules of Civil Procedure." *Slattery v. Appy City, LLC*, 385 N.C. 726, 736 n.12 (2024) (cleaned up). As explained further below, the *Wilder* test is

6. In a per curiam opinion, this Court recently affirmed a decision of the Court of Appeals that applied *Wilder*. *See Lauziere*, 271 N.C. App. at 223. While this Court has held that per curiam opinions are binding, *State v. Elder*, 383 N.C. 578, 598 (2022), the per curiam affirmance of *Lauziere* never addressed the specifics of the *Wilder* test. In *Lauziere*, this Court wrote a single paragraph specifying that the case should comply with particular procedural rules on remand. 376 N.C. at 789, *aff'g per curiam*, 271 N.C. App. 220. There is no true decision or reasoning from this Court on *Wilder*, so we are not bound by stare decisis on this issue. *See State v. Ballance*, 229 N.C. 764, 767 (1949) (reasoning that where there is no real series of prior decisions, stare decisis does not command adherence to precedent).

reflective of the key considerations weighed by federal courts and should be employed as this State's analysis for failure to prosecute issues.

Each federal circuit court deploys a marginally different approach for the failure to prosecute analysis. *See* 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2370.1 (4th ed. 2004) (last updated June 2024), Westlaw. But several common factors are shared amongst the various analyses. *See id.*

To start, the federal circuits unanimously agree that dismissal with prejudice for failure to prosecute is an incredibly harsh course of action that should be reserved only for extreme circumstances. *See, e.g.*, *Hernandez v. City of El Monte*, 138 F.3d 393, 400 (9th Cir. 1998) ("Because dismissal is a harsh penalty, however, it is appropriate only in extreme circumstances of unreasonable delay." (cleaned up)). Thus, every federal circuit requires the trial court to at least consider alternative sanctions. *See, e.g.*, *Arnold v. ADT Sec. Servs., Inc.*, 627 F.3d 716, 722 (8th Cir. 2010) (recognizing that a trial court must consider, among other factors, the efficacy of less severe sanctions).

The federal circuits further agree that there must be dilatory or delayed conduct, either intentional or inadvertent, before dismissing for failure to prosecute. *See, e.g.*, *Pomales v. Celulanes Telefónica, Inc.*, 342 F.3d 44, 48 (1st Cir. 2003) (stating that "extremely protracted inaction (measured in years)" can justify dismissal with prejudice for failure to prosecute). Federal courts also recognize that a distinction should be drawn between the plaintiff's personal responsibility for the delay and their attorney's share of the blame. *See, e.g.*, *Carpenter v. City of Flint*, 723 F.3d 700, 704 (6th Cir. 2013) (explaining that a plaintiff should not be punished for neglect due solely to their lawyer's unexcused and erroneous actions). Additionally, all federal circuit courts look to the extent of prejudice created by dilatory conduct. *See, e.g.*, *Attkisson v. Holder*, 925 F.3d 606, 625 (4th Cir. 2019) (recognizing that a trial court should consider the amount of prejudice to the defendants caused by the inaction of the plaintiff).

Lastly, although specific considerations are helpful in guiding a trial court's ultimate decision, federal circuit courts tend to weigh the totality of the circumstances when deciding whether to dismiss for failure to prosecute. *See, e.g.*, *McMahan v. Deutsche Bank AG*, 892 F.3d 926, 932 (7th Cir. 2018) ("Ultimately, the decision to dismiss depends on all the circumstances of the case." (quoting *Kasalo v. Harris & Harris, Ltd.*, 656 F.3d 557, 561 (7th Cir. 2011))). The federal approaches to the failure to prosecute analysis are functionalist tests designed to guide, but not

dictate, how trial courts address the issue. *See, e.g.*, *Briscoe v. Klaus*, 538 F.3d 252, 263 (3d Cir. 2008) ("In balancing the [enumerated] factors, we do not have a 'magic formula' or 'mechanical calculation' . . . . While no single [ ] factor is dispositive, we have also made it clear that not all of the [ ] factors need be satisfied in order to dismiss a complaint." (cleaned up)).

Given this case law, the essential elements of the failure to prosecute analysis can be summarized as: (1) evidence of delay; (2) the plaintiff's personal responsibility for the delay; (3) the amount of prejudice to the defendant; and (4) consideration of alternative sanctions. And when these factors are compared with *Wilder*, it is evident that *Wilder* is well supported by federal case law. The factors promulgated in *Wilder* comport with the common factors utilized across the federal circuit courts. *Cf.* 146 N.C. App. at 578 (the three-part *Wilder* test). Given the guidance from the federal circuit courts and *Wilder*'s agreement with the common principles reflected in federal case law, this Court would be prudent to explicitly adopt the *Wilder* test.

III. Conclusion

The Court of Appeals did not err as to either issue before this Court. The statute of limitations defense was not properly preserved for appellate review, so the Court of Appeals did not err in refusing to address that issue. Furthermore, the trial court abused its discretion by not following the correct legal standard in applying the *Wilder* test. The trial court misapprehended the law regarding the delay prong of *Wilder*, and its legal conclusions regarding prejudice and the suitability of lesser sanctions were unsupported by competent findings of fact. Although the Court of Appeals reasoned through the failure to prosecute issue differently than I would, it nonetheless reached the correct holding. For these reasons, I would modify and affirm the decision of the Court of Appeals and remand the matter to that court for remand to the trial court for further proceedings.

Justice RIGGS joins in this dissenting opinion.

CHAD GARDNER, LISA GARDNER, LONNIE NORTON, HOPE NORTON, THE TOWN OF DOBBINS HEIGHTS, AND THE CITY OF HAMLET
v.
RICHMOND COUNTY

No. 140PA23

Filed 18 October 2024

Appeal and Error—interlocutory order—substantial right—sufficiency of factual basis

The decision of the Court of Appeals dismissing a town's appeal from an interlocutory order (in which the trial court dismissed the town's claims for lack of standing but allowed another municipality's claims to proceed) was reversed where the town provided in its statement of appellate review a sufficient factual basis for immediate review pursuant to *Creek Pointe Homeowner's Ass'n, Inc. v. Happ*, 146 N.C. App. 159 (2001) (allowing immediate review under similar circumstances). The matter was remanded for the lower appellate court to consider the parties' arguments on the issue of standing.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, No. COA21-600 (N.C. Ct. App. May 2, 2023), dismissing the appeal as interlocutory. Heard in the Supreme Court on 24 September 2024.

The Brough Law Firm, PLLC, by Brady N. Herman and T.C. Morphis Jr., for plaintiff-appellant Town of Dobbins Heights.

McGuireWoods LLP, by Henry L. Kitchin Jr. and Dylan M. Bensinger, for defendant-appellee.

No brief for plaintiff-appellees Chad Gardner, Lisa Gardner, Lonnie Norton, Hope Norton, and City of Hamlet.

PER CURIAM.

Defendant Richmond County filed a motion to dismiss the claims of plaintiffs Town of Dobbins Heights (the Town) and City of Hamlet based on a lack of standing. The trial court entered an order granting

the motion as to the Town but denied it as to the other municipality. The Town appealed to the Court of Appeals.

Generally, a party has no right to an immediate appeal of an interlocutory order. In its brief to the Court of Appeals, the Town argued that it should be allowed to pursue an immediate appeal because otherwise "there would be the possibility of two trials (one for the remaining Plaintiffs and one for [the Town] if the Court [of Appeals] were to find that it has standing through a subsequent appeal)" and "[t]wo trials on the same issue would raise the possibility of inconsistent verdicts." *Gardner v. Richmond County*, No. COA21-600, slip op. at 4 (N.C. Ct. App. May 2, 2023) (unpublished). The Town further argued that the Court of Appeals had recognized the right to an immediate appeal in similar circumstances in *Creek Pointe Homeowner's Ass'n, Inc. v. Happ*, 146 N.C. App. 159 (2001). *Id.*

The Court of Appeals dismissed the Town's appeal, reasoning that the Town had "failed to demonstrate a substantial right that would be impacted by th[e] [c]ourt's failure to immediately hear its appeal." *Gardner*, slip op. at 6. According to the Court of Appeals, the Town had "simply cite[d] *Creek Pointe* and essentially assert[ed] [that] the holding in *Creek Pointe* require[d] immediate review of [the Town's] appeal without analysis." *Id.* at 5.

Our review of the Town's brief to the Court of Appeals reveals that the Town did more than baldly assert a right of immediate appeal under *Creek Pointe*. On the contrary, the statement of appellate review in the Town's brief adequately explained why the particular facts of this case satisfy the substantial rights test based on the holding in *Creek Pointe*. *See Creek Pointe*, 146 N.C. App. at 162. Since we agree that the Town articulated a sufficient factual basis to support appellate jurisdiction under *Creek Pointe*, we hold that the Court of Appeals erred in dismissing the Town's appeal. *See In re Civ. Penalty*, 324 N.C. 373, 384 (1989) (holding that when "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").

The decision of the Court of Appeals is reversed. On remand, the Court of Appeals should address the parties' competing arguments regarding the issue of standing.

REVERSED AND REMANDED.

IN RE K.P.W.

[386 N.C. 596 (2024)]

IN THE MATTER OF K.P.W.

No. 322A23

Filed 18 October 2024

Appeal pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, No. COA23-205 (N.C. Ct. App. Nov. 7, 2023), vacating an order entered on 18 November 2022 by Chief Judge David V. Byrd in District Court, Wilkes County. Heard in the Supreme Court on 26 September 2024.

Erika Leigh Hamby for petitioner-appellant Wilkes County Department of Social Services.

Michelle FormyDuval Lynch for appellant Guardian ad Litem.

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

PER CURIAM.

For the reasons stated in the dissenting opinion below, the decision of the Court of Appeals is reversed.

REVERSED.

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

Justice EARLS dissenting.

I would affirm the decision of the Court of Appeals for the reasons stated in the majority opinion below. Therefore, I respectfully dissent.

JAY SINGLETON, D.O., AND SINGLETON VISION CENTER, P.A.
v.
NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES; ROY COOPER, GOVERNOR OF THE STATE OF NORTH CAROLINA, IN HIS OFFICIAL CAPACITY; MANDY COHEN, NORTH CAROLINA SECRETARY OF HEALTH AND HUMAN SERVICES, IN HER OFFICIAL CAPACITY; PHIL BERGER, PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE, IN HIS OFFICIAL CAPACITY; AND TIM MOORE, SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, IN HIS OFFICIAL CAPACITY

No. 260PA22

Filed 18 October 2024

Constitutional Law—challenge to Certificate of Need law—claims not limited to as-applied challenge—facial challenge implicated—remand required

In a case challenging the constitutionality of North Carolina's Certificate of Need law, although plaintiffs asserted that their claims constituted an "as-applied" challenge, where the allegations in their complaint, if proven, could render the law unconstitutional in all its applications, the trial court and Court of Appeals mistakenly treated the claims exclusively as as-applied challenges rather than both as-applied and facial challenges. The lower courts' decisions were vacated and the matter was remanded for further proceedings.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 284 N.C. App. 104 (2022), dismissing in part and affirming in part an order entered on 11 June 2021 by Judge Michael O'Foghludha in Superior Court, Wake County. Heard in the Supreme Court on 17 April 2024.

Joshua Windham, *Renée Flaherty*, *and Daniel Gibson for plaintiff-appellants.*

Joshua H. Stein, *Attorney General*, *by Ryan Y. Park*, *Solicitor General*, *Nicholas S. Brod*, *Deputy Solicitor General*, *Derek L. Hunter*, *Special Deputy Attorney General*, *and John H. Schaeffer*, *Assistant Attorney General*, *for defendant-appellees.*

Fox Rothschild LLP, *by Marcus C. Hewitt*, *for Bio-Medical Applications of North Carolina*, *Inc.*, *amicus curiae; and Gary S. Qualls*, *Susan K. Hackney*, *and Anderson M. Shackelford for the Charlotte-Mecklenburg Hospital Authority d/b/a Atrium Health*, *University Health Systems of Eastern Carolina*, *Inc. d/b/a Vidant*

Health, and Cumberland County Hospital System, Inc., d/b/a Cape Fear Valley Health System, amici curiae.

B. Tyler Brooks for Certificate of Need Scholars Thomas Stratmann, Christopher Koopman, and Matthew Mitchell, amici curiae.

Sellers, Ayers, Dortch & Lyons, P.A., by Elliot M. Engstrom, for Goldwater Institute, amicus curiae.

Jonathan D. Guze for the John Locke Foundation and Professor John V. Orth, amici curiae.

Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, by Iain M. Stauffer, for NCHA, Inc. d/b/a the North Carolina Healthcare Association, the North Carolina Healthcare Facilities Association, the North Carolina Chapter of the American College of Radiology, Inc., the North Carolina Senior Living Association, and the Association for Home and Hospice Care of North Carolina, amici curiae; and Parker Poe Adams & Bernstein LLP, by Robert A. Leandro, for the North Carolina Ambulatory Surgical Center Association, amicus curiae.

PER CURIAM.

This case involves a constitutional challenge to a series of statutes commonly known as the Certificate of Need law. *See* N.C.G.S. § 131E-175 *et seq.* (2023). Plaintiffs brought claims alleging that the Certificate of Need law violates their rights under the Monopolies Clause, Exclusive Emoluments Clause, and Law of the Land Clause of the North Carolina Constitution. *See* N.C. Const. art. I, §§ 19, 32, 34.

Plaintiffs described their constitutional claims as "as-applied" challenges in the complaint. Both the trial court and the Court of Appeals accepted plaintiffs' characterization of these claims and evaluated the claims as as-applied challenges.

After oral argument at this Court, we requested supplemental briefing from the parties on two issues, including the following: "Whether plaintiffs' constitutional claims, based on the facts alleged in the complaint, are facial challenges, as-applied challenges, or both, and what implications this has for our review of the Court of Appeals' decision and the trial court's order."

After reviewing the parties' submissions, we conclude that plaintiffs' complaint asserts both facial and as-applied challenges. We recognize

that plaintiffs initially characterized their claims as "as-applied" challenges and expressly sought declaratory and injunctive relief "as applied to Plaintiffs." But when courts distinguish between facial and as-applied challenges, the "label is not what matters." *Doe v. Reed*, 561 U.S. 186, 194 (2010). When the "plaintiffs' claim and the relief that would follow" could "reach beyond the particular circumstances of these plaintiffs," then that claim becomes "a facial challenge to the extent of that reach." *Id.*

Here, plaintiffs' complaint alleges facts that could undermine the Certificate of Need law's constitutionality far beyond the particular circumstances of these plaintiffs. Indeed, in their supplemental briefing, plaintiffs acknowledge that, should they prevail, the "need for relief that extends beyond [plaintiffs] will likely arise here" and "will likely entail facial relief."

We agree. The complaint contains allegations that, if proven, could render the Certificate of Need law unconstitutional in all its applications. *See In re Certificate of Need for Aston Park Hosp., Inc.*, 282 N.C. 542, 551–52 (1973). Accordingly, plaintiffs' complaint asserts both facial and as-applied challenges to the Certificate of Need law.

This is a crucial determination because a facial constitutional challenge to the validity of an act of the General Assembly is governed by additional jurisdictional and procedural criteria that do not apply to as-applied challenges. *See* N.C.G.S. § 1-267.1 (2023); N.C.G.S. § 1A-1, Rule 42(b)(4) (2023).

Because the trial court and the Court of Appeals mistakenly treated plaintiffs' claims exclusively as as-applied challenges, we vacate the decision of the Court of Appeals and remand this matter to the Court of Appeals with instructions to vacate the trial court's judgment and remand for further proceedings. On remand, the trial court should proceed as provided in N.C.G.S. § 1-267.1 and N.C.G.S. § 1A-1, Rule 42(b)(4).

Because we vacate the decision of the Court of Appeals on this basis, we need not address plaintiffs' challenges to that decision asserted in the briefing before this Court. However, for the benefit of the trial court on remand, we disavow the Court of Appeals' jurisdictional analysis concerning the exhaustion of administrative remedies and direct the trial court to this Court's recent decisions in *Askew v. City of Kinston*, 902 S.E.2d 722 (N.C. 2024), and *Kinsley v. Ace Speedway Racing, Ltd.*, 904 S.E.2d 720 (N.C. 2024).

VACATED AND REMANDED.

STATE v. BURRIS

[386 N.C. 600 (2024)]

STATE OF NORTH CAROLINA
v.
KYLE ALLEN BURRIS

No. 198A23

Filed 18 October 2024

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 289 N.C. App. 535 (2023), finding no error in the judgments entered 11 August 2021 by Judge Jacqueline D. Grant in Superior Court, Buncombe County. Heard in the Supreme Court on 25 September 2024.

Joshua H. Stein, Attorney General, by Derrick C. Mertz, Special Deputy Attorney General, for the State-appellee.

Kimberly P. Hoppin for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE v. KING

[386 N.C. 601 (2024)]

STATE OF NORTH CAROLINA
v.
JASON WILLIAM KING

No. 119A23

Filed 18 October 2024

Sentencing—driving while impaired—aggravating factors—found by trial judge instead of jury—harmless error review

In a prosecution for impaired driving, although the trial judge violated N.C.G.S. § 20-179(a1)(2) by finding the existence of aggravating factors—since "only a jury may determine if an aggravating factor is present"—the error was not automatically reversible because it was subject to harmless error analysis (i.e., whether the trial judge's actions prejudiced defendant). The decision of the Court of Appeals determining that the statute violation mandated resentencing—and that harmless error review was inapplicable—was reversed, and the matter was remanded for application of the correct standard of review.

Justice EARLS dissenting.

Justice RIGGS 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, 288 N.C. App. 459 (2023), vacating a judgment entered on 18 November 2021 by Judge Karen Eady-Williams in Superior Court, Buncombe County, and remanding the case for a new sentencing hearing. Heard in the Supreme Court on 13 February 2024.

Joshua H. Stein, Attorney General, by Kathryne E. Hathcock, Special Deputy Attorney General, and Christopher W. Brooks, Special Deputy Attorney General, for the State-appellant.

