386 N.C.—No. 2 Pages 286-579

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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

NOVEMBER 6, 2024

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OF

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SUPREME COURT OF NORTH CAROLINA

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FILED 28 JUNE 2024 AND 23 AUGUST 2024

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Homeowner's fire insurance—notice of cancellation—statutory requirements—actual notice sufficient—Where plaintiff homeowners had actual notice that their provisional homeowner's fire insurance policy had been cancelled—based, in part, on evidence that plaintiffs received, signed, and cashed a check from defendant insurance company listing the policy number and refunding plaintiffs their excess premium—and, therefore, had a reasonable opportunity to procure other insurance before their house burned down two months later, the Supreme Court found it unnecessary to address the broader question of whether defendant's manner of notice—by mailing a letter of cancellation to plaintiffs that they claimed not to have received—was sufficient to meet the requirements of N.C.G.S. § 58-44-16(f)(10). **Ha v. Nationwide Gen. Ins. Co., 399.**

NEGLIGENCE

Contributory negligence—fall through attic floor—open and obvious risk—failure to exercise reasonable care—Plaintiff was barred from asserting a negligence claim against defendant, who was the builder of her newly constructed home, for injuries plaintiff suffered when she was walking through her attic, stepped backward off of a plywood walkway without looking, and fell through a scuttle hole that defendant had cut into the attic floor. Plaintiff's failure to exercise reasonable care to avoid an open and obvious risk, particularly given her acknowledgment that she knew the attic floor was unsafe, contributed to her injuries as a matter of law; therefore, summary judgment was properly entered in favor of defendant. **Cullen v. Logan Devs., Inc., 373.**

Gross negligence—unsafe condition—alleged building code violation—conscious disregard for safety not shown—Plaintiff failed to show that defendant, the builder of her newly constructed home, acted with a bad purpose or reckless indifference to plaintiff's rights by constructing a scuttle hole in the attic floor—through which plaintiff fell to the floor below and severely injured herself—and, therefore, defendant was entitled to summary judgment on plaintiff's claim of gross negligence. Even if defendant violated the building code by covering over the hole in

SCHEDULE FOR HEARING APPEALS DURING 2024

NORTH CAROLINA SUPREME COURT

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

February 13, 14, 15, 20, 21, 22
April 9, 10, 11, 16, 17, 18
September 17, 18, 19, 24, 25, 26
October 22, 23, 24, 29, 30, 31

JOSEPH ASKEW, CHARLIE GORDON WADE III, AND CURTIS WASHINGTON
v.
CITY OF KINSTON, A MUNICIPAL CORPORATION

No. 55A23

Filed 28 June 2024

Constitutional Law—direct constitutional claims—condemnation of plaintiffs' properties—adequate state law remedy

In an action raising direct claims under the state constitution ("*Corum* claims"), in which plaintiffs alleged that defendant city violated their rights to equal protection and substantive due process by condemning plaintiffs' properties and marking them for demolition, the trial court had subject matter jurisdiction to hear the claims even though plaintiffs had not exhausted their administrative remedies first. Exhaustion of administrative remedies does not dictate a court's jurisdiction over direct constitutional claims, but instead speaks to an element of this type of claim: whether an adequate state law remedy exists for the constitutional harm alleged. Further, in determining the availability of an adequate state law remedy, plaintiffs' equal protection and due process claims could not be lumped together, since each claim involved different constitutional rights, raised different injuries, and envisioned different modes of relief.

On appeal of right of a substantial constitutional question pursuant to N.C.G.S. § 7A-30(1) of a unanimous decision of the Court of Appeals, 287 N.C. App. 222 (2022), vacating an order of summary judgment entered on 29 September 2021 by Judge Joshua Willey in Superior Court, Lenoir County, and remanding the case. Heard in the Supreme Court on 9 April 2024.

Ralph T. Bryant, Jr., for plaintiffs-appellants.

Hartzog Law Group LLP, by Dan M. Hartzog Jr. and Katherine Barber-Jones, for defendant-appellee.

EARLS, Justice.

In *Corum v. Univ. of N.C.*, 330 N.C. 761, 783 (1992), this Court "recognized a direct action under the State Constitution against state officials for violation of rights guaranteed by the Declaration of Rights."

The question in this case is whether plaintiffs bringing *Corum* claims must exhaust administrative remedies before entering the courthouse doors. The Court of Appeals said yes. Linking administrative exhaustion to subject-matter jurisdiction, it held that a court cannot hear a *Corum* suit unless the plaintiff first depleted all agency relief. *Askew v. City of Kinston*, 287 N.C. App. 222, 230 (2022).

We reject that approach. Exhaustion of administrative remedies does not dictate jurisdiction over *Corum* claims. That authority flows from the Constitution itself. *See Corum*, 330 N.C. at 784. To ensure that North Carolinians "may seek to redress all constitutional violations," *Corum* creates a unique path into court when existing channels fail to offer an adequate remedy. *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 342 (2009).

The prospect of agency relief goes to an element of a *Corum* cause of action: that the plaintiff lacks meaningful redress through "established claims and remedies." *Corum*, 330 N.C. at 784; *see also Washington v. Cline*, 898 S.E.2d 667, 671 (N.C. 2024). That issue is substantive rather than jurisdictional—it focuses on whether *Corum* is the right vehicle for a claim, not a court's power to act on it. In *Corum* cases like this one, the question is whether the review and relief afforded by the administrative process is an effective stand-in for a direct constitutional suit. *See id.* Because the Court of Appeals substituted that case-by-case inquiry with a blanket jurisdictional mandate, we vacate and remand.

I. Background

A. Kinston Crafts a Large-Scale Condemnation Plan

Plaintiffs Joseph Askew and Curtis Washington[1] live and own property in the City of Kinston (Kinston). Plaintiffs are African American, and they allege that their lots are in predominately African American neighborhoods. In 2017, Kinston condemned two of Mr. Askew's properties and one of Mr. Washington's. Soon after, it slated those properties for demolition.

Those condemnations were not isolated decisions—they were part of Kinston's renewed efforts to remove blighted buildings. In the early 2010s, Kinston began razing "condemned, unsafe properties." For several years, those properties were "identified one-by-one" and "[d]emolitions proceeded when necessary." Starting in 2017, however, Kinston

1. At the start of this litigation, a third plaintiff—Gordon Wade III—joined Mr. Askew and Mr. Washington in filing the complaint. Mr. Wade, however, voluntarily dismissed his claims without prejudice before the trial court granted summary judgment for Kinston.

adopted "a more targeted approach to improve the appearance of neighborhoods." It ramped up its efforts to "condemn[ ] and demolish[ ] dilapidated, blighted houses and commercial buildings." And that same year, it upped demolition funding by 150%.

To make wise use of those new funds, Kinston's planning department chose 150 properties "that met the criteria for condemnation" under "applicable statutes and building code provisions." The City narrowed that list to a "Top 50" to prioritize for condemnation. According to Kinston, it chose those "Top 50" properties based on factors like dilapidation and closeness to "a heavily travelled road." The City also used a technique called clustering—sites in "proximity to other qualifying" buildings were grouped together as "part of a 'cluster' of dilapidated properties." Identifying and focusing on "clusters" ensured that "buildings close together were condemned" and made "eligible for demolition around the same time." As an added measure, Kinston asked its police department to "identify[ ] buildings [that] were especially problematic."

Later that year, the Kinston City Council met to review the "Top 50" list and the criteria used to create it. During the meeting, council members "confirmed that houses would be clustered to cut down on cost where possible." Adam Short, Kinston's planning director, pointed the council to clusters in specific areas that were candidates for large-scale condemnations. For instance, he flagged a grouping of lots on Tower Hill Road as a "great starting point for clustering." That area, Mr. Short conceded in deposition, "is predominantly African American." The council, with minor revisions, approved the selection criteria and finalized the "Top 50" list. With that blessing, Kinston moved forward with condemning and demolishing the "Top 50" properties.

B. Plaintiffs Assert Racial Discrimination in Kinston's Condemnation Selections

Plaintiffs offer a different perspective on Kinston's condemnation scheme. In their view, the City engaged in the "systematic destruction of African American buildings" by using "the process for demolishing dilapidated properties in a racial[ly] discriminatory manner." They allege that Kinston singled out "buildings that are owned by African Americans or buildings that exist in the African American neighborhoods." At the same time, they continue, Kinston ignored "buildings that are in similar or worse state[s] of disrepair[ ] that have Caucasian property owners" and are located "in the neighborhoods with predominately Caucasian residents." Plaintiffs assert, for instance, that the City "has targeted the east side of Kinston where African Americans primarily live." But

in "primarily Caucasian" areas—such as "Mitchell Town, a historic district . . . on the west side of Kinston"—"very few or any buildings are being demolished." Though the City has funds to repair and preserve historic properties, plaintiffs contend that it "distribute[s] those funds in a racially disproportionate manner." In their view, Kinston reserves those funds for "historic buildings" in "predominately Caucasian neighborhoods, while systematically destroying and denying the same financial assistance to African American residents."

Plaintiffs argue that the City's "actionable double standard" was a conscious scheme made possible by its "arbitrary selection process." They allege that Kinston "has no guidelines" for selecting properties to condemn and demolish. Instead, plaintiffs contend, the City makes "arbitrary decisions" about which properties are chosen for demolition, which ones are actually demolished, and when those demolitions move forward. From plaintiffs' perspective, the City selected sites for demolition that do not fit any standardized criteria. It has "removed properties from the list of demolition without following any guidelines." According to plaintiffs, then, Kinston did not pick "which buildings would be demolished based on the condition of, or degree of disrepair of the buildings." And guidelines proffered by the City were, plaintiffs assert, crafted "to specifically justify the decision to target the African American buildings in Kinston for demolition."

In short, plaintiffs urge that Kinston has weaponized "a local blight ordinance to target low-income African American Kinston residents, so the [C]ity can take their property and resell it to high-end developers without paying compensation to the African American owners." And when Kinston placed plaintiffs' properties on the demolition list, they allege, it did so because of their race.

C. Kinston's Process for Condemning Properties and the Administrative Relief Available to Property Owners

Kinston asserts that it relied on then-existing blight statutes to condemn the chosen properties—including plaintiffs'—and schedule them for demolition.[2] Those provisions allowed the City's building inspectors

2. In 2019, the General Assembly repealed Article 19 of Chapter 160A of the General Statutes and added Chapter 160D. *See* An Act to Clarify, Consolidate, and Reorganize the Land-Use Regulatory Laws of the State, S.L. 2019-111, §§ 2.1(a), 2.3, 2019 N.C. Sess. Laws 424, 439. However, Article 19 of Chapter 160A remained in effect during the events relevant to the claims in this case. *Id.* § 3.2, 2019 N.C. Sess. Laws at 547 ("[B]ecomes effective on January 1, 2021, and applies to local government development regulation decisions made on or after that date.").

to condemn a structure as "especially dangerous to life because of its liability to fire or because of bad condition of walls, overloaded floors, defective construction, decay, unsafe wiring or heating system, inadequate means of egress, or other causes." N.C.G.S. § 160A-426(a) (2019) (repealed 2019). An inspector must post a notice in a "conspicuous place" on the building. N.C.G.S. § 160A-426(c) (2019) (repealed 2019). That notice, in turn, must specify the structure's dangerous condition. N.C.G.S. § 160A-428 (2019) (repealed 2019).

It need also alert the property's owner of a hearing before the inspector. *Id.* During that hearing, the owner is "entitled to be heard in person or by counsel," and may "present arguments and evidence" against condemnation. *Id.* The inspector may then order the owner to "remedy the defective conditions by repairing, closing, vacating, or demolishing" the structure, or by "taking other necessary steps" to fix the problem. N.C.G.S. § 160A-429 (2019) (repealed 2019).

An administrative process allows property owners to challenge a condemnation decision. Within ten days of the inspector's written order, an owner may appeal it to the city council. N.C.G.S. § 160A-430 (2019) (repealed 2019). The council, in turn, reviews the inspector's decision and—after hearing from the owner—may "affirm, modify and affirm, or revoke the order." *Id.* The owner may then challenge the council's decision by petitioning the superior court for writ of certiorari. N.C.G.S. § 160A-393(f) (2019) (repealed 2019).

On review, the superior court examines whether the challenged order is "[i]n violation of constitutional provisions," "[a]rbitrary or capricious," or "[a]ffected by other error of law." N.C.G.S. § 160A-393(k)(1) (2019) (repealed 2019). It makes that decision based on the record, statutorily defined as the documents, exhibits, and other materials submitted to the city council. N.C.G.S. § 160A-393(i) (2019) (repealed 2019). But if the court deems the record "not adequate to allow an appropriate determination" of the legal merits, it may supplement the record with affidavits, witness testimony, or documentary and other evidence as needed. N.C.G.S. § 160A-393(j) (2019) (repealed 2019).

After examining a condemnation order, the superior court may affirm the council's decision, reverse it and remand the case with instructions, or remand the case for further proceedings. N.C.G.S. § 160A-393(l) (2019) (repealed 2019). If, for instance, the court finds that a condemnation was "based upon an error of law," it may "remand the case with an order that directs the decision-making board to take

whatever action should have been taken had the error not been committed or to take such other action as is necessary to correct the error." N.C.G.S. § 160A-393(l)(3) (repealed 2019). Ancillary injunctive relief is also available—the court may enjoin a "party to th[e] proceeding to take certain action or refrain from taking action that is consistent with the court's decision on the merits of the appeal." N.C.G.S. § 160A-393(m) (2019) (repealed 2019).

D. Kinston Condemns Plaintiffs' Properties

In late November 2017, Kinston condemned two of Mr. Askew's properties citing fire hazards, decay, structural problems, and unsafe wiring. After a hearing, the building inspector issued orders to abate and directed Mr. Askew to "remedy the defective conditions" by repairing or demolishing the buildings within set timeframes. Mr. Askew appealed neither order.

City inspectors revisited the sites at the agreed-upon intervals. For the first property, they saw no "observable improvement to the condition" and so recommended "[m]oving forward with the condemnation process." Mr. Askew sought a hearing from the Kinston City Council and appeared at a meeting in January 2019. The council upheld the condemnation order. Mr. Askew never petitioned the superior court for writ of certiorari, as allowed by statute.

For Mr. Askew's second property, city inspectors visited the lot and noted improvements. As requested, they gave Mr. Askew more time to continue repairs. But when inspectors returned to the site the next year, they elected to condemn it because Mr. Askew had "failed to stabilize the structure or protect the building from water damage that continues to cause rot and decay."

In 2018, Kinston condemned Mr. Washington's property citing fire hazards, decay, structural problems, and a collapsing roof. The building inspector issued an abatement order, but Mr. Washington did not appeal it to the Kinston City Council or superior court.

In 2019, Mr. Askew and Mr. Washington jointly sued Kinston in federal court, alleging "violations of their [Fourteenth] amendment, substantial due process, equal protection rights, discrimination, disparity and condemnation of a historical home." *Askew v. City of Kinston*, No. 4:19-CV-13-D, 2019 WL 2126690, at *1 (E.D.N.C. May 15, 2019) (alteration in original). A federal district court dismissed the complaint for lack of subject-matter jurisdiction. *Id.* at *4.

E. Plaintiffs Bring *Corum* Claims Against Kinston

Mr. Askew and Mr. Washington then filed *Corum* claims against Kinston in the Superior Court, Lenoir County. According to plaintiffs, the City's discriminatory and arbitrary decisions violated the equal protection and due process guarantees of North Carolina's Constitution. That meant, plaintiffs continued, that the administrative process could not offer an "adequate remedy at state law." For Kinston's constitutional breaches, plaintiffs sought a declaratory judgment, injunctive relief, and damages over $25,000.

In its answer, Kinston generally denied the complaint's allegation. It later moved for summary judgment, arguing that plaintiffs failed to exhaust administrative remedies. The superior court granted summary judgment for Kinston on all claims. Mr. Askew and Mr. Washington appealed.

F. The Court of Appeals Rules Against Plaintiffs on Jurisdictional Grounds

The Court of Appeals also dispensed with plaintiffs' claims. *See Askew*, 287 N.C. App. at 229–30. But rather than examine the summary judgment ruling, the Court of Appeals focused on jurisdiction. *See id.* at 229. This Court has explained:

> As a general rule, where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts. This is especially true where a statute establishes . . . a procedure whereby matters of regulation and control are first addressed by commissions or agencies particularly qualified for the purpose.

Presnell v. Pell, 298 N.C. 715, 721 (1979) (citations omitted). The Court of Appeals imported that exhaustion requirement into the framework for *Corum* claims. *See Askew*, 287 N.C. App. at 229–30. It held, in essence, that a court cannot hear a direct constitutional suit unless the plaintiff depletes all avenues of administrative relief. *See id.*

In the court's view, plaintiffs "primarily seek to enjoin [Kinston] from demolishing [their] properties." *Id.* at 229. They did "not allege that exhaustion would be futile." *Id.* And since the administrative process allows "the city council and the superior court to review [p]laintiffs' injuries and grant the relief [they] seek," the court reasoned, they "are not excused from exhausting their administrative remedies." *Id.* Because

plaintiffs bypassed the administrative scheme before raising their *Corum* claims, the court explained, their failure to exhaust administrative relief deprived the trial court of jurisdiction. *Id.* at 230. The Court of Appeals thus directed the trial court to dismiss plaintiffs' *Corum* claims without prejudice for lack of subject-matter jurisdiction. *Id.*

II. Analysis

The Court of Appeals' analysis was doubly flawed. It failed to disaggregate and examine plaintiffs' distinct constitutional claims. On top of that, the court tied administrative exhaustion to subject-matter jurisdiction over *Corum* suits, transplanting the rules for run-of-the-mill agency disputes into *Corum*'s unique framework.

A. Plaintiffs' Discrete *Corum* Claims

Corum embodies a "time-honored" legal principle: "[W]here there is a right, there must be a remedy." *See Washington*, 898 S.E.2d at 668–69 (cleaned up). To "ensure that every right does indeed have a remedy in our court system," *id.*, *Corum* offers a common law cause of action when existing relief does not sufficiently redress "a violation of a *particular* constitutional right," *Corum*, 330 N.C. at 784 (emphasis added). Our post-*Corum* cases have elaborated on that point, explaining that "an adequate remedy is one that meaningfully addresses the constitutional violation, even if the plaintiff might prefer a different form of relief." *See Washington*, 898 S.E.2d at 671; *see also id.* at 672 (explaining that *Corum* "applies when one's rights are violated, and the law offers either no remedy or a remedy that is meaningless").

The "power to fashion an appropriate remedy" turns on "the right violated and the facts of the particular case." *Simeon v. Hardin*, 339 N.C. 358, 373 (1994) (quoting *Corum*, 330 N.C. at 784). That is because different rights "protect persons from injuries to particular interests." *Carey v. Piphus*, 435 U.S. 247, 254 (1978). And so "[v]arious rights" in various contexts may "require greater or lesser relief to rectify" their breach. *Corum*, 330 N.C. at 784; *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("[E]very right, when withheld, must have a remedy, and every injury its proper redress." (cleaned up)).

Across our *Corum* precedent, then, we have parsed the different constitutional injuries—and thus the different modes of relief—at play when the state infringes the "[v]arious rights" protected by our Constitution. *See Corum*, 330 N.C. at 782 (free speech); *Copper v. Denlinger*, 363 N.C. 784, 788 (2010) (procedural due process); *Deminski v. State Bd. of Educ.*, 377 N.C. 406, 413 (2021) (opportunity to

receive a sound basic education); *Tully v. City of Wilmington*, 370 N.C. 527, 535 (2018) (pursuit of "one's profession free from unreasonable governmental action"); *Washington*, 898 S.E.2d at 672 (speedy trial).

If a plaintiff brings distinct *Corum* actions for the violation of distinct constitutional rights, courts may not lump those claims together. That cookie-cutter approach to rights and remedies strays from *Corum*'s flexible inquiry. As a legal and logical matter, the scope and nature of the constitutional wrong dictate whether existing modes of redress "apply to the facts alleged" or "provide for the type of remedy sought." *Craig*, 363 N.C. at 340, 342. To thus accord "every injury its proper redress," *Washington*, 898 S.E.2d at 670 (quoting *Marbury*, 5 U.S. (1 Cranch) at 163), *Corum* requires courts to disaggregate "the right[s] violated," the constitutional harms alleged, and the "appropriate remedy" on "the facts of the particular case," *Simeon*, 339 N.C. at 373 (quoting *Corum*, 330 N.C. at 784).

The Court of Appeals, however, collapsed plaintiffs' claims into a monolith without examining the contours, injuries, and theories underpinning each. Plaintiffs brought two *Corum* suits—one based on substantive due process, the other on equal protection. Both are rooted in Article I, Section 19, often called the Law of the Land Clause. In full, that provision reads:

> No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

N.C. Const., art. I, § 19. Despite their shared constitutional origins, plaintiffs' *Corum* claims assert different rights, raise different injuries, and envision different modes of relief.

Substantive due process "is a guaranty against arbitrary legislation, demanding that the law be substantially related to the valid object sought to be obtained." *Lowe v. Tarble*, 313 N.C. 460, 461 (1985). In essence, it guards against unreasonable government actions that deprive people of life, liberty, or property. *See Halikierra Cmty. Servs. LLC v. N.C. Dep't of Health & Hum. Servs.*, 898 S.E.2d 685, 689 (N.C. 2024). Invoking that guarantee, plaintiffs contend that Kinston's decisions to condemn and demolish their properties were "unreasonable, arbitrary or capricious."

See State v. Joyner, 286 N.C. 366, 371 (1975). For their substantive due process claim, then, plaintiffs' alleged constitutional injury is the "arbitrary and unduly discriminatory interference" with their rights as property owners. *See In re Ellis*, 277 N.C. 419, 424 (1970). If their argument holds, plaintiffs can remedy that harm by stopping the City from following through on its condemnation orders and demolishing their lots.

But plaintiffs advance another *Corum* claim—an equal protection challenge to Kinston's condemnation scheme. They argue that the City chose properties based on race—that it singled out black-owned properties in majority-black neighborhoods, while ignoring similarly dilapidated white-owned homes in predominately white neighborhoods. That racially disparate treatment, plaintiffs urge, violates the Equal Protection Clause, which "guarantees equal treatment of those who are similarly situated." *Grace Baptist Church v. City of Oxford*, 320 N.C. 439, 447 (1987) (cleaned up).

For plaintiffs' equal protection claim, then, the constitutional violation is Kinston's alleged discrimination based on race. That harm springs from plaintiffs' right to evenhanded treatment from the government. Plaintiffs' ultimate complaint, in other words, is not about what happens to their land but the alleged racial targeting that tainted the proceedings from the start. *Cf. Shaw v. Reno*, 509 U.S. 630, 641, 643 (1993) ("An understanding of the nature of appellants' claim is critical to our resolution of the case . . . Classifications of citizens solely on the basis of race are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." (cleaned up)); *Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984) (explaining that discrimination harms "persons who are personally denied equal treatment" by "perpetuating archaic and stereotypic notions or by stigmatizing members of the disfavored group as innately inferior and therefore as less worthy participants in the political community" (cleaned up)).

If plaintiffs carry the day, their equal protection claim contemplates a distinct form of relief—equal treatment from Kinston, not a specific outcome as to their properties. Said differently, this claim focuses on the journey—how the City chose properties—rather than the destination—whether Kinston may ultimately condemn and demolish plaintiffs' lots. When "the right invoked is that to equal treatment, the appropriate remedy is a *mandate* of equal treatment." *See id.* at 740; *cf. State v. Cofield*, 320 N.C. 297, 309 (1987) (invoking Equal Protection Clause to set aside conviction based on racial discrimination in grand jury selection but allowing the State to reindict defendant through nondiscriminatory procedures). For instance, if plaintiffs come forward with enough evidence

to prove that Kinston chose properties using impermissible race-based criteria in violation of the Equal Protection Clause, the appropriate remedy would be to prohibit the City from engaging in race-based discrimination. Even then, plaintiffs' properties might ultimately be selected for condemnation using race-neutral criteria. *See S. S. Kresge Co. v. Davis*, 277 N.C. 654, 663 (1971) (holding that a city violated Equal Protection Clause by selectively enforcing ordinance and awarding plaintiffs injunction "so long as [city officials] continue the discriminatory practices" but limiting relief so that the city could "inaugurat[e] and carry[ ] out a nondiscriminatory enforcement policy and program"). But merely stopping Kinston from demolishing plaintiffs' specific lots would not fix the asserted racial targeting that undergirded the City's condemnation plan. In other words, no administrative decision would redress the alleged race-based discrimination at the threshold.

The Court of Appeals grasped one of plaintiffs' *Corum* claims. It squarely addressed their substantive due process challenge to Kinston's demolition of their individual properties. But the court overlooked plaintiffs' equal protection suit and the contours of that asserted right. It recast the constitutional harm as the mere condemnation of plaintiffs' land and the resulting interference with their property rights. *See Askew*, 287 N.C. App. at 229. So framed, the proper relief for that injury, the court continued, is "to enjoin [Kinston] from demolishing [p]laintiffs' properties." *Id.* And if plaintiffs' constitutional injuries are reduced to disputes about their individual lots, the administrative process seems suited to the task. The Court of Appeals thought so. In its view, the administrative remedy allowed "the city council and the superior court to review [p]laintiffs' injuries and grant the relief [they] seek"—i.e., quashing the condemnation orders for their properties and stopping Kinston's demolitions. *Id.*

But though that summation may fairly characterize plaintiffs' substantive due process claim, it sidesteps their equal protection challenge. For the latter, plaintiffs assert a different injury—Kinston's alleged racial discrimination—which requires a different species of relief—a "*mandate* of equal treatment." *See Heckler*, 465 U.S. at 740. According to plaintiffs, then, the administrative process is miscalibrated for their equal protection claims. It can only halt the condemnation of atomized parcels, they contend, not strike at Kinston's alleged systemic discrimination. Plaintiffs thus urge that forcing them to exhaust administrative channels would only prolong the inequality they assert.

We leave the merits of those arguments for remand. But methodologically, plaintiffs' challenges to the administrative process highlight

the missteps in the opinion below. By treating plaintiffs' separate constitutional claims as the same, the Court of Appeals dislocated the *Corum* analysis from the discrete "right[s] violated and the facts of the particular case." *Simeon*, 339 N.C. at 373 (quoting *Corum*, 330 N.C. at 784).

B. Subject-Matter Jurisdiction

A second flaw built on the first. The Court of Appeals tied administrative exhaustion to subject-matter jurisdiction over direct constitutional suits, holding that a court's power to hear *Corum* claims hinges on whether the plaintiff first depleted administrative relief. That was error. In so holding, the Court of Appeals drew from a distinct class of cases—those dealing with routine administrative grievances reviewable through statutory channels. But the rules for garden variety agency disputes cannot be unflinchingly transplanted into the universe of *Corum*.

We start with first principles. Subject-matter jurisdiction is a court's "power to pass on the merits of a case." *Slattery v. Appy City, LLC*, 898 S.E.2d 700, 704 (N.C. 2024) (cleaned up). It is "conferred by the Constitution, statutes and the law of the land, that is, by sovereign authority." *Stafford v. Gallops*, 123 N.C. 19, 22 (1898). Subject-matter jurisdiction is also "fundamental." *Henderson County v. Smyth*, 216 N.C. 421, 424 (1939). In "its absence a court has no power to act." *In re T.R.P.*, 360 N.C. 588, 590 (2006).

As we have explained, the "allegations of a complaint determine a court's jurisdiction over the subject matter of the action." *In re K.J.L.*, 363 N.C. 343, 345 (2009). Because the "nature of the case and the type of relief sought" differ between administrative disputes and *Corum* claims, a court's jurisdiction over those matters is triggered by different allegations and governed by different rules. *See In re T.R.P.*, 360 N.C. at 590 (cleaned up).

1. Subject-Matter Jurisdiction in Administrative Law

In the administrative realm, jurisdiction over agency disputes turns on whether a party channeled their claim through prescribed administrative avenues. *See Presnell*, 298 N.C. at 722. If the legislature has "explicitly provided" a vehicle to "seek effective judicial review of [a] particular administrative action," *id.* at 722, that "relief must be exhausted before recourse may be had to the courts," *id.* at 721. That rule serves pragmatic aims. *See Elmore v. Lanier*, 270 N.C. 674, 678 (1967). It recognizes that an agency is well-suited to resolve and review "matters it customarily handles, and can apply distinctive knowledge to." *Axon Enter. v. FTC*, 143 S. Ct. 890, 901 (2023). And it fosters efficient and informed

decision-making, giving the "entity most concerned with a particular matter the first chance to discover and rectify error," gather facts, and decide matters within its specialized domain. *Presnell*, 298 N.C. at 721.

A court's power to review administrative decisions is—like agencies themselves—an "artificial creature of statute." *High Rock Lake Partners, LLC v. N.C. Dep't. of Transp.*, 366 N.C. 315, 318–19 (2012) (cleaned up). When "jurisdiction is statutory and the [l]egislature requires the [c]ourt to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the [c]ourt to certain limitations, an act of the [c]ourt beyond these limits is in excess of its jurisdiction." *In re T.R.P.*, 360 N.C. at 590 (cleaned up). In those cases, the "procedures established by law for the determination of juridical disputes" are like ships, "fashioned by lawmakers to carry legal controversies into judicial ports for decision." *See Brissie v. Craig*, 232 N.C. 701, 707 (1950). Litigants who deviate from statutorily prescribed routes will end up "shipwrecked on procedural reefs." *Id.*

To avoid those treacherous shoals, parties challenging administrative matters must adhere to statutory criteria as a "condition[ ] precedent to obtaining a review by the courts." *In re State ex rel. Emp. Sec. Comm'n*, 234 N.C. 651, 653 (1951); *cf. In re T.R.P.*, 360 N.C. at 590 (noting that pleading requirements for "certain causes of action created by statute" are "not a matter of form, but substance, and a defect therein is jurisdictional" (cleaned up)). Said differently, courts may examine agency disputes within legislative parameters, or not at all. *See id.* Administrative exhaustion—if statutorily required and "followed by effective judicial review"—thus "acquires the status of a jurisdictional prerequisite." *Presnell*, 298 N.C. at 722. Courts may hear such claims only after plaintiffs deplete "their available administrative remedies or demonstrate[ ] that doing so would [be] futile." *See Abrons Fam. Prac. & Urgent Care, PA v. N.C. Dep't of Health & Hum. Servs.*, 370 N.C. 443, 453 (2018).

2. Subject-Matter Jurisdiction Over Corum *Claims*

But agencies are not courts. *See Ocean Hill Joint Venture v. N.C. Dep't of Env't, Health & Nat. Res.*, 333 N.C. 318, 321 (1993). And *Corum* claims are not administrative grievances. While subject-matter jurisdiction over administrative matters is legislatively devised and statutorily defined, the judiciary's power to hear *Corum* claims flows from the "authority granted to it by the Constitution." *See Henderson County*, 216 N.C. at 423. That is, in part, because our "Constitution opens the courthouse doors to all who suffer injury." *Fearrington v. City of Greenville*,

No. 89PA22, slip op. at 10 (N.C. May. 23, 2024). It also enshrines a "foundational principle of every common law legal system"—that "[w]here there is a right, there is a remedy." *Washington*, 898 S.E.2d at 668 (citing N.C. Const. art. I, § 18). Because it is "the state judiciary that has the responsibility to protect the state constitutional rights of the citizens," *Corum*, 330 N.C. at 783, the power to hear and redress constitutional violations is "conferred by the Constitution," *Stafford*, 123 N.C. at 22; *see also Meads v. N.C. Dep't of Agric.*, 349 N.C. 656, 670 (1998) ("[I]t is the province of the judiciary to make constitutional determinations . . . ."); *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 642 (2004) ("[W]hen the State fails to live up to its constitutional duties, a court is empowered to order the deficiency remedied . . . .").

A complaint thus activates a court's subject-matter jurisdiction if it alleges the "infringement of a legal right" secured by the Constitution and presents a justiciable controversy. *See Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 608 (2021). Said another way, a court has jurisdiction if "the right of [plaintiffs] to recover under their complaint will be sustained if the Constitution" is "given one construction and will be defeated" if "given another." *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (quoting *Bell v. Hood*, 327 U.S. 678, 685 (1946)); *cf. Bell*, 327 U.S. at 681–82 ("[W]here the complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions later noted, must entertain the suit.").

The Court of Appeals, however, appeared to conflate two concepts: jurisdiction versus a cause of action. The difference between those is key. Jurisdiction concerns a court's authority to hear and decide a case. *See Slattery*, 898 S.E.2d at 704. A cause of action, on the other hand, is the set of facts or allegations that create a legal right to sue. *See Cause of Action*, *Black's Law Dictionary* (11th ed. 2019) (defining "cause of action" as "[a] group of operative facts giving rise to one or more bases for suing"). It captures the theory on which a plaintiff builds their suit, pointing to the wrong done and the remedy sought. In specific cases, *Corum* provides a "direct cause of action under the State Constitution," allowing a plaintiff to raise and redress a constitutional violation when existing mechanisms fall short. *Corum*, 330 N.C. at 786.

As a unique species of common law suit, *Corum* claims depend on the Constitution for both substance and a vehicle into court. They are born of necessity, taking root in the interstices between rights and remedies. *Corum* grounded its precepts in a simple truth: the "very purpose of the Declaration of Rights is to ensure that the violation of these

rights is never permitted by anyone who might be invested under the Constitution with the powers of the State." *Id.* at 783. Our Constitution thus secures the people's "rights against state officials and shifting political majorities." *Id.* at 787. It also tasks the courts with the "responsibility to guard and protect" constitutional guarantees. *Id.* at 785. To fulfill their duty and "ensure that every right does indeed have a remedy in our court system," *Washington*, 898 S.E.2d at 668, courts may draw on their "inherent constitutional power to fashion a common law remedy for a violation of a particular constitutional right," *Corum*, 330 N.C. at 784. Thus, *Corum*'s promise: "[I]n the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution." *Id.* at 782.

But *Corum* also recognized the prudential and structural parameters of that "extraordinary" authority. *Id.* at 784. It thus set two "critical limitations" on direct constitutional suits. *Id.* Courts must "bow to established claims and remedies" when adequate. *Id.*; *see also In re Alamance Cnty. Court Facilities*, 329 N.C. 84, 101 (1991) (urging judicial respect of existing "statutory remedies and constraints when the[y] do not stand in the way of obtaining what is reasonably necessary for the proper administration of justice"). And courts must minimize interbranch friction by crafting the "least intrusive remedy available and necessary to right the wrong." *Corum*, 330 N.C. at 784; *see also In re Alamance Cnty.*, 329 N.C. at 99 (cautioning that the use of inherent powers "must be no more forceful or invasive than the exigency of the circumstances requires"). *Corum* thus furnishes a court-created claim in specific circumstances: when existing channels do not adequately redress "a violation of a particular constitutional right." *Corum*, 330 N.C. at 784; *see also In re Alamance Cnty.*, 329 N.C. at 100 (reserving inherent powers for cases where "other means to rectify" the problem "are unavailable or ineffectual").

Consistent with those limits, the inadequacy of "established claims and remedies" is an element of a *Corum* cause of action. *Corum*, 330 N.C. at 784; *see also Deminski*, 377 N.C. at 413. It marks the conditions in which the judiciary will step into the breach and fashion a vehicle for a plaintiff to "have the merits of his case heard and his injury redressed if successful." *Craig*, 363 N.C. at 341. And it "ensures that an adequate remedy must provide the possibility of relief under the circumstances." *Id.* at 340. As part of a *Corum* cause of action, then, the sufficiency of existing relief—including administrative remedies—does not dictate subject-matter jurisdiction. *See Steel Co.*, 523 U.S. at 89 ("[T]he absence of a valid (as opposed to arguable) cause of action does not implicate

subject-matter jurisdiction."). The "courts' statutory or constitutional *power* to adjudicate the case" is "not defeated by the possibility that the averments [in the complaint] might fail to state a cause of action on which petitioners could actually recover." *Id.* (cleaned up). If the complaint places the dispute within the "authority granted to [the court] by the Constitution and laws of the sovereignty," *Henderson County*, 216 N.C. at 423, that court has "jurisdiction to decide whether the allegations state a cause of action on which [it] can grant relief as well as to determine issues of fact arising in the controversy," *Bell*, 327 U.S. at 682.

By those lights, administrative exhaustion does not imbue or divest a court with jurisdiction over *Corum* claims. The availability of agency relief goes to an element of a plaintiff's cause of action—i.e., whether *Corum* offers a direct constitutional claim because existing relief falls short. *Corum*, 330 N.C. at 782. That a court may hear the case does not, of course, mean the plaintiff will "win other pretrial motions, defeat affirmative defenses, or ultimately succeed on the merits of his case." *Craig*, 363 N.C. at 340. But those eventualities turn on the merits of the claim, not the courts' power to hear it at all. For that reason, *Corum* does not shut the courthouse doors merely because a plaintiff did not deplete administrative relief.

3. Remedial Adequacy and Administrative Exhaustion

The question instead is whether the administrative process is an adequate proxy for a direct constitutional suit. *Cf. Lloyd v. Babb*, 296 N.C. 416, 428 (1979) ("[W]hen an *effective* administrative remedy exists, that remedy is exclusive."). Courts must examine the interplay between the specific administrative regime, the asserted constitutional right, and "the wrongs of which [a plaintiff] complain[s]." *See id.* In general terms, an administrative process is adequate if it allows the plaintiff to enter the courthouse doors, meaningfully air their constitutional claim, and if successful, secure substantive redress for their injuries. *See Craig*, 363 N.C. 339–40 ("[T]o be considered adequate in redressing a constitutional wrong, a plaintiff must have at least the opportunity to enter the courthouse doors and present his claim."); *see also id.* at 340 ("[A]n adequate remedy must provide the possibility of relief under the circumstances."). We decline to set a checklist, as each case will turn on the fit between the administrative scheme, the asserted constitutional violation, and the facts alleged. In substance, though, an adequate administrative remedy must offer a fair "turn at bat"—it may not doom *Corum* claims to echo into a bureaucratic void. *See Goldston v. State*, 361 N.C. 26, 35 (2006) (cleaned up); *cf. Charlotte-Mecklenburg Hosp. Auth. v. N.C. Indus. Comm'n*, 336 N.C. 200, 209–10 (1993) (finding

administrative remedy inadequate because plaintiffs challenged the facial validity of agency rule and the statute only allowed review of individual disputes and awards on "*specific claims* for compensation").

This Court has followed that case-by-case approach. In *Deminski*, for instance, the plaintiff—a mother of public school students—brought *Corum* claims against a school board for its deliberate indifference to harassment in the classroom. *See Deminski*, 377 N.C. at 407. The board urged us to withhold *Corum* relief because the plaintiff enjoyed an adequate administrative remedy under N.C.G.S. § 115C-45. According to the board, that statute provided a right to appeal a final administrative decision of a school employee—first to the local school board and then to superior court. Since the plaintiff could eventually challenge the school's inaction or violation of state law, the board argued, the administrative process was good enough to bar her *Corum* suit.

We disagreed, holding that the plaintiff "alleged a colorable constitutional claim for which no other adequate state law remedy exists." *Id.* at 415. Necessarily, then, we rejected the adequacy of the administrative remedy and excused the plaintiff from exhausting it. *See id.* Our opinion acknowledged that the administrative process could protract the ongoing harassment. *See id.* at 409. We noted, for instance, that the plaintiff and her children repeatedly alerted the school of the bullying. *Id.* In response, school personnel alluded to the administrative protocol in place, "insist[ing] that there was a process that would take time." *Id.* (cleaned up). But despite those assurances, "the bullying and harassment continued with no real change." *Id.*

When the plaintiff sued, she alleged that the school—and thus the board—failed "to take adequate action to address" known harassment in the classroom. *Id.* at 414. Given the nature of the claim and the board's history of inaction, forcing the plaintiff to deplete essentially irrelevant administrative remedies would prolong the cycle of deliberate indifference she sought to end. Reasoning that the constitutional violation "cannot be redressed through other means," we allowed the plaintiff to seek *Corum* relief. *Id.* at 415.