Caryn Strickland for defendant-appellee.

ALLEN, Justice.

A divided panel of the Court of Appeals interpreted the sentencing statute for impaired driving offenses to require that defendant Jason

William King receive a new sentencing hearing because the trial judge found aggravating factors instead of submitting them to the jury. We do not read the statute to require resentencing if the trial judge's error did not prejudice defendant. We therefore reverse the decision of the Court of Appeals as it pertains to defendant's impaired driving offense and remand this case to that court for a harmless error determination.

On 30 August 2021, the District Court, Buncombe County, convicted defendant of driving while impaired (DWI), reckless driving, possession of marijuana, and possession of marijuana paraphernalia. The district court found the existence of an aggravating factor but concluded that it was substantially counterbalanced by a mitigating factor. Proceeding under N.C.G.S. § 20-179, the sentencing statute for DWI offenses, the district court imposed Level IV punishment. Specifically, the court sentenced defendant to 120 days of imprisonment but suspended the punishment and placed defendant on twelve months of supervised probation. The district court also sentenced defendant to an active term of seven days in custody and ordered defendant to pay a $100 fine and court costs.

Defendant appealed to the Superior Court, Buncombe County, where on 18 November 2021, a jury found him guilty of DWI and reckless driving but acquitted him of the remaining charges. Prior to sentencing defendant, the superior court judge found the existence of three aggravating factors: (1) "[t]he driving of the defendant was especially reckless;" (2) "[t]he driving of the defendant was especially dangerous;" and (3) "defendant was convicted . . . of [misdemeanor] death by motor vehicle" in August 2015. Unlike the district court, the superior court judge did not find the existence of any mitigating factors. Based on the three aggravating factors and the absence of any mitigating factors, the superior court judge imposed Level III punishment: six months of imprisonment, suspended pending defendant's completion of thirty-six months of supervised probation; an active sentence of three days in custody; and payment of a $500 fine and court costs.

Defendant filed a notice of appeal from the judgment of the superior court. He subsequently filed a petition for writ of certiorari asking the Court of Appeals to review his case even if it concluded "that his right to appeal was waived because of failure to comply with the technical requirements of [Rule 4 of the North Carolina Rules of Appellate Procedure]." The Court of Appeals allowed the petition for writ of certiorari.

On appeal, defendant argued that the trial court erred by finding aggravating factors because "such factors must be decided by a

jury."[1] *State v. King*, 288 N.C. App. 459, 464 (2023). The Court of Appeals agreed. Citing the decision of the United States Supreme Court in *Blakely v. Washington*, 542 U.S. 296 (2004), the Court of Appeals explained that a defendant's right to a jury trial under the Sixth Amendment to the United States Constitution is violated when a trial judge inflicts punishment beyond what the jury's verdict alone authorizes.[2] *Id.* at 465. The court further noted that the General Assembly amended the DWI sentencing statute in 2006 to remove the statutory authority of trial judges to find contested aggravating factors in DWI sentencing proceedings. *Id.* (citing The Motor Vehicle Driver Protection Act of 2006, S.L. 2006-253, § 23, 2006 N.C. Sess. Laws 1178, 1207). In particular, the legislature added N.C.G.S. § 20-179(a1)(2) to the statute. Subsection 20-179(a1)(2) "took the determination of aggravating factors out of the hands of the trial judge and placed it with the jury." *Id.*

Though unanimous in holding that the trial court erred, the Court of Appeals split over whether defendant should receive a new sentencing hearing. The majority held that resentencing is required whenever a trial judge finds aggravating factors in violation of N.C.G.S. § 20-179(a1)(2). *Id.* at 467. In reaching this conclusion, the majority conceded that both the Supreme Court and this Court have determined that the Sixth Amendment does not require resentencing for *Blakely* errors that are harmless beyond a reasonable doubt. *Id.* at 465 (citing *Washington v. Recuenco*, 548 U.S. 212 (2006); *State v. Blackwell*, 361 N.C. 41 (2006); *State v. Speight*, 186 N.C. App. 93 (2007)). Nonetheless, the majority concluded that N.C.G.S. § 20-179(a1)(2) mandates resentencing when *Blakely* errors occur during DWI sentencing proceedings, regardless of whether the errors prejudiced the defendant. *Id.* at 466–67.

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1. Defendant also argued that (1) the superior court erred by denying his motion to dismiss the charges against him and (2) he was entitled to a new sentencing hearing on his reckless driving conviction. Because the dissenting judge in the Court of Appeals did not disagree with the majority on those issues, they are not properly before this Court. *See* N.C. R. App. P. 16(b) ("When the sole ground of the appeal of right is the existence of a dissent in the Court of Appeals, review by the Supreme Court is limited to a consideration of those issues that are . . . specifically set out in the dissenting opinion as the basis for that dissent . . . .").

2. The Sixth Amendment to the United States Constitution provides in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. Const. amend. VI. Although the Sixth Amendment right to a jury trial did not originally extend to criminal trials in state courts, the Due Process Clause of the Fourteenth Amendment made it applicable to such proceedings. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1397 (2020).

Observing that the General Assembly "is free to provide [criminal defendants with] more protection than constitutionally required," the majority concluded that the legislature deliberately provided extra protection to persons convicted of DWI offenses when it added N.C.G.S. § 20-179(a1)(2) to the DWI sentencing statute in 2006. *Id.* at 466. Given the wording of N.C.G.S. § 20-179(a1)(2) and the timing of its enactment, the majority reasoned that the legislature did not intend for violations of N.C.G.S. § 20-179(a1)(2) to receive harmless error review. *Id.* at 466.

> Since the relevant federal cases provide the bare minimum, and all relevant state cases are distinguishable because they were decided prior to the modification of the statute where it is clear from the timing and language of the statute that the legislature intended to change the standards adopted by our courts, we hold aggravating factors must be decided by the jury or the case must be remanded for a new sentencing hearing.

Id. at 467.

The dissenting judge disagreed with the majority's interpretation of N.C.G.S. § 20-179(a1)(2). In his view, the General Assembly enacted the provision to comply with *Blakely*, not to create extra sentencing protections for persons convicted of DWI. *Id.* at 469 (Gore, J., dissenting). Consequently, he maintained that "[t]he trial court's failure to abide by [N.C.G.S. § 20-179(a1)(2)] leads to harmless error review, not reversible error." *Id.* The dissenting judge further opined that the superior court judge's error in this case was harmless because the evidence supporting the aggravating factors "was so overwhelming and uncontroverted that any rational fact-finder would have found the disputed aggravating factor[s] beyond a reasonable doubt." *Id.* (quoting *Blackwell*, 362 N.C. at 49).

On 5 May 2023, the State appealed to this Court. At the time, N.C.G.S. § 7A-30(2) afforded the State an appeal of right based on the dissent in the Court of Appeals. *See* Current Operations Appropriations Act of 2023, S.L. 2023-134, § 16.21(d)–(e), https://www.ncleg.gov/Sessions/2023/Bills/House/PDF/H259v7.pdf (eliminating right of appeal based on dissents for cases filed in the Court of Appeals on or after 3 October 2023).

"We review a lower court's interpretation of statutes de novo." *Morris v. Rodeberg*, 385 N.C. 405, 409 (2023) (emphasis omitted). "Under a de novo review, the [C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig v. New*

Hanover Cnty. Bd. of Educ., 363 N.C. 334, 337 (2009) (internal quotation marks omitted) (emphasis omitted).

This case asks us to decide whether a trial judge's finding of aggravating factors in violation of the DWI sentencing statute automatically entitles a defendant to a new sentencing hearing. In urging us to affirm the decision of the Court of Appeals, defendant argues that the plain language of N.C.G.S. § 20-179(a1)(2) requires juries to find any contested aggravating factors and thus trial courts have no discretion to deviate from this procedure. He asserts that reviewing violations of N.C.G.S. § 20-179(a1)(2) for harmlessness contradicts the provision's unambiguous text and renders the provision essentially meaningless. Defendant further contends that harmless error review does not extend to violations of N.C.G.S. § 20-179(a1)(2) because the General Assembly intended the provision to "expand[ ] on the minimum constitutional protections" set out in *Blakely* and related cases.

Notwithstanding defendant's arguments, we hold that the Court of Appeals erred in refusing to apply harmless error review to the superior court judge's finding of aggravating factors. The finding of aggravating factors by a trial judge contrary to N.C.G.S. § 20-179(a1)(2) does not constitute reversible error if the error was harmless.

To explain why we so hold, we turn first to the text of N.C.G.S. § 20-179(a1)(2). *See N.C. Farm Bureau Mut. Ins. Co. v. Hebert*, 385 N.C. 705, 711 (2024) ("The primary goal of statutory interpretation is to accomplish legislative intent, which, in the first instance, is discerned from the plain language of the enactment. . . . This Court may turn to other sources to determine legislative intent, including 'the spirit of the act,' only if the statute is ambiguous or susceptible to multiple interpretations.").

> The defendant may admit to the existence of an aggravating factor, and the factor so admitted shall be treated as though it were found by a jury . . . . If the defendant does not so admit, *only a jury may determine if an aggravating factor is present*. . . . The State bears the burden of proving beyond a reasonable doubt that an aggravating factor exists . . . .

N.C.G.S. § 20-179(a1)(2) (2023) (emphasis added).

Without question, this provision requires a jury—not a judge—to decide whether the State has established the existence of contested aggravating factors beyond a reasonable doubt. On the other hand, the

provision nowhere states that a violation automatically entitles a defendant to a new sentencing hearing.

According to defendant, the "unequivocal" nature of the wording used in N.C.G.S. § 20-179(a1)(2) implicitly mandates that our appellate courts vacate sentences imposed in contravention of its terms. We do not believe this inference is justified. The *Blakely* decision itself employs similarly categorial language: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum *must* be submitted to a jury, and proved beyond a reasonable doubt." 542 U.S. at 301 (emphasis added) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). Yet, as noted above, the Supreme Court has ruled that *Blakely* errors do not constitute reversible error if they are harmless beyond a reasonable doubt. *Recuenco*, 548 U.S. at 222.

For defendant to prevail, we would have to conclude that the General Assembly meant for N.C.G.S. § 20-179(a1)(2) to provide protection beyond what the Sixth Amendment requires for *Blakely* errors. Interestingly, the Court of Appeals majority conceded that the legislature "likely" added N.C.G.S. § 20-179(a1)(2) to the DWI sentencing statute "to provide defendants [convicted of DWI] the protections articulated in *Blakely*." *King*, 288 N.C. App. at 466–67. In our view, there is no "likely" about it. The legislature enacted N.C.G.S. § 20-179(a1)(2) to bring DWI sentencing into compliance with *Blakely*; it did not mean to require resentencing for *Blakely* errors that do not prejudice defendants.

The legislative intent behind N.C.G.S. § 20-179(a1)(2) seems clear when we consider the subsection together with an earlier and nearly identical provision in the Structured Sentencing Act.

> The defendant may admit to the existence of an aggravating factor, and the factor so admitted shall be treated as though it were found by a jury . . . . If the defendant does not so admit, *only a jury may determine if an aggravating factor is present in an offense.*

N.C.G.S. § 15A-1340.16(a1) (2023) (emphasis added) (originally enacted as Act to Amend State Law Regarding the Determination of Aggravating Factors in a Criminal Case to Conform with the United States Supreme Court Decision in Blakely v. Washington, S.L. 2005-145, § 1, 2005 N.C. Sess. Laws 253, 253).

The Structured Sentencing Act governs sentencing for most non-DWI offenses. *See* N.C.G.S. § 15A-1340.10 (2023). Originally, it entrusted

trial judges with the responsibility of determining the existence of aggravating factors. An Act to Provide for Structured Sentencing in North Carolina Consistent with the Standard Operating Capacity of the Department of Correction and Local Confinement Facilities and to Redefine State and County Responsibilities for the Confinement of Misdemeanants, ch. 538, § 1, 1993 N.C. Sess. Laws 2298, 2304–06.

Subsection 15A-1340.16(a1) is one in a series of amendments that the legislature made to the Structured Sentencing Act in 2005. *See* S.L. 2005-145, § 1, 2005 N.C. Sess. Laws at 253–57. By enacting N.C.G.S. § 15A-1340.16(a1), the legislature transferred the responsibility for finding contested aggravating factors from judges to juries.

It appears obvious to us that the General Assembly regarded this change to the Structured Sentencing Act as a codification of *Blakely*. No great powers of deduction are needed to reach this conclusion. For one thing, the title of the 2005 legislation unambiguously states that the legislation's main purpose was to incorporate *Blakely* into the Structured Sentencing Act. *See* S.L. 2005-145, 2005 N.C. Sess. Laws 253. Not surprisingly, then, we have referred to the 2005 legislation as "the *Blakely* Act." *Blackwell*, 361 N.C. at 49; *see also Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 812 (1999) ("[T]his Court has stated that the title of an act should be considered in ascertaining the intent of the legislature."). Likewise, N.C.G.S. § 15A-1340.16(a1) achieves the *Blakely* Act's stated purpose by prohibiting trial judges from determining the existence of disputed aggravating factors.[3] Trial judges who proceed in accordance with the statute will not commit *Blakely* errors.

The *Blakely* Act does not expressly address whether the impermissible finding of aggravating factors by trial judges in violation of N.C.G.S. § 15A-1340.16(a1) always constitutes reversible error. Moreover, when the General Assembly passed the *Blakely* Act, neither the Supreme Court nor this Court had yet said whether *Blakely* errors could be reviewed for harmlessness.[4] There was good reason to anticipate, however, that *Blakely* errors would be subject to harmless error review.

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3. The *Blakely* Act did impose some requirements not mandated by *Blakely* itself. For example, the *Blakely* Act requires the State to give written notice of any aggravating factors it intends to use at least thirty days before trial or plea of guilty or no contest unless the defendant waives notice. N.C.G.S. § 15A-1340.16(a6). We express no opinion regarding the impact of violations of those provisions.

4. Although this Court initially held that *Blakely* errors were not subject to harmless error review, we did so in an opinion that was not issued until the day after the *Blakely* Act went into effect. *See State v. Allen*, 359 N.C. 425, 448 (2005), *withdrawn*, 360 N.C. 569

Like everyone else, judges make mistakes. With this reality in mind, "this Court has said on numerous occasions . . . [that] litigants are not entitled to receive 'perfect' trials; instead, they are entitled to receive 'a fair trial, free of prejudicial error.' " *State v. Malachi*, 371 N.C. 719, 733 (2018) (quoting *State v. Ligon*, 332 N.C. 224, 243 (1992)). This principle holds true even for constitutional errors in criminal trials. "[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis."[5] *Rose v. Clark*, 478 U.S. 570, 579 (1986). Put differently, constitutional errors that do not prevent defendants from receiving fair trials are not grounds for reversal. *See id.* (remarking that most constitutional errors are subject to harmless error analysis because "[t]he thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments"). The General Assembly codified this understanding in N.C.G.S. § 15A-1443(b), which declares that a constitutional error in a criminal trial is not prejudicial if the State can "demonstrate, beyond a reasonable doubt, that the error was harmless." N.C.G.S. § 15A-1443(b) (2023).

Since the default rule is that constitutional errors are subject to review for harmlessness, the General Assembly undoubtedly realized that the courts could end up applying harmless error analysis to *Blakely* errors. *See State v. S. Ry. Co.*, 145 N.C. 495, 542 (1907) ("The Legislature is presumed to know the existing law and to legislate with reference to it."). Thus, if it had intended the *Blakely* Act to go beyond the constitutional minimum and mandate automatic reversal for *Blakely* errors, the legislature would have said so somewhere in the legislation. Finding no such statement, we perceive no such legislative intent. It follows that a trial judge's finding of a contested aggravating factor in violation of the

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(2006). We reversed our position after the Supreme Court clarified that resentencing is not necessary when *Blakely* errors are harmless beyond a reasonable doubt. *Recuenco*, 548 U.S. at 221–22; *Blackwell*, 361 N.C. at 44–45.

5. Some constitutional errors are "structural, and thus subject to automatic reversal." *Neder v. United States*, 527 U.S. 1, 8 (1999) (internal quotation marks omitted). However, the Supreme Court "ha[s] found structural errors only in a very limited class of cases." *Johnson v. United States*, 520 U.S. 461, 468 (1997) (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)) (complete denial of right to counsel); *see also Tumey v. Ohio*, 273 U.S. 510 (1927) (biased trial judge); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (racial discrimination in grand jury selection); *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (denial of right to self-representation); *Waller v. Georgia*, 467 U.S. 39 (1984) (denial of right to public trial); *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (erroneous reasonable doubt instruction).

Blakely Act does not entitle a defendant to relief unless the error prejudiced the defendant.

This brings us back to the DWI sentencing statute. The General Assembly copied the key language in N.C.G.S. § 20-179(a1)(2) nearly verbatim from N.C.G.S. § 15A-1340.16(a1). This fact alone strongly indicates that the legislature expected *Blakely* errors to receive the same treatment under either provision. Additionally, we do not know of any obvious policy reason why the General Assembly would want individuals convicted of DWI to enjoy more protection from *Blakely* errors than persons convicted of other offenses. In short, the legislature intended harmless error review to apply to aggravating factors found by trial judges in violation of either N.C.G.S. § 15A-1340.16(a1) or N.C.G.S. § 20-179(a1)(2).

Consistent with our view of the legislative intent behind N.C.G.S. § 20-179(a1)(2), the trial judge's finding of aggravating factors in this case is subject to review for harmlessness. In other words, resentencing is not necessary unless the violation of N.C.G.S. § 20-179(a1)(2) prejudiced defendant.

The rules for determining harmless error vary depending on whether a defendant has asserted the denial of a constitutional right or a statutory right. As explained above, when a defendant seeks relief for the denial of a constitutional right, the burden is on the State to prove harmlessness beyond a reasonable doubt. N.C.G.S. § 15A-1443(b). Here, however, defendant opted against pursuing a *Blakely* claim directly under the Sixth Amendment; rather, he based his request for a new sentencing hearing solely on the trial judge's violation of N.C.G.S. § 20-179(a1)(2).