In other cases, too, we have allowed *Corum* claims that assert constitutional harm in the administrative process itself. *See Tully*, 370 N.C. at 536 (allowing *Corum* claim under Article I, Section I when the plaintiff's government employer "arbitrarily and capriciously denied him the ability to appeal an aspect of the promotional process" by ignoring its own policies and "summarily denying his grievance petition without any reason or rationale other than that the examination answers were not

a grievable item" (cleaned up)). That approach is not an outlier. The Supreme Court of the United States, for instance, has allowed parties to bypass the usual administrative course when raising "structural constitutional claims," *see Axon*, 143 S. Ct. at 904, that allege harm in "being subjected to unconstitutional agency authority," *see id.* at 903 (cleaned up). If a plaintiff challenges their "subjection to an illegitimate" administrative process "irrespective of its outcome," the Court explained, they "will lose their rights not to undergo the complained-of agency proceedings if they cannot assert those rights until the proceedings are over." *Id.* at 903–04.

That precedent imparts a clear lesson: conditioning *Corum* claims on administrative exhaustion would ignore the special status of constitutional rights and the courts' special role in protecting them from state encroachment. In some cases, a particular agency process may allow meaningful ventilation of a particular constitutional claim on particular facts. *See*, *e.g.*, *Copper*, 363 N.C. at 788–89. In others, administrative channels may prove unavailing. *See*, *e.g.*, *Deminski*, 377 N.C. at 414. But the adequacy of administrative relief is, at bottom, a flexible inquiry that a court must weigh. *See*, *e.g.*, *Craig*, 363 N.C. at 342 (affirming the denial of summary judgment award and allowing *Corum* claim to proceed because plaintiff lacked an adequate remedy); *see also Washington*, 898 S.E.2d at 673 (affirming entry of summary judgment against *Corum* claimant because an existing statutory remedy provided adequate relief for speedy trial violation). Flatly tying administrative exhaustion to jurisdiction is inappropriate for *Corum* claims and the constitutional rights under their aegis.

C. Application

So examined, the Court of Appeals' errors are clear. It merged plaintiffs' separate claims under the Law of the Land Clause, treating their substantive due process and equal protection challenges as one and the same. The court's analysis thus overlooked the distinct constitutional injuries and theories of recovery raised by plaintiffs' separate *Corum* claims. That distinction (or lack thereof) matters. According to plaintiffs, *Corum* relief is needed precisely because the administrative process cannot meaningfully redress their discrete constitutional harms.

The Court of Appeals did not grapple with plaintiffs' adequacy arguments, much less the City's responses. Instead, it imported the administrative exhaustion requirement into *Corum*'s unique realm. Building on its first analytical shortfall, the court surmised that the crux of plaintiffs' constitutional claims—the unjustified condemnation of their

properties—could be reviewed and redressed through the administrative process. *Askew*, 287 N.C. App. at 229. For that reason, it held that plaintiffs' failure to exhaust extinguished the trial court's subject-matter jurisdiction. *Id*. at 230. That was error, as explained above. On remand, the Court of Appeals must revisit the administrative scheme and reevaluate its congruence with plaintiffs' discrete *Corum* claims.

III. Conclusion

The trial court granted summary judgment to Kinston on all claims against it. But because the Court of Appeals resolved the case on jurisdictional grounds, it vacated the trial court's ruling without reaching its substance. We vacate the Court of Appeals decision and remand to that court to conduct a standard de novo review of the merits of the trial court's summary judgment order. *See Est. of Graham v. Lambert*, 385 N.C. 644, 650 (2024).

Because plaintiffs are the nonmovants, the Court of Appeals must view the evidence in their favor and ask whether "there is any genuine issue as to any material fact, and whether any party is entitled to a judgment as a matter of law." *See Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 535 (1971). The trial court did not specify its rationale for granting summary judgment. On remand, then, the Court of Appeals should first ask whether the administrative process provides an adequate state law remedy for plaintiffs' discrete constitutional challenges. After disaggregating plaintiffs' *Corum* suits, the court should affirm the summary judgment order if there is no genuine factual question that the administrative process "meaningfully addresses the constitutional violation." *See Washington*, 898 S.E.2d at 671. If "established claims or remedies" are inadequate for plaintiffs' equal protection or substantive due process challenges, *see Corum*, 330 N.C. at 784, the Court of Appeals should then examine whether a genuine factual dispute exists on the merits of the surviving *Corum* claims.

VACATED AND REMANDED.

IN RE A.J.L.H.

[386 N.C. 305 (2024)]

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

No. 35PA21-2

Filed 28 June 2024

Child Abuse, Dependency, and Neglect—abuse and neglect—visitation—dispositional evidence and factual findings—principles for appellate review

In an abuse and neglect matter involving four biological parents (a mother and three men who each fathered one of her children), the Supreme Court reversed a decision by the Court of Appeals, which after prior remand from the higher court reversed the trial court's dispositional order denying visitation to all but one parent, and remanded the case directly to the trial court for any further proceedings. In doing so, the Supreme Court reiterated the following principles: on appeal, dispositional findings of fact are reviewed for whether they are supported by competent evidence; the Juvenile Code permits trial courts to consider hearsay evidence at disposition hearings; here, the trial court was not required to make specific findings for each parent regarding their parental fitness or any conduct inconsistent with their parental rights before determining whether visitation was in the children's best interest; because the issue of each parent's constitutionally protected parental status was not raised at trial, it could not be addressed on appeal; both the evidence and the unchallenged factual findings supported the trial court's disposition; and the trial court was not required to enter separate factual findings and legal conclusions for each parent before making its disposition.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 289 N.C. App. 644 (2023), vacating the dispositional portions of the adjudication and disposition order entered on 13 December 2019 by Judge Tonia A. Cutchin in District Court, Guilford County. On 1 September 2023, the Supreme Court allowed petitioner and guardian ad litem's amended joint petition for discretionary review. Heard in the Supreme Court on 17 April 2024.

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

Matthew D. Wunsche for petitioner-appellant Guardian ad Litem.

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

BARRINGER, Justice.

The issue before this Court is whether the Court of Appeals correctly determined that the trial court erred in denying visitation to respondent-mother. "The assessment of the juvenile's best interests concerning visitation is left to the sound discretion of the trial court and 'appellate courts review the trial court's assessment of a juvenile's best interests solely for an abuse of discretion.' " *In re A.J.L.H.*, 384 N.C. 45, 57 (2023).

It is difficult to overstate the Court of Appeals' multitude of errors in this case. The Court of Appeals ignored decades of precedent, cited authority which provides no support for its position, and disregarded our explicit directions in our previous opinion in this case, *In re A.J.L.H.*, 384 N.C. 45 (2023). For the following reasons, we reverse the Court of Appeals and remand this case directly to the trial court for any further proceedings.

I. Background

The underlying facts in this case are fully set out in a prior opinion of this Court, *In re A.J.L.H.*, 384 N.C. 45 (2023). For ease of reading, we briefly review the relevant facts. Respondent-mother and the father[1] of Anna were the subjects of an investigation by the Guilford County Department of Health and Human Services (DHHS) for maintaining an injurious environment and for neglecting Anna, Chris, and Margaret[2] by using improper discipline. *Id.* at 48–50.

Respondents admitted that they forced Margaret to stand in a corner for many hours at a time; whipped her with a belt, leaving bruises and marks on her neck and back; and made her sleep on a bare floor. Respondents claimed their actions were appropriate disciplinary measures due to Margaret's misbehavior. Respondents also informed social workers that they would continue to use that type of discipline until Margaret's behavior improved. *Id.* The trial court adjudicated Margaret abused and neglected, Anna as neglected, and Chris as neglected.

Immediately after the adjudication hearing, the trial court held a disposition hearing. The trial court received a court summary prepared

1. Anna's father is not a party to this appeal.

2. A pseudonym is used to protect the identities of the juveniles and for ease of reading.

by DHHS, a letter prepared by Margaret, and heard testimony from the current and previous foster care social workers.

Even though all three children entered nonsecure DHHS custody in August 2019, respondent-mother had not entered a case plan with DHHS for reunification with any of her children by the time of the November 2019 disposition order. Respondent-mother's case plan focused on improving her parenting skills, such as completing the PATE parenting education program and implementing the skills learned with her own children; completing and implementing recommendations made during a psychological evaluation; attending visits with her children once the trial court approved a schedule; "participat[ing] in shared parenting once per week via email"; completing substance abuse and mental health assessments; completing an anger management class; voluntarily agreeing to child support; actively seeking employment; and maintaining contact with her social worker.

DHHS requested that respondent-mother complete her parenting psychological and mental health assessment prior to DHHS making a recommendation regarding visitation between Margaret and respondent-mother. DHHS also requested that Margaret's "therapist have input regarding visits before a decision is made regarding visits and that if [Margaret] does not want to attend visits that her request[ ] be honored." Margaret wrote a letter to the trial court stating that she did not want to visit respondent-mother.

Respondents[3] appealed the decision of the trial court which adjudicated Margaret as an abused and neglected juvenile. The Court of Appeals reversed the order entered by the trial court, stating that "the trial court improperly admitted some hearsay evidence." *In re A.J.L.H.*, 384 N.C. at 47. The Court of Appeals held that the trial court's reasoning was so " 'heavily reliant and intertwined with' the hearsay evidence that the proper remedy was to vacate the trial court's order and remand for a new hearing with respect to Margaret." *Id.* "The Court of Appeals also ordered the trial court to dismiss the petitions directed at Margaret's younger siblings." *Id.* "Finally, the Court of Appeals instructed the trial court that, if it once again adjudicated Margaret as abused or neglected, the trial court must 'order generous and increasing visitation between Margaret and her mother.' " *Id.*

3. Respondent-mother and respondent-fathers previously appealed the trial court's decision. However, the only respondent currently before this Court is respondent-mother.

This Court allowed "discretionary review to reaffirm the proper role of an appellate court in reviewing a trial court's adjudication and disposition in a juvenile proceeding." *Id.* at 48. This Court determined that the trial court's order contained "sufficient findings, supported by clear, cogent, and convincing evidence, to support" the trial court's adjudications of the minor children. *Id.* The Court of Appeals decision was reversed and remanded "for that court to properly address respondents' arguments concerning the disposition order." *Id.*

On remand to the Court of Appeals, the court reversed "the orders of the trial court regarding visitation and remand[ed] for further findings of facts and conclusions of law." *In re A.J.L.H.*, 289 N.C. App. 644, 645 (2023).

The Court of Appeals reviewed whether the trial court abused its discretion with respect to not allowing visitation between respondents and their children. *Id.* at 649. Respondents argued that the trial court abused its discretion when: "(1) it prohibited any visitation between [r]espondent parents and their three children; and, (2) it concluded DHHS had made reasonable efforts to avoid taking custody of the children." *Id.* Respondents also asserted that "it was not reasonable for DHHS to seek custody of these children because of the parents' refusal to agree with the blanket accusation DHHS leveled against them." *Id.* Respondents also argued "the trial court abused its discretion and erred by failing to consider and make the required factors [sic] and determinations to support any finding it was in the children's best interests to deny visitation." *Id.*

The Court of Appeals held that, in previous cases in which it had denied visitation, it has required the trial court to find factors such as: (1) whether the parent denied visitation has a long history with Child Protective Services (CPS); (2) whether the issues which led to the removal of the current child are related to previous issues which led to the removal of another child; (3) whether a parent minimally participated, or failed to participate, in their case plan; (4) whether the parent failed to consistently utilize current visitation; and, (5) whether the parent relinquished their parental rights. *Id.* at 650 (citing *In re J.L.*, 264 N.C. App. 408, 422 (2019)).

The Court of Appeals further stated that the trial court was "constitutionally and statutorily required to assess whether and to the extent visitation should be awarded to four different parents for each of their respective children." *Id.* The trial court considered, but denied, visitation between respondent-mother and the three children and between

Anna and her father; the trial court considered and allowed visitation between Chris and his father. When the DHHS attorney asked the trial court about visitation for Margaret's father, the trial court responded with "[n]o visits." *Id.* at 651.

The Court of Appeals determined:

> The trial court failed to make specific determinations for each parent regarding unfitness or conduct inconsistent with their parental rights and, only after then, to determine whether parental visitation was in the best interests of each of their children. This absence demonstrates the trial court failed to make the required findings and conclusions and prejudicially erred in disposition. These failures: [sic] render the order manifestly unsupported by reason, demonstrate the conclusions of law were unsupported, lack legal validity, and constitutes an abuse of discretion.

Id. at 652.

The Court of Appeals held that the trial court "failed to make required and specific determinations of fact to demonstrate the trial court made supported conclusions of law. Upon remand, the trial court is to make the required findings of fact and conclusions of law concerning visitation, family placement, and parental involvement in medical treatment in the best interests *of each child for each respective parent of each child*." *Id.*

Petitioners filed a petition for discretionary review of the Court of Appeals' opinion. In their amended petition for discretionary review,[4] petitioners brought forth the following issues: (1) the Court of Appeals' published opinion misstated that clear, cogent, and convincing evidence was the dispositional standard of proof, which is contrary to this Court's well-settled caselaw; (2) the Court of Appeals took on the role of fact-finder and acted inconsistently with this Court's mandate when it reweighed the evidence and considered only the "properly admitted" evidence; and (3) the Court of Appeals' published opinion erroneously required the trial court to find that the parents had acted inconsistently with their constitutionally protected rights to order no visitation.

4. Petitioners amended the petition for discretionary review to clarify that they are seeking review only as it relates to Margaret.

II. Standard of Review

> [Appellate courts] review the trial court's dispositional findings of fact to determine whether they are supported by competent evidence. The trial court's assessment of a juvenile's best interests at the dispositional stage is reviewed solely for abuse of discretion. An abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.

In re T.A.M., 378 N.C. 64, 76 (2021) (extraneity excluded); *accord In re A.J.L.H.*, 384 N.C. at 57.

We have repeatedly used this standard of review when reviewing a trial court's disposition order, as has the Court of Appeals. *In re M.S.E.*, 378 N.C. 40, 60 (2021); *In re K.N.K.*, 374 N.C. 50, 57 (2020); *In re A.J.A-D.*, No. COA19-270, slip op. at 11 (Feb. 4, 2020) (unpublished) (Dietz, J., with Stroud and Hampson, J.J.) ("However, when making its best interests determination, the trial court need only make dispositional findings that are 'supported by competent evidence.' By employing the heightened 'clear, cogent and convincing standard of proof in making its dispositional findings, the trial court misapplied the relevant evidentiary standard.' " (extraneity excluded)).

However, in the present case, the Court of Appeals deviated from this standard. The Court of Appeals stated instead that, "Dispositional findings must be based upon properly admitted and clear cogent and convincing evidence." *In re A.J.L.H.*, 289 N.C. App. at 650 (citing *In re B.C.T.*, 265 N.C. App. 176, 185 (2019)). Not only is this the incorrect standard of review, but *In re B.C.T.*—the very case that the Court of Appeals cited for support—does not support the Court of Appeals' assertion. Moreover, N.C.G.S. § 7B-901(a) states, "The [trial] court may consider any evidence, including hearsay evidence . . . including testimony or evidence from any person who is not a party, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition." N.C.G.S § 7B-901(a) (2023). Accordingly, the Court of Appeals erred.

III. Analysis

Petitioners advanced several arguments as to why the Court of Appeals erred: (1) the Court of Appeals utilized the wrong standard of review when it analyzed the trial court's evidentiary rulings; (2) the

Court of Appeals erroneously required the trial court to find that the parents acted inconsistently with their constitutionally protected status to order no visitation; (3) the Court of Appeals erroneously abrogated N.C.G.S. § 7B-905.1 and created a novel constitutional rights analysis; (4) the Court of Appeals erroneously determined that there was not sufficient evidence to support the trial court's findings of fact; and (5) the Court of Appeals erred by holding that errors in findings of fact relating to other, non-appealing parties requires reversal of the trial court. We agree with all of petitioners' arguments. Accordingly, we reverse the Court of Appeals and remand this case directly to the trial court.

The Court of Appeals held, "The trial court failed to make specific determinations for each parent regarding unfitness or conduct inconsistent with their parental rights and, only after then, to determine whether parental visitation was in the best interests of each of their children." *In re A.J.L.H.*, 289 N.C. App. at 652. In doing so, the Court of Appeals established a novel two-step analysis for visitation. First, the Court of Appeals would require the trial court to enter findings of fact on each parent's fitness to parent or "conduct inconsistent with their parental rights." *Id.* Only after making this determination could a trial court analyze a child's best interests, according to the Court of Appeals' opinion.

Yet, the Juvenile Code provides: "An order that removes custody of a juvenile from a parent, guardian, or custodian or that continues the juvenile's placement outside the home shall provide for visitation that is in the *best interests of the juvenile* consistent with the juvenile's health and safety, including *no visitation*." N.C.G.S. § 7B-905.1(a) (2023) (emphasis added). Notably absent from the statute is any requirement that the trial court make findings on a parent's fitness to parent. It appears that the Court of Appeals drew this requirement from how this Court reviews a parent's constitutionally protected status as a parent. *See Price v. Howard*, 346 N.C. 68, 79 (1997). This was error.

In our first opinion in this case, we specifically stated, "Here, respondents did not assert a constitutional challenge on this basis in the trial court and did not raise the issue in their appellate briefing at the Court of Appeals. Accordingly, on remand, the Court of Appeals should not address this constitutional issue." *In re A.J.L.H.*, 384 N.C. at 57, n.2. Not only did we direct the Court of Appeals to avoid this issue in our last opinion, it was not preserved at the trial court. In other words—the Court of Appeals erred when it sua sponte raised a constitutional issue. It merely compounded its error when it continued to discuss this non-preserved issue in the face of a direct statement from this Court directing the Court of Appeals to "not address [the] constitutional issue." *Id.*

Not only did the Court of Appeals choose to address the non-preserved issue in spite of our opinion, it did so without any briefing or argument from the parties.

The Court of Appeals should have focused its review on whether the trial court abused its discretion instead of performing a pseudo-constitutional analysis on the respondents' parental rights. As we already stated in our previous opinion:

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

In re A.J.L.H., 384 N.C. at 57.

We now turn to the trial court's dispositional order and apply the correct standard of review.[5] The trial court's order contained several unchallenged findings of fact demonstrating that it did not abuse its discretion in denying visitation. Unchallenged findings of fact are binding on appeal. *In re J.M.*, 384 N.C. 584, 591 (2023). Furthermore, a trial court's "decisions as to the weight and credibility of the evidence, and the inferences drawn from the evidence, are not subject to appellate review." *Id.* (extraneity excluded).

The following unchallenged facts were found by the trial court. Respondent-mother "has extensive Child Protective Services (CPS) history" involving inappropriate discipline of Margaret and an older sibling. In May of 2017, respondent admitted using corporal punishment

5. We have already affirmed the trial court's adjudication order. *In re A.J.L.H.*, 384 N.C. 45, 57 (2023).

that left "marks" on Margaret's arms. In May of 2010, Guilford County CPS substantiated a report of abuse by respondent-mother's boyfriend on then four-month-old Margaret, who "presented to the Emergency Room with bruises on her forehead, both cheeks, and a scratch under her chin." In April of 2013, respondent-mother's boyfriend took Margaret to a babysitter and respondent-mother did not pick her up for several days. Respondent-mother failed to admit or understand that her discipline of Margaret was inappropriate and subjected Margaret to trauma. Respondent-mother defended the use of such punishment.

Furthermore, Margaret wrote a letter to the trial court saying:

> I don't want to visit my mom because I don't want to be hurt. I like it with grandma . . . because she treat[s] me great. I like where my sisters are. It wasn't only my mom who whooped me it was [Anna's father] to[o]. [Anna's father] gave me scabs when he was whooping me. Only once my mom tried to choke me.

Although this letter was challenged on hearsay grounds, N.C.G.S § 7B-901(a) specifically allows hearsay evidence to be considered in disposition hearings.

As explained above,

> The assessment of the juvenile's best interests concerning visitation is left to the sound discretion of the trial court and "appellate courts review the trial court's assessment of a juvenile's best interests solely for an abuse of discretion." *In re K.N.L.P.*, 380 N.C. 756, 759 (2022). "Under this standard, we defer to the trial court's decision unless it is manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Id.*

In re A.J.L.H., 384 N.C. at 57. Upon reviewing the facts of this case, it cannot be said that the trial court's order was "manifestly unsupported by reason" or was "so arbitrary that it could not have been the result of a reasoned decision." *Id.*

The Court of Appeals also held that, the "trial court failed to find and make conclusions of law addressing the factors applicable to visitation for *each child with each parent*." *In re A.J.L.H.*, 289 N.C. App. at 651. Further, "[t]he trial court made no findings or conclusions regarding why only one parent, Chris's biological father, was entitled to supervised visitation with his child, but the other three biological parents were

denied any and all visitation, placement with children's family or relatives, or presence and participation in their medical care." *Id.* Notably, Chris's biological father and Margaret's biological father did not appeal the trial court's decision. As DHHS aptly notes, "[t]here is no precedent which allows the Court of Appeals to assert an appeal on behalf of a non-appealing party." Moreover, even if they had appealed, no statutory provision or caselaw requires a trial court make findings differentiating between the parties.

IV. Conclusion

The first time this case was before this Court, we remanded to the Court of Appeals. On remand, the Court of Appeals made numerous and significant errors. First, the Court of Appeals erred when it stated that the dispositional findings must be based upon properly admitted and clear, cogent, and convincing evidence. Second, the Court of Appeals erred when it stated it can only review "properly admitted evidence" in disposition hearings. Third, the Court of Appeals erred when it required the trial court to make specific findings for each parent regarding unfitness or conduct inconsistent with their parental rights. Fourth, the Court of Appeals erred when it addressed, sua sponte, the constitutional rights of respondents. Fifth, the Court of Appeals erred when it determined there was insufficient evidence to support the trial court's order denying visitation. Sixth, finally, the Court of Appeals erred when it held the trial court was required to differentiate between respondents when no such requirement exists by statute or caselaw. Accordingly, we reverse the Court of Appeals' opinion.

REVERSED.

COOPER v. BERGER

[386 N.C. 315 (2024)]

ROY A. COOPER, III, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA

v.

PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; THE STATE OF NORTH CAROLINA; NORTH CAROLINA ENVIRONMENTAL MANAGEMENT COMMISSION; AND JOHN (JD) SOLOMON, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE NORTH CAROLINA ENVIRONMENTAL MANAGEMENT COMMISSION; CHRISTOPHER M. DUGGAN, IN HIS OFFICIAL CAPACITY AS VICE-CHAIR OF THE NORTH CAROLINA ENVIRONMENTAL MANAGEMENT COMMISSION; AND YVONNE C. BAILEY, TIMOTHY M. BAUMGARTNER, CHARLES S. CARTER, MARION DEERHAKE, MICHAEL S. ELLISON, STEVEN P. KEEN, H. KIM LYERLY, JACQUELINE M. GIBSON, JOSEPH REARDON, ROBIN SMITH, KEVIN L. TWEEDY, ELIZABETH J. WEESE, AND BILL YARBOROUGH, IN THEIR OFFICIAL CAPACITIES AS COMMISSIONERS OF THE NORTH CAROLINA ENVIRONMENTAL MANAGEMENT COMMISSION

From N.C. Court of Appeals
24-440

From Wake
23CV28505-910

No. 131P24

ORDER

Plaintiff moved the undersigned and this Court to consider whether recusal is required in a motion filed 11 June 2024. A response was filed 18 June 2024. Pursuant to an administrative order entered by this Court on 23 December 2021, the undersigned refers the motion to the Court for resolution.

This the 24th day of June 2024.

/s/ Berger, J.

Philip E. Berger, Jr.
Associate Justice

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 24th day of June 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

COOPER v. BERGER

[386 N.C. 317 (2024)]

ROY A. COOPER, III, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA

v.

PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; AND THE STATE OF NORTH CAROLINA

From N.C. Court of Appeals
24-406

From Wake
23CV29308-910

No. 132P24

ORDER

Plaintiff moved the undersigned and this Court to consider whether recusal is required in a motion filed 11 June 2024. A response was filed 18 June 2024. Pursuant to an administrative order entered by this Court on 23 December 2021, the undersigned refers the motion to the Court for resolution.

This the 24th day of June 2024.

/s/ Berger, J.

Philip E. Berger, Jr.
Associate Justice

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 24th day of June 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

IN THE MATTER OF CUSTODIAL LAW ENFORCEMENT AGENCY RECORDINGS SOUGHT BY:

APG-EAST LLC D/B/A THE DAILY ADVANCE; SCRIPPS BROADCAST HOLDINGS, LLC D/B/A WTKR-TV AND WGNT-TV; CAPITAL BROADCASTING COMPANY, INC. D/B/A WRAL-TV; THE MCCLATCHY COMPANY, LLC D/B/A THE NEWS AND OBSERVER AND THE CHARLOTTE OBSERVER; CAROLINA PUBLIC PRESS, INC. D/B/A CAROLINA PUBLIC PRESS; GREY MEDIA GROUP, INC. D/B/A WBTV, WECT AND WITN; WUNC, LLC D/B/A WUNC-FM; DTH MEDIA CO. D/B/A THE DAILY TARHEEL; NEXSTAR MEDIA, INC. D/B/A WAVY-TV AND WVBT-TV; CABLE NEWS NETWORK, INC. D/B/A CNN; WTVD TELEVISION, LLC D/B/A WTVD-ABC11; THE ASSOCIATED PRESS; WP COMPANY, LLC D/B/A THE WASHINGTON POST; CHARTER COMMUNICATIONS D/B/A SPECTRUM NEWS; CHATHAM MEDIA GROUP, LLC D/B/A CHATHAM NEWS + RECORD; AND GANNETT CO., INC. D/B/A WILMINGTON STAR NEWS AND USA TODAY, THE NEW YORK TIMES CO. D/B/A THE NEW YORK TIMES, MEDIA CONVERGENCE GROUP, D/B/A NEWSY COURT TV MEDIA, LLC D/B/A COURT TV

From N.C. Court of Appeals
22-446

From Pasquotank
21CVS262

No. 81P23

ORDER

The petitioners' petition for discretionary review is allowed for the limited purpose of remanding this case to the Court of Appeals for reconsideration in light of this Court's decision in *In re The McClatchy Co.*, No. 29A23 (N.C. May 23, 2024).

By order of the Court in Conference, this the 26th day of June 2024.

/s/ Riggs, J.
For the Court

Allen, J., recused.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 28th day of June 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

IN RE CUSTODIAL L. ENF'T AGENCY RECORDING

[386 N.C. 320 (2024)]

IN THE MATTER OF:

CUSTODIAL LAW ENFORCEMENT AGENCY RECORDING SOUGHT BY:

CAPITOL BROADCASTING COMPANY, INCORPORATED, D/B/A WRAL-TV; NEXSTAR BROADCASTING, INC., D/B/A WNCN-TV; WTVD TELEVISION LLC, D/B/A WTVD-TV; THE MCCLATCHY COMPANY D/B/A THE NEWS & OBSERVER; AND GANNETT NC, D/B/A WILMINGTON STARNEWS

From N.C. Court of Appeals
22-399

From Orange
21CVS1454

No. 126P23

ORDER

The petitioners' petition for discretionary review is allowed for the limited purpose of remanding this case to the Court of Appeals for reconsideration in light of this Court's decision in *In re The McClatchy Co.*, No. 29A23 (N.C. May 23, 2024).

By order of the Court in Conference, this the 26th day of June 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 28th day of June 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

JONES v. J. KIM HATCHER INS. AGENCIES INC.

[386 N.C. 321 (2024)]

DANIEL JONES

v.

J. KIM HATCHER INSURANCE AGENCIES INC.; HXS HOLDINGS, INC.; GEOVERA SPECIALTY INSURANCE COMPANY; AND GEOVERA ADVANTAGE INSURANCE SERVICES, INC.

From N.C. Court of Appeals
22-1030

From New Hanover
20CVS2374

No. 264A23

ORDER

Upon consideration of the petition filed on the 10th of October 2023 by the plaintiff in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to N.C.G.S. § 7A-31, the petition is allowed as to Issue III. The petition is denied as to Issues I and II.

By order of the Court in Conference, this the 26th day of June 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 28th day of June 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

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

From N.C. Court of Appeals
21-558

From Wake
20CVS5150

No. 260PA22

ORDER

The parties are directed to file supplemental briefs within thirty days addressing the following issues:

1. Whether plaintiffs were required to exhaust administrative remedies in light of this Court's decision in No. 55A23, *Askew v. City of Kinston*, __ N.C. __ (June 28, 2024).

2. 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.

By order of the Court in Conference, this the 26th day of June 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 28th day of June 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

SOUTHLAND NATIONAL INSURANCE CORPORATION IN REHABILITATION, BANKERS LIFE INSURANCE COMPANY IN REHABILITATION, COLORADO BANKERS LIFE INSURANCE COMPANY IN REHABILITATION, AND SOUTHLAND NATIONAL REINSURANCE CORPORATION IN REHABILITATION

v.

GREG E. LINDBERG, GLOBAL GROWTH HOLDINGS, INC. F/K/A ACADEMY ASSOCIATION, INC., EDWARDS MILL ASSET MANAGEMENT, LLC, NEW ENGLAND CAPITAL, LLC, AND PRIVATE BANKERS LIFE AND ANNUITY CO., LTD.

From N.C. Court of Appeals
22-1049

From Wake
19CVS13093

No. 173PA23

ORDER

This matter is before this Court on plaintiffs' and defendants' joint motion for a limited remand to Superior Court, Wake County. The parties request that this Court issue a limited remand to allow the trial court to implement the specific-performance remedy as set forth in the trial court's amended judgment on 26 May 2022. This matter is remanded to the trial court for the limited purpose of implementing the specific performance of the contract between the parties. Save and except the limited remand herein, the prior orders of this Court remain in full force and effect.

By order of the Court in Conference, this the 26th day of June 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 28th day of June 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

STATE v. CORNWELL

[386 N.C. 324 (2024)]

STATE OF NORTH CAROLINA	From N.C. Court of Appeals 23-36
v.	
JARON MONTE CORNWELL	From Catawba 18CRS1848-49 18CRS52417

No. 96P24

ORDER

The State's petition for discretionary review is allowed for the limited purpose of remanding this case to the Court of Appeals for reconsideration in light of this Court's decision in *State v. Singleton*, No. 318PA22 (N.C. May 23, 2024).

By order of the Court in Conference, this the 26th day of June 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 28th day of June 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

STATE v. HAMILTON

[386 N.C. 325 (2024)]

STATE OF NORTH CAROLINA	From N.C. Court of Appeals 22-847
v.	
KAJUAN DYSHAWN HAMILTON	From Davidson County 17CRS51616

No. 331P23

ORDER

The State's petition for discretionary review is allowed for the limited purpose of remanding this matter to the Court of Appeals to reconsider the instructional issue in light of this Court's decision in *State v. Reber*, 900 S.E.2d 781 (N.C. 2024).

By order of the Court in Conference, this the 26th day of June 2024.

/s/ Allen, J.
For the Court

Earls, J., and Riggs, J., dissent from this order.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 28th day of June 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

STATE v. MILLER

[386 N.C. 326 (2024)]

STATE OF NORTH CAROLINA	From N.C. Court of Appeals 22-689
v.	
MARK ALAN MILLER	From Henderson 18CRS54778 19CRS367

No. 81A24

ORDER

Defendant's petition for discretionary review as to additional issues is allowed in part and denied in part. The Court will review the following issues:

1. Did the Court of Appeals err affirming the trial court's denial of Miller's motion to dismiss the charge of trafficking opium by possession of hydrocodone, on the grounds hydrocodone is an opioid and opioids are included in N.C.G.S. § 90-95(h)(4)?

2. Did the Court of Appeals err by finding the trial court's instruction to the jury that opioids are included in N.C.G.S. § 90-95(h)(4) was a correct statement of the law?

By order of the Court in Conference, this the 26th day of June 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 28th day of June 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

STATE OF NORTH CAROLINA	From N.C. Court of Appeals P19-123
v.	
JUSTIN ALEXANDER VANDERGRIFF	From Wake 12CR735488

No. 74P19

ORDER

The following order has been entered on the motion to seal filed on the 6th of March 2024 by Defendant:

Motion Denied by order of the Court in conference, this the 26th of June 2024.

s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 28th day of June 2024.

Grant E. Buckner
Clerk of the Supreme Court

s/M.C.Hackney
Assistant Clerk

Justice DIETZ concurring.

I agree with my dissenting colleague that expunging criminal records serves laudable goals. *See post* (Earls, J., dissenting). In fact, I agree with most of what is in the dissent. I write to address what is *not* in it.

The dissent portrays this motion to seal as a straightforward matter that needs no briefing, no argument, no adversarial process. All we need to do is seal the requested records and move on. But spend a moment contemplating this motion and what emerges are deeply complicated and novel legal questions with strong arguments on both sides. This is anything but simple.

Take, for example, the dissent's insistence that this Court's authority to seal the records is obvious. That authority, according to the dissent,

comes from our constitutional power to create rules of procedure for the appellate courts. *See* N.C. Const., art. IV, § 13(2).

But is it that simple? What if there were no laws governing expunction? Could this Court, on its own initiative, seal the records of certain criminal defendants solely because we believed they were worthy of expunction? I don't think so. Choosing who is entitled to have their records expunged, and choosing which records should be expunged, are policy questions for lawmakers, not legal questions for judges.

That is where things get tricky, because there is ambiguity in what our lawmakers intended. The statutes described by the dissent only reference records of trial courts and state agencies. *See* N.C.G.S. §§ 15A-145 to 15A-153 (2023). This Court is neither of those.

Moreover, our decisions are not the same as those of trial courts. Our opinions are more than mere court records; they are part of the law, serving to hone past decisions or to fill the gaps in other positive law. *See* Benjamin N. Cardozo, *The Nature of the Judicial Process* (1921). We cannot seal that away from the public. We could no more hide our precedential decisions than we could mask the contents of the General Statutes.

Even sealing the remainder of an appellate record (everything but the opinion) creates problems. Our opinions frequently reference what the parties did or did not argue in their briefing, and almost always describe facts from the appellate record. As a result, future litigants use the appellate record of a decision to help interpret the decision's meaning and to explain why that decision is the same as, or different from, their own case. We do the same. *See*, *e.g.*, *State v. Richardson*, 385 N.C. 101, 200 (2023) (examining record in previous decision to determine if an issue not mentioned in the decision had been raised in the case).

Of course, not every case before this Court yields a written opinion—here, for example, we dismissed the defendant's petition in a boilerplate order. But that does not mean we should reflexively seal the record here. Why would the General Assembly intend for us to expunge *some* defendants' appellate records but not others, based solely on whether this Court happened to issue an opinion? That is something far beyond any defendant's control. Nothing in the language of the expunction statutes supports that sort of unjust, bifurcated approach.

Still, though, the dissent makes fair points. If this Court's records remain public, sealing the corresponding trial court records accomplishes little. After all, at present, this Court's decisions and records are

more readily available through our online search functionality than those of the trial courts. But, again to be fair, there is limited ability to scrape our database for information. It is designed for individual searches, not mass data collection.

Is there a solution to this dilemma? Perhaps. In juvenile cases that come to our appellate courts, we have a procedure that requires litigants to replace party names with pseudonyms. *See* N.C. R. App. P. 42(b). We could create a similar procedure for litigants whose records are expunged, permitting them to submit filings that replace identifying information with pseudonyms or redactions. Other states use this approach. *See*, *e.g.*, Ind. Code § 35-38-9-1(f)(4). Notably, though, these other states enacted the process by *statute*—meaning policymakers, not judges, chose it.

In sum, this is not a straightforward matter. Without further legislative guidance, it remains unclear whether this Court's records are covered by the new expunction laws and, if so, which of our records the General Assembly intended to be expunged. The defendant did not address these statutory interpretation issues in the motion. There is no response from an opposing party. The limited filings before us simply do not provide a vehicle to resolve the difficult legal questions we face. Thus, I join the majority's order. When these questions are answered, if the defendant in this case is entitled to have his appellate record expunged, I see nothing in the Court's order today preventing him from applying for that relief.

Justices BERGER and ALLEN join in this concurring opinion.

Justice EARLS dissenting.

Mr. Vandergriff moves to seal appellate records linked to an expunged misdemeanor conviction. Beyond question, this Court can grant that relief—we are constitutionally vested with "exclusive authority to make rules of procedure and practice for the Appellate Division." N.C. Const., art. IV, § 13(2). That rule-making power reaches the sealing of appellate records. *See* N.C. R. App. P. 42. Today, however, the Court denies Mr. Vandergriff's modest request—not for lack of power, but for lack of will. That is regrettable.

Recent statutory changes allow North Carolinians to expunge certain convictions from their records. *See generally* N.C.G.S. §§ 15A-145 to -173 (2023). The purpose of those provisions is laudable. Recognizing the longstanding barriers that often attach to a criminal conviction, an

expungement "legally eliminates the record" of a past offense, thus "offer[ing] the possibility of sweeping aside a wide range of legal and socioeconomic consequences at once." *See* J.J. Prescott and Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133(8) Harv. L. Rev. 2460, 2463 n.10 (2020); *see also id.* at 2468 (canvassing the sprawling harms of a criminal record, such as "exclusion from employment, obstacles to social integration, and a vast array of collateral legal consequences that often last a lifetime"). But by declining to seal the appellate records linked to an already-expunged conviction, this Court undermines the legislature's efforts to give people with criminal records a second chance. As logic dictates and scholarship confirms, an expunction has far less practical value if vestiges of the offense remain enshrined in publicly accessible appellate websites and databases. *See id.* at 2470.

In my view, when a party asks to seal appellate records for an expunged conviction, granting that relief is within this Court's constitutional authority and faithful to the purpose of expunctions. It ensures that North Carolinians have the second chance our legislature promised them. Because I would thus allow Mr. Vandergriff's request, I dissent from the denial of his motion.

Justice RIGGS joins in this dissenting opinion.

STATE v. VANDERGRIFF

[386 N.C. 331 (2024)]

STATE OF NORTH CAROLINA	From N.C. Court of Appeals P19-112
v.	
JUSTIN ALEXANDER VANDERGRIFF	From Wake 15CR721399

No. 97P19

ORDER

The following order has been entered on the motion to seal filed on the 6th of March 2024 by Defendant:

Motion Denied by order of the Court in conference, this the 26th of June 2024.

s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 28th day of June 2024.

Grant E. Buckner
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

Justice DIETZ concurring.

I agree with my dissenting colleague that expunging criminal records serves laudable goals. *See post* (Earls, J., dissenting). In fact, I agree with most of what is in the dissent. I write to address what is *not* in it.

The dissent portrays this motion to seal as a straightforward matter that needs no briefing, no argument, no adversarial process. All we need to do is seal the requested records and move on. But spend a moment contemplating this motion and what emerges are deeply complicated and novel legal questions with strong arguments on both sides. This is anything but simple.

Take, for example, the dissent's insistence that this Court's authority to seal the records is obvious. That authority, according to the dissent,

comes from our constitutional power to create rules of procedure for the appellate courts. *See* N.C. Const., art. IV, § 13(2).

But is it that simple? What if there were no laws governing expunction? Could this Court, on its own initiative, seal the records of certain criminal defendants solely because we believed they were worthy of expunction? I don't think so. Choosing who is entitled to have their records expunged, and choosing which records should be expunged, are policy questions for lawmakers, not legal questions for judges.

That is where things get tricky, because there is ambiguity in what our lawmakers intended. The statutes described by the dissent only reference records of trial courts and state agencies. *See* N.C.G.S. §§ 15A-145 to 15A-153 (2023). This Court is neither of those.

Moreover, our decisions are not the same as those of trial courts. Our opinions are more than mere court records; they are part of the law, serving to hone past decisions or to fill the gaps in other positive law. *See* Benjamin N. Cardozo, *The Nature of the Judicial Process* (1921). We cannot seal that away from the public. We could no more hide our precedential decisions than we could mask the contents of the General Statutes.