When a defendant requests relief for the denial of a statutory right, N.C.G.S. § 15A-1443(a) places the burden of demonstrating prejudice squarely on the defendant. N.C.G.S. § 15A-1443(a). In most circumstances, satisfying this burden requires the defendant to show "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises."[6] *Id.* Hence, defendant cannot establish grounds for resentencing in this case absent a reasonable possibility that, but for the

6. Subsection 15A-1443(a) further provides that prejudice "exists in any instance in which it is deemed to exist as a matter of law or error is deemed reversible per se." N.C.G.S. § 15A-1443(a). Since we conclude that violations of N.C.G.S. § 20-179(a1)(2) do not create prejudice as a matter of law and are not reversible error per se, this standard does not apply here.

trial judge's violation of N.C.G.S. § 20-179(a1)(2), he would have been sentenced at a lower level.[7]

We see no merit in defendant's contention that applying harmless error review to violations of N.C.G.S. § 20-179(a1)(2) will render the provision meaningless. It is true that most trial court errors are not prejudicial; however, it is also true that our appellate courts often find prejudicial error pursuant to N.C.G.S. § 15A-1443(a). *See, e.g.*, *State v. Aguilar*, 292 N.C. App. 596, 606 (2024) (holding the trial court's erroneous admission of testimony prejudiced the defendant).

Finally, in ruling for defendant, the Court of Appeals majority relied on *State v. Geisslercrain*, 233 N.C. App. 186 (2014). According to the majority, *Geisslercrain* "did not apply harmless error and evaluate whether . . . [an aggravating] factor existed but decided the finding of that factor placed the defendant at another DWI Level punishment, violating *Blakely*, and therefore vacated the sentence."[8] *King*, 288 N.C. App. at 466 (citing *Geisslercrain*, 233 N.C. App. at 191). To the extent that it conflicts with this opinion, *Geisslercrain* is overruled.

The Court of Appeals majority incorrectly construed N.C.G.S. § 20-179(a1)(2) to require resentencing whenever a trial judge in a DWI sentencing proceeding finds contested aggravating factors. It should have examined whether the superior court judge's finding of aggravating factors prejudiced defendant. Accordingly, we reverse the decision

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7. Our dissenting colleagues argue that, if harmless error analysis applies to violations of N.C.G.S. § 20-179(a1)(2), then the test for prejudice should be whether "a trial court's error affects the level of punishment imposed." Under that approach, prejudice would exist here merely because the trial judge's finding of aggravating factors resulted in a Level III sentence rather than a Level IV sentence.

The prejudice test proposed by our dissenting colleagues conflicts with our conclusion that the legislature enacted N.C.G.S. § 20-179(a1)(2) to comply with *Blakely*. To have a valid *Blakely* claim, a defendant must show both (1) that the trial judge found a contested aggravating factor *and* (2) that the trial judge relied on the factor to inflict a greater punishment than the jury's verdict alone would allow. *State v. Norris*, 360 N.C. 507, 516 (2006). Thus, if prejudice could be shown simply by the imposition of enhanced punishment, then every *Blakely* error would necessarily amount to reversible error under the Sixth Amendment. Of course, the Supreme Court and this Court have said that is not so. *See, e.g.*, *Recuenco*, 548 U.S. at 221–22 (holding that *Blakely* errors receive harmless error review). In effect, then, our dissenting colleagues' proposed prejudice test is just another way of interpreting N.C.G.S. § 20-179(a1)(2) to go beyond *Blakely*.

8. The Court of Appeals majority declined to follow the pre-*Geisslercrain* case of *State v. McQueen*, 181 N.C. App. 417 (2007), partly on the ground that "*McQueen* was decided prior to the 1 December 2006 amendment to [N.C.G.S.] § 20-179(a1)(2)." *King*, 288 N.C. App. at 466. In fact, the *McQueen* decision was not published until 16 January 2007.

of the Court of Appeals as to defendant's DWI offense and remand this case to that court for a harmless error determination.

REVERSED AND REMANDED.

Justice EARLS dissenting.

This case involves Mr. King's sentence pursuant to N.C.G.S. § 20-179 (DWI statute or DWI sentencing statute), which provides the procedure for determining aggravating factors following a conviction for impaired driving. There are two questions before this Court. The first is whether a harmless error analysis applies to violations of subsection 20-179(a1)(2). Next, if the harmless error standard does apply, then the question is whether the error in this case was harmless. I disagree with my colleagues that the harmless error standard applies to violations of subsection 20-179(a1)(2) because I read the terms of the statute to provide greater protection than that required by the United States Constitution under *Blakely v. Washington*, 542 U.S. 296 (2004), and *Washington v. Recuenco*, 548 U.S. 212 (2006). Further, even if harmless error were the standard, I disagree with the majority that remand to the Court of Appeals for its assessment of harmful error is the appropriate relief in this case. Rather I would hold that where, as here, the trial court's statutory violation affected the level at which the defendant was sentenced and where the facts support that a jury could have come to a different conclusion as to the aggravating factor, prejudice is established and the defendant is entitled to a new sentencing hearing. Therefore, I respectfully dissent.

The text of the statute is clear, in cases where a defendant declines to admit an aggravating factor exists, "only a jury may determine if an aggravating factor is present." N.C.G.S. § 20-179(a1)(2) (2023). In this case, the parties have not argued that Mr. King admitted to the presence of an aggravating factor and no aggravating factors were submitted to the jury. Despite this, the trial court concluded, on its own, that three aggravating factors were present: (1) Mr. King had a previous misdemeanor conviction for death by motor vehicle; (2) Mr. King's driving was "especially reckless"; and (3) Mr. King's driving was "especially dangerous." Mr. King was sentenced to six months in custody, suspended for thirty-six months of supervised probation. This sentence is the statutory maximum for a Level Three offender. *See* N.C.G.S. § 20-179(i). As a special condition of probation, the court also imposed a seventy-two-hour active sentence, with credit for time served. Pursuant to Mr. King's

reckless driving conviction, the trial court further imposed a sentence of forty-five days in custody, which it suspended for thirty-six months of supervised probation.

The trial court's reliance on these aggravating factors during sentencing was problematic for at least three reasons: (1) it misapplies the clear and unambiguous text of subsection 20-179(a1)(2), which states that only a jury may find aggravating factors; (2) due to this misapplication, Mr. King was incorrectly sentenced at a higher offender level; and (3) based on the facts of this case, it is unknown whether a jury would have found the presence of the "especially reckless" aggravating factor at all.

I. N.C.G.S. § 20-179(a1)(2)

A. Statutory Background

Before 2006, the applicable version of the DWI sentencing statute required the trial judge to hold a sentencing hearing "to determine whether there [were] aggravating or mitigating factors" present. Act of Oct. 14, 1998, S.L. 1998-182, § 25, 1998 N.C. Sess. Laws 592, 618. This statute was amended in 2006, and now provides that "only a jury may determine if an aggravating factor is present." N.C.G.S. § 20-179(a1)(2); *see also* The Motor Vehicle Driver Protection Act of 2006, S.L. 2006-253, § 23, 2006 N.C. Sess. Laws 1178, 1207. Similarly, in 2005, the General Assembly passed An Act to Amend State Law Regarding the Determination of Aggravating Factors in a Criminal Case to Conform with the United States Supreme Court Decision in Blakely v. Washington, S.L. 2005-145, 2005 N.C. Sess. Laws 253 (the Blakely Act). The changes made by the Blakely Act applied in part to N.C.G.S. § 15A-1340.16, which addresses the finding of aggravating and mitigating factors in criminal cases. *Id.* § 1, 2005 N.C. Sess. Laws at 253–57. Following the Blakely Act, under section 15A-1340.16, "only a jury may determine if an aggravating factor is present in an offense." N.C.G.S. § 15A-1340.16(a1) (2023).

The General Assembly's amendment of subsection 20-179(a1)(2), as well as its passing of the Blakely Act, followed the United States Supreme Court's decision in *Blakely*, 542 U.S. 296. *See* S.L. 2005-145, 2005 N.C. Sess. Laws at 253; S.L. 1998-182, § 25, 1998 N.C. Sess. Laws at 618. In *Blakely*, the Court determined that "[w]hen a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority." 542 U.S. at 304 (cleaned up). This results in a Sixth Amendment violation. *Id.* at 305. Later, in *Recuenco*, the Court held that a trial court's failure to submit a sentencing factor to the jury is not structural error. 548 U.S. at 222.

Following *Blakely*, *Recuenco*, and amendments to section 15A-1340.16, this Court issued its opinion in *State v. Blackwell*, 361 N.C. 41 (2006), which although governed by *Blakely*, was not governed by the statutory changes made under the Blakely Act. *See State v. Ward*, 364 N.C. 157, 170 (2010) (Brady, J., concurring in the result only). Likewise, while the Court of Appeals' decision in *State v. McQueen* also occurred after the 2006 amendments to subsection 20-179(a1)(2), the court applied the prior version of the statute, which allowed the judge to find an aggravating factor. 181 N.C. App. 417, 422 (2007). Thus, while *Blackwell* and *McQueen* may comport with the United States Constitution's requirements arising under *Blakely*, they did not address the subsequent statutory changes at issue here in subsection 20-179(a1)(2).

Instead, the unique requirements of the 2006 amendments to the DWI statute were first recognized in *State v. Geisslercrain*, 233 N.C. App. 186 (2014). There, a trial court sentenced a defendant to a Level Four punishment after erroneously finding, for itself, that an aggravating factor was present. *Id.* at 191. Had the trial court not erroneously found such a factor, it would have been required under the statute to sentence the defendant to a lesser Level Five punishment. *Id.* (citing N.C.G.S. § 20-179(f)(3)). Because "the aggravating factor in this case, which was improperly found by the judge, 'increase[d] the penalty for [the] crime beyond the prescribed maximum,' " *id.* at 191 (quoting *Blakely*, 542 U.S. at 301), the court vacated the sentence and remanded for an entry of a Level Five punishment, *id.* at 194.

B. Mr. King's Case

1. Section 20-179 precludes harmless error review where a jury does not find that an aggravating factor is present.

Since the precedents from this Court are distinguishable, the proper standard of error review when a trial court violates the current version of subsection 20-179(a1)(2) is a matter of first impression. I would hold that a faithful reading of the plain text of the statute requires that such a violation is reversible error that entitles a defendant to a new sentencing hearing.

The language of the DWI statute is plain. It provides that "only a jury may determine if an aggravating factor is present." N.C.G.S. § 20-179(a1)(2). Our Court has long held that "[w]here 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." *State v. White*, 372 N.C. 248, 251 (2019) (quoting *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209 (1990)).

Our General Assembly can amend state law to grant greater protections than the United States Constitution requires. *State v. Carter*, 322 N.C. 709, 713 (1988); *see also State v. King*, 288 N.C. App. 459, 466 (2023). It did so here. By stating that "only a jury may determine" the presence of an aggravating factor, N.C.G.S. § 20-179(a1)(2), the legislature expanded the procedural protections for defendants subject to sentencing under the DWI statute—a proper use of its statutory authority, *see Carter*, 322 N.C. at 713 (reinforcing that North Carolina can provide its citizens with more protection than the United States Constitution requires).

The majority concedes in a footnote that the statute goes beyond *Blakely*'s constitutional floor with other mandates, like requiring the State to give written notice to the defendant of any aggravating factors it intends to use. Yet it reasons the General Assembly "would have said so" if it meant to mandate more than harmless error review for statutory violations. This reasoning does not give proper credit to the General Assembly's clear and unambiguous language and our presumption that "the Legislature chose its words with due care" when enacting legislation. *See C Invs. 2, LLC v. Auger*, 383 N.C. 1, 10 (2022) (citing *Sellers v. Friedrich Refrigerators, Inc.*, 283 N.C. 79, 85 (1973)).

Importantly, the majority's reading of the statute contradicts its plain text. It allows a judge to find for herself any aggravating factors, only to be overturned if a different judge guesses that a jury would have reached a different result. *See State v. Lawrence*, 365 N.C. 506, 513 (2012) (explaining the harmless error standard for federal constitutional and other legal errors). That system of review sidelines any role for the jury in a statutory scheme where the General Assembly gave the essential task to "only" the jury. *See* N.C.G.S. § 20-179(a1)(2). Such a holding contradicts the "basic rule" of statutory interpretation to "ascertain and effectuate the intent of the legislat[ure]." *See Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629 (1980).

Moreover, section 20-179's sentencing scheme and overall structure reaffirms that harmless error review is not the right test. The provision details extensive, special instructions for convening, selecting, and impaneling the jury to find any aggravating factors, and instructs trial courts on how to impanel a new jury if the jury from the guilt phase is unable to reconvene to hear evidence on the aggravating factors issue. N.C.G.S. § 20-179(a1)(2)–(3). Once factors are found by the jury, the judge then has the responsibility to weigh them to determine the correct level of punishment. N.C.G.S. § 20-179(a1)(2), (d)–(f). That distinctive role for the judge regarding the jury's findings reaffirms that the only proper remedy where a jury failed to find aggravating factors in

the first place is to remand for a new sentencing hearing for a jury to find those factors. Otherwise, the judge is improperly supplanting the jury's role and transgressing its otherwise circumscribed role. A new sentencing hearing for such statutory errors better comports with the statute's structure which assigns different actors to different decision-making roles, in addition to being consistent with the plain, clear language of the text.

2. Even if harmless error were the correct standard, the error in Mr. King's case is prejudicial because it affected his punishment level, and resentencing is the correct remedy.

Mr. King further argues that if harmless error is the correct standard, then the lower court's error was prejudicial because it affected the level of punishment imposed on him. I agree and would hold that, at the very least, a trial court's error prejudices a defendant where it affects the defendant's sentencing level.

In DWI cases, correct application of the statute is essential to determine the level at which a defendant is sentenced. Section 20-179's sentencing scheme is "systematic and tiered" and does not afford trial judges discretion in sentencing. *Geisslercrain*, 233 N.C. App. at 190 (cleaned up). This is in contrast to a provision in the Structured Sentencing Act, N.C.G.S. § 15A-1340.16(a), which grants the trial court discretion to sentence in the presumptive range, even when aggravating factors are present, and discretion to depart from the presumptive range, even when only mitigating factors are properly found, *id.* (noting that "the decision to depart from the presumptive range is in the discretion of the court"); *see also Geisslercrain*, 233 N.C. App. at 192 ("Under the Structured Sentencing Act the trial court has the discretion to sentence a defendant within the presumptive range even where only mitigating factors are properly found."); *accord State v. Norris*, 360 N.C. 507, 514 (2006).

No similar discretion applies under section 20-179. For example, if there are no aggravating or mitigating factors present, then the trial court must impose a Level Four punishment. *Geisslercrain*, 233 N.C. App. at 191; *see also* N.C.G.S. § 20-179(f)(2). The court must impose a Level Three punishment if aggravating factors substantially outweigh any mitigating factors, *id.* at (f)(1), and it must impose Level Five punishment if mitigating factors substantially outweigh any aggravating factors, *id.* at (f)(3). Punishment corresponds with these different tiers: Level Three punishment imposes a fine of up to $1,000 and up to six months of imprisonment, *id.* at (i), while a Level Five punishment

imposes a fine of up to $200 and a maximum term of sixty days of imprisonment, *id*. at (k). Put simply, the finding of aggravating and mitigating factors directly dictates the mandatory punishment level, which directly affects how the defendant is penalized.

In this case, but for the trial court's reliance on the three aggravating factors, which were not found by a jury, the trial court would have been required to impose a lesser Level Four punishment, not the harsher Level Three punishment it imposed on Mr. King. *See Geisslercrain*, 233 N.C. App. at 190. Mr. King suffered prejudicial error from the trial court's improper finding of aggravating factors because his punishment was more severe than it otherwise would have been had the trial court stayed within its constitutional and statutory lane. *Cf. Glover v. United States*, 531 U.S. 198, 200 (2001) (holding that a showing of an increased prison sentence can establish prejudice for a Sixth Amendment ineffective assistance of counsel claim).

Importantly, under this approach, not every case in which the trial court erroneously finds an aggravating factor for itself will require reversal. For example, if the State had provided notice to Mr. King of any other aggravating factor in his case and proven it to the jury, then the trial court's error in finding the "especially reckless" aggravating factor would not have been prejudicial because it would not have affected Mr. King's sentencing level. That is because the Superior Court found no mitigating factors in his case. And in the absence of any mitigating factors, the aggravating factors would necessarily "substantially outweigh any mitigating factors," and the court would be required to impose a Level Three punishment. N.C.G.S. § 20-179(f)(1); *see also Geisslercrain*, 233 N.C. App. at 191 ("[I]f there are only aggravating factors present—and no mitigating factors present—then the aggravating factors 'substantially outweigh' the mitigating factors . . . as a matter of law . . . ."). Thus, it follows that whether an error is prejudicial is based on whether there are other properly found mitigating or aggravating factors, and accordingly, not every case will result in a per se reversal. Put another way, under this reading, prejudice is not automatically presumed. Instead, prejudice is present when a trial court's error affects the level of punishment imposed. *See* N.C.G.S. § 20-179(f); *Geisslercrain*, 233 N.C. App. at 191.[1]

1. Related to this point, it is unclear how *Geisslercrain* is inconsistent with the majority's holding today such that it stands to be "overruled" at all. *Geisslercrain* did not announce a reversible error standard for section 20-179. Instead, it held that because the trial court found for itself an aggravating factor, it improperly sentenced the defendant to a harsher punishment (i.e., the defendant was prejudiced), and it remanded for the trial court to resentence the defendant at the less harsh punishment level. *Geisslercrain*, 233

Such prejudice occurred here, when the trial court in Mr. King's case incorrectly found, for itself, the presence of three aggravating factors. The subject of this appeal relates specifically to the "especially reckless" aggravating factor, the only factor the State gave notice to Mr. King that it intended to prove. *See* N.C.G.S. § 20-179(a1)(1). Under harmless error review for a federal constitutional violation, this Court is tasked with determining if the evidence in the record "against the defendant was so 'overwhelming' and 'uncontroverted' that any rational fact-finder would have found the disputed aggravating factor beyond a reasonable doubt." *Blackwell*, 361 N.C. at 49. Simply put, "[b]efore a court can find a Constitutional error to be harmless it must be able to declare a belief that such error was harmless beyond a reasonable doubt." *Id.* at 49–50 (quoting *State v. Heard*, 285 N.C. 167, 172 (1974)).[2]

Assuming that the harmless error standard applies to the DWI sentencing statute, the error in Mr. King's case was not harmless. Our courts have stated that "[i]mpaired driving is in and of itself reckless and dangerous." *State v. Mack*, 81 N.C. App. 578, 585 (1986) (cleaned up). "Therefore, to determine whether there [is] enough evidence to prove the defendant's driving was . . . especially reckless[,] . . . [the court] must focus on whether the facts of [the] case disclose excessive aspects of recklessness . . . not normally present in the offense of impaired driving . . . ." *Id.* (cleaned up). The evidence in Mr. King's case does not conclusively reach this standard.

While the State argues that the evidence in Mr. King's case was "uncontroverted" such that the trial judge could substitute its own

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N.C. App. at 192, 194. *Geisslercrain* thus fits neatly within a harmless error approach to violations of subsection 20-179(a1)(2).

To the extent the majority does see itself as overruling *Geisslercrain*, it appears to adopt a rule that a defendant cannot establish prejudice by showing that the trial judge's statutory violation led it to impose an enhanced punishment. Such a definition of prejudice makes it nearly impossible to show prejudice. While the majority dismisses this concern as simply a re-litigation of the issue of whether the statute goes beyond *Blakely*, its conflation of the statute with the constitutional rule sows confusion as to what exactly a defendant must show to win a resentencing when a trial judge violates subsection 20-179(a1)(2).

2. In a curious maneuver, the majority goes from vigorously insisting that subsection 20-179(a1)(2) only "codifi[ed] . . . *Blakely*" to asserting that a defendant's challenge under that provision is not, in fact, a challenge of constitutional error. Instead, it holds that the stricter harmless error standard for nonconstitutional challenges applies, which places the burden on the defendant, since the majority says Mr. King sought relief on the basis of the statute. I cannot make sense of this double standard, which seems designed only to implement procedural hurdles that make it harder for criminal defendants to vindicate their constitutional rights.

judgment for that of the jury, the factual nuances present here do not support that conclusion. The evidence in Mr. King's case did not show the signs of especially reckless driving often present. Namely, it did not show that he drove at an excessive speed, drove off the road, or that he hit anyone. There is also testimony from Deputy Martin that Mr. King stopped at a red light and complied with Deputy Martin's instructions pulling over "very quickly" and without any problem. Contradictory testimony was also offered by Trooper Onderdonk and Deputy Martin. While Trooper Onderdonk testified that Mr. King was driving between two lanes and almost hit another car, Deputy Martin testified that when he pulled Mr. King over, "[t]here was nobody around . . . other than the off-duty . . . trooper behind me" and that he did not recall the incident Trooper Onderdonk referenced. Moreover, at trial Deputy Martin testified that he pulled Mr. King over based on the information he received from the dispatch officer and that without that information he could not say if he would have stopped Mr. King at all.[3] Accordingly, it is possible that based on the evidence the jury received at trial, it would not have found the "especially reckless" driving aggravating factor.

Moreover, although some of the aggravating factors listed in subsection 20-179(d) are based entirely on objective factors (e.g., driving with a revoked driver's license), the "especially reckless" driving aggravating factor depends on discretionary judgments about all of the circumstances. Based on this alone, it is questionable whether a jury would have found that Mr. King was "especially reckless" in his driving. In light of the facts of this case, which are not so " 'overwhelming' and 'uncontroverted,' " it is truly unknown whether "any rational fact-finder would have found the disputed aggravating factor beyond a reasonable doubt." *See Blackwell*, 361 N.C. at 49.

The majority may agree with many of these points. Because it only remands this case to the Court of Appeals for a harmless error determination, the Court of Appeals is seemingly free to adopt parts of the approach I outline here. But that raises another question: why does the majority remand this case to the Court of Appeals in the first place? This Court is equally as capable of assessing prejudicial error based on the record before us as the intermediate appellate court. It does not serve the interests of judicial economy and the expeditious resolution of cases to subject this matter to yet further appellate review.

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3. Although it is true that Deputy Martin stated that Mr. King was driving in the middle of the roadway "[p]retty much the whole time," this statement was made during the suppression hearing and was not presented to the jury.

With that in mind, I would hold that if the harmless error standard applies, prejudice occurs when the evidence shows that a trial court's error affected the defendant's sentencing level, and I would remand this case to the trial court for a new sentencing hearing.

II. Conclusion

Accordingly, I would affirm the Court of Appeals decision and hold that subsection 20-179(a1)(2) should be applied as written and thus, the harmless error standard does not apply. Additionally, because the aggravating factors in Mr. King's case should have been found by a jury and because the trial court's misapplication of the statute impacted the level Mr. King was sentenced at, his case should be remanded for resentencing. Alternatively, even under the harmless error standard this Court has chosen to import into the statute, a policy choice different from that made by the General Assembly, I would hold that the trial court finding—rather than the jury finding—that Mr. King's driving was "especially reckless" was not harmless beyond a reasonable doubt. This is because based on these facts, the jury could find that Mr. King's driving was not especially reckless, which in turn affected the level at which Mr. King was sentenced.

Justice RIGGS joins in this dissenting opinion.

ROBERT F. KENNEDY, JR.

v.

NORTH CAROLINA STATE BOARD OF ELECTIONS; KAREN BRINSON BELL, IN HER OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; ALAN HIRSCH, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; JEFF CARMON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; STACY EGGERS IV, KEVIN N. LEWIS, AND SIOBHAN O'DUFFY MILLEN, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS

From N.C. Court of Appeals
P24-624

From Wake
24CVS27757

No. 235P24

ORDER

"[O]ur state constitution 'declare[s]' our rights so that 'the great, general, and essential principles of liberty and free government may be recognized and established.' " *Bouvier v. Porter*, 386 N.C. 1, 2, 900 S.E.2d 838, 842 (2024) (alteration in original) (quoting N.C. Const. art. I). The text recognizes that "[a]ll political power is vested in and derived from the people," N.C. Const. art. I, § 2, and that the people "have the inherent, sole, and exclusive right of regulating the internal government," *id.* art. I, § 3. "The people exercise this 'exclusive right' through one of our most fundamental political processes—elections." *Bouvier*, 386 N.C. at 3, 900 S.E.2d at 842.

"Since 1776 the state constitution has recognized the importance of elections and their integrity in the Declaration of Rights." *Id.* The Free Elections Clause requires that "[a]ll elections shall be free." N.C. Const. art. I, § 10. This language is plain: "it protects voters from interference and intimidation in the voting process," *Harper v. Hall*, 384 N.C. 292, 361, 886 S.E.2d 393, 438 (2023), and guarantees that "(1) each voter is able to vote according to his or her judgment, and (2) the votes are . . . accurately counted." *Bouvier*, 386 N.C. at 3, 900 S.E.2d at 842. "This Court has consistently interpreted the North Carolina Constitution to provide the utmost protection for the foundational democratic freedom[ ]

of . . . voting." *Libertarian Party of N.C. v. State*, 365 N.C. 41, 55, 707 S.E.2d 199, 208–09 (2011) (Newby, J., dissenting).

To protect this important right, the elections process should ensure that voters are presented with accurate information regarding the candidates running for an elected office. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346–47, 115 S. Ct. 1511, 1519 (1995) (quoting *Buckley v. Valeo*, 424 U.S. 1, 14–15, 96 S. Ct. 612 (1976)) ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation."). Where a ballot contains misleading information or inaccurately lists the candidates, it risks interfering with the right to vote according to one's conscience.

Defendants filed a petition for writ of supersedeas seeking to stay enforcement of the Court of Appeals' 6 September 2024 interlocutory order and simultaneously filed a petition for discretionary review seeking review of the same order.

> Interlocutory determinations by the Court of Appeals, including orders remanding the cause for . . . other proceedings, shall be certified for review by the Supreme Court only upon a determination by the Supreme Court that failure to certify would cause a delay in final adjudication which would probably result in substantial harm.

N.C.G.S. § 7A-31(c) (2023). We conclude that defendants have not met their heavy burden under this standard, and accordingly we deny their petition for discretionary review and also deny their petition for writ of supersedeas.

Neither party in this case disputes that plaintiff submitted a resignation of candidacy. N.C.G.S. § 163-113 (2023). Therefore, by law, a vote for plaintiff in this election will not count. *Id.* But if plaintiff's name appears on the ballot, it could disenfranchise countless voters who mistakenly believe that plaintiff remains a candidate for office. The trial court did not appropriately weigh this consideration in its ruling, instead focusing on the minimal harm to plaintiff himself and the significant resources the State would need to expend to create an accurate ballot for this election.

Moreover, although N.C.G.S. § 163-165.3(c) requires the State Board to promulgate rules for the reprinting of ballots "where practical" in

response to replacement candidates or other late changes, we are unpersuaded by the practical objections defendants raise in their submissions to this Court. To a large extent, any harm suffered by defendants in light of the Court of Appeals' order is of their own making. Indeed, defendant Bell candidly admitted that she was aware on Friday, 23 August 2024, that plaintiff had suspended his campaign and intended to remove his name from ballots in battleground states. Additionally, a representative of plaintiff's presidential campaign emailed the State Board on 23 August 2024 to inquire about removing plaintiff's name from ballots, putting the State Board on notice that plaintiff intended to remove his name. Rather than following up with plaintiff or the We The People Party, defendant Bell instructed the County Boards of Election to continue the ballot preparation process, which they did over the weekend. By Monday, 26 August 2024, plaintiff contacted the State Board regarding the process for withdrawing. Nevertheless, the State Board did not instruct the County Boards to pause ballot preparation. On Tuesday, 27 August 2024, the State Board received plaintiff's formal withdrawal request but gave no further instructions other than stating that the We The People Party needed to submit a formal withdrawal request. And perhaps most strikingly, after the State Board received the We The People Party's formal withdrawal request on Wednesday, 28 August 2024, and scheduled an emergency board meeting, director Bell instructed the County Boards to continue printing ballots. When the State Board held its emergency meeting on Thursday, 29 August 2024, it voted 3-2 that removing plaintiff's name would not be practical in light of the current state of ballot production.

Thus, despite being on notice of plaintiff's intention to withdraw his name from the ballot for nearly a week, the State Board directed the County Boards to continue ballot production, including over the weekend, rather than communicating and cooperating forthrightly with plaintiff and the We The People Party. We decline to grant defendants extraordinary relief when they are responsible for their own predicament. *Cf.*, *e.g.*, *Creech v. Melnik*, 347 N.C. 520, 529, 495 S.E.2d 907, 913 (1998) ("One who seeks equity must do equity. The fundamental maxim, 'He who comes into equity must come with clean hands,' is a well-established foundation[al] principle upon which the equity powers of the courts of North Carolina rest.").

We also note that defendant Bell indicated in her affidavit that ballot content was not "finalized" until, at the earliest, 21 August 2024. She stated that for a "handful" of ballot styles, parties had until 22 August 2024 to fill nomination vacancies. Therefore, by the time plaintiff announced

the suspension of his campaign and his intention to remove his name from ballots in battleground states, the ballot preparation was in its infant stages. At this time, the State Board could have communicated with plaintiff or the We The People Party to clarify plaintiff's intentions before ballot production had progressed too far. Yet, as noted, defendant Bell and the State Board forged ahead and directed County Boards to continue ballot preparation. The State Board's substantial harm arguments thus ring hollow.

We acknowledge that expediting the process of printing new ballots will require considerable time and effort by our election officials and significant expense to the State. But that is a price the North Carolina Constitution expects us to incur to protect voters' fundamental right to vote their conscience and have that vote count. N.C. Const. art. I, § 10; *Bouvier*, 386 N.C. at 3, 900 S.E.2d at 842.

For all these reasons, the Court of Appeals properly issued its writ of supersedeas to prevent the dissemination of inaccurate ballots and to ensure that voters in our state are able to vote their conscience and have those votes counted. Accordingly, defendant's petition for writ of supersedeas and petition for discretionary review are denied.

By order of the Court in Conference, this the 9th day of September 2024.

/s/ Allen, J.
For the Court

Justices Earls, Dietz, and Riggs, dissent.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 9th day of September 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

Justice BERGER concurring.

I concur with the Special Order entered by the Court today denying the State's petition for writ of supersedeas and petition for discretionary review. To the extent there is substantial harm or the potential for substantial harm, it is to the voters of North Carolina, not the State Board of Elections.

I write separately to emphasize that, if we were to reach the merits of this case, more should be done to uphold and preserve the integrity of the upcoming election. There are now hundreds of thousands of invalid ballots in existence, if not more. Thus, there is the potential, however slight, that North Carolina voters could acquire both versions of seemingly legitimate ballots during the 2024 election. Whether by unintentional acts or by those who would deliberately inject chaos into the election, the substantial confusion that could result would appear to warrant attention.

A fair counting of official ballots must be defended, *see Swaringen v. Poplin*, 211 N.C. 700, 191 S.E. 746, 747 (1937), and invalid ballots could "sow confusion and ultimately dampen confidence in the integrity and fairness of elections." *Rep. Party of Penn. v. Degraffenreid*, 141 S. Ct. 732, 734 (2021) (Thomas, J., *dissenting*). Because elections are free when "vote[s are] accurately counted," *Harper v. Hall*, 384 N.C. at 364 (2023), we should not leave open the possibility that these invalid ballots could be commingled with official ballots.

Thus, one could argue that the order entered by the Court of Appeals enjoining the State Board of Elections "from disseminating ballots listing petitioner as a candidate for President of the United States," and also directing that the Board "disseminate ballots without the name" of petitioner does not go far enough. All previously printed ballots listing Robert F. Kennedy, Jr.'s name should be destroyed, and the director of the State Board of Elections and the director of each county Board of Elections should be required to certify destruction of these invalid ballots to maintain public confidence in the upcoming election.

Justice EARLS dissenting.

I fully join my colleague Justice Riggs in her comprehensive dissent. I write separately to emphasize a couple of additional considerations that underlie my concern that contravening state and federal laws to

satisfy the shifting desires of a particular political candidate and his political party erodes the rule of law and contributes to a loss of faith in the impartiality of the state judiciary.

The Constitution of the State of North Carolina declares in Article I that "all persons are created equal" (Section 1); that "All power of suspending laws or the execution of laws by any authority, without the consent of the representatives of the people, is injurious to their rights and shall not be exercised" (Section 7); that "all elections shall be free" (Section 10); and that "No person shall be denied the equal protection of the laws" (Section 19). Given the unequivocal state law mandate that absentee ballots in a general election must be mailed 60 days before election day (this year, September 6),[1] N.C.G.S. § 163-227.10(a) (for a statewide general election); N.C.G.S. § 163-258.9(a) (for military and overseas voters), and the federal law mandate that absentee ballots for federal offices must be mailed to overseas voters 45 days before election day (this year, September 21), 52 U.S.C. § 20302(a)(8); N.C.G.S. § 163-258.9(a), this Court's decision to allow the Court of Appeals unexplained mandatory injunction contravening those laws is unjustified.[2] It amounts to a suspension of state law not mandated by the representatives of the people, and grants a favor to one candidate not extended to other candidates, namely, additional time to decide whether to stand for office.

The right to vote is sacred, and fundamental to our system of democracy. *E.g.*, *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.' " (quoting *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979))); *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society."). Abridging that right for voters who vote absentee by mail, and particularly overseas voters, in order to satisfy a particular candidate, no matter what party or what political office they seek, is not consistent with free elections and equal protection of the

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1. There is evidence in the record from an affidavit of Wake County Board of Elections member Gerry Cohen, attached to Defendants' Petition for Writ of Supersedeas, that the State Board of Elections has never deviated from that deadline absent a separate and express statutory authorization to do so. *See* Cohen Aff., ¶ 3.

2. Highlighting the importance of the timely mailing of absentee ballots, North Carolina law also provides that "[i]n every instance the board of elections shall exert every effort to provide absentee ballots, of the kinds needed by the date on which absentee voting is authorized to commence." N.C.G.S. § 163-227.10(a).

laws. *See, e.g.*, *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 665 (1966) (noting that election laws may not be "inconsistent with the Equal Protection Clause of the Fourteenth Amendment"); *Burdick*, 504 U.S. at 441 (upholding reasonable, nondiscriminatory restrictions in the election process as necessary "to maintain the integrity of the democratic system"). The rules governing elections should be the same for everyone and the courts should enforce those rules equally.

With regard to the equal protection concern, it is worth noting that other offices on the ballot in certain jurisdictions were provided notice that they had until a date certain to correct issues with who might be a candidate for those offices. There is evidence in the record, from an affidavit submitted by Board executive director Karen Brinson Bell, that Board officials contacted political party officials in mid-August to inform them of vacancies and withdrawals on the ballot. Ex. B, C, D (communications from Board general counsel Paul Cox to Democratic Party, Republican Party, and Libertarian Party officials) [hereinafter Bell Aff.]. Party officials were told in those same notices that any replacement nominees *must be certified by 22 August* in order for those names to appear on printed absentee ballots. *Id.* But it was days after that deadline, applicable to all other candidates, that Mr. Kennedy submitted his request to withdraw.[3] Mr. Kennedy does not explain why he is entitled to such special treatment.