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Of course, not every case before this Court yields a written opinion—here, for example, we dismissed the defendant's petition in a boilerplate order. But that does not mean we should reflexively seal the record here. Why would the General Assembly intend for us to expunge *some* defendants' appellate records but not others, based solely on whether this Court happened to issue an opinion? That is something far beyond any defendant's control. Nothing in the language of the expunction statutes supports that sort of unjust, bifurcated approach.

Still, though, the dissent makes fair points. If this Court's records remain public, sealing the corresponding trial court records accomplishes little. After all, at present, this Court's decisions and records

are more readily available through our online search functionality than those of the trial courts. But, again to be fair, there is limited ability to scrape our database for information. It is designed for individual searches, not mass data collection.

Is there a solution to this dilemma? Perhaps. In juvenile cases that come to our appellate courts, we have a procedure that requires litigants to replace party names with pseudonyms. *See* N.C. R. App. P. 42(b). We could create a similar procedure for litigants whose records are expunged, permitting them to submit filings that replace identifying information with pseudonyms or redactions. Other states use this approach. *See*, *e.g.*, Ind. Code § 35-38-9-1(f)(4). Notably, though, these other states enacted the process by *statute*—meaning policymakers, not judges, chose it.

In sum, this is not a straightforward matter. Without further legislative guidance, it remains unclear whether this Court's records are covered by the new expunction laws and, if so, which of our records the General Assembly intended to be expunged. The defendant did not address these statutory interpretation issues in the motion. There is no response from an opposing party. The limited filings before us simply do not provide a vehicle to resolve the difficult legal questions we face. Thus, I join the majority's order. When these questions are answered, if the defendant in this case is entitled to have his appellate record expunged, I see nothing in the Court's order today preventing him from applying for that relief.

Justices BERGER and ALLEN join in this concurring opinion.

Justice EARLS dissenting.

Mr. Vandergriff moves to seal appellate records linked to an expunged misdemeanor conviction. Beyond question, this Court can grant that relief—we are constitutionally vested with "exclusive authority to make rules of procedure and practice for the Appellate Division." N.C. Const., art. IV, § 13(2). That rule-making power reaches the sealing of appellate records. *See* N.C. R. App. P. 42. Today, however, the Court denies Mr. Vandergriff's modest request—not for lack of power, but for lack of will. That is regrettable.

Recent statutory changes allow North Carolinians to expunge certain convictions from their records. *See generally* N.C.G.S. §§ 15A-145 to -173 (2023). The purpose of those provisions is laudable. Recognizing the longstanding barriers that often attach to a criminal conviction,

an expungement "legally eliminates the record" of a past offense, thus "offer[ing] the possibility of sweeping aside a wide range of legal and socioeconomic consequences at once." *See* J.J. Prescott and Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133(8) Harv. L. Rev. 2460, 2463 n.10 (2020); *see also id.* at 2468 (canvassing the sprawling harms of a criminal record, such as "exclusion from employment, obstacles to social integration, and a vast array of collateral legal consequences that often last a lifetime"). But by declining to seal the appellate records linked to an already-expunged conviction, this Court undermines the legislature's efforts to give people with criminal records a second chance. As logic dictates and scholarship confirms, an expunction has far less practical value if vestiges of the offense remain enshrined in publicly accessible appellate websites and databases. *See id.* at 2470.

In my view, when a party asks to seal appellate records for an expunged conviction, granting that relief is within this Court's constitutional authority and faithful to the purpose of expunctions. It ensures that North Carolinians have the second chance our legislature promised them. Because I would thus allow Mr. Vandergriff's request, I dissent from the denial of his motion.

Justice RIGGS joins in this dissenting opinion.

STATE OF NORTH CAROLINA	From N.C. Court of Appeals P19-121
v.	
JUSTIN ALEXANDER VANDERGRIFF	From Wake 14CR730526

No. 128P19

ORDER

The following order has been entered on the motion to seal filed on the 6th of March 2024 by Defendant:

Motion Denied by order of the Court in conference, this the 26th of June 2024.

s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 28th day of June 2024.

Grant E. Buckner
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

Justice DIETZ concurring.

I agree with my dissenting colleague that expunging criminal records serves laudable goals. *See post* (Earls, J., dissenting). In fact, I agree with most of what is in the dissent. I write to address what is *not* in it.

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Of course, not every case before this Court yields a written opinion—here, for example, we dismissed the defendant's petition in a boilerplate order. But that does not mean we should reflexively seal the record here. Why would the General Assembly intend for us to expunge *some* defendants' appellate records but not others, based solely on whether this Court happened to issue an opinion? That is something far beyond any defendant's control. Nothing in the language of the expunction statutes supports that sort of unjust, bifurcated approach.

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In sum, this is not a straightforward matter. Without further legislative guidance, it remains unclear whether this Court's records are covered by the new expunction laws and, if so, which of our records the General Assembly intended to be expunged. The defendant did not address these statutory interpretation issues in the motion. There is no response from an opposing party. The limited filings before us simply do not provide a vehicle to resolve the difficult legal questions we face. Thus, I join the majority's order. When these questions are answered, if the defendant in this case is entitled to have his appellate record expunged, I see nothing in the Court's order today preventing him from applying for that relief.

Justices BERGER and ALLEN join in this concurring opinion.

Justice EARLS dissenting.

Mr. Vandergriff moves to seal appellate records linked to an expunged misdemeanor conviction. Beyond question, this Court can grant that relief—we are constitutionally vested with "exclusive authority to make rules of procedure and practice for the Appellate Division." N.C. Const., art. IV, § 13(2). That rule-making power reaches the sealing of appellate records. *See* N.C. R. App. P. 42. Today, however, the Court denies Mr. Vandergriff's modest request—not for lack of power, but for lack of will. That is regrettable.

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In my view, when a party asks to seal appellate records for an expunged conviction, granting that relief is within this Court's constitutional authority and faithful to the purpose of expunctions. It ensures that North Carolinians have the second chance our legislature promised them. Because I would thus allow Mr. Vandergriff's request, I dissent from the denial of his motion.

Justice RIGGS joins in this dissenting opinion.

UNIVERSAL LIFE INSURANCE COMPANY	From N.C. Court of Appeals 23-274
v.	From Durham 22CVS2507
GREG E. LINDBERG	

No. 344PA23

ORDER

This matter is before the Court on plaintiff's motion for leave to withdraw its pending appeal. Defendant does not oppose the motion.

Plaintiff's motion for leave to withdraw its pending appeal is allowed. The Court of Appeals' decision is left undisturbed but stands without precedential value.

By order of the Court in Conference, this the 26th day of June 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 28th day of June 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

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

28 JUNE 2024

2P24	State v. Steven Forrest Wade	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-492)	Denied
5P24	State v. C.K.D.	1. State's Motion for Temporary Stay (COA23-204) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/08/2024** Dissolved 2. Denied 3. Denied
6P23	Jose Cabrera and Jose Cabrera, Jr. v. Harvest Street Holdings, Inc., Shop & Go, LLC, Walter Cabrera, Luciano Cabrera, and Gregorio Paz	1. Plts' Petition for Writ of Certiorari to Review Decision of COA (COA21-328) 2. Plts' Petition for Writ of Certiorari to Review Order of Superior Court, Durham County 3. Plts' Motion for Withdrawal of Petition for Writ of Certiorari to Review Decision of the COA and Petition for Writ of Certiorari to Review Order of the Superior Court	1. --- 2. --- 3. Allowed
9P24	State v. Donte Derell Shine	Def's PDR Under N.C.G.S. § 7A-31 (COA23-106)	Denied
19P24	Joel Robertson v. Zaxby's of Knightdale	1. Plt's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA23-513) 2. Plt's Pro Se PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Dismiss Appeal 4. Def's Motion to Strike New Brief 5. Plt's Pro Se Motion for Appropriate Relief and Sanctions 6. Plt's Pro Se Motion for Sanctions	1. --- 2. Denied 3. Allowed 4. Dismissed as moot 5. Dismissed 6. Dismissed
22P24	State v. Bryan Aaron Berryman	Def's PDR Under N.C.G.S. § 7A-31 (COA23-225)	Denied
23A24	State v. Kendrick Keyanti Gregory	1. Def's Notice of Appeal Based Upon a Dissent (COA22-1034) 2. Def's PDR as to Additional Issues	1. 2. Denied
24P24	State v. Desmond Jakeem Bethea	Def's PDR Under N.C.G.S. § 7A-31 (COA22-932)	Denied
25P24	State v. Luis Fernando Saldana	1. Def's PDR Under N.C.G.S. § 7A-31 (COA23-51) 2. Def's Petition for Writ of Certiorari to Review Decision of the COA	1. Dismissed 2. Denied

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

28 JUNE 2024

42P24	State v. Sha'le Monique Glenn	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-201)	Denied
43P18-4	Jonathan H. Bynum v. Lincoln County Department of Social Services	1. Plt's Pro Se Motion to Proceed as a Veteran 2. Plt's Pro Se Motion for Cause of Action	1. Dismissed 2. Dismissed
47P24-2	In the Matter of M.M., E.M., J.M., S.M., C.M.	Respondent-Father's Pro Se Petition for Writ of Certiorari	Dismissed
52P24	State v. Thomas D. Alexander	1. Def's Pro Se Motion for Notice of Appeal (COAP23-750) 2. Def's Pro Se Motion for PDR 3. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA 4. Def's Pro Se Motion for Appointment of Appellant Counsel	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed as moot
56P24	State v. Eric Ramond Chambers	1. State's Motion for Temporary Stay (COA22-1063) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **03/07/2024** 2. Allowed 3. Allowed
57P24	State v. Chad Coffey	1. State's Motion for Temporary Stay (COA22-883) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Notice of Appeal Based Upon a Constitutional Question 5. Def's PDR Under N.C.G.S. § 7A-31 6. State's Motion to Dismiss Appeal	1. Allowed **03/08/2024** Dissolved 2. Denied 3. Denied 4. --- 5. Denied 6. Allowed
60P24	State v. Phillip Daniel Hills	1. Def's Petition for Writ of Certiorari to Review Order of the COA (COA22-1001) 2. Def's Motion to Supplement Petition for Writ of Certiorari	1. Denied 2. Allowed
62P24	State v. Lorenzo Marcel Ingram	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-207)	Denied

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

28 JUNE 2024

69P24	True Homes, LLC and D.R. Horton, Inc., on behalf of themselves and all others similarly situated v. City of Greensboro	Def's PDR Under N.C.G.S. § 7A-31 (COA23-48)	Denied **Berger, J., recused**
74P19	State v. Justin Alexander Vandergriff	Def's Motion to Seal (COAP19-123)	Denied
74P24	State v. Jamario Clinton	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-463)	Denied
76P24	State v. Christopher Dale Tate	Def's PDR Under N.C.G.S. § 7A-31 (COA23-11)	Denied
80P23-2	State v. Jim Robinson, III	1. Def's Pro Se Motion for Appropriate Relief 2. Def's Pro Se Motion to Proceed In Forma Pauperis	1. Dismissed 2. Allowed
81P23	In re Custodial Law Enforcement Agency Recordings	1. Petitioners' PDR Under N.C.G.S. § 7A-31 (COA22-446) 2. Petitioners' Motion to Amend PDR	1. Special Order 2. Dismissed as moot **Allen, J., recused**
81A24	State v. Mark Alan Miller	1. Def's Notice of Appeal Based Upon a Dissent (COA22-689) 2. Def's PDR as to Additional Issues	1. 2. Special Order
83P24	In the Matter of the Foreclosure of a Deed of Trust Executed by Raymond Carpenter and Rachel Carpenter in the Original Amount of $395,100.00 Dated March 21, 2005 Recorded in the Book 11298 at Page 02021 in the Wake County Registry, North Carolina, Substitute Trustee Services, Inc., Substitute Trustee	1. Respondent's Pro Se Motion for Petition for Discretionary Review 2. Respondent's Pro Se Motion to Withdraw	1. --- 2. Allowed

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

28 JUNE 2024

91P24	Jordan N. Mitchell v. Sheriff Danny Rogers and Deputy Tim Patterson	Plt's Pro Se Motion for Notice of Appeal Upon Discretionary Review	Denied
92P24	Solomon Nimrod Butler v. North Carolina Department of Justice	1. Plt's Pro Se Petition for Writ of Mandamus 2. Plt's Pro Se Petition for Writ of Certiorari	1. Dismissed 2. Dismissed
95P24	State v. Monte Lovette Hudson	Def's PDR Under N.C.G.S. § 7A-31 (COA23-336)	Denied
96P24	State v. Jaron Monte Cornwell	1. State's Motion for Temporary Stay (COA23-36) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/22/2024** Dissolved 2. Denied 3. Special Order
97P19	State v. Justin Alexander Vandergriff	Def's Motion to Seal (COAP19-112)	Denied
103P17-4	State v. Earl Wayne Flowers	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **05/23/2024**
105P24	State v. Neeadre Sonay Legen Chandler	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA23-634) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
106P24	State v. Christopher D. Cromartie, Jr.	Def's Pro Se Motion for Writ of Certiorari	Dismissed
112P24	Franklin Garland, Plaintiff v. Orange County, Orange County Board of Commissioners, Defendants and Terra Equity, Inc., Defendant-Intervenor	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA23-588) 2. Plt's Motion for Temporary Stay 3. Plt's Petition for Writ of Supersedeas	1. 2. Allowed **05/23/2024** 3.
115P24	State v. Eric James Ducker	Def's PDR Prior to a Determination by the COA (COA24-373)	Denied
117P24	State v. Chad Julius Clark	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Yancey County	Dismissed

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

28 JUNE 2024

118P24	State v. Albert M. Anderson	Def's Pro Se Motion for Emergency Relief	Dismissed
120P24	Daniel T. Bryan and Lisa D. Bryan v. Barbara Snow Adams and Pamela Frederes	1. Plts' Pro Se Motion for Notice of Appeal (COA23-714) 2. Plt's Pro Se Motion for Extension of Time to File Brief	1. Dismissed *ex mero motu* 2. Dismissed as moot
122P24	State v. Jessiah James Hubbard	Def's Pro Se Petition for Writ of Habeas Corpus (COAP23-420)	Denied **05/24/2024**
126P23	In re Custodial Law Enforcement Agency Recording	1. Petitioners' PDR Under N.C.G.S. § 7A-31 (COA22-399) 2. Petitioners' Motion to Consolidate Appeals 3. Petitioners' Motion to Amend PDR	1. Special Order 2. Dismissed as moot 3. Dismissed as moot
126PA24	North Carolina Bar and Tavern Association, et al. v. Roy A. Cooper, III, in His Official Capacity as Governor of North Carolina	1. Def's PDR Under N.C.G.S. § 7A-31 (COA22-725) 2. Plts' Conditional PDR Under N.C.G.S. § 7A-31 3. Parties' Joint Motion to Set Briefing Schedule	1. Allowed **06/05/2024** 2. Allowed **06/05/2024** 3. Allowed **06/12/2024**
127P24	State v. Wallace Lyndale Hawthorne	1. Def's PDR Under N.C.G.S. § 7A-31 (COA23-906) 2. Def's Motion for Temporary Stay 3. Def's Petition for Writ of Supersedeas	1. Denied **05/29/2024** 2. Denied **05/29/2024** 3. Denied **05/29/2024**
128P19	State v. Justin Alexander Vandergriff	Def's Motion to Seal (COAP19-121)	Denied
128P24	In re The Matter of the Petition for Reinstatement of: Gregory Bartko	Petitioner's Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-980)	Denied
129P24	Kenneth Hayes v. Hutchens Law Firm/PNC Bank/ Substitute Trustee Services	1. Plt's Pro Se Motion for Temporary Stay 2. Plt's Pro Se Petition for Writ of Supersedeas 3. Plt's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Moore County	1. Denied **05/28/2024** 2. Denied **05/28/2024** 3. Denied **05/28/2024**

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130P24	Jason M. Sneed v. Charity A. Johnston	1. Plt's Motion for Temporary Stay (COA23-446) 2. Plt's Petition for Writ of Supersedeas 3. Plt's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/30/2024** 2. 3.
133P24	State v. Leonard Roy Dean Holland	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Davie County 2. Def's Pro Se Motion to Proceed In Forma Pauperis 3. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
134P24	In re Earl J. Watson	Petitioner's Pro Se Motion for Notice and Petition for Redress Grievance and or Issue a Remedial Prerogative Writ	Dismissed
135P22-2	In the Matter of Jacqualyn Lanier	Petitioner's Pro Se Petition for Writ of Certiorari	Denied
135P24	Rudolph I. Lofton v. Brianna J. Virgil	Plt's Pro Se Petition for Writ of Habeas Corpus	Denied **06/05/2024**
137P24	State v. Joseph John Radomski, III	1. State's Motion for Temporary Stay (COA23-340) 2. State's Petition for Writ of Supersedeas	1. Allowed **06/07/2024** 2.
143P24	The North Carolina State Bar v. Mark Cummings	1. Def's Motion for Temporary Stay (COAP24-328) 2. Def's Petition for Writ of Supersedeas 3. Plt's Motion to Dissolve the Stay	1. Allowed **06/11/2024** 2. 3.
144P21-2	State v. Derrick Jervon Lindsay	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Stanly County 2. Def's Pro Se Motion for Request f or Admissions	1. Denied 2. Dismissed
144P24	Dr. Darren Masier v. North Carolina State University	1. Respondent's Motion for Temporary Stay (COAP24-318) 2. Respondent's Petition for Writ of Supersedeas	1. Allowed **06/13/2024** 2.
149P24	State v. Matthew Thomas Primm	1. Def's Motion for Temporary Stay (COA23-949) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/12/2024** 2.

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153A23	Carl E. Merrell, et al. v. James M. Smith, et al. ——————— Jeffery A. Strack, et al. v. James M. Smith et al. ——————— Jeffrey Neal Cochrane and Gary Alan Cochrane, Administrators of the Estate of Ralph Neal Cochrane v. James M. Smith, et al. ——————— Charles David Short v. James M. Smith, et al.	Plts' Motion to Dismiss Appeals	Allowed **05/23/2024**
159P24	The North Carolina State Bar v. Martin Musinguzi, Attorney	1. Def's Motion for Temporary Stay (COAP24-92) 2. Def's Petition for Writ of Supersedeas	1. Allowed **06/14/2024** 2.
165P24	State of North Carolina v. Philip Anthony Montanino	1. State's Motion for Temporary Stay (COA23-409) 2. State's Petition for Writ of Supersedeas	1. Allowed **06/21/2024** 2.
166A24	State v. Jonathan Ray Lail	1. State's Motion for Temporary Stay (COA23-845) 2. State's Petition for Writ of Supersedeas	1. Allowed **06/26/2024** 2.
169P23-3	State v. Christopher Leon Minor	1. Def's Pro Se Petition for Writ of Habeas Corpus 2. Def's Pro Se Motion to Dismiss 3. Def's Pro Se Motion to Proceed as Indigent 4. Def's Pro Se Motion for Custody Hearing 5. Def's Pro Se Motion for Post Conviction Discovery	1. Denied **06/05/2024** 2. Dismissed **06/05/2024** 3. Allowed **06/05/2024** 4. Dismissed **06/05/2024** 5. Dismissed **06/05/2024** **Riggs, J., recused**

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169P24	State v. Jeanie Kassandra Ditty	1. Def's Motion for Temporary Stay (COA23-141) 2. Def's Petition for Writ of Supersedeas	1. Allowed **06/26/2024** 2. **Riggs, J., recused**
173PA23	Southland National Insurance Corporation, et al. v. Lindberg, et al.	Parties' Joint Motion for Limited Remand (COA22-1049)	Special Order
216P23	State v. Scott Lee Bridges	Def's PDR Under N.C.G.S. § 7A-31 (COA22-208)	Denied
238A23	State v. Pedro Isaias Calderon	1. State's Motion for Temporary Stay (COA22-822) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent 4. State's PDR as to Additional Issues 5. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/20/2023** 2. Allowed **09/28/2023** 3. --- 4. Allowed 5. Allowed
239P23	Wilson County Board of Education v. Retirement Systems Division, Department of State Treasurer, TSERS Board of Trustees; Tim Moore, North Carolina Speaker of the House; and Philip E. Berger, President Pro Tempore of the North Carolina Senate	1. Petitioner's Notice of Appeal Based Upon a Constitutional Question (COA22-1027) 2. Petitioner's PDR Under N.C.G.S. § 7A-31 3. Respondents' Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
243P19-3	State v. Gregory K. Parks	1. Def's Pro Se Motion for PDR (COAP21-277) 2. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA	1. Dismissed 2. Dismissed
252A23	Tiffany Howell, et al. v. Roy A. Cooper, III, et al.	1. Notice of Appeal Based Upon a Dissent 2. Defs' (State of North Carolina and Roy A. Cooper III) PDR as to Additional Issues (COA22-571)	1. --- 2. Allowed **05/30/2024**

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264A23	Daniel Jones v. J. Kim Hatcher Insurance Agencies Inc.; HXS Holdings, Inc.; GeoVera Specialty Insurance Company; and GeoVera Advantage Insurance Services, Inc.	1. Def's (J. Kim Hatcher Insurance Agencies Inc.) Notice of Appeal Based Upon a Dissent (COA22-1030) 2. Plt's PDR Under N.C.G.S. § 7A-31	1. 2. Special Order
293P23-2	State v. Andre Eugene Lester	1. State's Motion for Temporary Stay (COA23-115) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Conditional PDR Under N.C.G.S. § 7A-31 5. Def's Motion to Dissolve Temporary Stay	1. Allowed **12/13/2023** 2. Allowed 3. Allowed 4. Denied 5. Denied **05/28/2024**
305P97-11	State of North Carolina v. Egbert Francis, Jr.	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Wake County	Dismissed
310P23-2	State v. Rocky J. Bryant	Def's Pro Se Motion for Removal of Senior Resident Superior Court Judge	Dismissed **Riggs, J., recused**
315P23	Philip Richard Bulliard, Philip Richard Bulliard, Trustee for the PRB Living Trust v. Highland Gate Homeowners Association, Inc., et al.	Plt's Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-452)	Denied
316P23	State v. David Mark Fields	Def's PDR Under N.C.G.S. § 7A-31 (COA23-155)	Denied
317PA14-3	State v. Rodney Nigee Pledger Taylor	Def's Petition for Writ of Certiorari to Review Order of the COA (COA23-5921)	Dismissed
318P23	Harnett County Board of Education v. Retirement Systems Division, Department of State Treasurer	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA22-750)	Denied

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323P23-3	Hamza Tebib v. Judge Caroline Burnette	1. Plt's Pro Se Motion for Complaint 2. Plt's Pro Se Petition for Writ of Certiorari 3. Plt's Pro Se Motion for PDR	1. Dismissed 2. Dismissed 3. Dismissed
325P23	Traci C. Kirkman, as Administrator of the Estate of Chad Wayne Kirkman, Deceased v. Rowan Regional Medical Center, Inc., d/b/a Novant Health Rowan Medical Center; and Mindy P. France, LPC	Plt's PDR Under N.C.G.S. § 7A-31 (COA23-282)	Denied **Riggs, J., recused**
327P22-2	Stephen Lawing and Donna Lawing v. Chadwick P. Miller, C.P. Miller, Inc., Danny Edward Eaton, II, and Danny Eaton Plumbing, LLC	1. Plts' Pro Se Motion to Stay All Other Proceedings in this Action 2. Plts' Pro Se PDR Under N.C.G.S. § 7A-31 (COA22 99)	1. Denied **05/01/2024** 2. Denied
329A09-7	State v. Martinez Orlando Black	Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP23-10)	Dismissed **Riggs, J., recused**
330P23	State v. Sean Ruffolo	Def's PDR Under N.C.G.S. § 7A-31 (COA23-178)	Denied
331P23	State v. Kajuan Dyshawn Hamilton	1. State's Motion for Temporary Stay (COA22-847) 2. State's Petition for Writ of Supersedeas 3. Def's Notice of Appeal Based Upon a Constitutional Question 4. Def's PDR Under N.C.G.S. § 7A-31 5. State's Motion to Dismiss Appeal 6. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/11/2023** Dissolved 2. Denied 3. --- 4. Denied 5. Allowed 6. Special Order
343P23-2	Robert Terrell, III v. Siler City Police Department	Plt's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COA23-716)	Dismissed

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344PA23	Universal Life Insurance Company v. Greg E. Lindberg	1. Plt's Motion for Temporary Stay (COA23-274) 2. Plt's Petition for Writ of Supersedeas 3. Plt's PDR Under N.C.G.S. § 7A-31 4. Plt's Motion for Leave to Withdraw Appeal	1. Allowed **12/22/2023** Dissolved 2. Allowed **05/21/2024** Dissolved 3. Special Order **05/21/2024** 4. Special Order
368A22-2	U.S. Bank Trust, as Trustee for LSF10 Master Participation Trust v. Raleigh G. Rogers, Dreama Louise Rogers, & Jonathan J. Rogers	1. Def's (Raleigh Rogers) Pro Se Motion for Notice of Appeal Constitutional Question (COA23-326) 2. Def's (Raleigh Rogers) Pro Se Motion for Notice of Appeal Discretionary Review 3. Def's Pro Se Motion to Amend Notice of Appeal 4. Def's Pro Se Conditional Petition for Writ of Certiorari to Review Order of the COA	1. Dismissed *ex mero motu* 2. Denied 3. Dismissed as moot 4. Dismissed as moot
387P18-3	State v. Jashawn Arnez Summers	1. Def's PDR Under N.C.G.S. § 7A-31 (COA22-980) 2. Attorney J. Clark Fischer's Motion to Withdraw as Counsel of Record for Defendant	1. Denied 2. Allowed **Riggs, J., recused**
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. 3.
449P11-29	In re Charles Everette Hinton	Petitioner's Pro Se Motion for Petition to Depose Adverse Witnesses and to Perpetuate Testimonies by Written Interrogatories	Dismissed
469P09-3	State v. James Edward Downey	Def's Pro Se Motion for Reconsideration of Order	Dismissed
536P20-3	State v. Siddhanth Sharma	Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP24-247)	Denied

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580P05-31	In re David Lee Smith	1. Def's Pro Se Motion for Justice Allen's Recommendation for Governor Cooper's Executive Order for Declaration and Order of Transfer to (3) Judge Panel for Process (COA04-1033)	1. Dismissed
		2. Def's Pro Se Motion for Demand for Chief Justice Newby to Issue Emergency Recommendation that N.C. Governor Cooper Issue an Emergency Executive Order Declaring Act of Attempted Genocide	2. Dismissed
		3. Def's Pro Se Motion for PDR	3. Dismissed **Riggs, J., recused**

ALISON ARTER
v.
ORANGE COUNTY, STEPHEN M. BURT, SHARON C. BURT,
JODI BAKST, AND REAL ESTATE EXPERTS

No. 229A23

Filed 23 August 2024

Zoning—ordinance—land use buffer—conflicting text and table—interpretive provision—text controls

A county board of adjustment properly decided against installing a buffer between petitioner's property and a road being built next to an adjacent residential subdivision, where the county's zoning ordinance only required buffers between properties from different zoning districts and both of the properties involved here were in the same "R-1 residential" zoning district. Although the ordinance included a table suggesting that buffers were required based on either the zoning districts or the land uses of the subject and adjacent properties, the ordinance's introductory provision eliminated any internal ambiguity by clarifying that where the text and a table contradicted each other, the text would control.

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. 128 (2023), affirming an order entered on 23 June 2022 by Judge R. Allen Baddour, Jr. in Superior Court, Orange County. Heard in the Supreme Court on 10 April 2024.

Petesch Law, by Andrew J. Petesch, for petitioner-appellant.

James Bryan and Joseph Herrin for respondent-appellee Orange County.

The Brough Law Firm, PLLC, by Robert E. Hornik, Jr., for respondent-appellees Stephen M. Burt, Sharon C. Burt, Jodi Bakst, and Real Estate Experts.

DIETZ, Justice.

Local governments have a responsibility to enact clear, unambiguous zoning rules. The increasing complexity of many local zoning ordinances

can make that a difficult task. Zoning ordinances often contain pages upon pages of indices, headings, text, tables, and illustrative figures, all cross-referencing each other. Ensuring that this thicket of rules is free from ambiguity and internal inconsistency is a daunting task.

Orange County sought to address this dilemma through an interpretive rule in its zoning ordinances. An introductory provision in those ordinances states that the many headings, tables, figures, and illustrations contained within are merely "provided for convenience and reference" and if there is "any difference of meaning or implication between the text of this Ordinance and any heading, drawing, table, figure, or illustration, the text controls."

This case concerns a conflict between the text and a corresponding table in Orange County's zoning ordinances. As explained in more detail below, we agree with the Court of Appeals majority, which held that the interpretive instruction quoted above resolves the conflict, leaving no ambiguity in meaning. We therefore affirm the decision of the Court of Appeals.

Facts and Procedural History

In the mid-2000s, Alison Arter purchased land from Stephen and Sharon Burt in Orange County. The property had a home and a horse farm. Arter continued to operate the horse farm after buying the property. The Burts continued to own an adjacent property.

In 2020, a real estate developer applied to subdivide the Burts' property and construct a number of homes. At the time, both Arter's property and the Burts' property were zoned "R-1" residential under Orange County's zoning ordinances. Because of topography and water features on the Burts' property, the developer planned to build the main road leading to the new subdivision along the Burts' side of the property line separating that property from Arter's property.

Upon learning of the plans for the subdivision and, in particular, the road next to her property line, Arter raised concerns that the road would disrupt activities on her horse farm. Arter submitted letters to Orange County asserting that the developer had an obligation, based on the applicable zoning ordinances, to build a thirty-foot buffer between the subdivision's road and her property.

The Orange County Planning & Inspections Department rejected Arter's arguments, determining that the county's zoning ordinances did not "require the establishment of a land use buffer when parcels have the same/similar general use zoning designations."

Arter appealed to the Orange County Board of Adjustment, which entered a written order upholding the department's decision. Arter then sought judicial review in Superior Court. After a hearing, the court affirmed. Arter then appealed to the Court of Appeals.

The Court of Appeals issued a divided decision. The majority held that the county's zoning ordinances only required buffers between different zoning districts and, because both properties were in the same R-1 zoning district, no buffers were required. *Arter v. Orange County*, 290 N.C. App. 128, 131 (2023). The majority therefore affirmed the lower court decision.

The dissent argued that, when also considering a table accompanying the text that offered contradictory guidance, buffers are required "based on the zoning districts *or* land uses of the subject and adjacent properties." *Id.* at 136 (Carpenter, J., dissenting). Thus, the dissent argued, the case should be remanded for further fact-finding concerning the land use of the properties. *Id.*

Arter then filed a notice of appeal with this Court based on the dissent.

Analysis

In this type of zoning appeal, the trial court sits as an appellate court and applies "de novo review to alleged errors of law, including challenges to a board of adjustment's interpretation of a term in a municipal ordinance." *Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd. of Adjustment*, 365 N.C. 152, 155 (2011). On further appellate review, both the Court of Appeals and this Court likewise apply de novo review to legal questions concerning the proper interpretation of a disputed provision in a zoning ordinance. *Id.*

Courts interpret zoning ordinances largely in the same manner as statutes and other written laws. *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 303 (2001). We begin with the text of the statute and, if that text is clear and unambiguous, we "conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms." *Lanvale Props., LLC v. County of Cabarrus*, 366 N.C. 142, 154 (2012).

When a zoning ordinance's language is ambiguous, we resort to other accepted tools of statutory construction to "ascertain and effectuate the intent of the legislative body." *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629 (1980). The only difference between traditional statutory interpretation and the interpretation of

zoning laws is a special rule of construction: because zoning laws "are in derogation of common law rights," they "cannot be construed to include or exclude by implication that which is not clearly their express terms." *Yancey v. Heafner*, 268 N.C. 263, 266 (1966). Moreover, when there are "well-founded doubts" about the proper meaning of a zoning law—that is to say, an ambiguity—courts must choose the reasonable interpretation that favors "the free use of property." *Id.*

With these principles in mind, we turn to the disputed portions of Orange County's zoning ordinances. The crux of this case is a conflict between the text of the applicable ordinance and the contents of a corresponding table that purports to complement that text.

Section 6.8.6 of Orange County's zoning ordinances is titled "Land Use Buffers." Subsection (A) contains a purpose statement indicating the buffers are intended to screen certain land uses from other "incompatible" uses. Subsection (B) contains the operative text stating that buffers are required based on the respective zoning districts of the properties:

> **6.8.6 Land Use Buffers**
>
> **(A) Purpose**
>
> Land use buffers are intended to screen and buffer lower intensity/density uses from incompatible higher intensity/density land uses. Buffers reduce adverse visual effects, as well as noise, dust, and odor.
>
> **(B) Applicability**
>
> Land use buffers will be required based on the zoning district of the proposed use and the zoning district of the adjacent uses.

Orange County Unified Development Ordinance (UDO) art. 6, § 6.8.6.

Following another subsection discussing the location of required buffers, the ordinance then contains subsection (D) which is titled "Land Use Buffer Table" and includes the following table:

TABLE 6.8.6.D: LAND USE BUFFERS

		ZONING OR USE OF ADJACENT PROPERTIES											
		RB, AR, RI	R-2, R-3	R-4, R-5	R-8, R-13	HP-CD	O/RM, NC-2, LC-1	CC-3,GC-4, EC-5	EI, I-1, I-2, I-3, PID	INTERSTATE HIGHWAY	ARTERIAL STREET	COLLECTOR STREET	ACTIVE FARM/ AGRICULTURE
Zoning or Use of Subject Property	RB, AR, R1	-	A	A	B	F	E	F	F	F	E	B	B
	R-2 & R-3	A	-	A	B	F	D	F	F	F	D	B	B
	R-4 & R-5	A	A	-	B	F	C	E	E	F	C	B	B
	R-8 & R-13	B	B	B	-	F	B	D	D	F	C	B	B
	HP-CD	F	F	F	F	-	F	F	F	F	F	F	F
	O/RM, NC-2, LC-1	E	D	C	B	F	-	-	-	F	B	B	D
	CC-3, GC-4, EC-5	F	F	E	D	F	-	-	-	F	B	B	D
	EI, I-1, I-2, I-3, PID	F	F	E	E	F	-	-	-	F	B	B	D
	AS, ASE-CD	D	A	A	A	F	A	A	A	F	B	B	B

Note: MPD-CD, R-CD, and NR-CD buffers to be determined at time of approval.

Id. § 6.8.6(D).

This table lists each of the zoning districts identified in other portions of the ordinances. *See id.* art. 3. The rows represent the zoning districts of the "subject property" and the columns represent the zoning districts of the "adjacent properties." The letters in the table correspond to the type of buffer required for each possible combination of zoning districts. *Id.* § 6.8.6(F).

There are two noteworthy points about this Land Use Buffer Table in subsection (D). First, when comparing zoning districts to each other, the table is consistent with the operative text in subsection (B), which states that buffers are "required based on the zoning district of the proposed use and the zoning district of the adjacent uses." *Id.* § 6.8.6(B). The table identifies the type of buffer required for each possible combination of zoning districts. Additionally, whenever the table compares a zoning district to itself, the notation in the table is simply a dash, indicating that no buffer is required. *Id.* All of this is consistent with the text of subsection (B).

But there is a second, conflicting portion of the table. In addition to listing each possible zoning district in the columns, the table also includes four categories that are not zoning districts: Interstate

Highway, Arterial Street, Collector Street, and Active Farm/Agriculture. *Id.* § 6.8.6(D). This sets up an internal conflict within the table. Suppose a property is zoned R-4 and the adjacent property is zoned R-2. The table indicates that this combination requires buffer type "A". But what if that adjacent R-2 property is an active farm? The table requires buffer type "B" between a property zoned R-4 and an active farm. Thus, in this example, the table is internally inconsistent, requiring both buffer types "A" and "B".

Moreover, there is a broader conflict between the table and the text in subsection (B). The text states that buffers are required based on the *zoning districts* of the properties. *Id.* § 6.8.6(B). The additional categories in the table—highways, active farms, and so on—are not zoning districts. Thus, requiring a buffer based on these additional categories conflicts with the textual requirement of subsection (B).

Ordinarily, these types of internal inconsistencies would create ambiguity that courts must resolve through the interpretive rules described above. But a "fundamental rule of statutory construction is that when the legislature has erected within the statute itself a guide to its interpretation, that guide must be considered by the courts in the construction of other provisions of the act which, in themselves, are not clear and explicit." *Williams v. Williams*, 299 N.C. 174, 180 (1980).

Of course, these interpretive guides cannot override this Court's precedent governing how we interpret the law, because it is exclusively the judiciary's role "to say what the law is." *White v. Worth*, 126 N.C. 570, 583 (1900) (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)); *see also* N.C. Const. art. IV, § 12. But legislative bodies are free to define terms, provide grammatical rules, and take other steps to eliminate potential ambiguity in the text of written laws. *See Williams*, 299 N.C. at 179–80.

Here, Orange County's zoning ordinances contain this sort of permissible interpretive guide. Section 1.1.12 states that when there is a conflict between the text of an ordinance and a table, the text controls:

> Headings and illustrations contained herein are provided for convenience and reference only and do not define or limit the scope of any provision of this Ordinance. In case of any difference of meaning or implication between the text of this Ordinance and any heading, drawing, table, figure, or illustration, the text controls.

Orange County UDO art. 1, § 1.1.12 (2024).

This interpretive provision removes any potential conflict between the text and the table. As the provision plainly states, "the text controls." The text of the ordinance provides that buffers are "based on the zoning district of the proposed use and the zoning district of the adjacent uses." *Id.* § 6.8.6(B). Thus, in discerning the meaning of these ordinances, we ignore the four columns of the table that are not zoning districts. A landowner's obligation to install a "land use buffer" under this ordinance is based solely on the zoning district of the landowner's property and the zoning district of the adjacent property.

Here, the parties do not dispute that the Burts' property and Arter's property are both zoned R-1. Consulting the corresponding portion of the Land Use Buffer Table that governs buffers between zoning districts, no buffer is required because the zoning districts are the same. *Id.* § 6.8.6(D).

Accordingly, the Court of Appeals majority properly held that the unambiguous language of the relevant zoning ordinances did not require any buffer between these two properties.

Conclusion

We affirm the decision of the Court of Appeals.

AFFIRMED.

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

BOTTOMS TOWING & RECOVERY, LLC
v.
CIRCLE OF SEVEN, LLC

No. 189A22

Filed 23 August 2024

Appeal and Error—appeal to Supreme Court—based on Court of Appeals dissent—new theory asserted in dissent—review declined

In an appeal to the Supreme Court based on a dissent from the Court of Appeals, where a business sought to overturn the trial court's order upholding a towing company's statutory lien on one of the business's trucks and authorizing the sale of the truck, the Supreme Court declined to review the dissent's theory of the case—that the towing company unlawfully converted the truck for personal use and, therefore, the lien should have been reduced based on the truck's loss in fair market value—because it was not first raised and argued by the parties and addressing it would require access to evidence that no party presented at trial and findings of fact that the trial court never made.

Justice EARLS dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 283 N.C. App. 446 (2022), affirming an order and judgment entered on 26 February 2021 by Judge Quentin T. Sumner in Superior Court, Nash County. Heard in the Supreme Court on 18 April 2024.

Fields & Cooper, PLLC, by Ryan S. King and John S. Williford Jr., for petitioner-appellee.

Q Byrd Law, by Quintin D. Byrd, for respondent-appellant.

DIETZ, Justice.

This appeal involves a dispute over a few thousand dollars for a truck that got towed. In the trial court and the Court of Appeals, the truck's owner raised a series of straightforward legal arguments about

the validity and amount of the towing company's lien. The lower courts rejected those arguments.

The appeal then came to this Court based on a dissent at the Court of Appeals that does not have anything to do with the party's arguments. The dissent concocted a new theory for the truck owner and reasoned that, based on that new theory, the trial court erred.

The dissent's theory of the case is not properly before this Court. We do not review issues raised by a Court of Appeals dissent that were not first raised and argued by the parties. *See M.E. v. T.J.*, 380 N.C. 539, 562 (2022). This rule is particularly apt here because addressing the dissent's theory requires evidence that no party presented below and fact-finding that never took place in the trial court. Accordingly, we decline to address the matters raised by the dissent and affirm the decision of the Court of Appeals.