And nor could he. His request, if tolerated, opens the door to candidates and parties of all stripes demanding last-minute changes to already printed ballots. Importantly, the 100 county boards of election, not the state, bear the cost and responsibility of printing and distributing ballots. Bell Aff. ¶ 23; N.C.G.S. §§ 163-33(6), -165.3. Were county boards required to accommodate such late-breaking requests, the toll on budgets and limited staff capacity could be profound. If that door is not made open to other candidates, Mr. Kennedy receives the special treatment he demands. Such special treatment undermines our system of fair elections—where every candidate abides by the same set of rules. *Cf. Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C.

3. The majority reasons that the Board should have acted sooner based on Mr. Kennedy's public announcement that he intended to remove his name from ballots in battleground states. The majority neglects to mention that North Carolina was not mentioned by name in that announcement. The announcement also stated that Kennedy was "suspending" his presidential campaign "but not terminating it." CNN Politics, Hear the Moment RFK Jr. Suspends his Presidential Campaign, at 1:15 (August 23, 2024), https://www.cnn.com/2024/08/23/politics/video/rfk-jr-robert-kennedy-suspends-campaign-announcement-arizona-digvid.

558, 610 (2021) (Newby, J. concurring in result) (noting the General Assembly's "constitutional mandate to protect fair play in elections").

If this case seems like much ado about nothing, it bears considering that 2,348 different ballot styles are in use in this state for this election. Bell Aff. ¶ 7. That figure reflects all of the contests and referenda on which voters in North Carolina's 100 counties have a say in November, from contests for the office of US president to the local soil and water conservation district supervisor, and everything in between.[4] More than 2,910,000 general election ballots have already been printed to facilitate our sacred exercise of the franchise. Bell Aff. ¶ 56.

We know that ballot layout matters enormously for an accurate count of the voters' will. *See generally Bush v. Gore*, 531 U.S. 98 (2000). That's why North Carolina statutorily mandates that all ballots are "readily understandable by voters" and designed to "facilitate an accurate vote count." N.C.G.S. § 163-165.4(1), (4). They must "[p]resent all candidates and questions in a fair and nondiscriminatory manner." *Id.* at (2). And it's why "the work of preparing and proofing the ballots" takes weeks, and this year began in early August. Bell Aff. ¶ 9.

Why such a lengthy process? Consider the steps in finalizing a ballot. First, obviously, officials have to know what goes on the ballots. Bell Aff. ¶ 9. Then the ballot itself must be prepared. When a voter fills in an oval next to a candidate's name, that mark must be translated to the correct contest, candidate, or referenda in official tallies. Bell Aff. ¶ 11. State and county boards take careful steps to ensure that a voter's ballot selection is accurately read by tabulators and voting machines. Bell Aff. ¶ 11–12. Which requires the uniform and accurate coding of those machines. Proofreading all of the ballots across the state, as required by law, takes roughly a full calendar week. Bell Aff. ¶ 12; N.C.G.S. § 163-165.3(a)(4)–(5). Only after these steps can the approved ballots be disseminated, by the sixty-day deadline required by state law: this year September 6. N.C.G.S. § 163-227.10.

As the sample ballots—that election officials had already made publicly available—show, presidential contenders are at the top. Bell Aff. ¶ 16. Deleting an entire political party from the presidential ballot item thus potentially requires reconfiguring the layout for the entire contest,

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4. *Candidate Filing Period: Soil & Water Districts, 2024 General Election*, North Carolina State Board of Elections, https://www.ncsbe.gov/news/events/candidate-filing-period-soil-water-districts-2024-general-election (accessed 9 September 2024).

possibly the entire first ballot column, and potentially the other columns and page breaks too. Bell Aff. ¶ 51.

This brief recitation serves to underscore that, since the Court of Appeals has issued an "extraordinary remedy" to require state and county boards to re-prepare, re-print, and disseminate ballots *without* Mr. Kennedy's name, on the very day state law requires them to be sent out, depriving voters of their statutorily guaranteed voting period and at a substantial cost of money and time resources, it must be for a very, very good reason. *AEP Industries v. McClure*, 308 N.C. 393, 401 (1983). And likelihood of success on the merits is certainly an important part of the calculus. Indeed, without such likelihood of success, the courts have no legal authority to otherwise disregard state and federal law. We as a Court are not free to simply balance the equities and decide who gets harmed more if, in the first place, there is no valid legal claim to justify our intervention. That is, in fact, policymaking at its best, something this Court previously has expressed a reluctance to countenance. *See*, *e.g.*, *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169 (2004) ("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."); *Harper v. Hall*, 384 N.C. 292, 322–23 (2023) (same).

Here there is no valid reason justifying intervening in the election contrary to state law and established election rules for North Carolina. Mr. Kennedy filed his motion for emergency relief on 3 September 2024, a week before ballots were to be disseminated, wanting his name removed from all of North Carolina's 2,348 ballots. The superior court denied his request. After reviewing all the evidence and the arguments of counsel, the court found that Mr. Kennedy "will suffer no practical, personal, or pecuniary harm should his name remain on the ballot." By contrast, it found the harm to North Carolina's election officials and voters "would be substantial." Because Mr. Kennedy failed to show irreparable harm that outweighed the harm to the public, he was not entitled to his injunction as a matter of law. *See A.E.P. Industries*, *Inc. v. McClure*, 308 N.C. 393, 401 (1983); *State ex rel. Edmisten v. Fayetteville St. Christian Sch.*, 299 N.C. 351, 357 (1980). That means the superior court *did not examine* the credibility of Mr. Kennedy's underlying claims—alleged statutory and constitutional rights to have his name removed at this late stage. No valid claim, no injunction.

Mr. Kennedy appealed. Below, the Court of Appeals issued an unexplained order reversing the superior court. It directed the Board to "disseminate ballots without the name of petitioner Robert F. Kennedy, Jr. appearing as a candidate for President of the United States."

Today, the majority in its order likewise declines to explain what entitles Mr. Kennedy to this extraordinary measure. The North Carolina judicial system has not adequately explained to the public why their ballots are to be reprinted, *after* they were already ready to be mailed, after the statutory deadline.

That fact should give grave pause. In a democracy, "government should be by 'settled, standing laws,' not by 'absolute arbitrary power.' " Margaret Radin, *Can the Rule of Law Survive* Bush v. Gore*?*, *in* Bush v. Gore, *the Question of Legitimacy*, 110, 111 (Bruce Ackerman, ed. 2002) (quoting John Locke, *Of the Extent of Legislative Power*, *in Two Treatises of Government* (3d ed. 1698)). Giving reasons for decisions that transcend the immediate case outcome not only limits the independent will of the judiciary, but it also informs citizens and empowers their constitutional role in our democracy. William Haltom & Mark Silverstein, *The Scholarly Tradition Revisited: Alexander Bickel*, *Herbert Wechsler*, *and the Legitimacy of Judicial Review*, 4 Constitutional Commentary 25, 26 (1987) (summarizing scholarship on the necessity of reasoned judicial decisions). Finally, it is the way our judicial system guarantees the equal protection of the laws, so that future cases and future litigants are governed by the same principles and treated equally. *See Blankenship v. Bartlett*, 363 N.C. 518, 521–22, 525–26 (2009); *Hoke Cnty. Bd. of Educ. v. State*, 385 N.C. 380, 387 (2023) (order) (Earls, J., dissenting) ("A court's legitimacy is earned over time. But it can be destroyed much more quickly. That is because our authority largely depends on the public's willingness to respect and follow our decisions." (cleaned up)).

Our precedent holds that an appellate court is not bound by superior court findings of fact on appeals from an order of a superior court granting or denying a preliminary injunction. *A.E.P. Indus.*, *Inc.*, 308 N.C. at 402; *see also Pruitt v. Williams*, 288 N.C. 368, 372–73; *Telephone Co. v. Plastics*, *Inc.*, 287 N.C. 232, 235 (1975); *Huskins v. Hospital*, 238 N.C. 357, 362 (1953). But the appellate court is still required to "review and weigh the evidence and find facts for itself." *A.E.P. Indus.*, *Inc.*, 308 N.C. at 402. That review ought to include the "considerations specific to election cases" and take into account the risk of voter confusion from late-coming court orders that change election rules. *See Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006).

The specific facts of this case cast serious doubt that Mr. Kennedy would succeed on the merits were the merits ever given serious consideration. A political party that weeks ago fought to be recognized as a political party in this state, now, literally days before ballots will be distributed, apparently decides that its presidential candidate should

be removed from the ballot in certain swing states while remaining on the ballot in other states,[5] even though doing so would mean that the party is no longer recognized for future elections as a political party in North Carolina. N.C.G.S. §§ 163-96(a)(1), -97. Voters across the state expecting to receive their absentee ballots and seeking to participate in elections for multiple state and federal offices, are denied the benefit of state law, local governments must expend hundreds of thousands of dollars, and election workers in every county of the state must redo their ballots to allow this late-devised political strategy to be carried out. The rules of our elections allow such attempted gaming of the presidential election system when done far enough in advance, but it is not fair to the rest of the state to disregard state election laws to accommodate a late-breaking political strategy. Even a second grader knows it is not fair to change the rules in the middle of the game just because you fear you are not winning.

On the merits of the statutory argument, in addition to the points made in Justice Riggs' dissent, I would note that N.C.G.S., § 163-113, relied on by Mr. Kennedy to justify relief, actually does not apply to him. This statute governs the withdrawal of candidates who have been nominated through a primary process, as the statutes referenced in that provision make clear. *See* N.C.G.S. §§ 163-182.15, 163-110. Mr. Kennedy is a presidential candidate, nominated through a convention process. Thus, by its express terms, the statute does not apply to Mr. Kennedy at all. It cannot be a basis for granting the relief he seeks. Put another way, Mr. Kennedy cannot use a law that does not apply to him to justify setting aside state law requirements concerning when absentee ballots must be mailed to voters.[6]

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5. For example, Mr. Kennedy has filed a brief in New York arguing that he would be irreparably harmed if he were omitted from that state's ballot. See Team Kennedy, et al., vs. Berger, et al., No. 1:24-cv-3897-ALC, Docket No. 54, Pln's Reply Memo. Supporting PI, p. 9 and 9 n.5.

6. Presidential elections are unique and the processes for nominating and electing presidential candidates are governed by an entirely different article of the election code than the laws governing other elections. *See* N.C.G.S. § 163, Article 18. Notably, under state law, when a duly recognized political party decides to place a presidential candidate on the state's ballot, the party, not the candidate, controls who that candidate is and what happens in the event of a vacancy. *See* N.C.G.S. § 163-209(a). In fact, when voting for president during a general election, voters are voting for electors. N.C.G.S. § 163-209(a) ("A vote for the [presidential] candidates named on the ballot shall be a vote for the electors of the party or unaffiliated candidate by which those candidates were nominated . . . .") And the electors themselves are chosen by political parties. N.C.G.S. § 163-1(c).

Next, Mr. Kennedy's constitutional argument on the merits is borderline frivolous. There is no precedent for the notion that a candidate's or a party's right to not have their speech compelled is implicated by the orderly application of state election laws. There are rules under state law for how and when previously identified candidates can be removed from a ballot and those rules should be fairly applied to all candidates. Nothing about them compels speech, perhaps most significantly because a ballot is not the candidate's speech. "Ballots serve primarily to elect candidates, not as forums for political expression." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997) (rejecting the notion that there is "a right to use the ballot itself to send a particularized message").

Ultimately, without an explanation or adequate justification for this mandatory injunction, the public is left in the dark about why voting laws requiring the mailing of absentee ballots are being violated; it is impossible to guarantee that future candidates will be treated equally, and consequently impossible to guarantee the rule of law. *See generally* Erwin Chemerinsky, Bush v. Gore *Was Not Justiciable*, 76 Notre Dame L. Rev. 1093 (2001) (arguing the case was a "self-inflicted wound"). Therefore, I respectfully dissent.

Justice RIGGS joins in this dissent.

Justice DIETZ dissenting.

I respectfully dissent. As explained below, I believe our election laws support the State Board of Elections' determination. I would therefore issue a writ of supersedeas staying the Court of Appeals order.

This point raises further procedural concerns about whether an individual candidate, Mr. Kennedy, is even the proper party to bring a suit for the relief he wants—to withdraw entirely from the ballot without a replacement. Presumably he seeks to eliminate the presidential ballot line item of the party he represents, We The People, altogether. Bell Aff. Ex. K. But the political party, not the candidate, is the proper party to seek that relief. That party is not before us today.

The Court of Appeals Order muddles this distinction: It orders ballots disseminated "without the name of petitioner Robert F. Kennedy, Jr." but says nothing of the status of Kennedy's vice-presidential running-mate or We The People's presidential ballot line. Such confusion further supports that this Court should allow the Defendant's Petition for Writ of Supersedeas. Pointedly Mr. Kennedy identifies no statute authorizing a presidential nominee of a party to authorize a change to a party's nominee.

Having said that, I want to emphasize that the majority's thoughtful analysis is entirely reasonable. As the majority observes, the single most important goal of our election process is to ensure that every vote counts. Had the State used the earlier ballots, an untold number of voters would have voted for Robert F. Kennedy, Jr. without knowing that he formally resigned as a candidate and, as a result, their vote in the presidential race would not count. Our election officials must do everything in their power to avoid that outcome.

Still, I believe this Court's role is to follow the law as it is written. In my view, our election laws permitted the State Board of Elections to decline to reprint new ballots but also compelled the Board to take other steps, explained in more detail below, to inform voters that Kennedy resigned and that a vote for him would not count.

To begin, a bit about the applicable election laws. State law unquestionably gives the nominee of a political party the right to "resign as a candidate" at any time before the State sends out absentee ballots to military and overseas voters. N.C.G.S. § 163-113. But "resigning as a candidate" is not the same as having the candidate's name removed from the ballot. We know this for several reasons.

First, when the nominee of a political party resigns in this way, the same series of state laws provides a process for that political party to choose a replacement candidate. N.C.G.S. § 163-114. When this occurs, the law expressly states that the new nominee does not have an absolute right to have her name added to the ballot in place of the candidate who resigned. Instead, if the new nominee is chosen after the "general election ballots have already been printed," then the State Board of Elections must assess whether it is "practical" to make the change. N.C.G.S. § 163-165.3(c). If it is not practical, the candidate who resigned remains on the ballot. *Id.*

This shows that the law governing resignation of a candidate does not *impliedly* include an absolute right to be removed from the ballot because, if it did, it would conflict with the language in this accompanying provision that *expressly* says the opposite.

Second, the plain language of the resignation provision in N.C.G.S. § 163-113 simply does not address changes to the ballot. But it certainly could have. The General Assembly understands how to include this language because another withdrawal statute, dealing with the primary election, includes express instructions about how the withdrawal impacts whether the candidate's name will be "printed on the primary ballot." N.C.G.S. § 163-106.4.

Finally, as a matter of general election law, a provision permitting a candidate to resign is not the same as a provision requiring the ballot to be changed or reprinted. We know this not just from the plain meaning of these words and their use in our own election laws, but by examining the laws of other states.

Many of our sister states have similar election laws that permit candidates to withdraw up until ballots are sent out, but leave it to election officials to determine whether it is feasible to reprint ballots. *See*, *e.g.*, S.C. Code Ann. § 7-13-380 (after ballots have been printed, withdrawal does not require reprinting, but the appropriate authority may do so if it determines it is "feasible"); Ga. Code Ann. § 21-2-134(a)(1) (providing that withdrawal of candidacy voids votes for that candidate but leaving it to election officials' discretion whether ballots should be reprinted); Utah Code Ann. § 20A-9-207(3)(d) (providing that, where a candidate for state or local office withdraws within 65 days of an election, notice should be included in the ballot "if practicable"); Col. Rev. Stat. § 31-10-903 (providing that when a candidate resigns or withdraws, the name "shall be erased or canceled, if possible, before the ballots are delivered to the voters").

All of this is to say, I do not believe Kennedy's right to be removed from the ballot is governed by the "resign as a candidate" provision in N.C.G.S. § 163-113. Instead, it is governed by the separate "Late Changes in Ballots" provision in N.C.G.S. § 163-165.3. That provision permits the Board of Elections to authorize "reprinting, where practical, of official ballots" as a result of "late changes." *Id.* § 163-165.3(c).

Here, the State Board of Elections properly determined that it would not be practical to reprint the ballots. Why? Because another state law, the Uniform Military and Overseas Voters Act, required absentee ballots to be sent to military and overseas voters no later than September 6. *See* N.C.G.S. § 163-258.9(a). This uniform law, enacted in a number of states, is designed to ensure that military personnel and overseas civilians can overcome "logistical obstacles to participating in American elections." *Uniform Military and Overseas Voter Act*, *Prefatory Note*, National Conference of Commissioners on Uniform State Laws, at 1 (2010).

In testimony given under oath in an affidavit to this Court, State Elections Director Karen Brinson Bell testified that it would take a minimum of 18 to 23 days to generate, print, proof, and assemble new ballot packets. Bell Aff. ¶ 50. Taking this testimony as true, even if the Board of Elections had started the process as soon as Kennedy's press conference announcing his withdrawal, there would not have been time to

prepare new ballots before the September 6 deadline in the Uniform Military and Overseas Voters Act.

In my view, the inability to comply with this legal deadline was a valid basis for the Board's determination of impracticality. The General Assembly created that state deadline (which provides even more time than a corresponding federal deadline) to ensure that the brave servicemembers defending our nation have time to vote in the elections of the democracy they are defending.

Having said that, I have questions about Karen Brinson Bell's affidavit. First, according to State Board of Elections records, the Board gave political parties until August 22 to make additions or changes to the ballot and the Board received changes or additions up to at least August 21. Bell Aff. ¶ 50, Ex. B, C, D. Thus, under the 18-day to 23-day timeframe asserted in Bell's affidavit, even the existing ballots would not be ready by the September 6 deadline.

Likewise, the affidavit states that the bulk of the preparation time is the 12 to 13 days it would take for a third-party vendor to print the ballots. But according to the same affidavit, the county boards of elections sent their original printing requests between August 24 and August 26 and by August 28 most counties had received their printed ballots from the vendor and the rest were near completion. Bell Aff. ¶¶ 37–38, 50.

Why would it take *more* time to redo these ballots than it did to create the first set of ballots two weeks ago, when elections workers presumably would work longer and harder because of the emergency nature of this ballot change? And why would reprinting ballots to remove Kennedy's name—with the Board presumably requesting expedited service from the vendor because of the looming deadline—take more than twice as long as printing the original ballots two weeks ago when there was no exigency?

Simply put, I question whether the State Board of Elections and its staff were sufficiently vigorous in assessing how long it truly would take to prepare new ballots on an expedited basis. Moreover, as the majority points out, the State Board of Elections received valid, written notice of Kennedy's resignation yet waited days before acting on it. In any event, these questions are beyond this Court's time-constrained review of an emergency petition for an extraordinary writ. *See State v. Jordan*, 385 N.C. 753, 757 (2024) (noting that appellate courts only review legal questions and "cannot find facts"). Thus, I must accept the sworn testimony in the affidavit as true. Doing so, I conclude that it was impractical to

prepare new ballots without Kennedy's name before the September 6 deadline set by law.

Nevertheless, I acknowledge the majority's concern that we must protect the fundamental right of voters to vote and then have that vote counted. Ballots listing Kennedy's name as a candidate for president will likely confuse voters and, worse yet, lead them to wrongly believe their vote for Kennedy will count. It will not.

But there are ways to minimize harm to voters while adhering to our existing election law provisions. Many states address last-minute withdrawals after ballots are printed by posting notices at polling places. *See*, *e.g.*, Ga. Code Ann. § 21-2-134(a)(1); La. Stat. Ann. § 18:503; Wyo. Stat. Ann. § 22-5-401(e). In Georgia, for example, the law provides that if a candidate resigns after ballots are printed, "prominent notices shall be posted in all polling places in which the name of the withdrawn candidate appears on the ballot stating that such candidate has withdrawn and that all votes cast for such withdrawn candidate shall be void and shall not be counted." Ga. Code Ann. § 21-2-134(a)(1).

I see nothing in our State's election laws that would prohibit a similar notice at polling locations. These notices also could be sent to voters who requested absentee ballots. Indeed, I think our constitutional protections of voting rights would *compel* the State Board of Elections to take these steps. Even if the Board was unwilling to do so—due to partisanship on the Board or any other reason—interested parties could bring suit to compel it, or the General Assembly could intervene and enact a law requiring it.

In sum, I view my role as enforcing the law as it is written and, as explained above, I believe our election laws support the Board's determination. Thus, while I respect the majority's well-reasoned decision, I would allow the petition for a writ of supersedeas and stay the order of the Court of Appeals.

Justice RIGGS dissenting.

The magnitude of the harm wrought by the Court of Appeals' order, both to voters of the state who have been guaranteed by their elected legislature sixty days in which to receive and cast absentee ballots and to the overworked and underpaid public servants working as election administrators in a time when such service has subjected those public servants to harassment and peril, *see* Linda So & Jason Szep, *U.S.*

Election Workers Get Little Help from Law Enforcement as Terror Threats Mount, Reuters (Sept. 8, 2021) (identifying more than 100 threats of death or violence received by forty election workers in highly contested battleground states during the 2020 elections),[1] is egregious and unjustified. A currently anonymous panel of three intermediate state appellate judges have taken into their hands the power to significantly shorten the absentee voting period and to throw into disarray preparations for a presidential election in this state.

Elections—the cornerstone of our democracy—are not games or exercises in ego-stroking. With a disturbing disregard for the impact on millions of North Carolina voters, plaintiff Robert F. Kennedy, Jr., (Mr. Kennedy) seeks to have his cake and eat it, too. Forcing the state to put his name on the ballot, creating for the state costs both practical and legal, he now wants to reprint millions of ballots because he has decided to suspend his campaign without actually ending it or foreclosing the possibility of his election. *Hear the Moment RFK Jr. Suspends his Presidential Campaign*, CNN Politics at 1:07 (August 23, 2024), https://www.cnn.com/2024/08/23/politics/video/rfk-jr-robert-kennedy-suspends-campaign-announcement-arizona-digvid. Here, the whims of one man have been elevated above the constitutional interests of tens of thousands of North Carolina voters who have requested an absentee ballot and seek to exercise their right, under North Carolina law, to cast their ballot as soon as possible after the statutory deadline required to distribute absentee ballots.

The Court of Appeals' gross overstep of its powers, in disregard of the duly-enacted law of this state and of the federal and state constitutions, has and will cause further irreparable harm to this state, magnifying the harm of Mr. Kennedy's apparent gamesmanship. This Court's failure to intervene to uphold the rule of law and the well-defined constitutional and statutory norms underpinning our election machinery makes this a dark day in the history of the state's judiciary. North Carolina voters deserve better.

The North Carolina State Board of Elections (the Board) seeks from this Court a writ of supersedeas to allow the Board—in accordance with state law—to mail absentee ballots to the more than 125,500

1. *See also* Ruby Edlin & Lawrence Norden, *Poll of Election Officials Shows High Turnover Amid Safety Threats and Political Interference*, Brennan Ctr. for Just., (Apr. 25, 2023) (highlighting that threats, abuse, and harassment have led to resignations of experienced election administration professionals).

military, overseas, and absentee voters who have already exercised their right under North Carolina law to request and cast an absentee ballot. Instead, with only a cursory explanation, this Court denies the request of the Board and effectively truncates, by at least two weeks, the absentee period for the voters of North Carolina. This ruling guarantees the maximum detrimental effect of an impetuous decision from the Court of Appeals requiring the Board to remove a candidate's name from the ballots—creating substantial work for election administrators and reduced access to the franchise for no appreciable benefit to the electorate or to the trustworthiness of our electoral system. Because the failure of this Court to allow the writ of supersedeas irreparably harms the voters of North Carolina and detrimentally affects the Board's ability to administer the election process in an orderly and efficient manner, I dissent.

The purpose of a writ of supersedeas is "to preserve the status quo pending the exercise of the appellate court's jurisdiction." *City of New Bern v. Walker*, 255 N.C. 355, 356 (1961) (per curiam). To determine whether this Court should order a writ of supersedeas, the Court considers whether the party requesting the writ has shown a likelihood of success on the merits and whether irreparable harm will occur absent a stay. *See* N.C. R. App. P. App'x D (providing guidance that a party requesting a writ of supersedeas should provide a factual and legal argument "that irreparable harm will result to petitioner if it is required to obey decree pending its review; [and] that petitioner has meritorious basis for seeking review"). In this case, both criteria are amply satisfied. The Board has demonstrated the likelihood of success on the merits and that the Board and, significantly, the voters of North Carolina will suffer irreparable harm if this Court fails to allow the writ.

The Board Has Shown It is Likely to be Successful on the Merits.

Mr. Kennedy challenged the Board's decision denying the request to remove his name from printed ballots because, in his view, N.C.G.S. § 163-113 provides him with the statutory right to be removed from the ballot. However, N.C.G.S. § 163-113 does not provide a statutory right for a candidate to remove his name from already-printed ballots. Thus, the Board is likely to be successful on the merits.

In its entirety, N.C.G.S. § 163-113 states that:

> A person who has been declared the nominee of a political party for a specified office under the provisions of G.S. 163-182.15 or G.S. 163-110, *shall not be permitted* to resign as a candidate unless, prior to the first day on which military and overseas absentee

> ballots are transmitted to voters under Article 21A of this Chapter, that [the] person submits to the board of elections which certified the nomination a written *request that person be permitted to withdraw*.

N.C.G.S. § 163-113 (2023) (emphases added). The first clause issues a mandatory directive: Candidates nominated under the specified provision "shall not be permitted to resign as a candidate." *Id.*; *see also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 112 (1st ed. 2012) (noting that shall is mandatory). The second clause enumerates conditions under which a nominated candidate may request permission to withdraw. *See* N.C.G.S. § 163-113. The statute does *not* say a nominated candidate has a right to withdraw. Nor can the indeterminate title of the provision, *see id.* ("Nominee's right to withdraw as candidate."), contradict the statute's clear language. *Carter v. United States*, 530 U.S. 255, 267 (2000) (Thomas, J.) ("[T]he title of a statute is of use only when it sheds light on some ambiguous word or phrase in the statute itself." (cleaned up)).

Further, when a candidate *does* have a statutory right to withdraw, the State election code says so explicitly. *See*, *e.g.*, N.C.G.S. § 163-106.4 (2023) (granting any person who has filed a notice of candidacy "the right to withdraw it at any time" prior to a specific deadline). Such meaningful variation shows the legislature knows how to give candidates a statutory right to withdraw and did not do so here. Scalia & Garner, *Reading Law* at 170 (recognizing that a material variation in terms suggest a variation in meaning).

Not only is there no statutory right to withdraw, but Mr. Kennedy conflates withdrawal under section 163-113 with the relief he seeks: removal from already-printed ballots. That conflation is erroneous. The same words are generally presumed to carry the same meaning when they appear in different but related sections of the code. *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 536 (2013). In contrast, "different words used in the same statute should be assigned different meanings." *Ferrell v. Express Check Advance of SC LLC*, 591 F.3d 698, 704 (4th Cir. 2010). Here, the General Assembly chose different words for a reason: it repeatedly distinguishes between withdrawing from an electoral contest and removing a candidate's name from the ballot in the General Statutes. *See*, *e.g.*, N.C.G.S. § 163-106.4 (contemplating a candidate who has withdrawn yet whose name remains printed on the primary ballot); N.C.G.S. § 163-165.3 (2023) (addressing a scenario where a candidate withdraws, yet the withdrawn candidate's name appears on the ballots and votes cast for the withdrawn candidate are assigned to

the replacement candidate not named on the ballot). Presuming intentional word usage further affirms that section 163-113 has nothing to do with having one's name removed from a ballot.

Furthermore, interpreting "withdrawal" in section 163-113 to be synonymous with "removal" from the ballot creates a conflict with the Board's statutory obligation to ready ballots for mail exactly sixty days ahead of the election—the exact conflict presented in this case. *See* N.C.G.S. § 163-227.10 (2023). Such an interpretation would also conflict with the Board's statutory obligations to "certify that the content and arrangement of the official ballot are in substantial compliance" with state law and to "proofread the official ballot of every county, if practical, prior to final production." N.C.G.S. § 163-165.3(a)(4)–(5). Reading these two words to have distinct meanings avoids this conflict and brings coherence to the state's election laws. *See Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 222 (2008) (Thomas, J.) (recognizing that the construction of statutory terms "must, to the extent possible, ensure that the statutory scheme is coherent and consistent").

Mr. Kennedy argues that his statutory construction must be correct because he sees no benefit to being allowed to withdraw from the electoral contest if he nonetheless is forced to keep his name on the ballot. That is demonstrably inaccurate. His argument ignores the fact that he also represents his party, the We The People (WTP) party, on the ballot. A political party in North Carolina is "[a]ny group of voters which, at the last preceding general State election, polled for its candidate for Governor, or for presidential electors, at least two percent (2%) of the entire vote cast in the State for Governor or for presidential electors." N.C.G.S. § 163-96(a)(1) (2023). Currently, the WTP party does not have a candidate for Governor on the ballot. Therefore, if Mr. Kennedy's name as presidential candidate for the WTP party is removed from North Carolina ballots, the party, which was only recognized as a political party in North Carolina on 16 July 2024, will no longer be recognized as a political party here. *See* N.C. State Bd. of Elections, *State Board Recognizes We The People as Official NC Political Party*, (July 16, 2024), https://www.ncsbe.gov/news/press-releases/2024/07/16/state-board-recognizes-we-people-official-nc-political-party. Thus, in future elections, the WTP party would have to submit anew petitions for the formulation of a new political party to the Board. *See* N.C.G.S. § 163-96(a)(2) (requiring "signatures of registered and qualified voters in this State equal in number to one-quarter of one percent [ ] of the total number of voters who voted in the most recent general election for Governor" for the Board to recognize a new political party). Thus, the allowance of withdrawal without

removal creates another pathway for the WTP party to retain party recognition and North Carolina WTP voters can still accrue benefit from Mr. Kennedy's name remaining on the ballot. The legislature plainly understood this, even if Mr. Kennedy does not.

Indeed, this explanation is consistent with the rule that the party must withdraw presidential candidates from the election—it is not just up to a presidential candidate to unilaterally remove their name from the ballot in the run-up to an election. On Monday, 26 August 2024, three days after Mr. Kennedy suspended his campaign, the vice-chair of the WTP party emailed the Board about the suspension. The vice-chair inquired about the possibility of removing Mr. Kennedy's name from the ballot and "the repercussions for the party should the nominee be withdrawn." Ultimately, on Wednesday, 28 August 2024, the WTP party sent a request to remove Mr. Kennedy, as its presidential nominee, from the North Carolina ballots but did not present an alternate representative for the party. *See* N.C.G.S. § 163-114 (2023) (providing a procedure for filling vacancies among party nominees occurring after nomination and before elections). The Board called an emergency meeting on Thursday, 29 August 2024, and voted to allow the WTP party to remove its presidential candidate, but due to the status of the ballot preparation across the state, voted to keep his name on the ballot.

Finally, the General Assembly unambiguously afforded the Board discretion to determine how to respond to late ballot changes. *See* N.C.G.S. § 163-165.3(c) ("The State Board shall promulgate rules for late changes in ballots. The rules shall provide for the reprinting, *where practical*, of official ballots as a result of replacement candidates to fill vacancies in accordance with G.S. 163-114 or other late changes." (emphasis added)). The Board published a procedure to address late changes in ballots. *See* Late Changes to Ballots, 08 N.C. Admin Code 06B.0104 ("If the vacancy occurs before the absentee voting period begins, the responsible county board of elections, or State Board of Elections if the contest spans more than one county, may determine whether it is practical to have the ballots reprinted with the name of the replacement nominee as authorized by G.S. 163-114."). In accordance with this policy, the Board determined it was impractical to print new ballots and comply with the state law requiring absentee ballots to be mailed one week later, on 6 September 2024.

In sum, the plain language of N.C.G.S. § 163-113 and a fair reading of the statute within its broader statutory context contradicts Mr. Kennedy's assertion of a statutory right to be removed from the ballot at this stage of the election process. The statute does not grant Mr. Kennedy a "right"

to be removed from the ballot. This straightforward statutory analysis should end the judicial branch's role in Mr. Kennedy's quest. "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." *State v. Borum*, 384 N.C. 118, 124 (2023) (internal quotations omitted) (quoting *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209 (1990)). The Board did not violate N.C.G.S. § 163-113, and the Board is likely to be successful on the merits. Thus, this Court should grant the Board's petition for writ of supersedeas to stay the order of the Court of Appeals before it causes any additional harm to the voters of North Carolina.

Mr. Kennedy's Claim of Compelled Speech is Unsupported.

Mr. Kennedy's constitutional arguments are no more availing than his statutory arguments, and the Board is likely to succeed on the merits of these claims as well. Mr. Kennedy argues that the Board's refusal to remove his name from the North Carolina ballots amounts to compelled speech in violation of his free speech rights. We disagree with Mr. Kennedy's interpretation, and even if this were compelled speech (and it is not), the burden imposed on voters and election administrators greatly outweighs any burden on the free speech of a candidate required to keep his name on the ballot when he explicitly is still running for the office of President of the United States. *Hear the Moment RFK Jr. Suspends his Presidential Campaign*, CNN Politics at 1:07.

In cases such as this one, inquiries into the propriety of a state election law depend upon whether the law severely burdens a parties free speech rights or only "reasonabl[y], nondiscriminator[ily] restrict[s]" those rights. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (cleaned up) (recognizing that the mere fact a state's system limits the field of candidates from which voters might choose does not of itself compel close scrutiny from a court). The Supreme Court of the United States' guidance on this front is well-settled: Courts consider the "character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" and balances that against the "precise interest put forward by the State as justifications for the burden imposed by its rule." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (citations omitted).

Neither the trial court nor the Court of Appeals analyzed this issue. The parties have not fully briefed the issue, and Mr. Kennedy provides no legal citation for the proposition that a candidate's name on a government-issued ballot is protected speech. Mr. Kennedy's name remains

on the ballot in twenty states other than North Carolina, and he has filed lawsuits to add his name to the ballot in at least two additional states.[2] Mr. Kennedy still seeks the office of the presidency: in his words, he "could conceivably still end up in the White House in a contingent election." *Hear the Moment RFK Jr. Suspends his Presidential Campaign*, CNN Politics at 1:07. Mr. Kennedy does not reconcile his desire to remain a candidate in the majority of states with his position that keeping his name on the ballot in North Carolina would irreparably injure his free speech rights. In *Anderson*, the Supreme Court of the United States concluded that constitutional challenges such as this should be resolved through "an analytical process that parallels its work in ordinary litigation." 460 U.S. at 789. This issue should not be resolved without any analysis in a single-page order entered by an intermediate court on the day ballots are ready and required to be mailed to voters. *See Reynolds v. Sims*, 377 U.S. 533, 585 (1964) ("In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws and should act and rely upon general equitable principles.").

Even if this issue was properly before the Court, we know of no case where a court, federal or state, has treated the declination to remove a name from a government ballot, this close to an election, as compelled speech or a constitutional free speech injury. Rather the Supreme Court has said "[b]allots serve primarily to elect candidates, not as forums for political expression." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997) (citation omitted).

And even if the Board's decision, in its discretion under state law, to leave Mr. Kennedy's name on the ballot when the burden of reprepairing and reprinting ballots would be so costly and difficult did qualify as the government compelling Mr. Kennedy's speech, such a burden on his free speech rights would not outweigh the harms wrought on election administrators and voters. Keeping one man's name on the ballot when he still wants the office and fought to have his name put on that ballot cannot be of more constitutional significance than the ability of thousands of eligible voters to access the franchise via absentee voting. Nor do Mr. Kennedy's free speech rights outweigh the risks of creating disarray in a statewide election. "States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce

2. Caitlin Yilek & Allison Novelo, *Map Shows Where RFK Jr. Is on the Ballot in the 2024 Election*, CBS News (Sept. 6, 2024), https://www.cbsnews.com/news/rfk-jr-map-on-the-ballot-states/.

election- and campaign-related disorder." *Libertarian Party of N.C. v. State*, 365 N.C. 41, 49 (2011) (quoting *Timmons*, 520 U.S. at 358). In this case, any burden to Mr. Kennedy of keeping his name on the ballots in North Carolina pales in comparison to the State's interest in affording military, overseas, and other absentee voters the statutorily-mandated voting period.