Facts and Procedural History

Circle of Seven is a limited liability company that has now ceased operations. Several years ago, Circle of Seven left a Dodge Ram truck on property that it lost in a foreclosure sale. At the time, Circle of Seven's sole managing member, Sainte Deon Robinson, was incarcerated after pleading guilty to federal crimes. Robinson left Eulanda Elliot, a Circle of Seven employee, in charge of the company's affairs when he went to prison.

The purchaser of the foreclosed property hired Bottoms Towing & Recovery to tow the Dodge Ram away from the property. Bottoms Towing later petitioned to sell the truck to satisfy the lien for unpaid towing and storage expenses. Circle of Seven opposed the sale and challenged the amount of the purported lien.

The trial court held a hearing to address the contested issues. Relevant to this appeal, Circle of Seven presented the testimony of both Robinson and Elliot. Elliot testified that she repeatedly attempted to pick up the truck from Bottoms Towing but was unable to do so because Bottoms Towing did not believe she had sufficient proof that she was authorized to take the truck. Circle of Seven asked the trial court to reduce the amount of the lien by removing storage costs for the period after Bottoms Towing refused to release the truck to Elliot.

In addition, Robinson testified that he had the truck serviced shortly before it was towed and had documentation indicating the truck's mileage at that time was roughly 81,000 miles. Later, when Circle of Seven sought to reacquire the truck, the mileage was roughly 90,000 miles. Bottoms Towing also had the truck serviced and made cosmetic changes such as

adding chrome wheel covers and removing vinyl decals. Circle of Seven argued that this evidence proved Bottoms Towing had used the truck without authorization. It argued that the lien amount should be reduced because Bottoms Towing cannot charge for storage time when the towing company was improperly using the truck rather than simply storing it.

After the hearing, the trial court entered an order and judgment reducing the lien amount by $1,427.14 due to unnecessary maintenance and cosmetic alterations. The trial court also found that Bottoms Towing drove the truck for approximately 250 miles when the truck should have been stored, and therefore further reduced the lien by $62.50 to account for the time when Bottoms Towing used the truck.

Circle of Seven appealed, arguing that the trial court had not reduced the lien by a sufficient amount based on the evidence. The Court of Appeals issued a divided opinion affirming the trial court's order and judgment. *Bottoms Towing & Recovery, LLC v. Circle of Seven, LLC*, 283 N.C. App. 446 (2022). The majority held that competent evidence supported the trial court's findings and corresponding conclusions concerning the appropriate amount of the lien. *Id.* at 455–56.

The dissent argued that Bottoms Towing unlawfully converted the truck for personal use and that the case should be remanded for the trial court to reduce the lien based on the truck's loss in fair market value as a result of the conversion. *Id.* at 457–58 (Tyson, J., concurring in the result in part and dissenting in part).

Circle of Seven timely filed a notice of appeal to this Court based on the dissent. It also petitioned for discretionary review, asking this Court to review the issues that it raised in the lower courts but that the dissent did not address. This Court denied the petition for discretionary review as to additional issues.

Analysis

We begin our analysis by examining the scope of the issues brought before us based on the dissent. Because we denied Circle of Seven's petition for discretionary review, the sole basis for our appellate jurisdiction in this case is the dissent at the Court of Appeals. *See* N.C.G.S. § 7A-30(2) (2023).[1]

1. The General Assembly repealed the portion of N.C.G.S. § 7A-30 that conferred a right to appeal to the Supreme Court based on a Court of Appeals dissent. Current Operations Appropriations Act of 2023, S.L. 2023-134, § 16.21(d). This appeal was filed and docketed at the Court of Appeals before the effective date of that act.

Under Rule 16(b) of the Rules of Appellate Procedure, our jurisdiction in this circumstance is limited to those issues "specifically set out in the dissenting opinion as the basis for that dissent." N.C. R. App. P. 16(b). We recently emphasized that this requirement limits our review solely to those issues for which the dissent provides "reasoning." *Cryan v. Nat'l Council of YMCAs*, 384 N.C. 569, 575 (2023); *Morris v. Rodeberg*, 385 N.C. 405, 415 (2023). On matters where the dissent does not provide any reasoning, this Court lacks jurisdiction unless we separately allow discretionary review of those additional issues. *See Cryan*, 384 N.C. at 575.

Here, the dissenting judge concurred in the majority's "conclusion that petitioner possesses a valid statutory lien" but asserted that the trial court "erred in its calculation of the offset to reduce the lien amount due to Bottoms' unlawful conversion and personal use" of the truck. *Bottoms Towing*, 283 N.C. App. at 456 (Tyson, J., concurring in the result in part and dissenting in part). The dissent reasoned that Bottoms Towing's unauthorized use of the truck while it should have been stored awaiting pickup was a form of unlawful "conversion." *Id.* at 457. "Our General Statutes should provide a statutory remedy and offset" for this unlawful conversion, the dissent reasoned. *Id.*

Because the dissent believed the trial court's reduction of the claimed lien amount was not a permissible way to "compute this offset value against the lien," the dissent would have reversed the trial court's order and judgment and remanded for the trial court to assess "the loss in value" of the truck—in other words, an offset based on the reduction in the truck's "book value" due to Bottoms Towing's unauthorized use. *Id.* at 457–58.

The dissent provided extensive reasoning for this position, and we therefore have appellate jurisdiction over the issue. *See Cryan*, 384 N.C. at 575. But possessing appellate jurisdiction does not automatically mean the issue is one that we can properly address. It is well-settled that "the Court of Appeals may not address an issue not raised or argued by [the appellant] for it is not the role of the appellate courts to create an appeal for an appellant." *In re R.A.F.*, 384 N.C. 505, 512 (2023) (cleaned up). This rule applies equally to both the Court of Appeals majority and the dissent.

Indeed, even where the dissent raises issues that would void the trial court's judgment, this Court has declined to examine those issues because the parties did not raise them at the Court of Appeals. *See M.E.*, 380 N.C. at 564. In *M.E.*, for example, the dissent argued that the plaintiff failed to join necessary parties under Rule 19 of the Rules of Civil

Procedure, which rendered the trial court's order void *ab initio*. *Id.* at 551–52. We held that "the necessary joinder issue was raised neither by defendant nor by the trial court *ex meru motu* and was not mentioned until the Court of Appeals dissent. Accordingly, this issue is not properly before this Court, and we therefore decline to consider it." *Id.* at 564.

Here, Circle of Seven never raised a conversion argument, never argued that Bottoms Towing's unauthorized use had reduced the value of the truck, and never presented any evidence as to the value of the truck. This makes sense because Circle of Seven operated under entirely different legal theories in the courts below. The company argued that the applicable statute only permitted a lien for unpaid amounts related to the towing and storing of the truck. *See* N.C.G.S. § 44A-2 (2023). As a result, Circle of Seven argued that the lien must be reduced for two reasons.

First, it argued that it sent Elliott, its authorized representative, to pick up the truck, but Bottoms Towing refused to release it. Thus, it argued that the lien "amount is limited to the period of 5 March 2021 through 27 March 2021, representing the date of the tow through the date Ms. Elliott contacted Petitioner to retrieve the Truck."

Second, Circle of Seven argued that the truck's mileage and other evidence showed Bottoms Towing had driven the truck for personal use. This, it argued, meant the trial court should determine when the truck was being used, rather than stored, and "reduce the amount of the lien" because Bottoms Towing "could not be said to have been storing the Truck when using it for personal use."

Importantly, Circle of Seven did not bring a claim for conversion and did not make any argument that Bottoms Towing diminished the value of the truck—the sole basis for the dissent in this case. That issue "was not mentioned until the Court of Appeals dissent." *See M.E.*, 380 N.C. at 564.

If we were to review this issue, it would be unjust for a number of reasons. First, and most obviously, it would require departing from the well-settled procedural rule that appellate courts may not address issues not raised by the parties because "it is not the role of the appellate courts to create an appeal for an appellant." *In re R.A.F.*, 384 N.C. at 512 (cleaned up). The public, and other jurisdictions that may be called upon to recognize our state's court judgments, expect us to apply these procedural rules uniformly to all litigants who appear before us.

Second, Bottoms Towing never had an opportunity to disprove the fact-intensive assertions made by the dissent. There is no evidence in

the record concerning the "book value" of the truck or how much that value depreciated, or any of the other facts necessary to calculate the "damages" that the dissent describes based on "the difference between the market value immediately before the injury and the market value immediately afterwards." *Bottoms Towing*, 283 N.C. App. at 457–58.

The dissent's approach to this case would effectively require the trial court to start over from the beginning—conduct another hearing, receive evidence on the change in the truck's fair market value, and then enter an entirely different order. Our rules of preservation exist precisely to discourage this sort of unfair do-over in the trial court. Circle of Seven had the opportunity to present this evidence to the trial court and the opportunity to raise this issue in its appellate briefing to the Court of Appeals. It did neither—understandably so, because Circle of Seven had different (and, to be fair, more appropriate) arguments to contest the claimed storage charges under the language of the applicable statute. *See* N.C.G.S. § 44A-2. This is a statutory proceeding to authorize the sale of a motor vehicle under a lien. The dissent's theory concerns affirmative claims for conversion or negligence on the part of a bailee. These are claims that must be raised in a complaint or counterclaim, not as statutory defenses to the sale proceeding.

Accordingly, the conversion theory raised by the dissent is not properly before us and we decline to address it. Because this is the only issue before this Court (as we denied Circle of Seven's petition for discretionary review as to additional issues), our review is at an end.

Conclusion

We affirm the decision of the Court of Appeals.

AFFIRMED.

Justice EARLS dissenting.

Circle of Seven, LLC and Bottoms Towing & Recovery, LLC have a genuine property dispute which is properly before this Court based on a dissent in the Court of Appeals pursuant to N.C.G.S. § 7A-30(2), a statute that has now been amended to eliminate such appeals in the future. *See* N.C.G.S. § 7A-30(2) (2023); 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 a dissent for cases filed in the Court of Appeals on or after 3 October 2023).

Bottoms Towing contends that it acted in good faith when it towed and stored Circle of Seven's truck and that it properly seeks reimbursement for the associated fees by way of a lien on the truck. Circle of Seven contends that despite repeated attempts to recover possession of the truck, Bottoms Towing improperly refused to release it and not only purposefully amassed months of storage fees, which it then used as the basis for the lien, but also made unauthorized changes to the truck and used it extensively for personal purposes, driving it almost 10,000 miles while it was supposedly in storage. At the trial level, considerable evidence was introduced by Circle of Seven to support its version of events. The legal question for the appellate courts is whether the trial court applied the law correctly to the facts it found to be established by the evidence. I dissent because in my view this Court takes a hyper-technical and unjustifiably narrow approach to determining whether Circle of Seven made the necessary legal arguments regarding conversion at trial and whether the dissenting opinion in the Court of Appeals legitimately addressed issues properly before it.

The majority declines to reach the merits of the appeal because, in its view, Circle of Seven's evidence about Glenn Bottoms's unauthorized personal use of the truck and the impact that should have on the proper amount of any lien on the truck did not raise the issue of conversion. However, in fact, Circle of Seven did raise the issue of conversion at the trial court and with the Court of Appeals, it just did not use that specific terminology. Recently, this Court professed a disinclination to rest on mere technicalities of this nature. *See State v. Singleton*, 900 S.E.2d 802, 823–24 (N.C. 2024) ("As we recognized in 1898, we reiterate that '[t]he practical sense of the age demands' that technicalities should not carry the day . . . ." (first alteration in original) (quoting *State v. Hester*, 122 N.C. 1047, 1050 (1898))). It is unfair to do so here.

In addition, the majority's decision not to reach the merits of this case rests on a principle that is only selectively followed. Contrary to the majority's authoritative-sounding recitation of a supposedly cardinal rule of appellate practice, this Court does address issues and decide cases on grounds that were not raised or argued below. *See*, *e.g.*, *Stark ex rel. Jacobsen v. Ford Motor Co.*, 365 N.C. 468, 480, 483 (2012) (engaging in a sufficiency of the evidence analysis not ruled on by the Court of Appeals); *Ha v. Nationwide Gen. Ins. Co.*, No. 312A19-2, slip op. at 10 (N.C. Aug. 23, 2024) (deciding the case on "narrower grounds" not raised by the parties); *Old Republic Nat'l Title Ins. Co. v. Hartford Fire Ins. Co.*, 369 N.C. 500, 507, 510 (2017) (analyzing a judicial estoppel issue that was not briefed or argued by the parties); *N.C. Farm Bureau Mut.*

Ins. Co. v. Hebert, 385 N.C. 705, 715–16 (2024) (addressing "whether [a] defendant may stack and compare in order to activate his [underinsured motorist] coverage" despite the parties never having briefed or argued this theory below). This makes the majority's decision not to rule on the merits in this case all that more egregious.

I. Background

In 2018, Sainte Deon Robinson—the head of Circle of Seven, LLC—was charged with and pled guilty to a federal tax crime. On 22 March 2019, Robinson was sentenced to a thirty-month active sentence, which commenced on 10 September 2019. Before entering prison, Robinson gave Eulanda Elliot, a Circle of Seven employee, express authority to handle the company's affairs.

In July 2018, Anne Cliett, one of Robinson's creditors, started foreclosure proceedings against Robinson for a property located on Wesleyan Boulevard in Rocky Mount, North Carolina. Cliett subsequently purchased this property at a judicial sale. Because Robinson had left personal belongings on the Wesleyan property—including the 2018 Dodge truck, which is the subject of this dispute—Elliot contacted Dan Howell, who oversaw Cliett's affairs, to arrange for the retrieval of Robinson's property. However, Howell instructed Elliot to make those arrangements with Cliett's attorney, John Williford.

As was agreed, Elliot arrived at the Wesleyan property on 28 February 2020 with a U-Haul truck to retrieve Robinson's remaining items. While Robinson testified that he had left one key in the truck's ignition before locking up the Wesleyan property and beginning his period of incarceration, that key was not available to Elliot when she arrived to retrieve Robinson's belongings. The existence of the truck's key remains disputed as Mr. Bottoms testified that because he was unable to locate a key for the Dodge truck, he incurred a $150 fee to contract with a locksmith to create one. Since Elliot did not have a key for the truck, she was unable to start it, let alone remove it from the Wesleyan property. Elliot communicated this to Howell, and the two arranged for her to retrieve the truck at a later, undetermined date.

Eight days later, on 5 March 2020, Cliett contracted with Bottoms Towing & Recovery, LLC to remove the Dodge truck from the Wesleyan property for $150 and to store it for $40 per day. Accordingly, Mr. Bottoms towed the truck and stored it at his place of business on May Drive in Rocky Mount, North Carolina. On 13 March 2020, Mr. Bottoms filed the necessary documents with the North Carolina Division of

Motor Vehicles (DMV) to sell the truck under a possessory lien pursuant to N.C.G.S. § 44A-2(d).

Elliott made several attempts to retrieve the Dodge truck. In doing so, she placed five calls to Williford's law firm, Fields & Cooper, PLLC; sixteen calls to Howell; and eight calls to Mr. Bottoms. Elliot's repeated attempts to regain possession of the truck yielded differing responses from Mr. Bottoms.

On 27 March 2020 when Elliot contacted Mr. Bottoms the first time, he directed her to speak with Howell. Then on 30 March 2020, Mr. Bottoms informed Elliot that he was required to hear from the DMV before releasing the truck. Later, on 9 April 2020, Elliot received a letter from the North Carolina Department of Transportation stating that Mr. Bottoms had submitted an unclaimed vehicle report for the truck. In response, Elliot placed four calls to Mr. Bottoms, informed him of the letter she received, and asked again about obtaining the truck. This time, Mr. Bottoms explained that he could not release the truck until he heard back from the bank. Then, in a fourth attempt to retrieve the truck, on 17 April 2020, Elliot placed two calls to Mr. Bottoms who stated that he could not release the truck because the bank had instructed him not to.

On 24 April 2020, Mr. Bottoms completed DMV Form LT-262, titled Notice of Intent to Sell a Vehicle to Satisfy Storage and/or Mechanic's Lien. Circle of Seven subsequently received a letter dated 10 September 2020, which indicated that Bottoms Tire & Auto[1] had claimed a lien in the amount of $2,230. Because Bottoms Tire & Auto failed to secure delivery by certified mail, the Department of Transportation informed it that a judicial hearing was required for authorization to sell the truck.

After Robinson finished his term of imprisonment on 13 October 2020 and learned that Bottoms Towing still had possession of his truck, he too made an attempt to regain possession of the vehicle. But Mr. Bottoms refused to release the truck unless Robinson provided "some paperwork from the bank." On 9 November 2020, Robinson visited Bottoms Towing and noticed that his truck had undergone a number of changes since he last saw it: his company's business decals and logos had been removed, the rims on the truck's tires had been replaced, there was damage to the truck's bumper and passenger side fender, the fifth tire and tools inside the truck had been removed, and transport tags had been placed on the vehicle. Mr. Bottoms admitted to making changes to

1. Mr. Bottoms has two businesses, Bottoms Towing & Recovery and Bottoms Tire & Auto.

the truck and reported he incurred the following charges to prepare the truck for sale:

2 Interstate batteries	379.00
Right front tire	129.65
Bottom fuel filter	89.40
Def fluid	16.95
12 quarts oil	59.40
Oil filter	12.50
Chrome wheel covers	395.00
Shop supplies	20.00
Fuel	50.00
Install two batteries	28.00
Remove and replace fuel filters	98.00
Change oil and filter	35.00
Sales tax	114.24

The total for these expenses was $1,427.14.

Additionally, Mr. Bottoms testified that he only drove the truck five or six times, for a total of about 250 miles, "to make sure everything was running good." However, Robinson presented evidence—receipts from an oil change and tire replacement that detailed the truck's odometer reading—that the Dodge truck had almost 10,000 more miles on it than when he left it parked at the Wesleyan property. When Robinson visited Mr. Bottoms on 9 November 2020, he also noticed laundry and a coffee cup inside the Dodge truck.

Moreover, while Mr. Bottoms asserted that Robinson owed him $10,000 for the work he had completed on the vehicle, he never provided Robinson with an invoice. Similarly, Mr. Bottoms never communicated to Elliot the $150 towing fee or the $40 per day storage fee or provided her with an invoice.

On 17 November 2020, Bottoms Towing filed a petition in the trial court to sell the Dodge truck under a towing and storage lien. Circle of Seven objected to the sale and filed its response on 16 December 2020. The trial court entered its order and judgment in the matter on 26 February 2021, concluding that Bottoms Towing was "entitled to a possessory lien on the Truck," pursuant to subsection 44A-2(d), "in the amount of $13,557.50." Because the trial court found the expenses Bottoms Towing incurred in preparing the truck for the sale were "unnecessary," the court calculated the lien based only on (1) the towing

charge and storage for 333 days, from 5 March 2020 to 1 February 2021; and (2) "the locksmith key creation charge." This amount was then reduced by $62.50 to account for the 250 miles Mr. Bottoms drove the truck while it was stored.

Circle of Seven raised three arguments at the Court of Appeals. First, it questioned the validity of Bottoms Towing's contract with Cliett because Cliett was not the legal possessor of the truck. *Bottoms Towing & Recovery, LLC v. Circle of Seven, LLC*, 283 N.C. App. 446, 452 (2022). Second, it challenged the possessory lien on the truck, claiming that N.C.G.S. § 44A-4(a) only allows a lien to be enforced if towing and storage charges are unpaid for "10 days following the maturity of the obligation to pay any such charges." *Id.* at 454 (quoting N.C.G.S. § 44A-4(a) (2021)). In support of this, Circle of Seven claimed that a reviewing court could not find that the lien had remained unpaid because Bottoms Towing had "never communicated or attempted to communicate" an obligation to pay until November 2020—after it had claimed a lien and amassed months of storage fees. *Id.*

Third, and most importantly for the purposes of this appeal, Circle of Seven contended that even if the lien was valid, its amount should only reflect the costs accumulated in the days prior to Elliot's first attempt to retrieve the truck and "*should be substantially reduced by Bottoms's personal use of the Truck*." *Id.* at 455 (emphasis added). To support its argument that the lien should be reduced based on Mr. Bottoms's personal use of the truck, Circle of Seven provided the following facts: "[Mr.] Bottoms drove the Truck, kept personal items inside, made alterations, and . . . increased [the Truck's mileage] by approximately ten thousand miles during the storage period." *Id.*

While the dissent at the Court of Appeals ultimately agreed that the statutory lien on the truck was valid, it disagreed with the trial court's calculation of that lien. *Id.* at 456 (Tyson, J., concurring in the result in part and dissenting in part). In doing so, the dissent explained that "diminished market value" has been applied "as a measure of damages for conversion and physical harm to property." *Id.* at 457. Thus, in the dissent's view, Mr. Bottoms's personal use of the Dodge truck resulted in a diminution of the truck's value, and the lien amount should be reduced based on that resulting monetary loss. *Id.* at 458.

II. Conversion

Conversion is defined as "an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of

an owner's rights." *Wall v. Colvard, Inc.*, 268 N.C. 43, 49 (1966) (quoting *Peed v. Burleson's, Inc.*, 244 N.C. 437, 439 (1956)). This means that there are "two essential elements of a conversion claim: ownership in the plaintiff and wrongful possession or conversion by the defendant." *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 523 (2012).

The majority's refusal to reach the merits of this case because "a conversion argument" was not raised below is unsupported by both the Court of Appeals opinion and the trial court's order. First, the Court of Appeals opinion explicitly states that Circle of Seven argued that the "lien should be limited by [Mr.] Bottoms's personal use of the Truck," which included that "[Mr.] Bottoms drove the Truck, kept personal items inside, made alternations, and that the Truck's mileage increased by approximately ten thousand miles during the storage period." *Bottoms Towing*, 283 N.C. App. at 455. Similarly, the trial court's order compensated Circle of Seven for Mr. Bottoms's unlawful use of the Dodge truck.

Taking this information into consideration, it is clear that the Court of Appeals dissent did not "create an appeal for an appellant." Indeed, Circle of Seven did raise the issue discussed by the dissent: that the amount of Bottoms Towing's lien should be reduced based on Mr. Bottoms's personal use of the truck, which included driving the truck, leaving personal items inside the truck, and making alterations to the truck. *Id.* Because conversion occurs when one party exercises a right of ownership over another party's property and either alters that property or excludes the rightful owner of their rights in that property, *Wall*, 268 N.C. at 49, the crux of Circle of Seven's claim is the conversion of the Dodge truck by Mr. Bottoms. Accordingly, the unauthorized use of the Dodge truck and the resulting diminution in value based on that use provides a method for calculating damages, which would reduce the amount of Bottoms Towing's lien. *See Bottoms Towing*, 283 N.C. App. at 457–58 (Tyson, J., concurring in the result in part and dissenting in part) (citing *Phillips v. Chesson*, 231 N.C. 556, 571 (1950)).

In holding otherwise, the majority elevates form over substance, effectively determining that because Circle of Seven framed its argument using plain English, rather than legal terminology, the dissent was not permitted to address Circle of Seven's argument using its legal name: conversion. This is contrary to this Court's constitutional mandate under Article I, Section 18 of the North Carolina Constitution, unfair to the parties, and an unfortunate waste of this Court's and the parties' time and resources.

III. This Court's Duty to Reach the Merits of a Claim

"All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." N.C. Const. art. I, § 18. Litigants in this state must have free access to courts as a means to settle private claims and disputes. *Petrou v. Hale*, 43 N.C. App. 655, 658 (1979). This means that "the courts of North Carolina cannot fail to provide a forum to determine a valid cause of action." *Coman v. Thomas Mfg. Co.*, 325 N.C. 172, 174 (1989).

"Appellate courts perform two important functions: (a) correcting errors that occurred at the trial level, and (b) clarifying, standardizing, and developing the rules and principles of law that apply in the jurisdiction." Thomas L. Fowler, *Appellate Rule 16(b): The Scope of Review in an Appeal Based Solely Upon a Dissent in the Court of Appeals*, 24 N.C. Cent. L. Rev. 1, 1 (2001). While N.C.G.S. § 7A-30(2) has now been repealed, Current Operations Appropriations Act of 2023 § 16.21(d), its enactment furthered this Court's error-correcting function. For when a three-judge panel at the Court of Appeals disagrees on the correct outcome of a case, the likelihood that an error has been committed below increases. This notion is supported by our caselaw, which limits the scope of these appeals to only those issues that the three-judge panel disagreed on. *See, e.g.*, *State v. Farmer*, 376 N.C. 407, 413 (2020). The majority's failure to reach the merits of this case leaves an open question: was error committed below?

While the majority states that it would be "unjust" to review this issue, it does not address the injustice that necessarily results from not addressing the issue. Although this Court could disagree with the Court of Appeals' dissent or either of the parties' arguments on the matter, failure to conclusively rule on the issue presented harms not only the parties in this case but also North Carolinians more generally. *See Mole' v. City of Durham*, 384 N.C. 78, 100 (2023) (Earls, J., dissenting). The parties in this action both filed briefs and participated in oral argument before this Court, no doubt expending a considerable amount of time, effort, and money to present their respective positions. As it pertains to Circle of Seven, this Court's failure to address the merits of this claim allows the Court of Appeals' conclusion to stand, without so much as an explanation or ruling on whether the majority opinion or dissenting opinion was correct in its application of the law.

Similarly, by declining to reach the merits of this claim, this Court has also failed to establish binding precedent on the legal issue raised by

the dissent. A holding in favor of either party on the merits would give litigants in this state a greater understanding of the tort of conversion and the proper procedure for calculating damages based on a diminution of value that may later be used to offset a lien. *See id.*

Additionally, although the majority states that addressing the merits of this case would deprive Bottoms Towing of the opportunity "to disprove the fact-intensive assertions made by the dissent," this concern is illusory because the facts necessary to resolve this claim were introduced at the hearing in this case and Bottoms Towing had the opportunity to contest the evidence at that time. Because Circle of Seven argued below that the value of Bottoms Towing's lien should be reduced by Mr. Bottoms's personal use of the truck, there would be no "unfair do-over in the trial court," and our preservation rules do not act as a bar to a proper resolution of this case on the merits. *See M.E. v. T.J.*, 380 N.C. 539, 563 (2022).

IV. Conclusion

For appeals arising under N.C.G.S. § 7A-30(2), this Court should reach the merits of the dissent so long as it addresses the substance of a party's claims and sets out the dissenting judge's reasoning for breaking with the majority. *See Cryan v. Nat'l Council of YMCAs*, 384 N.C. 569, 579 (2023). Judge Tyson's dissent clears that hurdle. Accordingly, I dissent from the majority's decision to affirm the Court of Appeals' holding without reaching the merits of this case.

DEBRA CULLEN
v.
LOGAN DEVELOPERS, INC.

No. 155PA23

Filed 23 August 2024

1. Negligence—contributory negligence—fall through attic floor —open and obvious risk—failure to exercise reasonable care

Plaintiff was barred from asserting a negligence claim against defendant, who was the builder of her newly constructed home, for injuries plaintiff suffered when she was walking through her attic, stepped backward off of a plywood walkway without looking, and fell through a scuttle hole that defendant had cut into the attic floor. Plaintiff's failure to exercise reasonable care to avoid an open and obvious risk, particularly given her acknowledgment that she knew the attic floor was unsafe, contributed to her injuries as a matter of law; therefore, summary judgment was properly entered in favor of defendant.

2. Negligence—gross negligence—unsafe condition—alleged building code violation—conscious disregard for safety not shown

Plaintiff failed to show that defendant, the builder of her newly constructed home, acted with a bad purpose or reckless indifference to plaintiff's rights by constructing a scuttle hole in the attic floor—through which plaintiff fell to the floor below and severely injured herself—and, therefore, defendant was entitled to summary judgment on plaintiff's claim of gross negligence. Even if defendant violated the building code by covering over the hole in the lower floor's ceiling with drywall, there was no indication that defendant acted with conscious disregard for plaintiff's safety, and the scuttle hole presented the same amount of risk as the other insulation-covered areas of the attic that were unsafe to walk on.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 289 N.C. App. 1 (2023), vacating and remanding an order entered on 14 October 2021 by Judge Henry L. Stevens in Superior Court, Brunswick County. Heard in the Supreme Court on 10 April 2024.

Ricci Law Firm, P.A., by Meredith S. Hinton, for plaintiff-appellee.

McAngus Goudelock & Courie, by Jeffery I. Stoddard and Walt Rapp, for defendant-appellant.

Ann C. Ochsner and Gabriel E. Zeller for North Carolina Advocates for Justice, amicus curiae.

ALLEN, Justice.

The law expects individuals to take reasonable steps to protect themselves from open and obvious risks. For this reason, plaintiffs ordinarily cannot recover damages from defendants who created such risks if the plaintiffs could have avoided harm through due regard for their own safety.

Plaintiff Debra Cullen sued defendant Logan Developers, Inc. for injuries she sustained when she fell through a hole that defendant had cut into the plywood flooring of plaintiff's attic to provide access to the home's air handler. By her own admission, plaintiff did not look before she stepped backwards into the hole, even though she knew that it was unsafe to walk on any part of the attic that was not covered by flooring. Because the hole presented an open and obvious risk and plaintiff failed to exercise reasonable care under the circumstances, plaintiff cannot prevail on her negligence claim against defendant.

Furthermore, plaintiff's claim against defendant for gross negligence fails as a matter of law. Even if we assume that defendant violated the North Carolina Building Code as plaintiff alleges, defendant did not display the conscious disregard for plaintiff's safety necessary to prove gross negligence. The trial court properly granted defendant's motion for summary judgment on all claims, and we therefore reverse the decision of the Court of Appeals vacating the trial court's order.

I. Background

In June 2018, plaintiff and her husband (the Cullens) contracted with defendant to build a new home in Southport. During construction, the Cullens rented a nearby residence and frequently visited the construction site to check on the status of their home and speak with the project superintendent.

Construction included installation of the mechanical air handler for the home's heating, ventilation, and air conditioning system. To reach the air handler, which was located in the attic, a person had to walk on plywood flooring that ran between rows of trusses and was surrounded

by insulation. Anyone who stepped off the flooring and onto insulation risked falling through the ceiling.

On 28 December 2018, a mechanical rough-in inspection conducted by a Brunswick County building inspector determined that defendant had installed the air handler too far from the entrance to the attic. As interpreted by the inspector, the North Carolina Building Code required the air handler to be located not more than twenty feet from the attic's entrance.[1]

To comply with the inspector's interpretation of the Building Code, defendant decided to install a second opening to the attic, this one within twenty feet of the air handler. Defendant concluded that the only suitable spot for the second opening was in the master bathroom. Installing the second opening—a so-called "scuttle hole"—entailed cutting a section out of the master bathroom's ceiling and out of the attic's flooring above it. Defendant filled the gap in the attic's flooring with insulation. Thereafter, the house passed reinspection.

The Cullens disapproved of the scuttle hole in the master bathroom. They had expected an entirely smooth ceiling. To resolve the issue, defendant covered the scuttle hole's opening in the master bathroom with drywall, giving it the smooth appearance the Cullens wanted. Defendant did not replace the section that had been cut out of the attic's flooring, however, out of concern that doing so would completely close the scuttle hole in violation of the Building Code.

The parties disagree over whether defendant told the Cullens that installing the scuttle hole had involved removing a section of the attic's flooring. Plaintiff insists that defendant did not. The project superintendent testified that he took the Cullens into the attic, pointed out the missing section, and explained why he was unwilling to close the scuttle hole on the attic side.

On 1 May 2019, shortly after the Cullens moved into their home, plaintiff entered the attic to take photographs of the attic's interior. The Cullens had hired a handyman and wanted to add more flooring to the attic to increase its storage space.

While in the attic, plaintiff stepped into the scuttle hole, falling through the master bathroom's ceiling and onto the bathroom floor. The

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1. The relevant provision is 2018 North Carolina State Building Code: Mechanical Code § 306.3 (2018), which states in part: "The passageway shall be not . . . more than 20 feet (6096 mm) in length measured along the centerline of the passageway from the opening to the appliance."

fall left plaintiff with a concussion, a broken heel on her right foot, and a broken thumb. It also aggravated preexisting back injuries.

Plaintiff later testified that she understood when she entered the attic that it was unsafe to step off the flooring and onto insulation. Although plaintiff denied remembering exactly how she fell, both she and Mr. Cullen concluded that she must have stepped backwards into the scuttle hole. Plaintiff admitted that nothing would have prevented her from seeing the insulation covering the scuttle hole if she had looked before she stepped.

On 16 July 2020, plaintiff filed suit against defendant in the Superior Court, Brunswick County, alleging claims of negligence and gross negligence based on the "dangerous condition of the attic floor." The parties engaged in discovery, after which defendant filed a motion for summary judgment on the grounds that (1) plaintiff's own negligence in stepping backwards into the scuttle hole barred plaintiff's negligence claim and (2) plaintiff had not set forth facts sufficient to establish gross negligence.

On 14 October 2021, the trial court granted defendant's summary judgment motion. The court ruled that plaintiff had "clearly contributed to her accident and the injuries she sustained by failing to keep a proper lookout for her own safety while stepping backwards and off the plywood walking path in the attic and into an area that she knew was unsafe." The trial court further determined that "insufficient facts" existed to support a claim of gross negligence.

The Court of Appeals vacated the trial court's summary judgment order. *Cullen v. Logan Devs., Inc.*, 289 N.C. App. 1, 12 (2023). On the issue of contributory negligence, the appellate court held that "the evidence [viewed] in the light most favorable to [p]laintiff . . . create[s] a genuine issue of material fact as to whether [p]laintiff knew the [scuttle hole] area [in the attic] remained unsafe such that she was negligent in failing to look out for her safety while walking." *Id.* at 7. Similarly, the Court of Appeals held that the trial court should not have granted defendant summary judgment on plaintiff's gross negligence claim because "[t]he forecasted evidence . . . contains allegations and averments which, if taken as true, show [d]efendant knew concealing the appearance of the scuttle hole from the side of the master bathroom ceiling violated applicable building code, and otherwise knew concealing the hole posed a hazard, but did it anyway." *Id.* at 11.

Defendant subsequently filed a petition for discretionary review with this Court pursuant to N.C.G.S. § 7A-31. We allowed the petition.

II. Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2023). "The summary judgment standard requires the trial court to construe evidence in the light most favorable to the nonmoving party[,]" in this case, plaintiff. *Draughon v. Evening Star Holiness Church of Dunn*, 374 N.C. 479, 482 (2020). "We review de novo an appeal of a summary judgment order. When reviewing a matter de novo, this Court considers the matter anew and freely substitutes its own judgment for that of the lower courts." *N.C. Farm Bureau Mut. Ins. Co. v. Herring*, 385 N.C. 419, 422 (2023) (internal quotation marks and citations omitted).

III. Plaintiff's Contributory Negligence

[1] "Negligence is the failure to exercise proper care in the performance of a legal duty which the defendant owed the plaintiff under the circumstances surrounding them." *Moore v. Moore*, 268 N.C. 110, 112 (1966). Contributory negligence is a defense to negligence claims. The defense arises from the duty that the law imposes on us all to take reasonable care to protect ourselves. *Draughon*, 374 N.C. at 480.

With certain exceptions, contributory negligence will bar a plaintiff's negligence claim if the defendant shows that the plaintiff could have avoided injury by exercising reasonable care for the plaintiff's own safety.[2] *Sorrells v. M.Y.B. Hosp. Ventures of Asheville*, 332 N.C. 645, 648 (1992); *Holderfield v. Rummage Brothers Trucking Co.*, 232 N.C. 623, 625 (1950). Significantly, "the existence of contributory negligence does not depend on [the] plaintiff's *subjective* appreciation of danger; rather, contributory negligence consists of conduct which fails to conform to an *objective* standard of behavior—the care an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury." *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 673 (1980) (internal quotation marks and citation omitted).

Whether the trial court properly granted defendant's motion for summary judgment on plaintiff's negligence claim turns on whether

2. The last clear chance doctrine offers one such exception. It allows a contributorily negligent plaintiff to recover when "the conduct of [the] defendant[,] after his negligence and the plaintiff's contributory negligence have had their play, still leav[es] the defendant time and opportunity to avoid the injury notwithstanding what both parties have previously done, or failed to do." *McMillan v. Horne*, 259 N.C. 159, 160 (1963).

plaintiff was contributorily negligent as a matter of law. *See* Mark W. Morris, *North Carolina Law of Torts* § 19.20[1][c][iv] (3d ed. 2023) ("[I]t is rare that the court will decide the issue of contributory negligence . . . as a matter of law. But when the plaintiff's evidence fails to raise any issue of material fact and the evidence of contributory negligence is uncontradicted, summary judgment for the defendant is appropriate.").

"[O]ur case law has made it clear that when the condition that allegedly caused the injury, viewed objectively, is open and obvious, judgment as a matter of law is appropriate." *Draughon*, 374 N.C. at 482–83. "A condition is open and obvious if it would be detected by 'any ordinarily intelligent person using his eyes in an ordinary manner.' " *Id.* at 483 (quoting *Coleman v. Colonial Stores, Inc.*, 259 N.C. 241, 242 (1963) (per curiam)).

We recently dealt with an instance of contributory negligence in the context of an open and obvious condition. In *Draughon*, the plaintiff helped carry a casket up a set of stairs and into a church. *Id.* at 480. "[W]atch[ing] the doorway instead of where he was stepping[,] [the plaintiff] tripped near the top of the steps, fell into the church building, and was injured." *Id.* The top step was covered with a layer of brick that raised it several inches higher than the other steps. *Id.* at 481. The plaintiff sued the church, alleging among other things that it had "failed to keep its premises in a reasonably safe condition and failed to warn [the] plaintiff of a dangerous and defective condition on the property." *Id.* at 482. In concluding that the trial court had properly granted the church's motion for summary judgment, this Court explained: "The distinct height and appearance of the step, the clear visibility of the set of stairs, and plaintiff's previous experience walking down the set of stairs show that a reasonable person in [the] plaintiff's position would have been aware of the step's condition and taken greater care." *Id.* at 485.

Plaintiff tries to distinguish her case from *Draughon* by noting that the *Draughon* plaintiff "had walked down the steps just before his accident." *Id.* at 486. Because he had just used the stairs, the *Draughon* plaintiff had a chance to appreciate the danger posed by the top step before he walked up the steps while carrying the casket. But here, according to plaintiff, she "had not walked in the attic after [d]efendant cut a hole in the walkway and had no way of knowing that [d]efendant had done so."

The problem with plaintiff's distinction is that the outcome in *Draughon* did not depend on the *Draughon* plaintiff's earlier descent of the church steps. We clearly indicated that the descent was an additional—not essential—basis for our decision:

> *Because the condition of the top step would be open and obvious to a reasonable person*, [the] *defendant had no duty to warn* [the] *plaintiff*. Similarly, because [the] plaintiff, after his previous descent of the steps, did not heed the risk obviously presented by the distinct appearance of the top step, and because he carried the casket while walking sideways without looking at the steps, his own negligence contributed to his fall.

Id. at 487 (emphasis added).

The first sentence of the above quotation demonstrates that our holding in *Draughon* rested on the open and obvious condition of the top step. Although this Court pointed to the plaintiff's earlier descent of the steps as further support for our contributory negligence determination, *id.*, we did not hold that a plaintiff must have prior knowledge of an open and obvious risk for the defense of contributory negligence to apply. Indeed, such a holding would have been at odds with our precedents. *See, e.g.*, *Benton v. United Bank Bldg. Co.*, 223 N.C. 809 (1944) (applying the "open and obvious" principle without reference to whether the plaintiff had previously visited the store where she fell).

Plaintiff also tries to distinguish this case from *Draughon* by denying that the scuttle hole presented an open and obvious risk. She observes that the attic had only a single light bulb and one window. Plaintiff further asserts that the scuttle hole "was filled in with a piece of batt insulation in the attic, which was flush with the walkway, making it indiscernible." At a minimum, plaintiff contends, whether the scuttle hole presented an open and obvious risk was a question for the jury, not the trial court.

This argument fails for two reasons. First, plaintiff's assertion that the batt insulation effectively camouflaged the scuttle hole appears to be a fresh allegation. She did not argue the batt insulation issue to the trial court or the Court of Appeals, and we find nothing in the record that supports her contention. "[T]he law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court." *Weil v. Herring*, 207 N.C. 6, 10 (1934).

Second, plaintiff's claim that poor lighting and the batt insulation made the scuttle hole hard to see is contradicted by plaintiff's own testimony. During her deposition, plaintiff admitted under oath that she would have seen the scuttle hole had she looked: "If I had [looked

toward the scuttle hole], I would have seen insulation and I would not have stepped in it." Likewise, plaintiff expressly denied that the hole was hidden or that anything blocked it from view. The summary judgment standard requires us to examine the evidence in the light most favorable to plaintiff; it does not oblige us to ignore the parts of plaintiff's testimony that torpedo her argument.

Despite her admission that the scuttle hole was plainly visible, plaintiff argues that she acted reasonably under the circumstances in stepping backwards in the attic without checking behind her. According to plaintiff, defendant never told her that the scuttle hole's installation had involved the removal of a section from the attic's flooring. She further contends that, even if she had known about the missing section, defendant's promise to repair the master bathroom's ceiling left her with no reason to suppose that the attic's flooring remained dangerous. Plaintiff directs our attention to her testimony that she had visited the attic perhaps twice before defendant installed the scuttle hole. Her familiarity with the attic's original condition, she maintains, left her without any reason to believe that a gap existed in the flooring.

Consistent with *Coleman v. Colonial Store, Inc.*, we reject plaintiff's contention that she acted reasonably by stepping backwards in the attic without looking. The customer in *Coleman* tripped over a metal screen as he turned to his right immediately after exiting the supermarket. 259 N.C. at 242. Shaped like a right triangle, the metal screen was fastened to the wall of the store and was "about four and a half or five feet high, about eight inches wide at the top, and about thirty-four inches wide at the bottom." *Id.* Although the screen was plainly visible through the glass of the exit door, "[t]here was nothing there to call [the customer's] attention to the metal screen." *Id.* The customer had visited the store previously but "in leaving had turned to his left" and "[i]n so doing . . . had not noticed the screen." *Id.* The customer admitted that he was not looking where he was going at the time of his fall. *Id.*

In affirming the trial court's order dismissing the customer's negligence lawsuit against the supermarket, this Court remarked that "[t]he metal screen at the exit door was obvious to any ordinarily intelligent person using his eyes in an ordinary manner." *Id.* We concluded that the customer's "evidence plainly show[ed] [that] he failed to exercise ordinary care for his own safety." *Id.* at 243.

Like the customer in *Coleman*, plaintiff did not look where she was stepping and was injured by an open and obvious condition. If anything, plaintiff had more reasons than the *Coleman* customer to watch where

she was going. Storefronts are not usually perilous environments, but plaintiff knew that she could fall through the ceiling if she stepped off the plywood and onto any area covered by insulation. Moreover, just as the *Coleman* customer's previous familiarity with the store did not excuse him from looking where he was going, plaintiff's prior visits to the attic did not relieve her of the obligation to watch her step.

Plaintiff argues that precedents from the Court of Appeals support her position. We find those cases materially distinguishable. For example, plaintiff points to *Duval v. OM Hospitality, LLC*, 186 N.C. App. 390 (2007). There, a woman and her husband had to make their way down an unlit stairwell to exit a motel. 186 N.C. App. at 391. The stairwell was unlit "because a light timer which controlled the light . . . had been deactivated." *Id.* As the couple descended the stairs, the woman tripped and fell, injuring herself. *Id.* She later testified that the stairwell "was so dark that [she] could not see the steps." *Id.* The woman sued the motel, but the trial court granted summary judgment in favor of the motel on contributory negligence grounds. *Id.* at 392. The Court of Appeals reversed, opining that

> a jury could also find that [the woman] acted reasonably in using the stairwell since she was not aware of another way out and because she used proper care in descending the dark stairs, carefully and slowly, holding the railing, and having her husband ahead of her feeling for the steps, but fell nonetheless.

Id. at 396.

It seems obvious to us that *Duval* is not on point. The woman in *Duval* moved forward cautiously but could not see where she was going through no fault of her own. Here, even if we assume she was moving slowly, plaintiff did not see the scuttle hole because she stepped backwards without looking.

Viewed in the light most favorable to plaintiff, the evidence shows that she failed to exercise reasonable care for her own safety in the attic. By her own admission, plaintiff understood that the attic was dangerous and could have avoided falling by looking before she stepped backwards. The trial court correctly determined that plaintiff was contributorily negligent, and the Court of Appeals erred in vacating the trial court's order granting summary judgment for defendant on plaintiff's negligence claim.

IV. Plaintiff's Claim for Gross Negligence

[2] "Contributory negligence is not a bar to a plaintiff's recovery when the defendant's gross negligence . . . is a proximate cause of the plaintiff's injuries." *Yancey v. Lea*, 354 N.C. 48, 51 (2001). Thus, although it defeats her negligence claim, plaintiff's contributory negligence does not prevent her from pursuing her claim against defendant for gross negligence. Like the trial court and the Court of Appeals, we proceed to the merits of plaintiff's gross negligence claim.

This Court has sometimes found it difficult to distinguish between negligence and gross negligence in practice. *See Hinson v. Dawson*, 244 N.C. 23, 27–28 (1956) ("When an injury is caused by negligence, any attempt to differentiate variations from slight to gross is fraught with maximum difficulty."). Nonetheless, "the difference between ordinary negligence and gross negligence is substantial." *Yancey*, 354 N.C. at 53. Whereas ordinary negligence involves inadvertence or carelessness, we have used the term gross negligence "in the sense of wanton conduct." *Id.* (quoting *Hinson*, 244 N.C. at 28). "An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others." *Foster v. Hyman*, 197 N.C. 189, 191 (1929).

Plaintiff argues that "defendant willfully violated the building code and consciously disregarded plaintiff's safety." According to plaintiff, defendant created a dangerous condition by leaving the scuttle hole open in the attic and not alerting plaintiff of the peril.

As plaintiff acknowledges, the Court of Appeals has opined that a Building Code violation without more does not qualify as gross negligence. *Bashford v. N.C. Licensing Bd. for Gen. Contractors*, 107 N.C. App. 462, 467 (1992). We agree that such a violation does not automatically constitute gross negligence because it is not necessarily the product of a bad purpose or reckless indifference to the rights of others. Consequently, even if we assume that defendant violated the Building Code by closing the scuttle hole on the master bathroom side, this fact alone does not establish that summary judgment for defendant was improper. The question is whether there is evidence that defendant acted with a bad purpose or with reckless indifference to plaintiff's rights.

Construed in the light most favorable to plaintiff, the evidence yields the following details. Defendant installed the scuttle hole to comply with the county inspector's interpretation of the Building Code. Plaintiff did not know that defendant had cut a section out of the attic's flooring

as part of the installation. Defendant subsequently closed the hole on the master bathroom side in response to the Cullens' unhappiness over the ceiling's appearance. Defendant did not clearly communicate its actions to plaintiff, who believed that the scuttle hole was entirely gone. The scuttle hole on the attic side was filled with insulation that plaintiff would have seen had she looked before stepping backwards.

On these facts, a jury could conclude that defendant violated the Building Code by closing the scuttle hole entrance in the master bathroom. Jurors could also find that defendant created a risk to plaintiff by failing to explain that the scuttle hole remained open in the attic.

Yet these facts do not demonstrate that defendant acted for some bad purpose, nor do they reflect a reckless indifference to the rights of others. Rather, they show that defendant made a thoroughly unwise—and unsuccessful—attempt to balance the competing priorities of customer satisfaction and Building Code compliance. Moreover, while plaintiff might have escaped injury if defendant had clearly informed her of the missing section in the attic's flooring, the scuttle hole presented essentially the same risk—the risk of falling through the ceiling—as the other parts of the attic that were covered with insulation instead of plywood. The insulation covering the scuttle hole was plainly visible and served as a warning not to step there. Defendant did not evince reckless indifference in assuming that plaintiff would heed that warning.

Plaintiff cannot show that defendant's conduct went beyond mere carelessness and rose to the level of wantonness. Defendant was therefore entitled to summary judgment as a matter of law on plaintiff's gross negligence claim.

V. Conclusion

For the reasons set out above, the trial court properly granted defendant's motion for summary judgment on plaintiff's claims of negligence and gross negligence. Accordingly, we reverse the decision of the Court of Appeals and reinstate the trial court's summary judgment order.

REVERSED.

DEPARTMENT OF TRANSPORTATION
v.
BLOOMSBURY ESTATES, LLC,
BLOOMSBURY ESTATES CONDOMINIUM HOMEOWNERS' ASSOCIATION, INC.

No. 250PA21-2

Filed 23 August 2024

Eminent Domain—condemnation—rights asserted by owner and developer—corollary suits pending—all pleaded issues regarding taking resolved—summary judgment proper

In a condemnation matter, where the property's owner (a condominium association) and a developer (to which the association had granted certain development rights with a set expiration date) asserted rights in the property at the time of the taking by the Department of Transportation (for a temporary construction easement) and, therefore, were both parties to the eminent domain action, the trial court did not err by granting summary judgment to and distributing settlement funds in favor of the developer even though the parties' corollary actions were not yet finalized. All of the issues pleaded in the taking action and argued at the hearing held pursuant to N.C.G.S. § 136-108 had been resolved, including the total amount of just compensation (which the parties settled via consent judgment) and issues related to the parties' relative interests in the taken property. Further, the trial court had discretion under section 136-117 to determine the apportionment of compensation between the parties, including that the developer was entitled to compensation for the loss of development rights, which was in accord with the assessment of both parties' appraisers.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 281 N.C. App. 660 (2022), reversing in part and affirming in part the order and final judgment entered on 3 March 2021 by Judge Vinston M. Rozier Jr. in Superior Court, Wake County and remanding the case. Heard in the Supreme Court on 31 October 2023.

No brief for plaintiff-appellee Department of Transportation.

Thomas, Ferguson & Beskind, LLP, by Jay H. Ferguson for defendant-appellant Bloomsbury Estates, LLC.

Law Firm Carolinas, by T. Keith Black and Harmony W. Taylor; and Rossabi Law Partners, by Gavin J. Reardon, for defendant-appellee Bloomsbury Estates Condominium Homeowners Association, Inc.

RIGGS, Justice.

This case asks us to examine the scope of issues that must be resolved within an eminent domain action under N.C.G.S. §§ 136-103 to -121.1 when the subject property is part of a condominium association. A complicating factor in this case is that the property subject to the taking was owned by a condominium association and the condominium declaration granted development rights for a portion of the property to defendant-appellant, Bloomsbury Estates, LLC (the Developer). Therefore, both the Developer and the Bloomsbury Estates Condominium Homeowners Association, Inc. (the Association) were parties to the eminent domain action and had rights to the property at the time of the taking.

Outside of this eminent domain action (the Taking Action), however, the Developer and the Association initiated separate litigation regarding the validity of the development rights and the interests of the property at the time of the taking. By litigating the development rights separately—that is, to some extent, initiating litigation of the interests in the land outside of the eminent domain action and, more specifically, outside of the hearing pursuant to N.C.G.S. § 136-108—the Developer and the Association created three proceedings with interconnected issues and now ask this Court to determine whether the Taking Action can be resolved prior to the resolution of the other claims in the separately-filed actions. The Developer argues the other claims can be litigated separately and the trial court appropriately granted the Developer's motion for summary judgment, distributing the bulk of the compensation from the taking to the Developer. In contrast, the Association contends that issues in the other cases affect the valuation of the property on the date of the taking and therefore must be decided before the compensation can be distributed.

We hold that the trial court did not err in granting summary judgment prior to resolution of the parties' issues in other cases because those issues were not pleaded in the Taking Action on appeal here. Summary judgment is proper when all pleaded issues affecting the rights of the property as of the date of the taking are resolved prior to final judgment. *See Century Commc'n, Inc. v. Hous. Auth.*, 313 N.C. 143, 145 (1985) ("Summary judgment is appropriate only if the pleadings

and other materials before the trial judge show that there is no genuine issue of material fact and that any party is entitled to a judgment as a matter of law."). Section 136-108 of the General Statutes establishes that, in a hearing under this statutory provision, "the judge . . . shall . . . hear and determine any and all issues raised by the pleadings other than the issue of damages, including, but not limited to, if controverted, questions of necessary and proper parties, title to the land, interest taken, and area taken." N.C.G.S. § 136-108 (2023).

Here, the parties settled via consent judgment the total amount of damages (just compensation), so there can be no dispute of material fact as to that matter. To the extent there was a dispute over how the just compensation should be distributed amongst the parties the trial court adopted the Association's appraisal on relative distribution and the Developer disclaims any dispute over that on appeal. Thus, the matter was ripe for resolution on a motion for summary judgment.

At the hearing for determination of issues other than damages (the N.C.G.S. § 136-108 hearing) the trial court resolved controverted questions of title to the land and interest taken that were raised in the action's pleadings. *See generally id.* Specifically, although the eminent domain statutory scheme is comprehensive and generally designed to avoid piecemeal litigation, the validity of the amendment at issue in this case was determined in a separate action and the parties were estopped then from relitigating that matter at the N.C.G.S. § 136-108 hearing.

Along a similar vein, we are generally hesitant to stay or interrupt all condemnation proceedings until later-instituted parallel proceedings conclude. *See Watters v. Parrish*, 252 N.C. 787, 791 (1960) (recognizing that a trial court's decision to hold one lawsuit in abeyance pending the outcome of another case will not be disturbed absent an abuse of discretion). Here, where the legal question of the parties' relative interests in the taken property had already been settled, staying the Taking Action for final resolution of all other litigation serves no purpose. For the reasons articulated below, we thus reverse the Court of Appeals' decision.

I. Factual & Procedural Background

A. Factual Background

The Bloomsbury Estates Condominium Development is situated on a tract of land in downtown Raleigh, adjacent to Raleigh Union Station. Development of the property began in 2006 when the Developer received approval from the City of Raleigh Planning Commission and City Council to build two phases of condominium buildings on the

property. Phase I consisted of a building with fifty-six condominiums and Phase II consisted of an additional building with an additional fifty-four condominiums and amenities to serve both buildings, including a proposed pool and fitness center. The Developer built the Phase I building and sold the fifty-six condominiums in the Phase I building before the Department of Transportation (DOT) initiated the Taking Action on 27 July 2015. In the Taking Action, the DOT permanently took approximately one-third of the Phase II land for a railroad right of way and temporarily took an additional quarter acre for a construction easement to expand the Raleigh Union Station. The land the DOT took coincided with the planned location of the Phase II building, preventing the construction of the Phase II building until the temporary easement ended on 13 September 2017, and affecting the cost of construction for the Phase II building.

After Phase I was completed but before the Taking Action was commenced, the Developer recorded a Declaration of Condominium (Declaration) for the property pursuant to the North Carolina Condominium Act, N.C.G.S. § 47C-2-101 (2023), which legally established the Association on 13 July 2009. The Declaration transferred ownership of the property to the Association but, in this case, gave the Developer control over the Association and reserved the Developer's right "[t]o complete, within five years of the date of recordation of this Declaration of Condominium, any and all improvements indicated on the plats and plans up to a maximum of 140 Units." The Developer recorded multiple amendments to the Declaration, ultimately recording the Fifth Amendment on 8 March 2013. The Fifth Amendment, provided for, *inter alia*, transferring control of the Association from the Developer to the unit owners and extending the Developer's right to complete Phase II until 13 July 2017. The Fifth Amendment stated that the amendment was agreed to by the Developer and at least sixty-seven percent of the unit owners; the Fifth Amendment was recorded on 8 March 2013.

On 27 July 2015, when the DOT initiated the taking, the Developer had not begun construction of the Phase II building and the taking prevented the construction of the Phase II building until after the DOT returned the property. At the time of the taking, the DOT anticipated keeping the temporary construction easement beyond 13 July 2017, the date when the Developer's rights to develop Phase II expired under the Fifth Amendment. The DOT ultimately terminated the temporary easement and returned control of the land to the Developer and the Association on 13 September 2017. When the DOT returned the property, the Developer's right to construct Phase II under the Fifth Amendment had expired.

The DOT initiated the Taking Action by filing a declaration of taking with an estimate of the just compensation for the taking and deposited the sum of $779,050 with the clerk of court as required by N.C.G.S. § 136-103. The DOT's filings referenced the Declaration and all five amendments as liens and encumbrances applicable to the property. The Developer and the Association jointly filed a responsive pleading arguing that the amount was grossly insufficient. This joint responsive pleading did not indicate any dispute over the validity of the Fifth Amendment or how the compensation would be apportioned between the parties.

After mediation in June of 2017, the DOT, the Developer, and the Association entered a consent judgment establishing that $3,950,000 was just compensation for the entire taking. The consent judgment did not establish how the just compensation would be divided between the Developer and the Association. Once the DOT deposited the full sum with the clerk of court, the DOT's involvement in the litigation ended.

During the pendency of the Taking Action, the Developer and the Association each filed a complaint against the other party regarding rights to the property. In the first of the related lawsuits the Developer filed a complaint against the Association seeking, *inter alia*, equitable reformation of the Fifth Amendment to allow the Developer additional time to develop Phase II of the property (Developer's Action). The Association responded to this claim asserting, among other things, that "the time limit expired within which development rights shall have been exercised pursuant to the Declaration and North Carolina law, and the time limit cannot be extended as a matter of North Carolina Law." The Association filed a separate complaint against the Developer shortly thereafter alleging twelve causes of action including, *inter alia*, a request for declaratory judgment to determine the Developer's rights to develop Phase II (Association's Action).

In the Developer's Action, the Developer and the Association litigated the validity of the Fifth Amendment in a hearing held on 28 August 2017. The trial court in that action granted partial summary judgment in favor of the Developer by finding the one-year statute of limitations in N.C.G.S. § 47C-2-117(b) barred the Association from challenging the validity of the Fifth Amendment. The trial court concluded the Fifth Amendment was valid and the "parties [were] bound by the rights and obligations contained therein." Because the Fifth Amendment was valid, the Developer held the right to construct the Phase II building. In other words, at the time the DOT took control of the property, the Developer held valid rights even though those rights had expired by the time of the return of the property under the temporary easement.

Subsequently, the Developer filed a motion for a N.C.G.S. § 136-108 hearing in the Taking Action. In that motion, the Developer contended the parties were bound by the trial court's ruling in the Developer's Action, and the Fifth Amendment controlled distribution of the compensation. The trial court in the Taking Action held a hearing in April 2018 and entered an order concluding that the Association was precluded from relitigating the validity of the Fifth Amendment. Determining that estoppel principles required that the ruling in the Developer's Action bound the court in the Taking Action, the trial court held that the Fifth Amendment was valid and that, as of the time of the taking, the Developer held a valid right to develop Phase II. Subsequently, on 13 November 2019, the Association moved to stay the distribution of the funds pending resolution of the other claims, which would allow the Association the right to appeal the validity of the Fifth Amendment. Additionally, the Association requested consolidation of the claims. The trial court denied the motion to stay the matter on 31 December 2019.

After the N.C.G.S. § 136-108 hearing in April of 2018, the Developer and the Association commissioned appraisals to provide opinions on the appropriate apportionment of the settlement. After the appraisals were complete, the Developer moved for summary judgment on 13 July 2020, requesting distribution of the taking compensation according to its appraisal. The Association, referencing the interplay between the claims, again asked the trial court to stay the action and to consolidate the claims. The Association argued that if, on appeal in the Developer's Action, the Fifth Amendment was found to be invalid, the conclusions of the appraisers would be invalid. The Developer argued that the appraisers agreed—albeit, premised upon the validity of the Fifth Amendment—that the majority of the value of the property taken resided in the development rights. If the Fifth Amendment was not valid, the appraisers for the Association reported that the compensation for the taking should be paid entirely to the Association. After a hearing on 22 July 2020, the trial court granted the motion for summary judgment in favor of the Developer pursuant to the valuation of property rights provided by the Association's appraiser, not the valuation set by the Developer's appraiser.[1] The trial court also consolidated all three actions. The Association filed a motion to amend the summary judgment order and requested the trial court's reconsideration. After a hearing on this motion, the trial court amended the order by decoupling

1. Again, the Developer does not contest on appeal the use of the Association's appraisal.

the Taking Action from the other two actions but otherwise left the order untouched.

The trial court in the Taking Action ultimately entered an order and final judgment concluding that the loss to the Developer from the taking, based upon the Association's appraisal, was $3,350,000 and the remainder of the compensation should be assigned to the Association. The trial court found that under N.C.G.S. § 47C-1-107, the Developer must be fully compensated for the loss of the development rights first and any remaining funds should be distributed to the Association. *See* N.C.G.S. § 47C-1-107 (2023). After adjusting the settlement amount based on prejudgment interest, attorneys' fees, and property taxes, the trial court ordered that $2,929,225 be distributed to the Developer and $54,410 to the Association. The settlement funds were distributed to the parties pursuant to this order.

B. Procedural Background

On appeal, a unanimous panel of the Court of Appeals held that the Developer was not entitled to summary judgment and distribution of settlement funds. *Dep't of Transp. v. Bloomsbury Ests., LLC*, 281 N.C. App. 660, 669 (2022). The Court of Appeals held that the issues presented in the Developer's Action and the Association's Action represented material facts affecting the apportionment of the settlement funds between the Developer and the Association in the Taking Action. *Id.* at 667–68. Additionally, the Court of Appeals held that because the valuation involves the opinion of appraisers, a jury should determine the credibility of each appraiser. *Id.* at 668. The Court of Appeals affirmed the trial court's order regarding the consolidation of the actions but reversed the trial court's summary judgment order and remanded for further proceedings. The Developer filed a petition for discretionary review, and we allowed it.

II. Analysis

The key issue in this case is whether the trial court appropriately resolved, under its authority pursuant to N.C.G.S. §§ 136-108 and -117, the interests in the taken property and the allocation of the just compensation settled in the consent judgment, such that summary judgment and distribution of just compensation was proper. The Developer argues that the validity of the Fifth Amendment was the only issue that affected the rights to the property on the date of the taking and, therefore, summary judgment and the distribution of compensation was appropriate before the resolution of the other claims. The Developer argues, that to the extent that the Association contends that any issues

in the other actions affect the value of the property on the date of the taking, the Association had a duty to present those issues at the N.C.G.S. § 136-108 hearing. The Association provides multiple reasons that the other actions must be resolved before the compensation is distributed. However, at the core of its arguments is the correct but ultimately ancillary argument that the Developer should not be allowed to "double dip" by recouping essentially all of the just compensation for the loss of its development rights and then also seek to equitably reform the Fifth Amendment to restore and extend its development rights after the taking. Recognizing the inequity in the Developer's position, we nonetheless hold, after consideration of the record and the other claims in the matter at hand, that the trial court properly granted summary judgment in favor of the Developer after resolving all issues presented for resolution at the N.C.G.S. § 136-108 hearing, and we trust a later trial court to weigh the Developer's future development rights in equity.

Fundamental to the "right to take private property for public use" is the requirement to pay "fair compensation for the property." *Town of Morganton v. Hutton & Bourbonnais Co.*, 251 N.C. 531, 533 (1960). When the public entity only takes a portion of the property, "just compensation consists of the difference between the fair market value of the entire tract immediately before the taking . . . and the fair market value of the land remaining immediately after the taking." *Dep't of Transp. v. M.M. Fowler, Inc.*, 361 N.C. 1, 5 (2006). In a similar vein, when the property taken has been approved for development, the value of those development rights affects the value of the taken property. *See Town of Midland v. Wayne*, 368 N.C. 55, 66 (2015) (recognizing that approved development rights are "an important feature of the condemned land" affecting the measure of damages).

Typically a judge or jury determines the value of the property in an eminent domain action. N.C.G.S. § 136-112 (2023). In this case, the value of the property was agreed upon in a consent judgment. The controversy at hand centers on the validity of the Fifth Amendment—an issue answering the question of which party held the development rights to the property when the DOT instituted the Taking Action—outside of this action. Importantly, while the Developer's Action is an action collateral to the Taking Action, the legal question in that matter was resolved prior to the N.C.G.S. § 136-108 hearing.

Principles of res judicata preclude "a second suit based on the same cause of action between the same parties." *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 413 (1996) (cleaned up). The resolution of the Fifth Amendment's validity in the Developer's Action led the trial court

in this matter to hold that validity of the Fifth Amendment could not be relitigated in this action. However, the trial court in the Developer's Action has not yet decided whether the Fifth Amendment can be equitably reformed to allow the Developer to develop the property after the taking was justly compensated and when the temporary easement ended. The resolution of the equitable reformation issue could affect which party held the development rights when the condemned land was returned to the parties. Instead, the trial court in the Taking Action—assuming no equitable reformation—held that the Developer lost development rights due to the taking and distributed compensation for the loss of those rights to the Developer. Plainly, to the extent the Developer wishes to press the undecided equitable reformation issue in a collateral action, the fact that the Developer has already been fully compensated for the loss of the development rights in the Taking Action would be a relevant consideration in equity. *See Surratt v. Chas. E. Lambeth Ins. Agency*, 244 N.C. 121, 131 (1956) (recognizing that when there are inconsistent rights or remedies of which a party may avail himself, a choice of one is held to be an election not to pursue the other).

Because the trial court resolved all issues related to the interests in the property and the just compensation was settled in a consent judgment, we hold that the trial court properly granted summary judgment in favor of the Developer in the Taking Action.

A. Eminent Domain Actions Generally

"The right to take private property for public use, the power of eminent domain, is one of the prerogatives of a sovereign state. . . . Its exercise, however, is limited by the constitutional requirements of due process and payment of just compensation for property condemned." *State v. Core Banks Club Props., Inc.*, 275 N.C. 328, 334 (1969). Both the U.S. Constitution and the North Carolina Constitution require due process and just compensation when a public entity uses its eminent domain power to take property. U.S. Const. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."); N.C. Const. art. I, § 19 ("[N]o person shall be . . . deprived of his . . . property, but by the law of the land.").

The General Assembly vested in the DOT the power of eminent domain and provided procedures for exercising this power in N.C.G.S. §§ 136-103 to -121.1. See N.C.G.S. § 136-19(a) (2023) ("The Department of Transportation is vested with the power to acquire either in the nature of an appropriate easement or in fee simple such rights-of-way and title to such land . . . as it may deem necessary and suitable . . . to enable it to properly prosecute the work, by purchase, donation, or condemnation,

in the manner hereinafter set out."). When the DOT exercises its eminent domain power, it must provide just compensation to the "person owning said property or any compensable interest therein at the time of the filing of the complaint." N.C.G.S. § 136-104 (2023). Just compensation is defined as "the market value of property *at the time of the taking*, unaffected by any subsequent change in the condition of the property." *W. Carolina Power Co. v. Hayes*, 193 N.C. 104, 107 (1927) (cleaned up) (emphasis added).

When a partial tract of land is taken, the measure of damages, or just compensation, "shall be the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking, with consideration being given to any special or general benefits resulting from the utilization of the part taken for highway purposes." N.C.G.S. § 136-112(1) (2023); *see also Barnes v. N.C. State Highway Comm'n*, 250 N.C. 378, 387 (1959) ("In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be, what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted—that is to say, what is it worth from its availability for valuable uses?" (quoting *Carolina-Tennessee Power Co. v. Hiawassee River Power Co.*, 186 N.C. 179, 183–84 (1923)).

In a DOT condemnation action, the General Assembly created a process for resolving questions related to the title of the land taken, interest in the land, proper parties, and all issues other than damages in N.C.G.S. § 136-108. The statute provides for a hearing to "eliminate from the jury trial any question as to what land [the State] is condemning and any question as to its title." *N.C. State Highway Comm'n v. Nuckles*, 271 N.C. 1, 14 (1967). The statute provides the following:

> After the filing of the plat, the judge, upon motion and 10 days' notice by either the Department of Transportation or the owner, shall, either in or out of term, hear and determine any and all issues raised by the pleadings other than the issue of damages, including, but not limited to, if controverted, questions of necessary and proper parties, title to the land, interest taken, and area taken.

N.C.G.S. § 136-108. It is the responsibility of the parties to argue all issues of which they are aware at the N.C.G.S. § 136-108 hearing. *See*

City of Wilson v. Batten Fam., L.L.C., 226 N.C. App. 434, 439 (2013) ("[A]t a minimum, a party must argue all issues of which it is aware, or reasonably should be aware, in a N.C.G.S. § 136-108 hearing.").

After the trial court resolves any issues related to the title of or interests in the property that was taken, then, under N.C.G.S. § 136-117, the trial court may determine how the settlement should be distributed:

> If there are adverse and conflicting claimants to the deposit made into the court by the Department of Transportation or the additional amount determined as just compensation, on which final judgment is entered in said action, the judge may direct the full amount determined to be paid into said court by the Department of Transportation and may retain said cause for determination of who is entitled to said moneys and may by further order in the cause direct to whom the same shall be paid and *may in its discretion order a reference to ascertain the facts on which such determination and order are to be made.*

N.C.G.S. § 136-117 (2023) (emphasis added). Generally, when there are conflicting claims as to how the compensation for the property taken by eminent domain should be apportioned, "a proper method of fixing the value of, or damage to, each interest or estate, is to determine the value of, or damage to, the property as a whole, and then to apportion the same among the several owners according to their respective interests or estates." *Barnes v. N.C. State Highway Comm'n*, 257 N.C. 507, 520 (1962).

With this general framework for an eminent domain action in mind, we now turn to the process employed in this case.

B. Resolution of this Eminent Domain Action

Initially, the Developer and the Association jointly argued that the DOT's estimated compensation, which did not include any value for development rights, was "grossly inadequate." A party's development rights in property, this Court has held, is an interest affected by condemnation of the property, and the right of development enhances the value of the property before the taking. *See Wayne*, 368 N.C. at 56 (holding that owners of an undeveloped portion of a subdivision had vested rights to complete the subdivision and the vested rights enhanced the value of the property before the taking). Although the DOT originally valued the land, including damages caused by the temporary taking, at $779,050, the Developer, the Association, and the DOT agreed after mediation that

the just compensation "for any and all claims for interests and costs; for any and all damages . . . ; and for the past and future use" was $3,950,000.

The Developer and the Association signed the consent judgment agreeing to the total valuation without agreeing between themselves on the apportionment of this compensation. The consent judgment which the Developer and the Association signed indicated that "the title to the property is not in dispute" and is "subject only to such liens and encumbrances as were set forth in Exhibit 'A' of the [c]omplaint and [d]eclaration of [t]aking." Exhibit "A" referenced the Declaration and all five amendments to the Declaration.

After the entry of this consent judgment, but before any N.C.G.S. § 136-108 hearing in the Taking Action, the Developer filed a collateral action seeking a declaratory judgment that the Developer "retains the right to develop Phase II until [13 July 2017], pursuant to the Fifth Amendment," and requesting reformation of the Fifth Amendment "to extend the time for [the Developer] to develop Phase II for a period of time equal to the time that the . . . DOT made it impossible for [the Developer] to do so." The Association filed a separate collateral complaint which alleged, *inter alia*, that "[t]he Fifth Amendment was not approved with unanimous consent of the unit owners." The Association did not notice the N.C.G.S. § 136-108 hearing prior to the resolution of the validity of the Fifth Amendment in the Developer's Action, although it could have. The trial court, in the Developer's action, held the Fifth Amendment was valid, establishing that the Developer held development rights at the time of the taking and those rights expired during the time that the DOT controlled a temporary easement on the property. The Association appealed that ruling to the Court of Appeals but then voluntarily withdrew the appeal on 5 January 2018. *Bloomsbury Ests., LLC*, 281 N.C. App. at 664. The Developer then asked the trial court in this action to adopt that ruling, asserting that the doctrine of collateral estoppel precluded the Association from relitigating the issue. *See generally Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 14–15 (2004) (acknowledging that issue preclusion estops a party from relitigating an issue in a later action after a final judgment has been entered on the merits in a prior judicial proceeding).

Even though the order finding the Fifth Amendment valid in the Developer's Action was an interlocutory order, the trial court in the Taking Action concluded that the "issue of the validity of the Fifth Amendment was fully litigated in [the Developer's] [A]ction and the [Association] enjoyed a full and fair opportunity to litigate this issue." In a condemnation action, the purpose of the N.C.G.S. § 136-108 hearing

is to eliminate "any question as to what land the [DOT] is condemning and any question as to its title." *Nuckles*, 271 N.C. at 14; *see, e.g.*, *DeHart v. N.C. Dep't. of Transp.*, 195 N.C. App. 417, 421–22 (2009) (resolving in the N.C.G.S. § 136-108 hearing an issue of whether a taking occurred). After the N.C.G.S. § 136-108 hearing, the trial court concluded that the "issue of the validity of the Fifth Amendment was a necessary ruling in [the Developer's Action] and therefore, the Fifth Amendment "is valid, and the parties are bound by the rights and obligations contained therein."[2]

However, neither the Developer nor the Association requested that the trial court address the issue of equitable reformation of the Fifth Amendment at the N.C.G.S. § 136-108 hearing. The Developer argued that such a request would not have been appropriate because any equitable reformation would not affect the value of the property on the date of the taking, thus making any determination of equitable reformation outside the scope of a N.C.G.S. § 136-108 hearing. However, with a temporary construction easement, the total loss due to the taking is affected by the value or condition of the property when it is returned to the owner. If the right to develop the property existed when the DOT took the land and was extinguished before the DOT returned the property, then the damages associated with the taking include the loss of those rights. *See Williams v. State Highway Comm'n*, 252 N.C. 514, 517 (1960) (recognizing that in calculating damages, "all of the capabilities of the property, and all of the uses to which it may be applied, or for which it is adapted, which affect its value in the market are to be considered, and not merely the condition it is in at the time and the use to which it is then applied by the owner" (cleaned up)). While we do recognize that the Developer was fully compensated for the loss of its development rights, we decline the Association's invitation to rule in this case on the equities of equitable reformation—such a determination was outside the scope of the N.C.G.S. § 136-108 hearing, and a trial court will undoubtedly weigh the equities taking into account this decision.

The legislature created this process "to eliminate from the jury trial any question as to what land the [DOT] is condemning," *Dep't of Transp. v. Rowe*, 351 N.C. 172, 175–76 (1999) (quoting *Nuckles*, 271 N.C. at 14), and "title to the land, interest taken, and area taken," N.C.G.S. § 136-108.

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2. The Association appealed this ruling to the Court of Appeals. The Court of Appeals dismissed the appeal as interlocutory since the Association "failed to meet its burden in its principal brief to show why it affects a substantial right or to demonstrate what substantial rights would be jeopardized absent immediate review by this Court." *Dep't of Transp. v. Bloomsbury Ests., LLC*, No. COA18-773, slip op. at 15–16 (N.C. Ct. App. Mar. 5, 2019) (unpublished). That decision was not appealed to this Court.

Principles of res judicata apply to matters that have been fully litigated. *See Gibbs v. Higgins*, 215 N.C. 201, 204–05 (1939) ("The plea of *res* [ ] *judicata* applies, except in special cases, not only to the points upon which the court was required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject in litigation and which the parties, exercising reasonable diligence, might have brought forward at the time and determined respecting it." (cleaned up)).

Because the parties in the Developer's Action litigated the validity of the Fifth Amendment, we conclude the trial court in this Taking Action did not err in concluding that the Fifth Amendment was valid, and the parties were bound by the rights and obligations of the Fifth Amendment.

C. Summary Judgment

At the conclusion of the N.C.G.S. § 136-108 hearing, all issues except how the compensation would be apportioned were resolved. Both parties previously agreed—by consent order—that the total damages for the taking were $3,950,000. The sole remaining issue was the appropriation of the compensation between the parties. In eminent domain proceedings, N.C.G.S. § 136-117 gives the trial court the discretion to "order a reference"—in this case, appraisals— "to ascertain the facts" as to "who is entitled to said moneys." N.C.G.S. § 136-117; *cf. Va. Elec. & Power Co. v. Tillett*, 316 N.C. 73, 77–78 (1986) (highlighting that the Rules of Civil Procedure are applicable in eminent domain proceedings to the extent that the rules do not conflict with procedures identified in the eminent domain statutes).

We review summary judgment de novo. *Forbis v. Neal*, 361 N.C. 519, 524 (2007). Summary judgment is appropriate only when the record shows that "there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573 (2008) (quoting *Forbis*, 361 N.C. at 523–24). "An issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518 (1972). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Dalton v. Camp*, 353 N.C. 647, 651 (2001).

At summary judgment, the appraisers for the Developer and the Association agreed that because the Fifth Amendment was valid,

the Developer should be fully compensated for the development rights, which—according to the Association's appraisal—were worth $3,350,000. The Association's appraisal "determined the loss to the [Developer] as a result of the partial taking, as of the date of the taking was $3,350,000 . . . and thus the remainder of the recovery ($600,000) should be assigned to the Association." At the time of the summary judgment hearing, only $3,055,102 of the compensation remained due to disbursements for attorneys' fees and costs. The Association argued that there were material issues of fact precluding an entry of summary judgment, i.e., whether the Association owned the property and the development rights and the proper allocation of the eminent domain proceeds. The trial court granted summary judgment and apportioned the remaining funds between the parties based upon percentages from the Association's appraisal. Because the Fifth Amendment was found to be valid and because the appraisers agreed—based upon the validity of the Fifth Amendment—that the Developer was entitled to compensation for loss of the development rights, there was no dispute of material facts. Therefore, the trial court did not err in granting summary judgment in favor of the Developer. Further the trial court did not err in exercising its discretion under N.C.G.S. § 136-117 to distribute the funds in a manner that compensated the Developer for the loss of the development right and distributed the residual funds to the Association.

The Court of Appeals held that summary judgment was not proper, and that "a jury should be allowed to determine the credibility of each appraiser and examine their opinions of value." *Bloomsbury Ests., LLC*, 281 N.C. App. at 668. However, the Court of Appeals did not address the fact that the appraisers agreed that the Developer should be compensated for the loss of the development rights. Additionally, the plain language of N.C.G.S. § 136-117 allows the trial court the discretion to order an appraisal that the trial court can use to determine the apportionment of the compensation. *See* N.C.G.S. § 136-117; *see also State Highway Comm'n v. Cape*, 49 N.C. App. 137, 140–41 (1980) (noting in the context of an eminent domain proceeding related to multiple tracts of land that when the total compensation is apportioned between distinct tracts of land, the trial court can apportion the damages among several owners of a single tract according to their respective interests and estates). The reference ordered by the trial court—the appraisals—along with the Developer's concession to use of the Association's appraisal established no dispute that the Developer was entitled to the compensation associated with the loss of development rights. The trial court adopted the Association's appraisal for the value of those rights as allowed by

N.C.G.S. § 136-117. The Court of Appeals erred in concluding that the trial court did not have the authority to do so.

III. Conclusion

In sum, the trial court in the Taking Action appropriately granted summary judgment after resolving all issues pleaded and argued at the N.C.G.S. § 136-108 hearing related to title and the interests taken as of the date of the taking. Accordingly, we reverse the decision of the Court of Appeals.

REVERSED.

NUNG HA AND NHIEM TRAN
v.
NATIONWIDE GENERAL INSURANCE COMPANY

No. 312A19-2

Filed 23 August 2024

Insurance—homeowner's fire insurance—notice of cancellation—statutory requirements—actual notice sufficient

Where plaintiff homeowners had actual notice that their provisional homeowner's fire insurance policy had been cancelled—based, in part, on evidence that plaintiffs received, signed, and cashed a check from defendant insurance company listing the policy number and refunding plaintiffs their excess premium—and, therefore, had a reasonable opportunity to procure other insurance before their house burned down two months later, the Supreme Court found it unnecessary to address the broader question of whether defendant's manner of notice—by mailing a letter of cancellation to plaintiffs that they claimed not to have received—was sufficient to meet the requirements of N.C.G.S. § 58-44-16(f)(10).