This Court Should Act to Avoid Irreparable Harm to the Voters of North Carolina.

On the day the Board was required by duly-enacted state law to mail absentee ballots to voters, the Court of Appeals ordered the Board to modify prepared, printed, and ready-to-mail ballots. The Court of Appeals' order essentially modified state election law—without any legal analysis—in a manner that irreparably harms the Board and the voters of North Carolina. This directive has the irrefutable effect of shortening the statutory voting window for absentee voters. *See* N.C.G.S. § 163-227 (requiring absentee ballots to be mailed sixty days before the election). Further, barring intervention by this Court, the Board estimates that North Carolina taxpayers will pay upwards of a million dollars to remove Mr. Kennedy's name from our ballots. We should have acted promptly to avoid both of these unjustified outcomes.

Voting is a fundamental right ranking "among our most precious freedoms," *Anderson*, 460 U.S. at 787 (quoting *Williams v. Rhodes*, 393 U.S. 23, 30 (1969)), and our Court should preciously respect and defend that freedom. We should be clear with the public about the impact of this ruling on the franchise: we have effectively rubberstamped the Court of Appeals' decision to eliminate one-quarter of the absentee voting period established by the North Carolina General Assembly. Any examination of irreparable harms should certainly look at the burdens on the Board and election administrators; even more significantly, though, we must also address the burden on the right to vote.

Removing a candidate's name from a ballot is not simple after the ballot preparation process is complete. For the upcoming general election, North Carolina has already created, proofed, coded, and printed almost three million ballots; these ballots include 2,348 different ballot styles reflecting "the version of a ballot within a jurisdiction that an individual voter is eligible to vote." N.C.G.S. § 163-165(3). Each ballot style has been proofed to ensure it meets the statutory criteria for official ballots. N.C.G.S. §§ 163-165.4 to -165.6. Each ballot style has also been coded to ensure that the vote tabulators correctly read the contest and candidate on the ballot. Changes made at the top of the ballot create

a likelihood that candidates and contests further down the ballot may not be coded properly. *Id.* Thus, once Mr. Kennedy's name, currently in the second position on the ballot, is removed from the 2,348 different ballot styles, all contests and candidates below his name will require re-proofing, re-coding, and quality control testing before reprinting. The Board estimates that this entire revisited process will take at least two weeks to complete. Under the Court of Appeals' order, the statutorily required sixty-day absentee voting period will be reduced by at least two weeks. *See* N.C.G.S. § 163-227.10(a); N.C.G.S. § 163-258.9(a) (2023) (deadline for military and overseas voters). Additionally, because the Board explains that complying with the Court of Appeals' order will take approximately two weeks, there is a risk of reducing the federally mandated absentee voting to less than the minimum time required under federal law. 52 U.S.C. § 20303(a)(8) (requiring states to mail absentee ballots to absent uniformed service voters and overseas voters "not later than 45 days before the election"). Not insignificantly, this work must be done by state and county election officials when they should be focused on preparations for early voting and other election-related tasks.

The concept of judicial restraint flew out the window when the Court of Appeals required, outside the normal course of appeal litigation, the Board of Elections to modify 2,348 ballot styles on the day that the first 125,500 of those ballots were printed, packaged, and ready to be mailed to military, overseas, and absentee voters. *See Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring) (highlighting an important principle of judicial restraint protects the state's interest in running an orderly, efficient election, preventing voter confusion, and giving citizens confidence in the fairness of the election). And that intermediate appellate court order also required non-compliance with state law requiring absentee ballots to be mailed out sixty days before an election. The Court of Appeals sits inappropriately as a policy-making body when it unilaterally decides to deprive voters of fully one-quarter of the absentee voting period. This should evoke constitutional and institutional outrage in any reasonable high court. Not only does the lower appellate court's order offend every traditional sense of judicial restraint, it also stands in stark contrast to repeated guidance from the Supreme Court of the United States counseling against last-minute judicial alteration to state election law. *See Purcell v. Gonzalez*, 549 U.S. 1, 5–6 (2006) (per curiam) (holding that because of the impending election and the necessity for clear guidance for voters and election administrators, courts should not alter election law right before elections).

When confronted with requests to modify election law in the run-up to an election, the Supreme Court of the United States has repeatedly emphasized that appellate courts should not modify election law in the period close to an election. *See Merrill v. Milligan*, 142 S. Ct. 879, 879 (2022) (Kavanaugh, J., concurring) (explaining that the Supreme Court's election-law precedent establishes that "federal district courts ordinarily should not enjoin state election laws in the period close to an election, and [ ] that federal appellate courts should stay injunction when . . . lower federal courts contravene that principle"). Even amid a national pandemic, the Supreme Court has rebuffed efforts to modify election law on the eve of an election. *See, e.g.*, *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. 423, 424 (2020) (staying a district court order that allowed ballots mailed and postmarked after election day to be counted). The Supreme Court has even denied an emergency application for a stay of a state election law when the Court believed "that both sides have advanced serious arguments on the merits." *Moore v. Harper*, 142 S. Ct. 1089, 1089 (2022) (emphasizing that "this Court has repeatedly ruled that federal courts ordinarily should not alter state election laws in the period close to an election"). This Court also has followed suit and avoided changing election law just before an election. *See Pender County v. Bartlett*, 361 N.C. 491, 510 (2007) (declining to enforce a required change in districting until after the 2008 election because the decision, issued on 24 August 2007, was too close to the upcoming election).

Finally, in balancing the equities of potential harm wrought in this matter, it should be noted that Mr. Kennedy waited until 3 September 2024 to file for a temporary restraining order after filing suit seeking the removal of his name from the ballot—only three days before absentee ballots must be mailed out under state law. Given the date of Mr. Kennedy's decision to "suspend" his campaign on 23 August 2024 and seek alteration of ballots on 28 August 2024, the delay in filing for an injunction cuts against the alleged irreparable harm to which Mr. Kennedy describes himself as subject. In many other election law cases, even where litigants seek relief that would affect a much broader class of individuals, this kind of delay has been deemed fatal. *See, e.g.*, *Lucas v. Townsend*, 486 U.S. 1301, 1305 (1988) (Kennedy, J., in chambers) (enjoining a bond referendum election for school maintenance funding because the Board of Education waited too long to set the date of the special election); *Spencer v. Pugh*, 543 U.S. 1301 (2004) (Stevens, J., in chambers) (declining to enter injunctive relief to keep parties planning to "mount indiscriminate challenges at polling places" out of polling places because the short time until voting began limited the Court's

ability to fully evaluate the filings of the parties); *Kishore v. Whitmer*, No. 20-11605, 2020 WL 3819125 (E.D. Mich. July 8, 2020), *aff'd*, 972 F.3d 745 (6th Cir. 2020) (denying plaintiffs' request for injunctive relief from state law requiring them to collect signatures to add a presidential candidate to the ballot where plaintiffs did not act diligently to obtain the required signatures); *see also Perry v. Judd*, 471 F. App'x 219, 220 (4th 2012) (denying candidate's emergency motion to be added to the ballot because of candidate's lack of diligence in challenging election rules and the affect on timely mailing of absentee ballots) (unpublished).

Today, any public aspersions cast on the impartiality, independence, and dignity of our state courts are well-earned. I despair of this Court's current failure to engage in plain reading of the law and its failure to forcefully defend the rights of the people, particularly when it comes to participation in the political process. I dissent.

Justice EARLS joins in this dissent.

STATE v. LESTER

[386 N.C. 647 (2024)]

STATE OF NORTH CAROLINA	From N.C. Court of Appeals 23-115
v.	
ANDRE EUGENE LESTER	From Wake 19CRS223407

No. 293PA23-2

ORDER

Defendant's Motion for Determination Without Oral Argument is denied. Defendant's Motion in the Alternative to Reschedule Oral Arguments is allowed as follows: oral argument in this case will be rescheduled to Thursday, 31 October 2024.

By order of the Court in Conference, this the 27th day of September 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 27th day of September 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

DURBIN v. DURBIN

[386 N.C. 648 (2024)]

JENNIFER C. DURBIN v. MATTHEW L. DURBIN	From N.C. Court of Appeals 23-308 From Wake 17CVD164

No. 78A24

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, plaintiff's motion to continue oral argument is dismissed as moot.

By order of the Court in Conference, this the 4th day of October 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 4th day of October 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

AYERS v. CURRITUCK CNTY. DEP'T OF SOC. SERVS.

[386 N.C. 649 (2024)]

JUDITH M. AYERS

v.

CURRITUCK COUNTY DEPARTMENT OF SOCIAL SERVICES

From N.C. Court of Appeals
23-420

From Office of Admin. Hearings
17OSP08518

No. 110A24

ORDER

On 5 May 2024, respondent filed a petition in the alternative for discretionary review of the decision of the North Carolina Court of Appeals pursuant to N.C.G.S. § 7A-31. By this order, the petition is denied as to Issue III. The petition is otherwise dismissed as moot as to Issues I and II that are before us to the extent that they are encompassed by the Court of Appeals dissent.

By order of the Court in Conference, this the 16th day of October 2024.

/s/ Riggs, J.
For the Court

Dietz, J., recused.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 18th day of October 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

LISA BIGGS FORE

v.

THE WESTERN NORTH CAROLINA CONFERENCE OF THE UNITED METHODIST CHURCH (A/K/A WESTERN NORTH CAROLINA CONFERENCE); AND THE CHILDREN'S HOME, INCORPORATED (A/K/A THE CHILDREN'S HOME, A/K/A THE CROSSNORE SCHOOL & CHILDREN'S HOME, A/K/A CROSSNORE CHILDREN'S HOME)

From N.C. Court of Appeals
21-546

From Mecklenburg
21CVS767

No. 217A22

ORDER

Plaintiff's motion to dismiss is denied. Under this Court's inherent supervisory authority over the lower courts, we vacate the Court of Appeals decision and remand this matter to the Court of Appeals for further remand to the trial court to conduct a hearing on plaintiff's motion after providing notice and opportunity to be heard to all parties entitled to notice by rule or statute.

By order of the Court in Conference, this the 16th day of October 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 18th day of October 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

IN RE A.G.J.

[386 N.C. 651 (2024)]

IN THE MATTER OF

A.G.J.

From N.C. Court of Appeals
23-323

From Rockingham
19JB109

No. 332A23

ORDER

Juvenile-Appellee's motion to dismiss appeal is allowed. *See In re Swindell*, 326 N.C. 473, 474–75 (1990) (dismissing appeal of juvenile commitment order as moot after "juvenile was conditionally released from custody"); *In re Doe*, 329 N.C. 743, 748 n.7 (1991) (noting that appeal of commitment order became moot when juvenile turned eighteen because "[a]t that age the Juvenile Court no longer has jurisdiction, and a final release from DYS custody is available" (cleaned up)). The decision of the Court of Appeals is vacated.

By order of the Court in Conference, this the 16th day of October 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 18th day of October 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

STATE v. FORD

[386 N.C. 652 (2024)]

STATE OF NORTH CAROLINA	From N.C. Court of Appeals 23-374
v.	
SCOTT EVERETT FORD	From Buncombe 21CRS84572 21CRS87417-19

No. 31A24

ORDER

The petition for discretionary review as to additional issues filed by defendant on 2 February 2024 is allowed as to the second issue only.

By order of the Court in Conference, this the 16th day of October 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 18th day of October 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

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

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14P24	State v. Hector Zapata	Def's PDR Under N.C.G.S. § 7A-31	Denied
24P23-5	SCGVIII-Lakepointe, LLC v. Vibha Men's Clothing, LLC; Kalishwar Das	1. Def's Pro Se Motion for New Order 2. Def's Pro Se Motion for Urgent Humanitarian Plea for Immediate Protection and Expedited Order to Stay	1. Dismissed 2. Dismissed **10/14/2024** **Dietz, J., recused** **Riggs, J., recused**
25P23-5	Kalishwar Das v. SCGVIII Lakepointe, LLC in c/o Mr. John F. Morgan, Jr.	1. Plt's Pro Se Motion for New Order (COA21-806) 2. Plt's Pro Se Motion for Urgent Humanitarian Plea for Immediate Protection and Expedited Order to Stay	1. Dismissed 2. Dismissed **10/14/2024** **Dietz, J., recused** **Riggs, J. recused**
26P24	State v. Cedric Alden Burnett	Def's PDR Under N.C.G.S. § 7A-31 (COA23-246)	Denied
31A24	State v. Scott Everett Ford	1. Def's Motion for Temporary Stay (COA23-374) 2. Def's Petition for Writ of Supersedeas 3. Def's Notice of Appeal Based Upon a Dissent 4. Def's PDR as to Additional Issues	1. Dismissed as moot **02/07/2024** 2. Allowed **02/07/2024** 3. --- 4. Special Order
34P24	Linda F. Johnson, as Successor Trustee of the Shirley T. Warner Revocable Trust v. Jeffrey C. Butler and Blaire Butler	Defs' PDR Under N.C.G.S. § 7A-31 (COA23-692)	Denied
35P24	Linda F. Johnson, as Successor Trustee of the Luther D. Warner Revocable Trust v. Jeffrey C. Butler	Def's PDR Under N.C.G.S. § 7A-31 (COA23-693)	Denied

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36P24	Linda F. Johnson, as Successor Trustee of the Luther and Shirley Warner Charitable Trust v. Jeffrey C. Butler	Def's PDR Under N.C.G.S. § 7A-31 (COA23-694)	Denied
39A22-2	State v. Robin Applewhite	Def's Pro Se Motion to Preserve/Stop Destruction of Evidence	Dismissed **Dietz, J., recused**
39A24-3	Chauncey Peele v. Melba Hodges Peele	Def's Pro Se Motion for Order to Comply to Dismissal	Dismissed
47P24-3	In re M.M., E.M., J.M., S.M., C.M.	Respondent-Father's Pro Se Petition for Writ of Certiorari	Denied
64A22-2	Howard, et al. v. MAXISIQ, Inc. et al.	1. Plts' Motion to Dismiss Appeal 2. Def's Motion for Extension of Time to File Reply Brief and Response to Motion to Dismiss Appeal	1. Allowed **09/04/2024** 2. Dismissed as moot **09/05/2024**
65P24	State v. Francisco Alvarado	Def's PDR Under N.C.G.S. § 7A-31 (COA23-385) Denied	
66A12-2	State v. Marcus Devan Hunter	Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP23-278)	Denied **09/18/2024**
67P24	State v. James Dia'Shawn Robinson	Def's PDR Under N.C.G.S. § 7A-31 (COA23-365)	Denied
78A24	Durbin v. Durbin	1. Plt's Notice of Appeal Based Upon a Dissent (COA23-308) 2. Plt's Motion to Continue Oral Arguments	1. --- 2. Special Order **10/04/2024**
82P24	Cape Homeowners Association, Inc., Desmond P. McHugh and Wife, Geraldine McHugh, Michael L. Bodnar and Wife, Patricia L. Bodnar, Donna J. Martin and Spouse, Peter Martin v. Southern Destiny, LLC	Proposed Intervenor-Def's (Bill Clark Homes of Wilmington, LLC) PDR Under N.C.G.S. § 7A-31 (COA23-593)	Denied

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102P22-2	State v. Marcus A. Satterfield	Def's Pro Se Motion to Appeal Findings of Three Judge Panel	Dismissed *ex mero motu*
105PA23	Dieckhaus, et al. v. Board of Governors of the University of N.C.	Def's Motion to Hold Oral Argument Contemporaneously with Lannan v. Board of Governors of the University of North Carolina, No. 316PA22	Dismissed as moot **08/27/2024** **Barringer, J., recused**
109P01-4	State v. William Dawson	1. State's Motion to Seal Petition for Writ of Supersedeas and Subsequent Filings (COA99-1268) 2. State's Motion for Temporary Stay 3. State's Petition for Writ of Supersedeas 4. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/27/2024** 2. Allowed **08/27/2024** 3. 4. **Riggs, J., recused**
110A24	Judith M. Ayers v. Currituck County Department of Social Services	1. Respondent's Notice of Appeal Based Upon a Dissent (COA23-420) 2. Respondent's Petition in the Alternative for Discretionary Review Under N.C.G.S. § 7A-31	1. --- 2. Special Order **Dietz, J., recused**
114P15-2	State v. Slade Weston Hicks, Jr.	Def's Pro Se Motion for Belated Appeal Constitutional Questions	Denied
124A24	Atlantic Coast Conference v. Board of Trustees of Florida State University	1. Plt's Consent Motion to Amend Briefing Schedule 2. Parties' Joint Motion for Oral Argument to Occur at the Same Session of Court	1. Allowed **09/04/2024** 2.
128P22-3	Leilei Zhang v. Wen Zhang	Plt's Pro Se Motion for Notice of Appeal (COAP24-470)	Dismissed
131P16-33	State v. Somchai Noonsab	Def's Pro Se Motion for Relief	Dismissed
135PA12-2	State v. Jamie Daquan Lowery	Def's Pro Se Motion for PDR (COA11-673)	Denied
145P24	State v. Peter Michael Frank	Def's PDR Under N.C.G.S. § 7A-31 (COA23-695)	Denied