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 286 N.C. App. 581 (2022), affirming a judgment entered on 30 July 2021 by Judge Rebecca W. Holt in Superior Court, Wake County. Heard in the Supreme Court on 16 April 2024.

John M. Kirby for plaintiffs-appellants.

Robinson, Bradshaw & Hinson, P.A., by Stephen D. Feldman, Travis S. Hinman, and Garrett A. Steadman, for defendant-appellee.

Young Moore and Henderson, P.A., by Angela Farag Craddock and Walter E. Brock, Jr., for North Carolina Rate Bureau, amicus curiae.

EARLS, Justice.

In this case, we consider whether Nationwide effectively canceled plaintiffs' fire insurance policy before their house burned down. Almost two months before that tragic fire, Nationwide mailed plaintiffs a letter explaining when and why it was terminating their coverage. The cancellation date came and went. Afterwards, Nationwide sent plaintiffs a check listing their policy number and refunding the excess premium. The company also broke from its regular course of drafting monthly premium payments from plaintiffs' bank account. Plaintiffs contend—and the trial court found—that they never saw the cancellation letter. But they received, signed, and cashed the refund check over a month before the fire.

When Nationwide denied plaintiffs' insurance claim, they sued. Nationwide maintained that it cancelled the policy before the blaze; plaintiffs argued that their coverage remained intact. The Court of Appeals held that Nationwide duly terminated plaintiffs' insurance after giving them the advanced notice required by N.C.G.S. § 58-44-16(f)(10) (2023). We affirm the Court of Appeals, but on slightly different grounds.

Ample evidence shows that plaintiffs had "actual notice" of cancellation. *See Moore v. Adams Elec. Co.*, 264 N.C. 667, 672 (1965). And when the "fact of notice" is clearly shown, the "manner of giving notice" becomes of "secondary importance." *Id.* By equipping plaintiffs with the forewarning, time, and information needed to secure other coverage before their insurance lapsed, Nationwide cancelled their policy in line with subsection 58-44-16(f)(10). We thus modify and affirm the Court of Appeals.

I. Background

A. Plaintiffs Seek Insurance

Plaintiffs Nhiem Tran and Nung Ha married in 1993 while living in Vietnam. Mr. Tran immigrated to the United States in 1996 as an international student at Pacific Christian College. Mrs. Ha soon followed.

Together, the couple have one daughter and three sons. In 2010, plaintiffs moved into a house in Wake Forest, North Carolina.

Plaintiffs began looking for homeowner's insurance in early 2015. They first secured coverage from AAA around March of that year. But after AAA inspected plaintiffs' home, it flagged several hazards, including an unfenced swimming pool and rotting wood. Based on those conditions, AAA canceled plaintiffs' policy. The company sent—and plaintiffs received—a written notice informing them of the cancellation and listing the issues with the property.

In response, plaintiffs sought coverage from Nationwide. On 1 April 2015, Mr. Tran filled out an online insurance application. A Nationwide agent called him that same day to discuss the property and his desired coverage. Mr. Tran arranged for Nationwide to draft monthly premiums from his checking account. He later logged into Nationwide's web portal and signed the policy electronically. Nationwide issued that policy subject to an underwriter's review.

B. Nationwide Cancels Plaintiffs' Policy

A few weeks later, Nationwide dispatched an underwriter to inspect plaintiffs' property. That inspection unearthed many of the same hazards logged by AAA—rotten siding, an unfenced swimming pool, and an unsecured trampoline. The latter two conditions were classified as "gross hazards." Citing those concerns, Nationwide—like AAA—chose to cancel plaintiffs' policy. The company then mailed plaintiffs a notice of cancellation on 22 May 2015 by first-class mail. The letter listed the three hazards prompting the cancellation. It also explained that plaintiffs' policy would end on 6 June 2015 unless they fixed the identified risks.

Plaintiffs did not contact Nationwide, and so the company terminated their policy on 6 June 2015—fifteen days after mailing the cancellation letter. According to plaintiffs, they never received that letter. The trial court so found. But everyone agrees that after Nationwide ended plaintiffs' coverage, it stopped drafting monthly premium payments from their bank account. So while funds were withdrawn at the beginning of April, May, and June, plaintiffs did not pay for insurance in July. Also important, two days after the cancellation date, Nationwide mailed plaintiffs a check refunding the excess premium paid for June. The check prominently listed the policy number. And plaintiffs endorsed and cashed that check on 17 June 2015.

On the evening of 24 July 2015, plaintiffs were at church when their home caught fire. The entire structure burned down, consuming

the family's belongings. When Mr. Tran called Nationwide to report the blaze, he learned that his policy ended on 6 June 2015. Plaintiffs later filed a claim with Nationwide—the company rejected it, contending that plaintiffs' insurance expired before the fire.

C. Procedural History of Plaintiffs' Suit

Plaintiffs sued. They invoked N.C.G.S. § 58-41-15(c) (2023), which allows an insurer to cancel a policy within the first sixty days by "furnishing to the insured at least 15 days prior written notice of and reasons for cancellation." According to plaintiffs, the statute requires actual notice of cancellation. And because they never received Nationwide's cancellation letter, plaintiffs continued, their policy remained in place.

After a bench trial, the trial court entered a judgment dismissing plaintiffs' claims in part and declaring that Nationwide canceled their policy before the fire. Per the court, the company's proof of mailing satisfied the statutory notice requirements. And because Nationwide "timely and properly canceled the [p]olicy," the trial court reasoned, it "did not breach the contract by denying [p]laintiffs' claim."

The Court of Appeals reversed. *See Ha v. Nationwide Gen. Ins. Co.*, 266 N.C. App. 10, 17 (2019). According to the court, "furnish[ing]" notice as required by section 58-41-15 entails more than mere proof of mailing. *Id.* Reasoning that the statute demands "actual delivery to and/or receipt" of a cancellation notice, *id.* at 15, the court reversed and remanded the trial court's judgment, *id.* at 17.

Nationwide appealed to this Court. We unanimously vacated the Court of Appeals decision and remanded to "determine whether Article 41, Article 36 or other statutes govern in this matter." *See Ha v. Nationwide Gen. Ins. Co.*, 375 N.C. 87 (2020). The Court of Appeals returned the case to the trial court to answer that question.

On remand, plaintiffs argued that N.C.G.S. § 58-44-16—a provision called the "standard fire insurance policy"—supplied the governing law. Subsection 58-44-16(f)(10) of that statute covers cancellation. It allows an insurer to end a policy "by giving to the insured a five days' written notice of cancellation." N.C.G.S. § 58-44-16(f)(10) (2023). In plaintiffs' view, that provision requires actual receipt of notice.

But according to the trial court, mailing notice of cancellation satisfies subsection 58-44-16(f)(10). Extending that logic, the court held that Nationwide discharged "its notice obligations under the applicable statutes and under the terms of . . . plaintiffs' homeowners' insurance policy by its proof of mailing a timely cancellation notice." The trial court again entered judgment for Nationwide.

A divided Court of Appeals panel affirmed. *See Ha v. Nationwide Gen. Ins. Co.*, 286 N.C. App. 581 (2022). The majority first held that section 58-44-16 controlled plaintiffs' policy. *Id.* at 583. Turning next to subsection 58-44-16(f)(10), the court concluded that the "plain meaning of the word 'give,' particularly in its present participle form, includes the act of mailing notice of cancellation to the insured." *Id.* at 583–84. The statute does not "require[ ] proof that the cancellation notice was actually received," the majority continued—instead, an insurer's "proof of mailing is sufficient to cancel the policy." *Id.* at 583. Applying that statutory analysis, the court held that Nationwide "properly cancelled the policy under section 58-44-16 by proving that the cancellation notice was mailed to [p]laintiffs." *Id.*

Judge Arrowood dissented. *See id.* at 585 (Arrowood, J., dissenting). Because the word "giving" was ambiguous, he reasoned, precedent required that the statute "be interpreted in favor of the insured." *Id.* at 586–87. He would thus hold that "for an insurance company to effectively cancel a policy under [subsection 58-44-16(f)(10)], they would need to show proof the notice of cancellation was actually received." *Id.* at 585. Plaintiffs appealed to this Court based on the dissent.

II. Analysis

Section 58-44-16 sets standard terms for fire insurance policies. *See Boyd v. Bankers & Shippers Ins. Co.*, 245 N.C. 503, 510–15 (1957) (tracing history and evolution of North Carolina's fire insurance provisions). As part of that statutory scheme, the legislature specified how insurers and insureds alike may cancel insurance coverage. N.C.G.S. § 58-44-16(f)(10) (2023). Insureds may end their policy by "communicat[ing] to the insurer a definite and unconditional request" to cancel. *Baysdon v. Nationwide Mut. Fire Ins. Co.*, 259 N.C. 181, 185 (1963). In that event, the "insurer shall, upon demand and surrender of this policy, refund the excess of paid premium above any short rates for the expired time." N.C.G.S. § 58-44-16(f)(10). Insurance companies may also cancel insurance policies by:

> [G]iving to the insured a five days' written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess premium (if not tendered) will be refunded on demand.

Id.

As this Court explained almost a century ago, statutory notice requirements are "manifestly for the protection of the insured." *See Dawson v. Concordia Fire Ins. Co.*, 192 N.C. 312, 316 (1926). They codify principles of "just dealing." *See Urey v. Southern Fire Ins. Co.*, 197 N.C. 385, 388 (1929). And they recognize the basic fairness of apprising consumers of "so important a matter as the cancellation of [their] insurance policy." *Id.* Subsection 58-44-16(f)(10) extends those values to fire insurance by obliging an insurer to give at least five days' written notice "before it terminates its contractual relationship with its insured, depriving him of protection." *See Levinson v. Travelers Indem. Co.*, 258 N.C. 672, 674 (1963). As this Court has recognized, though, the legislature crafted statutory notice requirements with a practical eye. *See Pearson v. Nationwide Mut. Ins. Co.*, 325 N.C. 246, 253 (1989). We have thus anchored notice provisions to their real-world purpose: giving insureds the "information necessary for [their] protection" and assuring a "reasonable opportunity to procure other insurance" before tragedy strikes. *See Levinson*, 258 N.C. at 674; *see also Moore*, 264 N.C. at 672.

In line with those principles, we have embraced a functional view of statutory notice requirements like subsection 58-44-16(f)(10). That approach is grounded in pragmatism and legislative fidelity. *See Harrelson v. State Farm Mut. Auto. Ins. Co.*, 272 N.C. 603, 610 (1968) (interpreting notice statute so as "to effectuate the purpose of the Legislature"). Mindful that the General Assembly designed notice provisions to give insureds a meaningful chance to avoid coverage lapses, our cases have elevated that purpose over procedural technicalities. *See Moore*, 264 N.C. at 672. We have thus explained that "the manner in which notice is given is of secondary importance—it is the *fact* of notice" that matters. *Id.* (emphasis added); *see also Levinson*, 258 N.C. at 674 ("When the notice to the insured conforms to the statute and *gives him information necessary for his protection*, the contractual obligation ends at the time fixed." (emphasis added)); *cf. Travelers Indem. Co. v. Guess*, 255 S.E.2d 55, 56 (Ga. 1979) (explaining that the statutory notice "methods adopted by the General Assembly are intended to assure actual notice of cancellation to an insured and where it is admitted such notice was received, the purpose of the statute has been accomplished").

This case tests our commitment to substance over form. The parties ask us to delimit subsection 58-44-16(f)(10) and decide, as did the Court of Appeals, whether "proof of mailing" qualifies as "giving" written notice. *Cf. Ha*, 286 N.C. App. at 583–84. But we settle the dispute on narrower grounds. Everyone agrees that actual notice of cancellation

satisfies subsection 58-44-16(f)(10). In general terms, a person has actual notice when the information "given directly to" him imparts clear knowledge of a fact or condition with legal significance. *See Actual Notice*, Black's Law Dictionary (11th ed. 2019); *see also Horton v. Home Ins. Co.*, 122 N.C. 498, 500 (1898) (insureds lacked notice because they "had no knowledge or information" of a property sale). And here, abundant evidence shows that plaintiffs had actual notice of cancellation well before the fire. Because Nationwide gave plaintiffs the timely forewarning required by subsection 58-44-16(f)(10), it properly canceled their policy.

Our holding, however, is specific to this record and the actual notice it divulges. We decline to gratuitously opine on whether depositing notice in the mail counts as "giving" written notice under subsection 58-44-16(f)(10). That restraint coheres with principles of judicial economy. It also tracks our cautious approach to evidence-intensive insurance disputes.[1] And most importantly, it affirms our longstanding recognition that "it is the *fact* of notice that is important." *Moore*, 264 N.C. at 672 (emphasis added).

Our precedent bears those principles out, illustrating our practical approach to statutory notice requirements. Consider our decision in *Moore*. In that case, the plaintiff—a worker for the Adams Electric Company—was injured on the job. *See Moore*, 264 N.C. at 667. After the accident, the plaintiff sought compensation and reimbursement for medical expenses from his employer. *Id.* at 668. The employer, as required by statute, had secured workmen's compensation insurance. *See id.* But the insurer insisted that it cancelled the employer's policy *before* the plaintiff's accident. *Id.* at 669. On that basis, the insurer disclaimed liability. *Id.*

There, as here, the case hinged on whether the insurer cancelled its policy in line with statutory notice requirements. *See id.* at 672. There, as here, the insurer mailed a notice of cancellation to the employer. *Id.* at 669. And there, as here, the employer contended that the cancellation notice "was either not received by" it or "was misplaced in [its] office."

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1. *See, e.g.*, *Harrelson*, 272 N.C. at 611 (deciding case on presented facts and thus deeming it "unnecessary" to examine the scope and application of various insurance statutes); *Abernethy v. Mecklenburg Farmers' Mut. Fire Ins. Co.*, 213 N.C. 23, 27 (1938) (holding that "the evidence clearly shows that the [notice] statute was not complied with" and—after noting potential conflict between statute and insurer's by-laws—explaining that "from the view we take of this case, this question is not necessary to be decided"); *Smith v. Nationwide Mut. Ins. Co.*, 315 N.C. 262, 268 (1985); *Dixie Fire & Cas. Co. v. Esso Standard Oil Co.*, 265 N.C. 121, 130 (1965).

Id. The Industrial Commission found that the insurer never "gave notice of an intention to cancel [its] workmen's compensation policies to [the] employer by registered mail or certified mail, as required by law." *Id.* at 672 (emphasis omitted). For that reason, the Commission deemed the cancellation ineffective and the insurer liable "upon the risk at the time of the injury." *Id.* (emphasis omitted).

This Court found that reasoning myopic and held that the Commission "reached the erroneous conclusion that the policy could only be terminated by registered or certified mail." *Id.* We underscored the goal of the notice requirement: to "assure an employer sufficient opportunity to procure other insurance." *Id.* In line with that purpose, we reasoned that "the fact of notice" is the statutory lodestar—measured against that animating goal, the "manner in which notice is given is of secondary importance." *Id.* By those lights, the Commission impermissibly "paramounted the *manner* of giving notice rather than the *fact* of notice." *Id.* (emphasis added). "If, in fact, [the] [e]mployer had 30 days' notice" of the insurer's "intent to terminate its compensation insurance," we explained, "the fact that notice was given by some means other than registered or certified mail would not prevent cancellation." *Id.* In our view, then, the "Commission should have answered this factual question: Did [the] [e]mployer have 30 days' actual notice of" the insurer's "intent to cancel its insurance policy"? *Id.* at 672–73. Because the insurer's liability hinged on that issue, we remanded for the Commission to "make necessary findings of fact on which it may make an award." *Id.* at 673.

The same logic controls this case. Though plaintiffs deny receiving Nationwide's cancellation letter, other direct datapoints armed them with clear knowledge and advanced warning of their policy's termination. *Cf. Horton*, 122 N.C. at 500. For that reason, plaintiffs had actual notice of cancellation and Nationwide duly ended their insurance before the fire.

We first offer some key context: Before contracting with Nationwide, plaintiffs sought coverage from AAA. But AAA cancelled plaintiffs' policy after an underwriter inspected their home and noted many of the hazards later flagged by Nationwide. AAA mailed, and plaintiffs received, a cancellation letter that itemized the issues with their property. But rather than fix those risks, plaintiffs sought new insurance from a different insurer. So when plaintiffs contracted with Nationwide, they did not do so in a vacuum—they signed that policy aware of, and yet declining to address, the hazards that led another insurance carrier to end their coverage just weeks before. It is significant, then, that Nationwide cancelled plaintiffs' policy for the same risks cited by AAA and known by plaintiffs.

Important, too, Nationwide's cancellation letter was not its last mailing to plaintiffs. Two days after their policy was terminated, Nationwide sent plaintiffs a check refunding the excess premium. Plaintiffs not only received that check, but personally signed and cashed it on 17 June 2015. *See Horton*, 122 N.C. at 501 (explaining that insured did not receive notice and emphasizing that "[n]o part of the unearned premium was ever repaid or tendered to [her]"); *see also White v. Dixie Fire Ins. Co.*, 226 N.C. 119, 124 (1946) (citing insured's receipt of excess premium as a factor relevant to whether insurer provided notice of cancellation). The check clearly listed plaintiffs' policy number. And the amount of the refund equaled the June premium, less the window of coverage until the cancellation date on 6 June 2015. Other state courts have found actual notice based on similar evidence.[2] Here, by the date of the fire on 24 July 2015, 46 days had passed since Nationwide mailed the reimbursement check, and 37 days since plaintiffs cashed it.

Yet another factor coincided with and contextualized that refund check. Recall that plaintiffs allowed Nationwide to draft monthly payments from their bank account. Over the policy's lifespan, Nationwide thrice withdrew that cost—and at regular intervals, too. Each time the company drafted payments, it did so within the first four days of the month: first on April 3rd, next on May 4th, and finally on June 2nd. In July, though, that regular cadence halted—a break from routine that started only *after* plaintiffs deposited the check refunding their June premium and prominently displaying their policy number.

Taken together, the facts show plaintiffs' actual notice of cancellation. We reach that conclusion based on:

- Plaintiffs' preexisting knowledge of specific property hazards;
- AAA's written cancellation of plaintiffs' coverage just weeks before they contracted with Nationwide;

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2. *See, e.g.*, *Carter v. Allstate Indem. Co.*, 592 So. 2d 66, 69–70 (Miss. 1991) (concluding that insured "receive[d] *actual* notice of the cancellation" in part because insurer mailed, and insured cashed, a refund check for the unearned premium that "clearly exhibit[ed] the policy number on its face" and "equaled the amount of the refund which would have been due" after coverage ended); *see also Favati v. Nat'l Prop. Owners Ins. Co.*, 266 S.E.2d 359, 361 (Ga. Ct. App. 1980) (finding that insured had actual notice of cancellation after he received, personally endorsed, and deposited a refund check "bearing information thereon that by reasonable implication informed [insured] the check was a return of premium that the [insurance] policy, by number, had been canceled"); *Conrad v. Universal Fire & Cas. Ins. Co.*, 686 N.E.2d 840, 844 (Ind. 1997) (noting that if premium "refund had been transmitted to the [insureds], it presumably would have put them on notice of cancellation").

- Plaintiffs' receipt, personal endorsement, and cashing of a check emblazoned with their policy number and matching their excess June premium; and
- Nationwide's abrupt cessation of once-regular monthly withdrawals from plaintiffs' bank account.

Continuing our focus on substance over form, we hold that plaintiffs had advanced warning of cancellation and were armed with the "information necessary for [their] protection." *Levinson*, 258 N.C. at 674. Because "the manner in which notice is given is of secondary importance" when clear evidence shows an insured's actual notice, *see Moore*, 264 N.C. at 672, we begin—and end—our analysis with plaintiffs' direct and palpable knowledge of their policy's expiration. It is unnecessary to parse the scope of subsection 58-44-16(f)(10), and we decline the parties' requests to do so.

III. Conclusion

On this discrete record, we hold that Nationwide gave plaintiffs the timely forewarning required by subsection 58-44-16(f)(10) and aligned with the "purpose of the Legislature." *Harrelson*, 272 N.C. at 610. Because Nationwide canceled plaintiffs' coverage well before 24 July 2015, their policy was not in place at the time of the tragic fire. The Court of Appeals correctly affirmed the trial court's judgment for Nationwide, though it did so by construing the statute rather than consulting the evidence. We thus affirm the Court of Appeals but modify its opinion to focus on the "fact of notice" rather than the "manner of giving notice." *Moore*, 264 N.C. at 672.

MODIFIED AND AFFIRMED.

IN RE A.J.

[386 N.C. 409 (2024)]

IN THE MATTER OF A.J., J.C., J.C.

No. 206PA23

Filed 23 August 2024

Child Abuse, Dependency, and Neglect—neglect and dependency —adjudication order—steps for reviewing on appeal—sufficiency of findings and evidence

In a neglect and dependency matter, where the parties agreed on appeal that many of the trial court's adjudicatory findings of fact were based on inadmissible hearsay and should therefore be disregarded, the Supreme Court reiterated the proper steps for reviewing an adjudication order on appeal after disregarding unsupported findings: first, the appellate court must examine whether the remaining findings of fact support the trial court's conclusions of law; then, if those findings do not support the trial court's conclusions, the appellate court must examine whether the record contains sufficient evidence that could support the necessary findings. Here, the trial court's remaining findings did not support its legal conclusions, but the record contained clear, cogent, and convincing evidence that could have supported the necessary findings, which required vacating the adjudication order and remanding the matter to the trial court to enter a new order.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 289 N.C. App. 632 (2023), reversing an order entered on 22 March 2022 by Judge Lee Teague in District Court, Pitt County, and remanding the case. Heard in the Supreme Court on 20 February 2024.

Jon G. Nuckolls for petitioner-appellant Pitt County Department of Social Services; and Matthew D. Wunsche, GAL Appellate Counsel, and Brittany T. McKinney, GAL Staff Attorney, and for respondent-appellant Guardian ad Litem.

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

DIETZ, Justice.

In this juvenile proceeding, the Court of Appeals held that many of the trial court's key findings in its adjudication order were based on inadmissible hearsay. In their briefing to this Court, the parties agree that those findings are improper and must be disregarded.

The issue before this Court is what to do about it. The Court of Appeals held that the trial court's "findings of fact, unsupported by properly admitted evidence, are insufficient to support the trial court's adjudications." *In re A.J.*, 289 N.C. App. 632, 644 (2023). As a result, the Court of Appeals reversed the trial court's order and remanded with instructions to dismiss the juvenile petitions.

As explained below, this holding omits crucial steps in the appellate analysis. First, when an appellate court determines that a finding of fact is not supported by sufficient evidence, the court must disregard that finding and examine whether the remaining findings support the trial court's conclusions of law. *In re A.J.L.H.*, 384 N.C. 45, 52–53 (2023). If the remaining findings support the trial court's conclusions, the appellate court must affirm, notwithstanding the existence of some invalid findings. *Id.*

Second, if the remaining findings do not support the trial court's conclusions, there is yet another step: the reviewing court must examine whether there is sufficient evidence in the record that *could* support the necessary findings. *See In re K.N.*, 373 N.C. 274, 284 (2020). If so, the appropriate disposition is to vacate the trial court's order and remand for entry of a new order. *Id.* This permits the trial court, as fact finder, to decide whether to enter a new order with sufficient findings based on the record or to change the court's conclusions because the court cannot make the necessary findings. *Id.* at 284–85.

Here, the Court of Appeals did not adequately examine whether the remaining findings supported the trial court's conclusions and did not examine whether the evidence in the record could support sufficient findings. Because the remaining findings of fact are insufficient but the record contains clear, cogent, and convincing evidence that *could* support both the neglect and dependency adjudications, we reverse the decision of the Court of Appeals and remand with instructions to vacate the trial court's order and remand the case for further proceedings in the trial court.

Facts and Procedural History

Respondent is the mother of three children, Amanda, Jade, and Juliet.[1] In 2021, the Pitt County Department of Social Services received several reports regarding respondent's family. At the time, respondent's youngest child, Amanda, lived with respondent while the two older children, Jade and Juliet, lived primarily with relatives but frequently spent time with respondent.

All of the reports involved interactions between respondent and her daughter Jade in which respondent acted in a hostile and aggressive manner, such as by smashing in a window of her car when Jade locked herself inside and leaving Jade outside the home in the cold until neighbors took her in. Respondent acknowledged to social workers that she needed to obtain a mental health assessment in light of her erratic, aggressive behavior. Respondent did not do so and later denied the need for any mental health assessment.

DSS ultimately filed petitions alleging that Jade and her two siblings were neglected and that Jade and her sister Juliet were dependent. At the hearing, over respondent's objection, the trial court admitted statements from Jade to the social workers. Jade did not testify at the hearing. The trial court later entered a written order concluding that all three juveniles were neglected and that Jade and Juliet were dependent. Many of the trial court's findings relied on Jade's hearsay statements or other evidence that was the subject of a timely objection by respondent. Respondent appealed.

On appeal, the Court of Appeals determined that the trial court erred by admitting Jade's hearsay statements. *In re A.J.*, 289 N.C. App. at 644. The court then held that the "findings of fact, unsupported by properly admitted evidence, are insufficient to support the trial court's adjudications either that Jade, Juliet, and Amanda were neglected, or that Jade and Juliet were dependent" and that the trial court's order "is reversed and this cause is remanded for dismissal." *Id.*

This Court allowed a joint petition for discretionary review from DSS and the guardian ad litem.

Analysis

This is an appeal from an initial adjudication in a juvenile proceeding. At this stage of the proceeding, the "sole question for the reviewing

1. We use pseudonyms to protect the identities of the juveniles.

court is whether the trial court's conclusions of law are supported by adequate findings and whether those findings, in turn, are supported by clear, cogent, and convincing evidence." *In re A.J.L.H.*, 384 N.C. at 53.

When assessing whether a particular finding is supported by clear, cogent, and convincing evidence, the reviewing court must consider any properly preserved challenges to the admission of the supporting evidence. *See In re J.S.*, 377 N.C. 73, 77–78 (2021). For example, the North Carolina Rules of Evidence apply at the adjudication stage of these juvenile proceedings. N.C.G.S. § 7B-804 (2023). Thus, statements that constitute inadmissible hearsay are not clear, cogent, and convincing evidence on which the trial court may rely. *See In re K.J.M.*, 288 N.C. App. 332, 345 (2023); *In re T.M.*, 187 N.C. App. 694, 698 (2007). Similarly, facts that must be established by expert testimony are not clear, cogent, and convincing evidence if offered by lay witnesses or inferred from other non-expert testimony. *Cf. In re K.L.*, 272 N.C. App. 30, 50 (2020). Assuming an evidentiary objection is properly preserved, a party may argue on appeal that any findings supported solely by inadmissible evidence are infirm and cannot support the trial court's conclusions of law.

We have repeatedly articulated what an appellate court must do if it determines that a finding of fact lacks sufficient support in the record: the reviewing court must disregard that finding and examine whether the remaining findings support the trial court's determination. *In re A.J.L.H.*, 384 N.C. at 52. Naturally, if the remaining findings sufficiently support the trial court's conclusion that a juvenile is abused, neglected, or dependent, then the reviewing court must affirm the trial court's order notwithstanding the existence of some unsupported findings. *Id.* at 52–53.

If, however, the appellate court determines that the trial court's remaining findings of fact are not sufficient, then the court must then examine a follow-on question: whether there is sufficient evidence in the record that *could* support the necessary findings. *See In re K.N.*, 373 N.C. at 284. If so, the appellate court must vacate the trial court's order and remand the case to give the trial court the opportunity to make additional findings if it chooses. *Id.* at 284–85. An appellate court may remand for entry of an order dismissing the matter only if the trial court's findings are insufficient *and* the evidentiary record is so lacking that it cannot support any appropriate findings on remand. *See id.*

Here, the Court of Appeals determined that a number of the trial court's findings of fact were not supported by clear, cogent, and convincing evidence because the supporting evidence was inadmissible

under the Rules of Evidence. *In re A.J.*, 289 N.C. App. at 637–40. But the Court of Appeals did not adequately engage in the additional steps of the analysis described above. First, instead of focusing on the remaining *supported* findings, the Court of Appeals repeatedly focused on the impact of the *unsupported* findings. *See id.* at 640 ("The unsupported findings of fact, as discussed above, are insufficient to support an adjudication that Jade was neglected."); *id.* at 644 ("The findings of fact, unsupported by properly admitted evidence, are insufficient to support the trial court's adjudications either that Jade, Juliet, and Amanda were neglected, or that Jade and Juliet were dependent.").

Second, after determining that the findings were insufficient, the Court of Appeals did not examine whether the evidentiary record *could* support additional findings. Instead, the court simply stated that "this cause is remanded for dismissal," without any examination of the full evidentiary record. *Id.*

We therefore begin our analysis by doing what our case law requires and what the Court of Appeals failed to do adequately: disregard any unsupported findings of fact, examine whether the remaining findings are sufficient, and if necessary, examine whether the evidentiary record could support additional findings.

The challenged findings can be divided into four categories. The first involves findings of a June 2021 incident that resulted in a report to DSS. With respect to that incident, the trial court found that respondent got into an altercation with Jade that led Jade to lock herself in the family's car. The court found that respondent took a shovel and broke out the window of the car, hit Jade with a belt buckle in the head and all over her body, choked Jade, and threatened to kill her.

Some of these findings are not supported by clear, cogent, and convincing evidence in the record. Specifically, respondent's use of a shovel, her choking of Jade, and her threat to kill Jade all were based solely on Jade's statements to social workers during their investigation. On appeal, DSS and the guardian ad litem do not dispute that Jade's statements are inadmissible hearsay.[2]

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2. Because, in their filings with this Court, DSS and the guardian ad litem do not contest the Court of Appeals' conclusion that Jade's statements were inadmissible hearsay, we do not consider that question and treat Jade's statements as inadmissible. *See Soc'y for the Hist. Pres. of the Twenty-Sixth N.C. Troops, Inc. v. City of Asheville*, 385 N.C. 744, 751 (2024) (declining to consider a portion of the Court of Appeals' opinion when the appellant abandoned that issue before the Supreme Court); *see also* N.C. R. App. P. 16(a), 28(a).

The remaining portions of the trial court's findings, however, are supported by clear, cogent, and convincing evidence. Respondent admitted to the social workers that she and Jade got into an "altercation" and Jade then locked herself in the car and was on the phone with police. Respondent also admitted to "breaking the window out of the car" while Jade was inside and to hitting Jade with a belt. A social worker testified that she saw a visible mark where respondent hit Jade with the belt. This supports the remaining portions of the trial court's findings.

The second category of findings concern a November 2021 incident in which the trial court found that respondent "choke slammed" Jade and "threw her out of the car." The trial court found that this incident "was reportedly witnessed by a family member over a video call." On appeal, DSS and the guardian ad litem do not dispute that this entire finding is based on inadmissible hearsay statements. We therefore disregard this finding in its entirety.

The third category involves a December 2021 report to DSS. The trial court found that respondent locked Jade outside of her home in cold weather because Jade refused to babysit her younger sister. The court found that neighbors saw Jade outside in the cold and brought her into their home. The court also found that when a law enforcement officer responded to the neighbor's call concerning Jade, the officer had to handcuff respondent to "get her to calm down," social workers observed respondent "cussing and fussing" in the presence of her children, and respondent's "behavior was unstable."

Again, some of these findings are not supported by sufficient evidence. Specifically, the only evidence that respondent actually locked Jade out of the home, as opposed to merely leaving Jade alone outside, is Jade's statements to social workers. DSS and the guardian ad litem do not contest the Court of Appeals' conclusion that these statements are inadmissible hearsay.

But, again, the remaining portions of the trial court's findings are supported by clear, cogent, and convincing evidence. This includes, importantly, the trial court's findings that respondent left Jade alone outside in the cold until neighbors took her in; that social workers observed respondent "cussing," "fussing," and "banging" in the presence of her children; that a law enforcement officer had to handcuff respondent "just to get her to calm down"; and that respondent's behavior during

this incident was so unusual and erratic that it fits the ordinary meaning of "unstable." [3]

The final category of findings concerns respondent's mental and emotional condition. The trial court found that respondent "suffers from mental and psychological illnesses as a result of traumatic experiences throughout her life" and that respondent "has denied mental health diagnosis." The trial court also found that respondent "presented as extremely hostile and aggressive through the hearing of this matter as evidenced by numerous outbursts in the Courtroom and aggressive comments directed toward other participants in this proceeding."[4] The court further found that respondent acknowledged the need to engage in a case plan to address these issues and specifically agreed "to begin mental health services" but did not do so.

Once again, some of these findings are unsupported by the record. Specifically, there is no evidence in the record of any diagnoses of respondent's mental health. To be diagnosed with a mental illness, a person must be evaluated by a trained mental health professional based on accepted criteria established in the profession, such as those in the Diagnostic and Statistical Manual of Mental Disorders (DSM). *See generally* Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders: DSM-5* (5th ed. 2013). Finding that a person suffers from a mental illness typically requires expert testimony or admissible evidence of a past diagnosis by a qualified health professional. *See*, *e.g.*, *State v. Lynch*, 340 N.C. 435, 459 (1995).

To be sure, a social worker testified at the hearing that he personally observed respondent's behavioral issues including "anger, resentment, with the family members," and other evidence in the record demonstrated that respondent had anger issues and acted erratically. The trial court also observed similar behavior at the hearing. But there was no expert testimony or documentary evidence that would support a finding that respondent had a diagnosed mental health condition. Thus, all

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3. The term "unstable" also can have a technical meaning in the context of a mental health diagnosis done by medical professionals. *See*, *e.g.*, *Unstable*, Oxford Advanced American Dictionary (2011). As explained in detail below, there is no evidence to support a finding that respondent had any diagnosed mental health issues, and we reject any interpretation of this finding that suggests otherwise.

4. The purpose of an adjudicatory hearing is to determine "the existence or nonexistence of any of the conditions alleged in a petition." N.C.G.S. § 7B-802; *see also In re L.N.H.*, 382 N.C. 536, 543 (2022). Thus, the "inquiry focuses on the status of the child at the time the petition is filed, not the post-petition actions of a party." *Id.*

findings specifically related to respondent's mental health are unsupported by the record.

The remaining findings, however, are supported by the record, including the trial court's finding that respondent exhibited "extremely hostile and aggressive" behavior and refused to follow through with a recommended case plan to address those issues.

Having identified the remaining findings that are supported by clear, cogent, and convincing evidence in the record, we turn to examining whether those findings support the trial court's conclusions of law. *See In re A.J.L.H.*, 384 N.C. at 52. Those conclusions involve two separate adjudications: the trial court adjudicated Jade and her siblings Amanda and Juliet as neglected and adjudicated Jade and her sibling Juliet as dependent.

A neglected juvenile is one whose parent, guardian, custodian, or caretaker "does not provide proper care, supervision, or discipline" or who "creates or allows to be created a living environment that is injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15) (2023). A juvenile may be adjudicated neglected even if not currently residing in the parent's home. When the juvenile does not currently reside with the parent, the trial court must assess whether there is substantial risk of future neglect based on the historical facts of the case. *In re K.J.D.*, 203 N.C. App. 653, 661 (2010).

A dependent juvenile is one whose "parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement." N.C.G.S. § 7B-101(9) (2023). Findings that a parent is unable to care for her children and that the parent lacks an alternative child care arrangement support a dependency adjudication. *In re J.J.*, 180 N.C. App. 344, 347 (2006), *aff'd per curiam*, 362 N.C. 172 (2008). The court "must consider the conditions as they exist at the time of the adjudication as well as the risk of harm to the child from return to a parent" and "look at the situation before the court at the time of the hearing when considering whether a juvenile is dependent." *In re F.S.*, 268 N.C. App. 34, 44, 46 (2019) (cleaned up).

Here, the remaining findings support many of the requirements to satisfy these standards. The findings establish a pattern in which respondent put Jade in situations that are *potentially* injurious to her welfare, such as smashing in a car window while Jade was inside the car and allowing Jade to be unsupervised and alone in cold weather until neighbors took her in. The findings also establish that respondent exhibited hostile and aggressive behavior during these incidents and

that respondent initially acknowledged the need to have these issues assessed by a mental health professional but refused to do so and later denied having these issues. Finally, there are unchallenged findings supporting respondent's lack of an alternative child care arrangement.

Still, there are necessary findings that are missing. There are many scenarios where a parent breaking a window out of a car to get at a child locked inside would be reasonable and would not be an injurious living environment. The same is true of allowing a child to stay outside without supervision, even when it is cold outside. Beyond the bare findings describing these events, the trial court did not make findings demonstrating how these incidents established that the children were not receiving proper care, supervision, or discipline, or were living in an injurious environment. Importantly, there is clear, cogent, and convincing evidence in the record that *could* support the necessary findings. But the trial court did not make those findings.

We therefore agree with the Court of Appeals' holding that the trial court's findings of fact were insufficient to support its conclusions of law.[5] But we reject the Court of Appeals' resulting disposition. After determining that the trial court's findings did not support its conclusions, the Court of Appeals stated that "this cause is remanded for dismissal." *Cf. In re A.J.*, 289 N.C. App. at 644. This is error.

As explained above, when an appellate court determines that the trial court's findings of fact are insufficient, the court must examine whether there is sufficient evidence in the record that could support the necessary findings. *See In re K.N.*, 373 N.C. at 284. If so, the appropriate disposition is to vacate the trial court's order and remand for entry of a new order. *Id.* This permits the trial court, as fact finder, to decide whether to enter a new order with sufficient findings based on the record or to change its conclusions of law because the court cannot make the necessary findings. *Id.* at 284–85.

Here, as we have noted, there is clear, cogent, and convincing evidence in the record that could support the necessary findings. We therefore reverse the decision of the Court of Appeals and remand this case

5. Although we agree with this portion of the Court of Appeals' reasoning, we reject the court's categorical statement that the "use of corporal punishment, with no evidence of any resulting marks, bruising, or other injury, does not constitute neglect." *In re A.J.*, 289 N.C. App. at 640–41. Whether a child is neglected is a fact-specific determination that cannot be reduced to this type of categorical statement. There are scenarios where discipline of a child can constitute neglect even when the discipline causes little or no physical injury. *See In re A.J.L.H.*, 384 N.C. at 55.

for further remand to the trial court. On remand, the trial court, in its discretion, may enter a new order on the existing record or conduct any further proceedings that the court deems necessary.

Conclusion

We reverse the decision of the Court of Appeals and remand with instructions to vacate the trial court's order and remand for further proceedings.

REVERSED AND REMANDED.

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

KODY KINSLEY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES

v.

ACE SPEEDWAY RACING, LTD., AFTER 5 EVENTS, LLC, 1804-1814 GREEN STREET ASSOCIATES LIMITED PARTNERSHIP, JASON TURNER, AND ROBERT TURNER

No. 280PA22

Filed 23 August 2024

Constitutional Law—North Carolina—direct constitutional claims—colorable—selective enforcement of emergency executive order—State's sovereign immunity overcome

In a dispute between the Department of Health and Human Services (DHHS) and a racetrack owner, who publicly criticized and refused to comply with the governor's executive order prohibiting "mass gatherings" during the COVID-19 pandemic, the trial court properly denied the State's motion to dismiss based on sovereign immunity where the counterclaims brought by defendants (the racetrack and its owner) adequately alleged colorable constitutional claims under the Fruits of Their Labor Clause and Equal Protection Clause of the North Carolina Constitution sufficient to pierce the State's sovereign immunity. Specifically, defendants alleged that: the governor singled out defendants by pressuring the local sheriff to arrest the racetrack owner and, when the sheriff refused, ordering DHHS officials to shut down the racetrack as a health hazard; the governor took these actions to punish the racetrack owner rather than to

address an actual health hazard at the racetrack; and DHHS officials did not take similar actions against other large outdoor venues whose owners did not openly criticize the emergency executive order.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 284 N.C. App. 665 (2022), affirming an order entered on 12 January 2021 by Judge John M. Dunlow in Superior Court, Alamance County. Heard in the Supreme Court on 7 November 2023.

Joshua H. Stein, Attorney General, by Ryan Y. Park, Solicitor General, James W. Doggett, Deputy Solicitor General, Nicholas S. Brod, Deputy Solicitor General, James W. Whalen, Solicitor General Fellow, John P. Barkley, Special Deputy Attorney General, and Hyrum J. Hemingway, Assistant Attorney General, for plaintiff-appellant.

Kitchen Law, PLLC, by S.C. Kitchen, for defendants-appellees, After 5 Events, LLC, Jason Turner, and Robert Turner.

Ivy A. Johnson and Kristi L. Graunke for ACLU of North Carolina Legal Foundation, amicus curiae.

Maynard Nexsen PC, by David S. Pokela and John Mabe, for Association of State and Territorial Health Officials, amicus curiae.

Teague Campbell Dennis & Gorham, by James M. Stanley, Jr. and Matthew W. Skidmore, for North Carolina Association of Local Health Directors, amicus curiae.

Institute for Justice, by Joshua Windham; and Stam Law Firm, by Daniel Gibson, for Jay Singleton, D.O. and Singleton Vision Center, P.A., amici curiae.

DIETZ, Justice.

In the early days of the COVID-19 pandemic, Governor Roy Cooper declared a state of emergency and issued an executive order affecting outdoor venues such as stadiums, concert arenas, and racetracks. The executive order permitted these venues to stay open but limited attendance to only twenty-five people, regardless of the venue's size.

Robert Turner, who operated a racetrack in Alamance County known as Ace Speedway, spoke out against these restrictions and told the public that his racetrack would remain open for all attendees. This led to the series of events at issue in this lawsuit.

These events concern matters that are controversial in contemporary politics. The legal issues in this appeal, by contrast, are so time-tested that they border on mundane. In our legal system, we treat the initial allegations in a lawsuit as true when assessing whether the case can move forward at the outset. It is only after the parties have had the opportunity to gather evidence—from each other, and from other parties with knowledge about the case—that courts examine whether those allegations are true.

Here, the claims at issue allege that Governor Cooper took a series of "unusual steps" to single out and shut down Ace Speedway—first by pressuring the local sheriff to arrest Turner and, when the sheriff refused, ordering public health officials to shut down Ace Speedway as a health hazard. The claims also allege that Governor Cooper took these actions not because there was an actual health hazard at the racetrack, but to punish Turner for speaking out, and that health officials did not take similar actions against other large outdoor venues whose owners did not openly criticize the Governor.

We emphasize that these allegations remain unproven. After all, the case has barely begun. Still, as explained below, these allegations assert colorable claims under the North Carolina Constitution for which there is no alternative remedy. As a result, at this stage of the case, the trial court properly denied the State's motion to dismiss. We affirm the decision of the Court of Appeals, which in turn affirmed the trial court's ruling.

Facts and Procedural History

The following statement of facts is taken from the counterclaims asserting constitutional violations. Under the applicable standard of review, we take these unproven allegations as true for purposes of our review. *Deminski v. State Bd. of Educ.*, 377 N.C. 406, 412 (2021).

In early March 2020, Governor Roy Cooper declared a state of emergency in response to the COVID pandemic. On 20 May 2020, the Governor invoked his emergency authority to issue Executive Order 141. That order temporarily prohibited all "mass gatherings." The order defined a mass gathering as "an event or convening that brings together more than ten (10) people indoors or more than twenty-five (25) people outdoors at the same time in a single confined indoor or outdoor space,

such as an auditorium, stadium, arena, or meeting hall." Exec. Order No. 141, 34 N.C. Reg. 2360 (May 20, 2020).

The executive order applied to Ace Speedway, a large outdoor racetrack in Alamance County. Shortly after the Governor announced the executive order, one of Ace Speedway's owners, Robert Turner, publicly announced that that racetrack would remain open and "have people in the stands."

Turner explained that "unless they can barricade the road, I'm going to do it. The racing community wants to race. They're sick and tired of the politics. People are not scared of something that ain't killing nobody. It may kill .03 percent, but we deal with more than that every day, and I'm not buying it no more."

As Turner indicated, Ace Speedway hosted its first race of the season on 23 May 2020, shortly after the executive order took effect. That event exceeded the 25-person attendance limit at the racetrack.

Ace Speedway had a second race scheduled for the following week. After learning that the speedway did not comply with the executive order, the Governor reached out to Alamance County Sheriff Terry Johnson. The Governor asked the Sheriff to meet with Ace Speedway and convince the speedway to postpone the upcoming race. As requested, Sheriff Johnson met with Ace Speedway. Nevertheless, the speedway hosted its second race as planned. Following that race, Sheriff Johnson announced that he would not take any further steps to enforce the executive order, citing concerns with the order's constitutionality.

On 5 June 2020, the Governor sent a letter to the Alamance County Commissioners and to Sheriff Johnson explaining that the races at Ace Speedway violated the executive order and were criminal acts subject to enforcement by local law enforcement officers. The letter warned that if Sheriff Johnson refused to "do his duty" and enforce the executive order, the Governor would take further action.

The letter did not stop Ace Speedway from hosting its third race of the season in early June. Following that third race, the Secretary of the North Carolina Department of Health and Human Services issued an abatement order that required Ace Speedway to close its operations as an "imminent hazard" to public health. The abatement order required Ace Speedway to notify the public that the upcoming races and events at the facility were canceled and confirm in writing to DHHS that the public had been notified of the racetrack's closure.

Other large venues across the State also permitted more than 25 people to attend their events in violation of the emergency order, but DHHS only issued an abatement order against Ace Speedway. DHHS did not take similar enforcement action against other venues that had not spoken out against Governor Cooper's policies.

Ace Speedway refused to comply with the abatement order. Just days later, DHHS filed a lawsuit. The complaint named Ace Speedway and its owners and operators as defendants.[1] It sought a declaratory judgment that Ace Speedway violated the abatement order and that the State was entitled to an injunction forcing it to comply.

After a hearing, the trial court issued a preliminary injunction prohibiting Ace Speedway from conducting races and other events at its facilities until it complied with the terms of the abatement order.

As the lawsuit progressed, Ace Speedway and its operators answered the complaint and asserted counterclaims against the State for violation of their constitutional right to earn a living and to be free from selective enforcement of the law.

Later in the year, as the lawsuit continued, the Governor replaced Executive Order 141 with a new executive order that loosened restrictions on mass gatherings. DHHS concluded that this extinguished the existing abatement order. DHHS therefore voluntarily dismissed its claims against Ace Speedway. The State also moved to dismiss the counterclaims on the ground that those claims were barred by sovereign immunity.

The trial court denied the motion to dismiss and the State appealed. The Court of Appeals affirmed the trial court's order denying the motion. This Court allowed the State's petition for discretionary review of that decision.

Analysis

I. Standard of Review

We begin our analysis with the appropriate standard of review. The State appealed the trial court's denial of a motion to dismiss based on sovereign immunity. Ordinarily, a court's analysis of sovereign immunity focuses not on the merits of the plaintiff's claim, but on whether the State has "consented or waived its immunity" to being sued. *Est. of Graham v. Lambert*, 385 N.C. 644, 651 (2024).

1. For ease of reading, we will refer to the defendants collectively as "Ace Speedway."

But here, the analysis is different because of the nature of the claims. Ace Speedway brought two claims for violations of rights in the North Carolina Constitution. These constitutional claims are known as "*Corum* claims." *See Corum v. Univ. of N.C.*, 330 N.C. 761 (1992). This Court created *Corum* claims because of the time-honored principle that where there is a right, there is a remedy. *Washington v. Cline*, 385 N.C. 824, 825 (2024). "To ensure that every right does indeed have a remedy in our court system, *Corum* offers a common law cause of action when existing relief does not sufficiently redress a violation of a particular constitutional right." *Askew v. City of Kinston*, 902 S.E.2d 722, 728 (2024) (cleaned up).

Importantly, the State cannot assert sovereign immunity as a defense to a valid *Corum* claim. As we explained in *Corum*, when there is "a clash between these constitutional rights and sovereign immunity, the constitutional rights must prevail." *Corum*, 330 N.C. at 786. Thus, sovereign immunity "cannot stand as a barrier" to a *Corum* claim. *Id.* at 785.

But it is not enough for a claimant to simply *assert* that a claim is valid under *Corum*. We have acknowledged that, to pierce the State's sovereign immunity at the outset, the complaint must "sufficiently allege" a *Corum* claim. *Deminski*, 377 N.C. at 407.

In *Deminski*, we outlined three criteria necessary to sufficiently allege a *Corum* claim. First, the complaint must allege that a state actor violated the claimant's state constitutional rights. *Id.* at 413. Second, "the claim must be colorable," meaning that the claim "must present facts sufficient to support an alleged violation of a right protected by the State Constitution." *Id.* Third, there must be no other "adequate state remedy" for this alleged constitutional violation. *Id.* If a claimant satisfies these three criteria, sovereign immunity "does not bar the claim" and the trial court must deny a motion to dismiss based on sovereign immunity. *Id.* at 407.

Much of our recent *Corum* jurisprudence has focused extensively on whether there was an adequate alternative remedy. *See, e.g.*, *Askew*, 902 S.E.2d at 733; *Washington*, 385 N.C. at 825. Here, though, the State does not dispute that Ace Speedway has no adequate alternative remedy because there is no other forum in which it could seek relief for these constitutional violations. We agree. Likewise, the State does not dispute that the complaint alleges state actors violated the state constitution. Again, we agree.

Thus, the first and third criteria of the test we set out in *Deminski* are satisfied. The State's arguments (and, as a result, this entire appeal)

focuses solely on the second criteria—whether Ace Speedway asserted a "colorable claim" under the state constitution.

As we made clear in *Deminski*, at the motion to dismiss stage, whether a claim is "colorable" focuses entirely on the allegations in the complaint. *Deminski*, 377 N.C. at 412. Those allegations are "treated as true" and the Court examines whether the allegations, if proven, constitute a violation of a right protected by the North Carolina Constitution. *Id.* We therefore examine each of Ace Speedway's constitutional claims and assess whether the allegations assert colorable constitutional claims.

II. Fruits of Their Labor Clause

We begin with Ace Speedway's claim that the State deprived the speedway and its owners of their inalienable right to earn a living guaranteed by the provision of Article I, Section 1 of the North Carolina Constitution known as the "Fruits of Their Labor Clause."

Article I, Section 1 provides as follows: "We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness." N.C. Const. art. I, § 1.

This language, added in our state's 1868 constitution, "borrowed certain phraseology from the Declaration of Independence." *State v. Ballance*, 229 N.C. 764, 768 (1949). But the framers also added something new, described in *Ballance* as an "interpolation"—the people's inalienable right to "the enjoyment of the fruits of their own labor." *Id.*

We explained in *Ballance* that this added constitutional right protects people "engaging in any legitimate business, occupation, or trade." *Id.* at 770. It bars state action burdening these activities unless "the promotion or protection of the public health, morals, order, or safety, or the general welfare makes it reasonably necessary." *Id.*

Thus, to survive constitutional scrutiny under this provision, the challenged state action "must be reasonably necessary to promote the accomplishment of a public good, or to prevent the infliction of a public harm." *Id.* This test involves a "twofold" inquiry: "(1) is there a proper governmental purpose for the statute, and (2) are the means chosen to effect that purpose reasonable?" *Poor Richard's, Inc. v. Stone*, 322 N.C. 61, 64 (1988).

The first step in this inquiry requires the reviewing court to identify the State's actual purpose for the constraint on private business activity.

Initially, the State may simply assert that purpose, without the need to "come forward with evidence" proving that it is, indeed, the true purpose. *Id.* at 66. But the plaintiff may rebut that assertion with evidence demonstrating that the State's asserted purpose is not the true one, and instead the State is pursuing a different, unstated purpose. *Id.*

For example, in *Roller v. Allen*, the State defended licensing requirements for ceramic tile installers by asserting that they were necessary to combat consumer fraud by unqualified workers. 245 N.C. 516, 521–23 (1957). After reviewing the evidence, this Court rejected that assertion, holding that the statute's "main and controlling purpose" was "not health, not safety, not morals, not welfare, but a tight control of tile contracting in perpetuity by those already in the business." *Id.* at 525. Simply put, courts assess Fruits of Their Labor Clause claims based on the *actual* purpose of the state action, and that may not always be the purpose initially put forward by the State.

Once the actual purpose of the challenged state action is identified, the reviewing court must then assess whether that purpose is a "proper governmental purpose." *Poor Richard's*, 322 N.C. at 64. Proper purposes are those that "promote the accomplishment of a public good, or to prevent the infliction of a public harm." *Ballance*, 229 N.C. at 770. It is, of course, impossible to enumerate every public good or public harm. But our case law offers guidance on how to determine if a purpose is broad enough that it addresses public welfare generally, rather than private interests. *Id.* at 770–71.

In *Ballance*, for example, this Court rejected the notion that it was a public good to reduce "fire risk incident to the practice of photography on account of combustible materials employed." *Id.* at 771. That purpose was too narrow to serve the public welfare generally. It addressed only "the interests of a particular class rather than the good of society as a whole." *Id.* at 772.

Put another way, reducing fire risks for *all* members of the public is a proper governmental purpose. And, if a particular business activity poses a heightened risk of fire hazards, regulating that specific activity may be a reasonable means of advancing the broader purpose, even if it only impacts a subset of the public. *See id.* But a proper governmental purpose must address the "public interest." Protecting the public from fire hazards is in the public interest. Protecting only *photography businesses* from fire hazards, with no concern for anyone else, is merely a regulation of "a private business unaffected in a legal sense with any public interest." *Id.* at 770.

If the reviewing court determines that the challenged state action serves a proper governmental purpose, the inquiry then reaches the second stage: "are the means chosen to effect that purpose reasonable?" *Poor Richard's*, 322 N.C. at 64. This is a fact-intensive analysis. "The means used must be measured by balancing the public good likely to result from their utilization against the burdens resulting to the businesses being regulated." *Id.* at 66.

This requires assessing two fact-specific questions—first, how effective is the state action at achieving the desired public purpose and, second, how burdensome is that state action to the targeted businesses. The analysis then becomes "a question of degree"—given all the options available to the state to advance the governmental purpose, was it reasonable for the state to choose this approach, with its corresponding benefits and burdens? *Id.*

Having laid out the appropriate test for a Fruits of Their Labor Clause claim, we now turn to whether the Court of Appeals erred when it held that Ace Speedway sufficiently alleged a colorable claim under that provision. At this point, we circle back to the standard of review described above. We treat the allegations in the complaint as true and examine whether, if those allegations are proven, Ace Speedway would prevail under the two-step inquiry for a Fruits of Their Labor Clause claim. *See Deminski*, 377 N.C. at 412.

We begin with the first step of the test. The State contends that there "can be little question that the order seeks to achieve 'a proper governmental purpose' " because "protecting North Carolinians from a novel virus—a virus that would eventually kill over one million Americans" is a proper governmental purpose.

But this ignores the central allegation in Ace Speedway's claim—that the purpose of the abatement order was not to protect public health, but to retaliate against Ace Speedway for criticizing the Governor. Ace Speedway alleges that it was "singled out by the Governor for enforcement" because it spoke out against the Governor's emergency order, and that other businesses violating the emergency order were not subjected to similar enforcement action by the State. This allegation, if true, would establish that the State did not pursue a proper governmental purpose because its purpose was not to protect the public interest, but to punish a private business for standing up to the government.

At the motion to dismiss stage, we must accept Ace Speedway's allegation as true. *Deminski*, 377 N.C. at 412. Accordingly, Ace Speedway

sufficiently alleged that the State's actions did not serve a proper governmental purpose.

We next turn to the second step of the test. Even if the State had a proper governmental purpose, we must assess whether the means chosen to achieve that purpose were reasonable. The State argues that the abatement order was reasonably necessary to protect the public health because "large mass gatherings at places like racetracks presented an elevated risk for spreading COVID-19." The State further argues that the need to use the abatement order to shut down Ace Speedway stemmed from "the best scientific and medical knowledge available at the time" to prevent the spread of COVID-19.

But again, the State ignores the allegations in this constitutional claim. Ace Speedway alleges that other racetracks and similar businesses violated the same emergency order, yet none of those speedways faced similar enforcement action. *See Poor Richard's*, 322 N.C. at 66. Even if we accept the State's asserted purpose for the abatement order—protecting the public by stopping the spread of COVID-19—this would mean that the State sought to achieve this governmental purpose by issuing an abatement order shutting down a single business while choosing to ignore many others presenting identical risks to the public. This is a particularly ineffective means of achieving the asserted governmental interest, while simultaneously imposing a tremendous burden on Ace Speedway. In other words, balancing the benefits and the burdens of the State's approach, the State's decision to target Ace Speedway but ignore other businesses posing identical risks is not reasonable.

Again, these are merely allegations. But, at this stage, we must accept those allegations as true. *Deminski*, 377 N.C. at 412. Doing so, we conclude that, even assuming the State had a proper governmental purpose, Ace Speedway sufficiently alleged that the means chosen by the State to achieve that purpose were unreasonable under the circumstances.

In sum, Ace Speedway has sufficiently alleged that the challenged state action fails both steps in the two-step analysis for a Fruit of Their Labor Clause claim. Accordingly, Ace Speedway asserted a colorable constitutional claim that pierces the State's sovereign immunity. The Court of Appeals properly affirmed the trial court's denial of the State's motion to dismiss this claim based on sovereign immunity.

III. Equal Protection Clause

We next turn to Ace Speedway's claim that the abatement order was a form of unconstitutional selective enforcement in violation

of the Equal Protection Clause in Article I, Section 19 of the North Carolina Constitution.

Ordinarily, the use of "some selectivity" when the government enforces the law is appropriate and not a violation of equal protection. *State v. Lawson*, 310 N.C. 632, 643 (1984). To establish that the State's selective enforcement violated the Equal Protection Clause, the claimant must show that the enforcement "was motivated by a discriminatory purpose and had a discriminatory effect." *State v. Garner*, 340 N.C. 573, 588 (1995). The "discriminatory purpose" prong requires a showing that the government consciously and deliberately based the enforcement on an "unjustifiable standard" or "arbitrary classification" such as race, religion, or the exercise of the claimant's constitutional rights. *State v. Ward*, 354 N.C. 231, 244 (2001). The "discriminatory effect" prong requires a showing that the claimant has been singled out and treated differently "when compared to persons similarly situated." *Maines v. City of Greensboro*, 300 N.C. 126, 132 (1980). Satisfying this two-part test is necessary to overcome the presumption that public officials act in good faith when choosing how to enforce the law. *Id.*

As we repeatedly explained above, we assess whether Ace Speedway sufficiently alleged a colorable selective enforcement claim at this early stage of the proceeding by accepting the allegations as true and examining whether those allegations, if proven, satisfy the two-part test articulated in our case law. *See Deminski*, 377 N.C. at 412.

Ace Speedway satisfies this standard. The central allegations of this selective enforcement claim are that Robert Turner exercised his First Amendment rights by openly criticizing Governor Cooper's emergency order. In response to that protected First Amendment activity, according to the allegations, Ace Speedway was "singled out by the Governor for enforcement."

Ace Speedway alleges that the Governor "took the unusual step of having a letter sent to the Sheriff of Alamance County directing him to take action" against the speedway and its operators. When the Sheriff refused, the State targeted the speedway with the abatement order. This was done, according to Ace Speedway's allegations, because of Robert Turner's public statements criticizing the Governor. Other, similarly situated racetracks did not face enforcement action even though the State knew that they, too, were violating the emergency order.

These allegations, if proven, would establish that the State acted with the discriminatory purpose of retaliating against Robert Turner's valid exercise of his First Amendment rights, and that the enforcement

had the discriminatory effect of harming Ace Speedway while other, similarly situated businesses faced no consequences for the same violations of the emergency order. *See Garner*, 340 N.C. at 588. Thus, Ace Speedway asserted a colorable selective enforcement claim that pierces the State's sovereign immunity. The Court of Appeals properly affirmed the trial court's denial of the State's motion to dismiss this claim as well.

IV. Least Intrusive Remedy Criteria

At the close of its new brief to this Court, the State also argues that, even if Ace Speedway asserted colorable constitutional claims, those claims "fail for an independent, alternative reason as well: Money damages are not the least-intrusive remedy for the constitutional violations."

This argument is not appropriate at this stage of the proceeding. In *Corum*, we held that, when adjudicating these constitutional claims, "the judiciary must recognize two critical limitations." *Corum*, 33 N.C. at 784. "First, it must bow to established claims and remedies where these provide an alternative to the extraordinary exercise of its inherent constitutional power." *Id.* "Second, in exercising that power, the judiciary must minimize the encroachment upon other branches of government—in appearance and in fact—by seeking the least intrusive remedy available and necessary to right the wrong." *Id.*

These two "critical limitations" arise at separate stages of a *Corum* action. As explained above, the first of these critical limitations—the adequate remedy prong—is incorporated into the test for alleging a valid *Corum* claim. *Deminski*, 377 N.C. at 407. It is effectively "an element" of the constitutional claim. *Askew*, 902 S.E.2d at 733. As a result, the analysis of whether the claimant has an adequate, alternative remedy can occur when a *Corum* claim is first asserted. *Id.* If there is an alternative remedy, the *Corum* claim is infirm and must be dismissed.

By contrast, the second critical limitation—that the *Corum* court must choose "the least intrusive remedy available and necessary to right the wrong"—arises *after* the claimant proves a constitutional violation. *Corum*, 330 N.C. at 784. *Corum* permits the judiciary to "exercise its inherent constitutional power to fashion a common law remedy for a violation of a particular constitutional right." *Id.* That remedy "will depend upon the facts of the case developed at trial. It will be a matter for the trial judge to craft the necessary relief." *Id.*

Thus, the second limitation identified in *Corum* is intended as a restraint on the scope of relief available to a successful *Corum* claimant. *Corum* ensures that claimants can obtain "remedies that are meaningful,

even if not necessarily complete or the relief they want." *Washington*, 385 N.C. at 830. Thus, even in cases where the claimant seeks money damages, the trial court, at the conclusion of the case, may need "to fashion a common law remedy less intrusive than money damages." *Corum*, 330 N.C. at 785. What remedy is both least-intrusive and sufficient to provide meaningful relief is a question that can be answered only after fact issues are resolved and the claim is proven.

Accordingly, we reject the State's argument that Ace Speedway's claims fail because the claims do not seek the least-intrusive remedy. That argument is not ripe for review. As we have repeated throughout this opinion, Ace Speedway's allegations remain unproven. The case has barely begun. The only question reviewable at this early stage of the case is whether Ace Speedway has sufficiently alleged a valid *Corum* claim, thus piercing the State's sovereign immunity and permitting it to bring the State into court to litigate the matter.

The trial court correctly concluded that the claims are valid and therefore the State's motion to dismiss must be denied. The Court of Appeals, in turn, properly affirmed that ruling.

Conclusion

We affirm the decision of the Court of Appeals.

AFFIRMED.

STATE OF NORTH CAROLINA
v.
ROBIN APPLEWHITE

No. 39A22

Filed 23 August 2024

1. Indictment and Information—sufficiency of indictments—human trafficking—multiple counts per victim—unit of prosecution

Each of four indictments charging defendant with multiple counts of human trafficking per victim over specified periods of time were sufficient to put defendant on notice of each offense because they contained the necessary elements of trafficking pursuant to N.C.G.S. § 14-43.11. Although defendant argued that he could be convicted of only one count per victim, the plain language of the statute makes clear that human trafficking is not one continuous offense, that a separate charge may be attached to each violation regardless of whether the same victim is involved, and that the offense is committed when a defendant "obtains" a victim—one of the essential elements of the offense—by any one of the alternative means listed in the statute.

2. Sentencing—prior record level—prior federal conviction—substantial similarity to N.C. offense—any error harmless

Any error by the trial court in calculating defendant's prior record level (to which he had not stipulated) without first comparing defendant's prior federal firearms conviction to any state offense was harmless because the record contained sufficient information demonstrating that the federal offense was substantially similar to the North Carolina offense of possession of a firearm by a felon.

Justice RIGGS concurring in part and dissenting in part.

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

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 281 N.C. App. 66 (2021), finding no error in judgments entered on 5 March 2019 by Judge Thomas H. Lock in Superior Court, Cumberland County. On 4 May 2022, the

Supreme Court allowed defendant's petition for discretionary review of additional issues. Heard in the Supreme Court on 15 February 2024.

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BARRINGER, Justice.

In this case, we are tasked with determining whether the Court of Appeals erred in affirming the trial court's judgments following a jury's verdict finding defendant guilty of twelve counts of human trafficking, eleven counts of promoting prostitution, four counts of conspiracy to promote prostitution, and attaining habitual felon status. For the following reasons, we affirm the decision of the Court of Appeals.

I. Background

Between December 2012 and March 2015, defendant met several women, including A.C., H.M., A.B., and M.F.[1] Defendant supplied the women with heroin, to which they quickly became addicted. Defendant used heroin to force the women to engage in prostitution arranged by defendant and his wife via online advertisements on Backpage, a website used to solicit prostitution customers. The women used the money they received to pay defendant for heroin as well as their basic needs. They paid defendant far more than what the heroin was worth. Defendant withheld from the women drugs, food, sleep, and any means of communication. He also provided the women housing in exchange for payment but would occasionally lock them in his basement or a hotel room. Defendant transported the women throughout North Carolina, and across state lines to Virginia, South Carolina, and Florida to engage in prostitution.

Defendant was indicted and convicted of five counts of trafficking A.C. between December 2012 and January 2013. Defendant used drugs to entice A.C. to lease a house that defendant would use for prostitution and storing drugs. Ultimately, defendant convinced A.C. to engage in prostitution. Defendant and his wife posted A.C.'s advertisement on Backpage at least 197 times in three cities. Defendant scheduled A.C. to engage in at least ten appointments per night.

1. The parties agree to the use of pseudonyms to protect the women's identities.

Defendant was indicted and convicted of two counts of trafficking H.M. between January 2014 and March 2014. Defendant met H.M. when he began supplying her heroin, which H.M. smoked daily. Eventually, defendant convinced H.M. to prostitute for him via online advertisements. Defendant agreed to support H.M. in exchange for prostituting. Defendant drove H.M. to Greensboro, Raleigh, and South Carolina while she was under the influence of heroin. In addition, defendant would lock H.M. in her hotel room or his basement without food or drugs.

Defendant was indicted and convicted of three counts of trafficking A.B. between January 2014 and April 2015. Defendant first met A.B. when he approached her outside a hotel and gave her pills, after which they engaged in sexual acts. A.B. traveled with defendant to his home where defendant offered A.B. what she thought was cocaine but was in fact heroin. At first, defendant provided A.B. with heroin without asking for anything in return. Ultimately, defendant forced A.B. to engage in acts of prostitution in exchange for drugs and housing. Defendant advertised A.B. online and drove A.B. to Charlotte and Raleigh to engage in prostitution.

Defendant was indicted and convicted of two counts of trafficking M.F. between March 2014 and April 2015. Before meeting defendant, M.F. used crack cocaine, but she began using heroin after she met defendant. Defendant treated M.F. like a girlfriend, but he still had her engage in prostitution. Advertisements for M.F. were posted on Backpage over 219 times.

Beginning on 18 February 2019, defendant represented himself pro se at trial. M.F. died before trial, but A.C., H.M., and A.B., among others, testified to their working arrangements with defendant. The jury returned a unanimous verdict finding defendant guilty of the above-listed charges. The jury found defendant not guilty of charges related to two other victims. Defendant was calculated as a prior record level five offender based on fourteen previous record points. Defendant did not stipulate in writing to the State's calculation of his prior record points. Defendant was sentenced to 2880 to 3744 months to be served consecutively, totaling 240 to 312 years in prison. The trial court also required defendant to register as a sex offender.

Defendant appealed to the Court of Appeals. The Court of Appeals issued a divided opinion finding no error by the trial court. *State v. Applewhite*, 281 N.C. App. 66, 81 (2021). Judge Arrowood concurred in part and dissented in part. In his dissent, he argued that human trafficking is a continuing offense because the statute criminalizing human

trafficking does not define the unit of prosecution. *Id.* (Arrowood, J., concurring in part and dissenting in part). Having committed a continuing offense, defendant could only be convicted of a single, continuing count of human trafficking per victim. *Id.* Therefore, the dissenting judge would remand defendant's case to the trial court to vacate all but one count of human trafficking per victim. *Id.* at 82.

II. Standard of Review

This Court reviews questions of statutory interpretation de novo. *High Point Bank & Trust Co. v. Highmark Props., LLC*, 368 N.C. 301, 304 (2015). This Court reviews a challenge to the sufficiency of an indictment de novo. *State v. Oldroyd*, 380 N.C. 613, 617 (2022).

This Court exercises de novo review over "questions of law concerning the trial court's alleged nonconformance with statutory requirements." *State v. Flow*, 384 N.C. 528, 546 (2023) (extraneity omitted). This Court will not vacate a judgment by the trial court unless the defendant can show such error prejudiced him. *Id.* at 549.

III. Analysis

Defendant filed a notice of appeal based on a dissent at the Court of Appeals. Defendant also filed a petition for discretionary review of additional issues with this Court, which was allowed. On appeal, defendant argues first that he may only be convicted of a single count of human trafficking per victim. Second, defendant argues that the trial court erred when it failed to compare the elements of defendant's earlier federal firearms conviction to a North Carolina offense. For the following reasons, we affirm the decision of the Court of Appeals that found no error in the trial court's judgments.

A. Defendant may be convicted of multiple counts of human trafficking per victim.

1. Unit of Prosecution

[1] At issue in this case is the unit of prosecution under N.C.G.S. § 14-43.11 (2021). Section 14-43.11[2] states, in pertinent part:

> (a) A person commits the offense of human trafficking when that person (i) knowingly or in reckless disregard of the consequences of the action recruits,

2. N.C.G.S. § 14-43.11 was amended effective 1 December 2023 to apply to offenses committed on or after that date. As the offenses occurred before 1 December 2023, this Court will analyze the statute as effective in 2022.

> entices, harbors, transports, provides, or obtains by any means another person with the intent that the other person be held in involuntary servitude or sexual servitude or (ii) willfully or in reckless disregard of the consequences of the action causes a minor to be held in involuntary servitude or sexual servitude.
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> . . . .
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> (c) Each violation of this section constitutes a separate offense and shall not merge with any other offense. Evidence of failure to deliver benefits or perform services standing alone shall not be sufficient to authorize a conviction under this section.
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> . . . .

"In resolving issues of statutory construction, we look first to the language of the statute itself." *Raleigh Hous. Auth. v. Winston*, 376 N.C. 790, 795 (2021) (quoting *Walker v. Bd. of Trs. of the N.C. Loc. Gov'tal Emps.' Ret. Sys.*, 348 N.C. 63, 65 (1998)). "When the [language] in the statute is unambiguous, the [language] 'should be understood in accordance with its plain meaning.' " *Id.* (quoting *Fid. Bank v. N.C. Dep't of Revenue*, 370 N.C. 10, 20 (2017)).

Here, the statutory language is clear and unambiguous. Subsection (a) of N.C.G.S. § 14-43.11 states that "[a] person commits the offense of human trafficking when that person" (1) "knowingly or in reckless disregard of the consequences of the action"; (2) "recruits, entices, harbors, transports, provides or obtains by any means [the victim]"; (3) "with the intent that [the victim] be held in . . . sexual servitude." N.C.G.S. § 14-43.11(a). The second element of section 14-43.11 is satisfied each time a defendant engages in any of the actions listed in subsection (a), "*or*" any other conduct that constitutes "obtain[ing]" the victim for the illicit purposes described in the statute. *Id.* (emphasis added).

Furthermore, subsection (c) of the human trafficking statute specifically states that "[e]ach violation of this section constitutes a separate offense and shall not merge with any other offense." *Id.* § 14-43.11(c). The plain language of subsection (c) clarifies that human trafficking is not a continuing offense. The language specifies that violations are *separate* offenses. The explicit language in the statute that each violation is a separate offense demonstrates that each distinct act of recruiting, enticing, harboring, transporting, providing or obtaining a victim can be separately prosecuted. In order to give meaning to every

word of the statute, the statute can only be read to reference multiple criminal acts.

Moreover, the statute explicitly states that violations shall not merge with other offenses. This anti-merger clause demonstrates that: (1) a single defendant can commit the offense of human trafficking through multiple acts with the same victim; (2) each separate violation "of this section" may be prosecuted; and (3) the several violations shall not merge with each other. *Id.* § 14-43.11(c). Thus, a defendant may be charged separately for each time the defendant violates the human trafficking statute, regardless of whether each violation involves the same victim. *See State v. Perry*, 316 N.C. 87, 104 (1986) ("[D]efendant may be convicted and punished separately for trafficking in heroin by possessing 28 grams or more of heroin, trafficking in heroin by manufacturing 28 grams or more of heroin, and trafficking in heroin by transporting 28 grams or more of heroin even when the contraband material in each separate offense is the same heroin."); *see also State v. Pipkins*, 337 N.C. 431, 434 (1994) (citing *Perry*, 316 N.C. at 102–04). If the legislature clearly intends to define each act as a separate offense and each act has distinct elements, then multiple charges do not violate double jeopardy. *See Blockburger v. United States*, 284 U.S. 299, 303–04 (1932).

The dissent disagrees. It argues that because the legislature included trafficking language in other statutes, the anti-merger provisions only apply to those statutes. But the plain language of N.C.G.S. § 14-43.11 demonstrates legislative intent—that the anti-merger provision applies equally to the human trafficking statute. When "the language of a statute expresses the legislative intent in clear and unambiguous terms, the words employed must be taken as the final expression of the meaning intended unaffected by its legislative history." *Lunsford v. Mills*, 367 N.C. 618, 626 (2014) (quoting *Piedmont Canteen Serv., Inc. v. Johnson*, 256 N.C. 155, 161 (1962)).

As further illustrated by the statute's catch-all language, "or obtain [ ] by any means," the list, "recruits, entices, harbors, transports, [or] provides," identifies different factual bases, or means, for satisfying the second element of the offense of human trafficking.[3] *See Mathis v. United States*, 579 U.S. 500, 514–17 (2016) (discussing the difference between elements of an offense and means for committing an offense); *see also Richardson v. United States*, 526 U.S. 813, 817 (1999) ("[A] federal jury need not always decide unanimously which of several possible sets of

3. This language is identical in the versions of N.C.G.S. § 14-43.11 which apply to all offenses alleged in this case.

underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime."); *King v. United States*, 965 F.3d 60, 66 (1st Cir. 2020) ("Means . . . are the different ways that a single element of a crime may be committed; and unlike elements, the government need not prove a particular means to obtain a conviction (any of the listed means will do).")."[I]f a statutory list is drafted to offer 'illustrative examples,' then it includes only a crime's means of commission." *Mathis*, 579 U.S. at 519. Moreover, a state's indictment listing the alternative means with a disjunctive "or" shows courts that "each alternative is only a possible means of commission, not an element that the prosecutor must prove to a jury beyond a reasonable doubt." *Id.*; *accord State v. Moir*, 369 N.C. 370, 381 n.8 (2016) (recognizing that a statute may "specif[y] several alternative *means* of committing a crime . . . instead of setting out alternative offenses made up of differing *elements*").

Here, the language of the statute provides different means to satisfy the second element of the crime of human trafficking. The statute lists numerous actions followed by the language "or obtains by any means," demonstrating that the prior listed terms are "means" to satisfy that element of the statute. To "obtain" means "[t]o bring into one's own possession; to procure." *Obtain*, Black's Law Dictionary (12th ed. 2024); *see Obtain*, Garner's Dictionary of Legal Usage (3d ed. 2011) ("[O]btain is a formal word for *get*."). The language of the statute leaves open the door for the prosecutor to prove not just one of the listed means but rather any other means by which the defendant "obtain[ed]" the victim. *See United States v. Cooper*, No. 21-CR-10184-NMG, 2024 U.S. Dist. LEXIS 6621, at *1 (D. Mass. Jan. 12, 2024) (stating that the language in 18 U.S.C. § 1591(a)(1), which criminalizes sex trafficking and closely mirrors the language of N.C.G.S. § 14-43.11(a), "constitute[s] means, not elements").

To determine whether the legislature intended for multiple words to constitute distinct offenses, the Supreme Court of the United States has looked to whether the "statutory alternatives carry different punishments." *Mathis*, 579 U.S. at 518. Regardless of how the defendant controls or "obtains" another individual, each violation of this statute constitutes a single offense because this statute does not distinguish the punishment based on the various means provided. *See id.* (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)) ("If statutory alternatives carry different punishments, then under *Apprendi* they must be elements."). "The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the

same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial." *Brown v. Ohio*, 432 U.S. 161, 165 (1977). In the instant case, a defendant who violated subsection (a) during the time of the offenses charged was "guilty of a Class F felony if the victim of the offense is an adult." N.C.G.S. § 14-43.11(c) (2016).[4] Accordingly, this statute does not distinguish the punishment based on the various means provided.

The evil sought to be prevented by the legislature is the trafficking of persons for the purpose of engaging in prostitution. *See* N.C.G.S. § 14-43.11. "Trafficking" can occur in numerous ways, all of which revolve around whether the defendant did so "with the intent that the [victim] be held in involuntary servitude or sexual servitude." *Id.* § 14-43.11(a). Thus, a defendant may be convicted of multiple counts of human trafficking per victim.

"The elementary rule is that every reasonable [statutory] construction must be resorted to, in order to save a statute from unconstitutionality." *Hooper v. California*, 155 U.S. 648, 657 (1895); *accord Skilling v. United States*, 561 U.S. 358, 406 (2010) ("[I]f this general class of offenses can be made constitutionally definite by a reasonable construction of the statute, this Court is under a duty to give the statute that construction." (quoting *United States v. Harriss*, 347 U.S. 612, 618 (1954))). This interpretation of N.C.G.S. § 14-43.11 is reasonable—that defendant has violated the human trafficking statute each instance he employs one of the means contemplated by statute.

Our dissenting colleagues disagree. The dissent alleges that defendant is facing multiple punishments for the same conduct, in violation of the Double Jeopardy Clause.[5] Where, as here, the State chooses to utilize the statutorily provided short form indictment, "[e]xamination of the facts underlying each charge [ ] more accurately illustrates whether defendant has been placed in double jeopardy." *State v. Rambert*, 341 N.C. 173, 176 (1995). Examination of the facts here clearly indicates

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4. Effective December 2017, the penalty for violating N.C.G.S. § 14-43.11 was increased to a Class C felony.

5. While defendant focused his argument on the sufficiency of the indictment, he briefly mentioned double jeopardy. Since the parties did not fully develop a double jeopardy argument, attempting to resolve a potential double jeopardy issue without complete briefing is improper. *See* N.C. R. App. P. 28.

Moreover, the dissent concedes this issue is non-jurisdictional. As aptly noted by the dissent, non-jurisdictional issues can be resolved by a defendant filing a bill of particulars or a motion to dismiss. Defendant did neither here.

that defendant employed a variety of means to traffic multiple women throughout the time periods specified in the indictments. Thus, we cannot conclude that defendant has been punished more than once for the same conduct.

Furthermore, the dissent creates ambiguity and substitutes its will when, as demonstrated by the plain language of the statute, legislative intent is clear. The dissent concludes that "recruits," "entices," and "obtains" are synonymous words. However, the very definitions used in the dissent belie that conclusion. For example, the dissent defines "recruit" as "enrolling," and "entice" as "luring or inducing." Clearly these words mean different things. It is not synonymous that students enroll in school every year, and that schools are luring their students every year.

2. Sufficiency of Indictment

The indictment was sufficient to put defendant on notice because it contained the necessary elements of the offense.[6] Section 15A-924 of the North Carolina General Statutes codifies the requirements for an indictment.

> [I]t is not the function of an indictment to bind the hands of the State with technical rules of pleading; rather, its purposes are to identify clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial, and to protect the accused from being jeopardized by the State more than once for the same crime.