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146P23-2	In re Timothy Omar Hankins, Sr.	1. Petitioner's Pro Se Petition for Writ of Certiorari for Review 2. Petitioner's Pro Se Petition for Writ of Certiorari	1. Denied 2. Denied
150P24	State v. My'Ka El	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA23-745) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
163P24-2	State v. Tramella Tineak Hinton	Def's Pro Se Motion to Reconsider (COA23-673)	Dismissed
165P23-3	In re Drew Hartley v. State of North Carolina, et al., Sheriff of Onslow County	1. Def's Pro Se Motion for Temporary Stay (COAP23-293) 2. Def's Pro Se Petition for Writ of Supersedeas	1. Dismissed **09/11/2024** 2. Dismissed **09/11/2024**
171P24	State v. William Anthony Brown	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA23-393) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
175P24	State v. Demistrus McKinley Ingram	1. State's Motion for Temporary Stay (COA23-748) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **07/01/2024** 2. Allowed 3. Allowed
188P24	In re E.H. & R.H.	1. Petitioner's Motion for Temporary Stay (COA23-864) 2. Petitioner's Petition for Writ of Supersedeas 3. Petitioner's PDR Under N.C.G.S. § 7A-31 4. Respondent-Parents' PDR Under N.C.G.S. § 7A-31	1. Allowed **07/15/2024** 2. Allowed 3. Allowed 4. Denied
189P24	State v. Wenchiann Holly Yeh	Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COA24-220)	Dismissed
195P24	State v. Mark Anthony Burnette	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-162)	Dismissed
198P24	State v. Terrell Aaron Saddler a/k/a Aaron Terrell Saddler	1. Def's PDR Under N.C.G.S. § 7A-31 (COA22-989) 2. Def's Motion to Amend PDR	1. Dismissed 2. Allowed

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199P24	State v. Jimmie Sinclair	1. Def's Pro Se Petition for Writ of Certiorari to Review Decision of the COA (COA24-85) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Denied 2. Allowed
202P24	Julius William Woody and Shannon Chad Gaines, Plaintiffs v. Randy Lynn Vickrey, individually and in his capacities as Trustee of the Julius William Woody Trust and as Attorney-In-Fact for Julius William Woody, Defendant and Third-Party Plaintiff v. Carrie F. Vickrey and Donald G. Ayscue, Third-Party Defendants	1. Plt and Third-Party Defs' Motion for Temporary Stay (COA22-776) 2. Plt and Third-Party Defs' Petition for Writ of Supersedeas 3. Plt and Third-Party Defs' Notice of Appeal Based Upon a Constitutional Question 4. Def's (Randy Lynn Vickrey) Motion to Dismiss Appeal	1. Allowed **07/25/2024** Dissolved 2. Denied 3. --- 4. Allowed
205P24	H.D. Rodgers, Executor of the Estate of Ruth Rodgers, Deceased v. Nash Hospitals, Inc., SC Surgicalists of North Carolina, P.C., Providence Anesthesiology Associates PA, Marcus Lynn Wever, M.D., and Andrea Kay Fuller, M.D.	1. Defs' Motion for Temporary Stay (COA24-125) 2. Defs' Petition for Writ of Supersedeas 3. Defs' Petition for Writ of Certiorari to Review Order of the COA	1. Special Order **08/07/2024** 2. Dismissed as moot **09/11/2024** 3. Dismissed as moot **09/11/2024**
208P23-2	Kalishwar Das v. State of North Carolina	1. Plt's Pro Se Petition for Writ of Mandamus (COA24-491) 2. Plt's Pro Se Supplemental Petition for Writ of Mandamus	1. Denied 2. Denied **Dietz, J., recused** **Riggs, J., recused**
212A24	Elior, Inc. v. Dennis Thomas	Parties' Joint Motion for Withdrawal of Appeal	Allowed **10/07/2024**

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217A22	Fore v. The Western N.C. Conference of the United Methodist Church, et al.	Plt's Motion to Dismiss Appeal	Special Order
218P24	Universal Life Insurance Company v. Greg E. Lindberg	1. Def's Motion for Temporary Stay (COAP24-546) 2. Def's Petition for Writ of Supersedeas	1. Dismissed **08/28/2024** 2. Dismissed **08/28/2024**
221A24	Atlantic Coast Conference v. Clemson University	1. Def's Motion to Admit David Eidson Dukes Pro Hac Vice 2. Plt's Consent Motion to Amend Briefing Schedule 3. Parties' Joint Motion for Oral Argument to Occur at the Same Session of Court	1. Allowed 2. Allowed **09/04/2024** 3.
224P24	TKAB Investments LLC v. Hair Insanity LLC	1. Def's Pro Se Motion for Temporary Stay (COAP24-294) 2. Def's Pro Se Petition for Writ of Supersedeas 3. Def's Pro Se Petition for Writ of Certiorari to Review Order of District Court, Wake County	1. Dismissed **09/18/2024** 2. Dismissed **09/18/2024** 3. Dismissed **09/18/2024**
225A24	State v. Blaine Dale Hague	1. State's Motion for Temporary Stay (COA23-734) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent 4. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/27/2024** 2. Allowed **09/23/2024** 3. --- 4.
225PA21-2	North State Deli, LLC, et al. v. The Cincinnati Insurance Company, et al.	1. Amicus Curiae's (North Carolina Restaurant & Lodging Association and Restaurant Law Center) Motion for Leave to Participate in Oral Argument (COA21-293) 2. Amicus Curiae's (State of NC) Motion for Leave to Participate in Oral Argument 3. Defs' Motion for Additional Argument Time	1. Allowed **09/05/2024** 2. Allowed **09/05/2024** 3. Allowed **09/16/2024**
227P24	State v. Sheldon T. Maynor	Def's Pro Se Motion for PDR (COAP23-847)	Dismissed

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230P24	State v. David Allen Patterson	1. Def's Pro Se Motion for Temporary Stay (COA22-606) 2. Def's Pro Se Petition for Writ of Supersedeas	1. Dismissed **09/05/2024** 2. Dismissed **09/05/2024** **Riggs, J., recused**
232P24	Solomon Butler v. North Carolina Department of Adult Corrections	Plt's Pro Se Petition for Writ of Certiorari	Dismissed
233P24	State of North Carolina v. Frederick Plotz	1. Def's Motion for Temporary Stay (COA23-749) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/09/2024** 2. 3.
235P24	Robert F. Kennedy, Jr. v. North Carolina State Board of Election, et al.	1. Defs' Petition for Writ of Supersedeas (COAP24-624) 2. Defs' PDR Under N.C.G.S. § 7A-31	1. Special Order **09/09/2024** 2. Special Order **09/09/2024**
239P24	State v. Michael Earl Lewis	Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP24-469)	Denied **09/11/2024**
246P24	State v. Jerico Shamon Givens, Jr.	1. Def's Motion for Temporary Stay (COA23-500) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/20/2024** 2. 3.
247P24	Remnant Management d/b/a Johnson Court Housing Partners, LP v. Tiffany Love	1. Def's Pro Se Motion for Temporary Stay (COAP24-583) 2. Def's Pro Se Petition for Writ of Supersedeas 3. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA	1. Dismissed **09/20/2024** 2. Dismissed **09/20/2024** 3. Dismissed **09/20/2024**
248P24	State v. Kedrick Daquane Thomas	1. State's Motion for Temporary Stay (COA23-210) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/23/2024** 2. 3.
250P24	Shelly G. Tolbert v. Qushawn Dennard Bristol	Plt's Pro Se Petition for Writ of Certiorari to Review Decision of District Court, Forsyth County	Dismissed

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251P24	State v. Adam Shawn Maness	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **09/24/2024**
253A24	2120 Arlington Place Trust Dated 10/28/21 v. Jeffrey Jones and Rachel Holbert	1. Defs' Pro Se Notice of Appeal Based Upon a Constitutional Question (COA24-39) 2. Plt's Motion to Dismiss Appeal	1. --- 2. Allowed **10/17/2024**
254P24	State v. Christopher L. Galbreath	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA24-48)	Denied
257P24	State v. John Maurice Robinson, Jr.	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA24-290)	Denied
258P24	State v. Brian Christopher Legette	1. Def's Motion for Temporary Stay (COA23-1153) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/01/2024** 2. 3.
258PA23	State v. Eric Wayne Wright	1. Def's Motion to Strike Portions of the State's Brief (COA22-996) 2. Def's Motion to Temporarily Stay the Parties' Briefing Schedule Until the State Files its Response to the Motion to Strike 3. Def's Motion to Stay the Briefing Schedule Pending Entry of an Order Disposing of the Motion to Strike 4. Def's Motion to Grant Counsel 23 Days from the Disposition of the Motion to Strike to File New Brief	1. 2. Dismissed as moot **09/11/2024** 3. Denied **09/11/2024** 4. Denied **09/11/2024** **Riggs, J., recused**
263P24	State v. Brindell Wilkins	1. State's Motion for Temporary Stay (COA23-839) 2. State's Petition for Writ of Supersedeas	1. Allowed **10/07/2024** 2.
264A23	Daniel Jones v. J. Kim Hatcher Insurance Agencies Inc., et al.	1. Def's (J. Kim Hatcher Insurance Agencies Inc.) Motion to Dismiss Appeal (COA22-1030) 2. Plt's Motion to Deem New Brief Timely Filed	1. Denied 2. Allowed
264P24	State v. Chauncey Jamal Slade	1. State's Motion for Temporary Stay 2. State's Petition for Writ of Supersedeas (COA23-1157)	1. Allowed **10/09/2024** 2.

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278A23	Gregory Cohane v. The Home Missioners of America d/b/a Glenmary Home Missioners, Roman Catholic Diocese of Charlotte, NC, and Al Behm	Amicus Curiae's (State of NC) Motion for Leave to Participate in Oral Argument (COA22-143)	Allowed **09/04/2024** **Riggs, J., recused**
281P06-19	Joseph E. Teague, Jr., P.E., C.M. v. NC Department of Transportation, J.E. Boyette, Secretary	Plt's Pro Se Motion to Vacate Firing and Dismiss Charges with Prejudice (COA05-522)	Dismissed
289PA23	State v. Kaylore Fenner	Def's Motion to Modify Oral Argument Calendar	Denied **09/05/2024**
293PA23-2	State v. Andre Eugene Lester	1. Def's Motion for Determination Without Oral Argument 2. Def's Motion in the Alternative to Reschedule Oral Arguments	1. Special Order **09/27/2024** 2. Special Order **09/27/2024**
295P10-2	State v. Terrence Wayne Lytle	1. Def's Pro Se Motion for PDR 2. Def's Pro Se Motion for Notice of Appeal 3. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Wake County	1. Dismissed 2. Dismissed 3. Dismissed
299P23	State v. Casey Starling	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA23-156) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Def's Petition in the Alternative for Writ of Certiorari to Review Order of the COA 4. Def's Petition in the Alternative for Writ of Certiorari to Review Order of Superior Court, Pender County 5. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Denied 4. Denied 5. Allowed

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304P23	Erin Rake, D.D.S., P.C.; Heidi Pantazis D.M.D. PLLC f/k/a RDest DDS PLLC III; Healthcare Delivered, LLC d/b/a Aria Care Partners; Aria Care Management, LLC f/k/a MobileCare 2U, LLC; and Aria Dental Management, LLC f/k/a Dest Dental Management, LLC v. SDC K-L, LLC; Erol Kanli, D.D.S.; Katina Cloud; Leslie Jernigan; and Elizabeth Kallman	1. Plts' Motion for Temporary Stay (COAP23-648) 2. Plts' Petition for Writ of Supersedeas 3. Plts' Petition for Writ of Certiorari to Review Order of the COA 4. Plts' Consent Motion to Withdraw Petition for Writ of Certiorari	1. Special Order **11/15/2023** Dissolved 2. Dismissed as moot 3. --- 4. Allowed
312P22	Bartlett v. Burke, et al.	1. Defs' (Estate of Jeffrey L. Burke and Air Methods Corporation) Notice of Appeal Based Upon a Constitutional Question (COA22-95) 2. Defs' (Estate of Jeffrey L. Burke and Air Methods Corporation) PDR Under N.C.G.S. § 7A-31 3. Plts' Notice of Appeal Based Upon a Constitutional Question 4. Plts' PDR Under N.C.G.S. § 7A-31 5. North Carolina Advocates for Justice's Motion for Leave to File Amicus Brief in Support of PDR 6. Defs' (Estate of Jeffrey L. Burke and Air Methods Corporation) Motion to Seal Document 7. Intervenor's (Robert Sollinger) Notice of Appeal Based Upon a Constitutional Question 8. Intervenor's (Robert Sollinger) PDR Under N.C.G.S. § 7A-31 9. Plts' Motion to Seal Document 10. Plts' Motion to Admit Gary C. Robb, Anita Porte Robb, and Brittany Sanders Robb Pro Hac Vice 11. Plts' Motion to Admit Deepak Gupta, Neil K. Sawhney, and Robert D. Friedman Pro Hac Vice	1. --- 2. Denied **09/11/2024** 3. --- 4. Denied **09/11/2024** 5. Allowed **09/11/2024** 6. Allowed **10/18/2022** 7. --- 8. Dismissed **09/11/2024** 9. Allowed **10/18/2022** 10. Dismissed as moot **09/11/2024** 11. Dismissed as moot **09/11/2024**

		12. Def's (Estate of Jeffrey L. Burke) Notice of Appeal Based Upon a Constitutional Question	12. ---
		13. Def's (Estate of Jeffrey L. Burke) PDR Under N.C.G.S. § 7A-31	13. Denied **09/11/2024**
		14. Def's (Safran Helicopter Engines) Motion to Dismiss Appeals	14. Allowed **09/11/2024**
		15. Def's (Airbus Helicopters Deutschland, GmbH) Motion to Dismiss Appeals	15. Allowed **09/11/2024**
		16. Def's (Airbus Helicopters Deutschland, GmbH) Motion to Seal and File Redacted Filing of Response and Motion to Dismiss	16. Allowed **11/21/2022**
		17. Def's (Airbus Helicopters Deutschland, GmbH) Motion to Admit Paul E. Stinson Pro Hac Vice	17. Dismissed as moot **09/11/2024**
		18. Def's (Airbus Helicopters Deutschland, GmbH) Motion to Admit Eric C. Strain Pro Hac Vice	18. Dismissed as moot **09/11/2024**
		19. Def's (Airbus Helicopters Deutschland, GmbH) Motion to Admit Hoa T. Nguyen Pro Hac Vice	19. Dismissed as moot **09/11/2024**
317P23-2	Jamaal Gittens v. Department of Transportation	Petitioner's Pro Se Petition for Writ of Mandamus	Dismissed
327P02-14	State v. Guy Tobias LeGrande	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **10/02/2024**
332A23	In re A.G.J.	Def's Motion to Dismiss Appeal	Special Order

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334A23	Jackson, et al. v. Home Depot U.S.A., Inc., et al.	1. Third-Party Def's (Home Depot U.S.A., Inc.) Motion to Admit Elliott Foote Pro Hac Vice	1. Dismissed as moot
		2. Third-Party Def's (Home Depot U.S.A., Inc.) Motion to Admit J. Andrew Pratt Pro Hac Vice	2. Dismissed as moot
		3. Third-Party Def's (Home Depot U.S.A., Inc.) Motion to Admit Sidney Stewart Haskins, II Pro Hac Vice	3. Dismissed as moot
		4. Third-Party Def's (Home Depot U.S.A., Inc.) Amended Motion to Admit Elliott Foote Pro Hac Vice	4. Allowed
		5. Third-Party Def's (Home Depot U.S.A., Inc.) Amended Motion to Admit J. Andrew Pratt Pro Hac Vice	5. Allowed
		6. Third-Party Def's (Home Depot U.S.A., Inc.) Amended Motion to Admit Sidney Stewart Haskins, II Pro Hac Vice	6. Allowed
338P23	NC Department of Environmental Quality, Division of Water Resources, Petitioner v. N.C. Farm Bureau Federation, Inc., Respondent ——————— North Carolina Environmental Justice Network and North Carolina State Conference of the National Association for the Advancement of Colored People, Petitioners v. N.C. Farm Bureau Federation, Inc. and NC Department of Environmental Quality, Division of Water Resources, Respondents	1. Petitioner's (North Carolina Department of Environmental Quality, Division of Water Resources) PDR Under N.C.G.S. § 7A-31 (COA22-1072)	1. Allowed
		2. Petitioners' (N.C. Environmental Justice Network and N.C. State Conference of the National Association for the Advancement of Colored People) Motion to Admit Sophia B. Jayanty Pro Hac Vice	2. Allowed

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353PA23	Cato Corporation, et al. v. Zurich American Insurance Company	1. Plts' Motion to Admit Gail A. McQuilkin Pro Hac Vice (COA23-305) 2. Plts' Motion to Admit Benjamin J. Widlanski Pro Hac Vice 3. Plts' Motion to Admit Dwayne A. Robinson Pro Hac Vice 4. Def's Motion to Admit Lauren S. Kuley Pro Hac Vice	1. Allowed **08/21/2024** 2. Allowed **08/21/2024** 3. Allowed **08/21/2024** 4. Allowed **09/18/2024**
374P13-8	State v. Marvin Wade Millsaps	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **10/08/2024**
387P18-4	State v. Jashawn Arnez Summers	Def's Pro Se Motion for Ineffective Assistance of Counsel	Dismissed **Riggs, J., recused**
416P15-6	State v. Nijel Lee	Def's Pro Se Motion for Notice of Appeal	Dismissed
442PA20-2	State v. James Ryan Kelliher	1. State's Motion for Temporary Stay (COA23-691) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/14/2024** 2. Allowed 3. Allowed
449P11-30	In re Charles Everette Hinton	Petitioner's Pro Se Motion for Petition for the Privilege of the Writ of Habeas Corpus and Inquiry into Restraints on Liberty	Denied **09/26/2024**
606P03-2	State v. Shawn Holliman	Def's Pro Se Motion for PDR (COAP24-293)	Dismissed
618P07-3	State v. Alfred William Riley, Jr.	1. Def's Pro Se Motion for PDR (COAP24-182) 2. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
719A05-2	State v. Eddie Lamar Taylor	Def's Petition for Writ of Certiorari to Review Order of Superior Court, Harnett County	Denied

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