State v. Creason, 313 N.C. 122, 130 (1985) (alteration in original) (quoting *State v. Sturdivant*, 304 N.C. 293, 311 (1981)); *see In re J.U.*, 384 N.C. 618, 624 (2023) ("It is generally held that the language in a statutorily prescribed form of criminal pleading is sufficient if the act or omission is clearly set forth so that a person of common understanding may know what is intended."). "Generally, the purpose of an indictment is to put the defendant on notice of the crime being charged and to protect the defendant from double jeopardy." *State v. Newborn*, 384 N.C. 656, 659 (2023) (citing *Sturdivant*, 304 N.C. at 311). As noted above, an indictment's "purpose[ ] [is] to identify clearly the crime being charged,

6. In this case, the State chose to utilize the statutorily provided short-form language containing the necessary elements of the offense. We note, however, that in cases where short-form language for a charged offense is not utilized, an indictment is sufficient when it "alleges facts supporting the essential elements of the offense to be charged." *State v. Newborn*, 384 N.C. 656, 659 (2023).

thereby putting the accused on reasonable notice to defend against it and prepare for trial." *Sturdivant*, 304 N.C. at 311. "[A]n indictment couched in the language of the statute is generally sufficient to charge the statutory offense." *State v. Palmer*, 293 N.C. 633, 638 (1977); *State v. Singleton*, 386 N.C. 183, 213–14 (2024).

In this case, the indictments tracked the language of the statute but included variations for the names of the victims and the date ranges of the alleged violations. The indictments used identical language, which stated:

> [B]etween and including [date range] . . . defendant . . . unlawfully, willfully and feloniously did knowingly or in reckless disregard of the consequences of the action, did recruit, entice, harbor, transport, provide or obtain by any means another person, [victim's name,] with the intent that the other person, [victim's name], be held in sexual servitude. This act was in violation of North Carolina General Statutes Section 14-43.11(a).[7]

Each indictment as written requires the State to satisfy three elements as to the date range alleged and the specific victim identified therein: (1) defendant "knowingly or in reckless disregard of the consequences"; (2) "did recruit, entice, harbor, transport, provide or obtain by any means [the victim]"; (3) "with the intent that [the victim] be held in sexual servitude." Put simply, the State must prove: (1) defendant's mental state surrounding his conduct; (2) defendant's actual conduct of obtaining the victim; and (3) defendant's intent when he obtained the victim.

This Court has stated that:

> The general rule is well settled that an indictment or information must not charge a party disjunctively or alternatively in such manner as to leave it uncertain what is relied on as the accusation against him. . . . [W]here a statute specifies several means or ways in which an offense may be committed in the

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7. This Court has previously rejected the argument that "short-form indictments [which] bear the same language and same time frame . . . lack specific details to link them to specific acts and incidents; thus, the court cannot be sure that jurors unanimously agreed that the State has proved each element that supports the crime charged in the indictment." *State v. Lawrence*, 360 N.C. 368, 373 (2006).

> alternative, it is bad pleading to allege such means or ways in the alternative. But where terms laid in the alternative are synonymous, the indictment is good; and where a statute in defining an offense, uses the word 'or' . . . in explanation of what precedes, making it signify the same thing, the indictment may follow the words of the statute. An indictment is not vitiated by an alternative statement in matter which may be rejected as surplusage. *State v. Jones*, 242 N.C. 563, 565 (1955) (first alteration in original).

Here, the State did not charge defendant "disjunctively or alternatively." *Id.* It is necessary to distinguish between alternative means for violating the statute and alternative means to satisfy an element. The indictments do not charge defendant in the alternative because the statute does not provide for alternative offenses. Rather, as discussed above, the statute provides a list of alternative means for satisfying one element of the offense—that defendant obtained, "got," or controlled the victim in some way. Because the language of the indictment tracks the pertinent statutory language and merely provides alternative means for how defendant obtained the victim in some way, the indictment is sufficient.

Here, none of the indictments rendered the charged offenses uncertain.[8] First, as stated above, the multiple means by which the State may prove an element of the offense are just that—illustrations of alternative ways to control, get, or obtain another person. The statute does not provide for alternative offenses, so defendant was not in doubt as to the charges against him. Thus, the indictment gave defendant sufficient notice of human trafficking charges for which he should prepare a defense.

It should be noted that defendants may not be convicted for *continuous* offenses if the continuous offenses listed in the indictments cover the same date range, as this runs afoul of double jeopardy protections. *State v. Johnson*, 212 N.C. 566, 569–70 (1937). However, as discussed above, the crime penalized by N.C.G.S. § 14-43.11 is not a continuous offense.

The dissent writes that defendant's convictions violate the Double Jeopardy Clause because the indictments do not make certain that

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8. This Court no longer follows our prior hyper-technical indictment jurisprudence. *See In re J.U.*, 384 N.C. at 624; Singleton, 386 N.C. at 195.

defendant was not placed in jeopardy for a subsequent prosecution for the same crime. Yet, as discussed above, "examination of the indictments is not always dispositive on the issue of double jeopardy." *Rambert*, 341 N.C. at 176. "For a plea of former jeopardy to be good it must be grounded on the same offense both in law and in fact." *Id.* at 175 (extraneity omitted). "Examination of the facts underlying each charge [ ] more accurately illustrates whether defendant has been placed in double jeopardy." *Id.* at 176. For a defendant's double jeopardy claim to prevail, he must show that he had been convicted of numerous offenses for the same prohibited conduct. Here, each offense requires proof of a fact that the others do not. *Brown*, 432 U.S. at 166. As discussed in the Background and Analysis sections above, the law and evidence both demonstrate that defendant's acts were distinct and do not run afoul of double jeopardy principles. *See Rambert*, 341 N.C. at 175–77.

B. The trial court erred in determining defendant's prior record level; however, this error did not cause any prejudice to defendant.

[2] Also at issue in this case is whether the trial court erred in calculating defendant's prior record level when defendant did not stipulate to his prior convictions, nor did the trial court compare defendant's federal conviction relevant to his sentencing here to any state offense. The trial court erred in failing to state its finding that defendant's federal conviction at issue was substantially similar to a North Carolina offense. However, such error was harmless.

A determination under subsection 15A-1340.14(e), which governs classification of prior convictions from other jurisdictions, "is a question of law involving comparison of the elements of the out-of-state offense to those of the North Carolina offense." *State v. Sanders*, 367 N.C. 716, 720 (2014) (extraneity omitted). Subsection 15A-1340.14(e) and this Court's precedent in *Sanders* require trial courts to compare North Carolina offenses and offenses from foreign jurisdictions in order to classify a prior offense as anything higher than a Class I felony. N.C.G.S. § 15A-1340.14(e) (2023). Subsection 15A-1340.14(e), states that "a conviction occurring in a jurisdiction other than North Carolina is classified as a Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony." *Id.* However, "[i]f the offender proves by the preponderance of the evidence that an offense classified as a felony in the other jurisdiction is substantially similar to an offense that is a misdemeanor in North Carolina, the conviction is treated as that class of misdemeanor for assigning prior record level points." *Id.* Substantial similarity may be shown through various listed methods,

including "[a]ny other method found by the court to be reliable." *Id.* § 15A-1340.14(f) (2023).

Here, the State classified defendant's prior federal firearms conviction as a Class G felony without furnishing the trial court any evidence to show substantial similarity between the offenses. Additionally, the trial court failed to check the box on the prior record level worksheet indicating that the trial court found the federal conviction was substantially similar to a North Carolina offense. The trial court thus erred in calculating defendant's prior record level because defendant did not stipulate to his prior record level nor did the trial court make a comparison of the elements of the federal offense to any North Carolina offense. Nonetheless, such error was harmless.

While not controlling, in *State v. Riley* the North Carolina Court of Appeals determined that "the federal offense of being a felon in possession of a firearm, 18 U.S.C. § 922(g)(1), is substantially similar to the North Carolina offense of possession of a firearm by a felon, N.C.[G.S.] § 14-415.1(a), a Class G felony." 253 N.C. App. 819, 820, 825 (2017). The Court of Appeals noted the record contained sufficient information for the court to make the analysis on its own despite the State's "fail[ure] to meet its burden of proof at sentencing." *Id.* at 825. In rendering its decision, the Court of Appeals reached "the almost inescapable conclusion that both offenses criminalize essentially the same conduct—the possession of firearms by disqualified felons." *Id.* at 827.

"In order to demonstrate prejudicial statutory error in accordance with N.C.G.S. § 15A-1443(a), defendant would have to prove that there was a reasonable possibility that, had the trial [conformed to the statutory requirement], a different outcome would have resulted at his trial." *Flow*, 384 N.C. at 549. Here, although the trial court erred, defendant has failed to show he was prejudiced by the error because his federal firearms conviction is substantially similar to a Class G felony in North Carolina. If the trial court's judgment was vacated and the matter remanded for resentencing, defendant's sentence would not change. Thus, no prejudicial error occurred at defendant's sentencing.

IV. Conclusion

Accordingly, we find no prejudicial error and affirm the decision of the Court of Appeals.

AFFIRMED.

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

Justice RIGGS concurring in part and dissenting in part.

Human trafficking is an egregious crime, and that fact does not give this Court the right to interpret criminal laws in a way that violates the Double Jeopardy Clause of the United States Constitution. Mr. Applewhite will spend the rest of his natural life incarcerated even under the constitutional interpretation of the statute put forth in this dissent. Our obligation is to ensure that ambiguous statutes, such as the one at bar here, are interpreted consistent with the Constitution, no matter how odious the crime.

Generally, the Court considers statutory language that is "equally susceptible to multiple interpretations" to be ambiguous. *Winkler v. N.C. State Bd. of Plumbing, Heating, & Fire Sprinkler Contractors*, 374 N.C. 726, 730 (2020). The language in the human trafficking statute, N.C.G.S. § 14-43.11 (2021), is open to multiple reasonable interpretations and therefore, is ambiguous, contrary to the majority's assertion. Significantly, the statutory language can be reasonably interpreted to punish the same conduct twice, violating the Double Jeopardy Clause. Further, the indictments in this case are insufficient to make certain that Mr. Applewhite is not placed in jeopardy in a subsequent prosecution for the same crime.

When a statute is ambiguous, the Court interprets the statute by considering "the language of the statute, the spirit of the statute, and what it seeks to accomplish." *State v. Barnett*, 369 N.C. 298, 304 (2016) (quoting *State ex rel. Utils. Comm'n v. Pub. Staff*, 309 N.C. 195, 210 (1983)). When we interpret statutes, it is fundamental that we interpret the statute consistently with the Constitution. *See In re Banks*, 295 N.C. 236, 239 (1978) ("A well recognized rule in this State is that, where a statute is susceptible to two interpretations—one constitutional and one unconstitutional—the Court should adopt the interpretation resulting in a finding of constitutionality."). Still, statutory construction does not demand that this Court give words the most strained meaning in order to avoid a constitutional problem; "words are given their fair meaning in accord with the manifest intent of the [legislature]." *State v. Jones*, 358 N.C. 473, 478 (2004) (quoting *United States v. Brown*, 333 U.S. 18, 25–26 (1948)) (recognizing statutory construction should not override common sense and evident statutory purpose by giving statutory language the narrowest meaning). The Court must construe statutes "mindful of the criminal conduct that the legislature intends to prohibit," *State v. Rankin*, 371 N.C. 885, 889 (2018), which in this statute is the entrapment of vulnerable victims in a state of involuntary sexual servitude.

I agree with the majority that some of the activities identified in the statute could represent multiple offenses against a single victim—but only if the charges are based upon distinct acts and the indictment gives "notice sufficient to prepare a defense and to protect against double jeopardy." *State v. Lancaster*, 385 N.C. 459, 462 (2023) (quoting *In re J.U.*, 384 N.C. 518, 623 (2023)). However, on the facts of this case, I would hold that the indictments are only sufficient to support one count of human trafficking per victim within the dates provided in the indictment. For this reason, I respectfully dissent from the majority's reading of the statute and its application here. I concur with the majority's holding that Mr. Applewhite was not prejudiced by the trial court's error in failing to compare the elements of his federal firearm conviction to the elements of a similar North Carolina offense.

I. Analysis

A. N.C.G.S. § 14-43.11 is Ambiguous.

Subsection (a) of the statute does not clearly state whether the six activities—"recruits, entices, harbors, transports, provides, or obtains by any other means"—represent separate offenses or alternative means of committing the same offense of human trafficking. N.C.G.S. § 14-43.11(a). The language can be reasonably interpreted as identifying six separate offenses for human trafficking in the same way that the drug trafficking statute, N.C.G.S. § 90-95(a)(1) (2023), establishes that sale and delivery, possession, and manufacturing of drugs represents three separate offenses under the statute. *See State v. Creason*, 313 N.C. 122, 129 (1985) (recognizing that sale and delivery, possession, and manufacturing represent three separate offenses under N.C.G.S. § 90-95(a)(1)); *State v. Aiken*, 286 N.C. 202, 206 (1974) (explaining that the sale of controlled substances is a separate offense from possession because a defendant can sell a substance which he does not possess and possess a substance that he does not sell). In contrast, the activities listed in the human trafficking statute can also be read to only represent alternative means of committing a single offense of human trafficking in the same way that N.C.G.S. § 14-202.1 establishes different means of committing the crime of taking indecent liberties with a child. *See* N.C.G.S. § 14-202.1 (2023); *State v. Hartness*, 326 N.C. 561, 564–65 (1990) (explaining "any immoral, improper, or indecent liberties" represent different means falling within the ambit of N.C.G.S. § 14-202.1). The majority adopts the latter view, reading the enumerated activities in the human trafficking statute as alternate means of committing human trafficking but also reads subsection (c) to allow each activity to represent a separate offense against a single victim. But the fact that the majority reads

the statute in a manner where the activities are both alternate means of committing the offense of human trafficking and separate offenses only reinforces the ambiguity of the statute.

I agree with the majority that the statute provides for multiple charges related to a single victim so long as each charge is based upon a distinct act. However, the majority glosses over the meaning of "distinct act" without analyzing whether the synonymous nature of the enumerated means of holding a victim in involuntary or sexual servitude could lead to multiple charges based upon the same conduct (or indeed, represents a distinct act). In doing so, the Court is interpreting the statute in a way that creates multiple punishments for the same distinct act in violation of double jeopardy protection. *See State v. Irick*, 291 N.C. 480, 502 (1977) ("[D]ouble jeopardy is designed to protect an accused from double punishment as well as double trials for the same offense.").

While several of the six activities identified in the statute represent distinct acts of human trafficking, some do not represent distinct acts. "Harbor" and "transport" represent two distinct means of holding a victim in servitude, and "provide" represents a means "[t]o furnish [or] supply" a victim for servitude. *Provide*, The American Heritage College Dictionary (3d ed. 1997). However, "recruits," "entices," and "obtains" are synonymous words related to bringing a victim into servitude. "Recruit" is defined as "enroll[ing] (someone) as a member or worker in an organization," *Recruit*, New Oxford American Dictionary (3d ed. 2010), while "entice" means "lur[ing] or induc[ing]; esp[ecially], to wrongfully solicit (a person) to do something," *Entice*, Black's Law Dictionary (12th ed. 2024). "Obtain," as the majority notes, means "bring[ing] into one's own possession; [ ] procur[ing], esp[ecially] through effort." *Obtain*, Black's Law Dictionary (12th ed. 2024).[1] The majority's flippant analogy that enrolling students in school is different from luring a student into school fails to consider the definitions of the words in the statutory context. *See West Virginia v. EPA*, 142 S. Ct. 2587, 2607 (2022) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." (quoting *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989))). This is not a statute about school enrollment. It is a criminal statute about actions executed with the intent to hold victims "in involuntary servitude or sexual servitude." N.C.G.S. § 14-43.11(a).

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1. The fact that the statute states "obtains by any other means" does not dictate that the verbs listed prior to that are legally understood as means of committing the same offense rather than separate offenses—"by any other means" simply describes and expands the verb "obtain."

In the context of human trafficking, recruiting, enticing, and obtaining are all means of bringing a victim into involuntary or sexual servitude. In this case, the State alleged that Mr. Applewhite offered the victims free heroin to get them addicted and then forced them to engage in prostitution to pay him for the heroin. Based on the State's evidence, providing heroin to the victims to lure them into the trafficking ring serves equally to "recruit[ ]," or "entice[ ]" them into the illegal program or to "obtain[ ]" them. In the context of this statute, there is no legally significant definitional daylight between the plain usage of the statute's three problematic verbs that would make "enroll[ing] (someone) as a member or worker in an organization," *Recruit*, New Oxford American Dictionary (3d ed. 2010), "lur[ing] or induc[ing] . . . esp[ecially], to wrongfully solicit (a person) to do something," *Entice*, Black's Law Dictionary (12th ed. 2024), and "bring[ing] into one's own possession; [ ] procu[ing], esp[ecially] through effort," *Obtain*, Black's Law Dictionary (12th ed. 2024), so distinct that it is reasonable to consider them three separate offenses.[2] The "by any other means" language supports this interpretation by expanding the statute to ensure that any means used to bring a victim into involuntary or sexual servitude can serve as the basis for a human trafficking charge so long as it is based upon a distinct act.

B. The Majority's Statutory Construction of N.C.G.S. § 14-43.11 Allows for Multiple Punishments for the Same Conduct.

In construing an ambiguous criminal statute, the legislative intent controls the interpretation. *Jones*, 358 N.C. at 478. All parts of the statute dealing with the same subject are to be construed together, and every part shall be given effect if it can be done by fair and reasonable interpretation. *State v. Tew*, 326 N.C. 732, 739 (1990). In construing ambiguous criminal statutes, the Court applies the rule of lenity, which requires that the statute be strictly construed against the State. *See State v. Hinton*, 361 N.C. 207, 211–12 (2007) (recognizing that the rule of lenity applies to construe ambiguous criminal statutes); *United States v. Santos*, 553 U.S. 507, 514 (2008) ("The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendant subjected to them."). Any doubt as to punishment "will be resolved against turning

2. This is not to say that a defendant may not be charged with recruiting the same victim multiple times. As the State suggested during oral argument, if a victim leaves the involuntary servitude but then is recruited back into servitude by a defendant, then the defendant could be charged with multiple counts against the same victim, but more specificity would be required by the State to establish each charge. Oral Argument at 32:15, *State v. Applewhite*, No. 39A22 (N.C. Aug. 23, 2024), https://www.youtube.com/watch?v=SaTrwzNAwSo.

a single transaction into multiple offenses." *State v. Conley*, 374 N.C. 209, 213 (2020) (quoting *State v. Smith*, 323 N.C. 439, 442 (1988)).

By comparison to other statutes intending to deal with far-reaching criminal enterprises, in creating the human trafficking statute, the legislature obviously sought to criminalize the insidious operation of human trafficking by casting a wide net to ensnare all aspects of a human trafficking operation and hold all who engage in any aspect responsible for such role, similar to the way Congress sought to address complex racketeering schemes. *See, e.g.*, 18 U.S.C. § 1959(a) (enumerating the wide range of crimes that can be committed for the purpose of joining a racketeering enterprise to include murder, kidnapping, maiming, assault, or a threat to commit a crime of violence). While we must construe the statute "mindful of the criminal conduct the legislature intends to prohibit," *Rankin*, 371 N.C. at 889, the Court may not increase the penalty the statute "places on an individual when the [l]egislature has not clearly stated such an intention," *Conley*, 374 N.C. at 212 (quoting *State v. Garris*, 191 N.C. App. 276, 284 (2008)).

The constitutional guarantee against double jeopardy protects a defendant from multiple punishments for the same distinct conduct. *See State v. Sparks*, 362 N.C. 181, 186 (2008) (recognizing that the constitutional prohibition against double jeopardy protects three distinct abuses including multiple punishments for the same offense). In the context of multiple violations of a single statute, the Supreme Court of the United States has acknowledged that when the legislature "has the will, that is, of defining what it desires to make the unit of prosecution" it can do so, but when the legislature "leaves to the [j]udiciary the task of imputing . . . an undeclared will, the ambiguity should be resolved in favor of lenity." *Bell v. United States*, 349 U.S. 81, 83 (1955) (holding that under the Mann Act, a defendant who transported two women on the same trip and in a single vehicle could only be charged with a single offense and not be subjected to cumulative punishment). Any ambiguity as to the unit of prosecution—that is the particular course of conduct defined by statutes as a distinct offense— should be resolved in favor of the defendant under the rule of lenity. *Id.*; *see also Sanabria v. United States*, 437 U.S. 54, 69–70 (1978) (describing an "allowable unit of prosecution" as the particular course of conduct defined by statute as a distinct offense). This Court applied this principle in the context of a North Carolina statute criminalizing obscene literature and exhibitions. *Smith*, 323 N.C. 439. In *Smith*, this Court concluded that the applicable statute "exhibits no clear expression of legislative intent to punish separately and cumulatively for each and every obscene item disseminated, regardless of the

number of transactions involved." *Id.* at 442 (cleaned up). The Court held that "until the General Assembly unambiguously declares a contrary intent, we should assume that a single sale . . . does not spawn multiple indictments." *Id.* at 444 (cleaned up).

Similarly, here, the legislature fails to unambiguously define the unit of prosecution for human trafficking and this Court must resolve any ambiguity as to the unit of prosecution in favor of lenity. While subsection (c) makes clear that a defendant may face multiple charges for a single victim by employing the language that "[e]ach violation of this section constitutes a separate offense," N.C.G.S. § 14-43.11(c), this language does not demonstrate legislative intent to allow multiple charges based upon the same conduct. This ambiguity on the unit of prosecution should be resolved in favor of lenity. *See Hinton*, 361 N.C. at 211 (recognizing the "rule of lenity" requires courts to construe ambiguity in a criminal statute in favor of the defendant); *Smith*, 323 N.C. at 442–44 (acknowledging that courts must construe ambiguity regarding the allowable unit of prosecution against the State and in favor of lenity).

When the legislature uses duplicative terms, this Court has looked at the conduct the legislature seeks to prevent to determine if the terms represent separate offenses. *See Creason*, 313 N.C. at 129 (holding that in the context of drug trafficking, "sell or deliver" is one offense that criminalizes placing drugs into the stream of commerce); *State v. Jones*, 242 N.C. 563, 565–66 (1955) (recognizing that the terms "build" or "install" as used in a health board ordinance are synonymous because the gist of the offense is failure to get a permit). Looking at the conduct the legislature intends to prevent, the synonymous terms "recruit," "entice," and "obtain" can, in the context of human trafficking, represent the same conduct of bringing a victim into involuntary or sexual servitude. *See State v. Rambert*, 341 N.C. 173, 176 (1995) (recognizing that an examination of the facts underlying each charge may be necessary to show that the defendant was not charged with the same offense for the same act but was charged with distinct acts and therefore, was not placed in double jeopardy).

Additionally, the plain language of the anti-merger language in subsection (c) does not demonstrate legislative intent to allow multiple charges based upon the same conduct. Indeed, the majority's interpretation of the anti-merger language gives it the same meaning as the prior clause in this subsection—"each violation of this section constitutes a separate offense." The majority's interpretation renders the anti-merger clause superfluous, completely redundant to the first clause in the subsection. *See Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 387 (2012)

("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.").

Importantly, the majority's interpretation undermines the legislative intent. The legislative history demonstrates that the anti-merger language operates to keep the crime of human trafficking from merging with offenses under other statutes, including kidnapping under N.C.G.S. § 14-39, involuntary servitude under N.C.G.S. § 14-43.12, and sexual servitude under N.C.G.S. § 14-43.13. *See* N.C.G.S. §§ 14-39, -43.12, -43.13 (2023). The 2006 legislation in which the General Assembly established the crime of human trafficking also created the separate offenses of involuntary servitude and sexual servitude. An Act to Protect North Carolina's Children/Sex Offender Law Changes, S.L. 2006-247, § 20(b), 2006 N.C. Sess. Laws 1065, 1084. Those two statutes include the same anti-merger language as in the statute at issue in this case—"[e]ach violation of this section constitutes a separate offense and shall not merge with any other offense." *Id.* Additionally, in that same legislative session, the legislature added language to the kidnapping statute that made confining a person for the purpose of human trafficking a crime under the kidnapping statute. *Id.* § 20(c). Thus, to interpret subsection (c) consistent with the legislative intent and to avoid rendering the last clause superfluous, I would hold that the anti-merger language in the human trafficking statute in subsection (c) ensures that the offense of human trafficking does not merge with the offenses of kidnapping, involuntary servitude, and sexual servitude. *See* N.C.G.S. § 14-43.11(c).

In sum, the plain language of the human trafficking statute, N.C.G.S. § 14-43.11, can support multiple reasonable interpretations. Therefore, to interpret the statute in a manner that does not violate the prohibition against double jeopardy but also effectuates the will of the legislature, I would hold that the three means of "recruit[ing]," "entic[ing]," and "obtain[ing] by any means" can only represent multiple offenses of bringing a victim into involuntary or sexual servitude if the indictment meets the particularity standards articulated in the section below.

C. The Indictments Were Insufficient to Avoid Double Jeopardy in a Subsequent Prosecution.

Even though the statute allows nonduplicative separate offenses against a single victim, the indictments in this case do not make certain that in a subsequent prosecution, Mr. Applewhite will not be charged with the same crime. *See State v. Gardner*, 315 N.C. 444, 454 (1986) ("[W]hen a person is acquitted of or convicted and sentenced for an offense, the prosecution is prohibited from subsequently . . . indicting,

convicting, or sentencing him a second time for that offense . . . ."). The purpose of an indictment, as the majority recognizes, is to "identify clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial, and to protect the accused from being jeopardized by the State more than once for the same crime."[3] *Creason*, 313 N.C. at 130 (quoting *State v. Sturdivant*, 304 N.C. 293, 311 (1981)); *accord State v. Singleton*, 900 S.E.2d 802, 821 (N.C. 2024) ("An indictment might fail to satisfy constitutional purposes by failing to provide 'notice sufficient to prepare a defense and to protect against double jeopardy' " (quoting *Lancaster*, 385 N.C. at 462)). But the prosecutor must charge the multiple offenses in a manner as to eliminate any doubt as to the nature of the offenses to which the defendant must answer and to protect against double jeopardy. *See State v. Freeman*, 314 N.C. 432, 435 (1985) (acknowledging the "long held view" of this Court that one of the purposes of an indictment is putting the defendant "in a position to plead prior jeopardy if he is again brought to trial for the same offense").

An indictment cannot be sufficient if it does not make certain a prosecutor cannot bring a charge for the same conduct in a subsequent prosecution. *See State v. Greer*, 238 N.C. 325, 327 (1953) (recognizing that a valid indictment must "protect the accused from being twice put in jeopardy for the same offense"). Double jeopardy protects against a second prosecution for the same offense following an acquittal, a second prosecution for the same offense following a conviction, and multiple punishments for the same offense. *State v. Thompson*, 349 N.C. 483, 495 (1998). In this case, if Mr. Applewhite faced subsequent prosecution for human trafficking for these victims during the same time frames alleged in the indictments, there would be no way to know if he was facing a second prosecution for the same offense.

Here, the State indicted Mr. Applewhite for multiple counts of human trafficking against each victim simply replicating the statutory language. The indictments do not differentiate the multiple charges

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3. Because the indictment alleged a crime, the defect in the indictment is not jurisdictional. Under Rule 10(a)(1) of the Rules of Appellate Procedure, the question of whether a criminal charge is sufficient in law is automatically preserved for review. N.C. R. App. P. 10(a)(1). Because Mr. Applewhite is alleging a constitutional error, we use the test found in N.C.G.S. § 15A-1443(b) to determine whether the error was prejudicial. N.C.G.S. § 15A-1443(b) ("A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.").

on the basis of the date the offense occurred or on the basis of the means Mr. Applewhite used—i.e., "recruit[ing], entic[ing], harbor[ing], transport[ing], provid[ing], or obtain[ing] by any other means." *See* N.C.G.S. § 14-43.11(a). For example, Mr. Applewhite was acquitted of two charges of human trafficking against J.O. Neither the indictments nor the jury verdicts indicate the conduct that was the basis of the charges for which he was acquitted. Therefore, a prosecutor cannot bring subsequent charges against Mr. Applewhite for the human trafficking of J.O. during the same date range. Any subsequent charges of human trafficking within the date range would present a risk of a second prosecution for the same offense for which he was already acquitted. *See State v. Oldroyd*, 380 N.C. 613, 620 (2022) (concluding that an indictment must convey "the exactitude necessary to place [the defendant] on notice of the event or transaction against which he was expected to defend, to protect [the] defendant from being placed in jeopardy twice for the same crime").

Also, Mr. Applewhite was convicted of three counts of human trafficking as to the victim A.B., and all the charges have the same date range. Neither the indictments nor the jury verdicts specify the means that Mr. Applewhite used to commit the offense for which he was convicted. To explain, imagine a prosecutor decided to indict Mr. Applewhite again for human trafficking of A.B. during the same date range—there is no way to know if the new charge represents a duplicative means, the same means, or a different means of the offense for which the jury has already convicted him. Therefore, a new indictment within the same date range, even if the new indictment specifies the means and the date, could put him in jeopardy for an offense for which he was already convicted.

To be sure, in this case, the State presented evidence of the crimes this defendant committed against each victim. However, neither the indictments nor the jury verdict clarified the distinct acts that served as the basis for each means charged and each conviction. During the charge conference, even the trial court asked the prosecutor how to distinguish the charges so that the jury could differentiate between the charges it was considering. However, the prosecutor did not provide any means of identifying the conduct that was the basis of each charge, and even now, the majority does not, because it cannot, delineate in the facts the conduct that served as the basis for each charge in this case.

Therefore, the indictments, in this case, are insufficient to make certain that in subsequent prosecutions, Mr. Applewhite is not placed in jeopardy again for the same crime. The insufficiency in the indictments

is not, however, jurisdictional in nature because the indictments allege the crime of human trafficking. *See Singleton*, 900 S.E.2d at 805 (holding that an indictment raises jurisdictional concerns only when it wholly fails to charge a crime against the laws or people of this state).[4] In order to resolve these types of non-jurisdictional defects in an indictment, a defendant can request a bill of particulars or file a motion to dismiss under N.C.G.S. § 15A-952(b)(6)(c). *See* N.C.G.S. § 15A-952(b)(6)(c) (2023).

II. Conclusion

In sum, I would hold that a defendant can be charged with multiple counts of human trafficking against a single victim so long as each count is based upon a distinct act. However, the indictment must allege the multiple offenses in a manner that provides the defendant with notice and protection against double jeopardy.

In this case, the indictments do not shed light on the specific conduct the State alleged to support multiple counts of human trafficking against each victim. Therefore, I would hold the indictments here are only sufficient to support a single count of human trafficking against each victim. For these reasons, I respectfully dissent.

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

4. The fact that the inadequacies in the indictment are not jurisdictional by no means suggests that those inadequacies cannot rise to a constitutional level, particularly given the majority's interpretation of the statute. All this means is that we do not suggest that the entirety of Mr. Applewhite's convictions should be overturned because of the indictments.

STATE OF NORTH CAROLINA
v.
TRAVIS LAMONT DAVENPORT

No. 155PA22

Filed 23 August 2024

1. Robbery—with a dangerous weapon—taking of property—sufficiency of evidence

In a prosecution for murder and robbery, the State presented sufficient evidence to survive defendant's motion to dismiss the charge of robbery with a dangerous weapon, including that: the victim's wallet had contained a large sum of money the day before his murder and he had not planned to deposit the money until the next day; the victim's money, wallet, and cell phone were missing from his house where he was killed; the victim's body exhibited defensive wounds from a knife that was presumed to be the murder weapon, which supported the theory that his life was endangered or threatened; witness testimony and cell phone records linked defendant temporally and spatially with the crime; and defendant gave an extrajudicial confession to a fellow inmate that he killed the victim so that he could steal $10,000 from him. Although some of the evidence was circumstantial and the victim's items were never recovered, all of the evidence considered as a whole and in the light most favorable to the State established each element of the offense and that defendant was the perpetrator.

2. Evidence—murder and robbery trial—defendant's prior incarceration, gang affiliation, and tattoos—plain error analysis—prejudice prong not met

In defendant's prosecution for first-degree murder and robbery with a dangerous weapon, there was no plain error in the admission of evidence regarding defendant's prior incarceration, gang affiliation, and tattoos because, even if the evidence had been excluded, the jury probably would not have reached a different result in light of other evidence consisting of witness statements placing defendant at the scene of the crime and defendant's extrajudicial confession to another inmate that defendant killed the victim for money.

3. Evidence—hearsay—phone call between murder victim and niece—code name used for defendant—excited utterance exception

In defendant's prosecution for first-degree murder and robbery with a dangerous weapon, evidence that the victim called his niece the night before he was murdered and quickly said "Dianne to the house" before hanging up, which they both knew was a code name for defendant, was not improperly admitted because, although the statement was hearsay, it fell within the excited utterance exception since it was made in circumstances indicating that the victim was startled by the defendant's intention to come to his home (the phone call was hurried and brief, and the victim and defendant had experienced recent conflict in their relationship).

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, No. COA20-628 (N.C. Ct. App. May 3, 2022), reversing an order entered on 3 May 2019 by Judge Cy A. Grant in Superior Court, Martin County, denying defendant's motion to dismiss the charge of robbery with a dangerous weapon, and concluding that defendant is entitled to a new trial for first-degree murder. Heard in the Supreme Court on 17 April 2024.

Joshua H. Stein, Attorney General, by Teresa M. Postell, Special Deputy Attorney General, for the State-appellant.

Kellie Mannette for defendant-appellee.

EARLS, Justice.

This case presents three issues arising from the trial of Travis Davenport for the robbery and murder of Mike Griffin. The first issue is whether the State presented substantial evidence of each essential element of robbery with a dangerous weapon and of Davenport's identity as the perpetrator of that crime. The next issue is whether the admission of evidence related to Davenport's prior incarceration, gang affiliation, and tattoos rises to the level of plain error. The final issue is whether the statement "Dianne to the house" is admissible under the excited utterance exception to the hearsay rule. We reverse the decision of the Court of Appeals on all three issues and hold that: (1) the State presented substantial evidence of each essential element of robbery with a dangerous weapon and of Davenport's identity as the perpetrator of that crime; (2) the trial court's admission of evidence related to Davenport's prior incarceration, his gang affiliation, and his tattoos was not plain error; and (3) the statement "Dianne to the house" is admissible pursuant to the excited utterance exception to the hearsay rule.

I. Procedural History

On 3 May 2019, Travis Davenport was convicted of robbery with a dangerous weapon and first-degree murder under theories of premeditation and deliberation and felony murder. Davenport also stipulated to being a level IV felony offender with eleven prior record points. The trial court sentenced Davenport to life in prison for the first-degree murder conviction and 97 to 129 months for the robbery with a dangerous weapon conviction.

On appeal, Davenport argued that the trial court erred in denying his motion to dismiss the charge of robbery with a dangerous weapon. *State v. Davenport*, No. COA20-628, slip op. at 8 (N.C. Ct. App. May 3, 2022) (unpublished). Davenport also claimed he was entitled to a new trial on the charge of first-degree murder because the trial court erred in allowing inadmissible character evidence of Davenport's prior incarceration, gang affiliation, and tattoos under Rule 404(b) of the North Carolina Rules of Evidence. *Id*. at 13.

The Court of Appeals held that Davenport's motion to dismiss the robbery charge should have been granted because the State had not presented substantial evidence of each essential element of the crime. *Id*. at 10–11. On the admissibility of Rule 404(b) evidence pertaining to Davenport's prior incarceration, gang involvement, and tattoos, the court determined that admission of that evidence amounted to plain error. *Id*. at 22. Based on this, the court awarded Davenport a new trial for the first-degree murder charge. *Id*. Lastly, the court held that the hearsay statement "Dianne to the house" was inadmissible hearsay. *Id*. at 25. However, because it had already awarded Davenport a new trial pursuant to improperly admitted 404(b) evidence, the court declined to reach the question of whether admission of the hearsay statement was prejudicial. *Id*. The State petitioned for discretionary review, which this Court allowed on 1 March 2023.

II. Background

After being released from prison in 2015, Travis Davenport moved to Rocky Mount, North Carolina, to live with his brother, Timothy, and his sister-in-law, Sylvia. Davenport's mother lived in Williamston, North Carolina, and Davenport often visited her there. The victim, Mike Griffin, also lived in Williamston. Griffin sold cocaine and had previously been in prison. Davenport and Griffin dated in the 1990s, and they rekindled their relationship in November 2015.

Griffin had diabetes and received dialysis treatments several days a week. These treatments were always early in the morning. On treatment

days, Griffin would wake up and shower between 4:30 a.m. and 4:45 a.m., check his blood sugar and eat breakfast around 5:00 a.m., and leave around 5:30 a.m. Craig Daniels, a local magistrate, routinely provided Griffin with transportation to his dialysis appointments around 5:30 a.m.

Griffin had a close relationship with both of his nieces. His niece, Marion Griffin Knight, sometimes drove him to medical appointments, and his other niece, Somers Griffin, lived two blocks away from Griffin and spoke to him daily. Griffin introduced Davenport to his two nieces in November and December of 2015. At that time, Somers believed that Griffin and Davenport had a "good relationship."

That relationship changed later in December 2015 when Griffin and Davenport got into an argument, which led to a physical altercation. According to Somers, Davenport "put[ ] hands on" Griffin, and Griffin responded by "pull[ing] out a blade." Somers later called Davenport to discuss the incident. During that call, Davenport called Griffin a "mother fucker." Referring to himself, Davenport stated that he was not "the same Travis he used to be," identified himself as "Blood," and stated it was "against his gang religion" for someone to pull a weapon on him. In addition, Davenport stated, "If I had my banger I would've did that mother fucker dirty" and stated, "If that mother fucker pull out a blade on me again I will do that mother fucker dirty." At trial, Somers explained that she understood "banger" to mean "gun" and the term "do him dirty" to mean "kill him."

A. The Day Before Griffin's Murder

On 18 January 2016, Davenport had a disagreement with his brother, and he was asked to leave his brother's home. Davenport left and went to his mother's home in Williamston. That same day, Griffin went to Somers's home to give her ten dollars to play the lottery. During that visit, Somers noticed Griffin's wallet was so full of money that the "wallet couldn't fold" closed. When Somers asked Griffin why he had so much cash, he said he was going to load it on his card the next day.

That same evening, after 9:00 p.m., Griffin called Somers hurriedly stating, "Dianne to the house" after which they simply hung up. At trial, Somers testified that "Dianne" was a code name for Davenport. At 10:06 p.m., Griffin called William Edwards, a cab driver, to give his "friend" a ride home. Griffin often relied on Edwards to take him to medical appointments and the grocery store. At trial, Edwards testified that he did not recognize Griffin's friend but described him as a Black man with facial tattoos who was wearing a "nice jogging suit, white, trimmed in red, with a hood." Edwards dropped Griffin's friend off near

Davenport's mother's home. Witness testimony later established that Griffin had given a white track suit to Davenport as a gift.

B. The Day of Griffin's Murder

At 12:09 a.m. on 19 January 2016, Davenport called Griffin. The two subsequently exchanged at least eight phone calls, with the last call between them occurring at 12:39 a.m. Despite phone records showing these calls occurred, Davenport told police he had no contact with Griffin for "about a month" prior to Griffin's death.

Edwards received calls from an unknown number at 12:43 a.m. and at 12:50 a.m. At 1:03 a.m., Edwards returned these calls to what was later identified as Davenport's phone number, and a man answered asking to be driven back to Griffin's home. At pick up, Edwards saw Griffin's friend in the "white jogging suit with red trimming." In the car, the friend told Edwards that "he had just got out of prison" after serving "like thirteen years." Edwards dropped the man off at Griffin's home, and Griffin let the man in. Before departing, Edwards saw Griffin gesturing with his hands through the glass door and presumed Griffin and his friend were arguing.[1]

At 5:08 a.m., Griffin's glucometer was used. But at 5:20 a.m., when Magistrate Daniels arrived to drive Griffin to his dialysis appointment, a Black man, unfamiliar to Magistrate Daniels, waved him away and stated that he "didn't need a ride." Because it was unusual for Griffin to miss a dialysis appointment, a concerned employee from the dialysis center asked the police to conduct a wellbeing check. During this check, officers knocked on Griffin's doors and windows. After receiving no response, officers talked to Griffin's neighbors and called the fire department to determine if EMS had picked anyone up from Griffin's home. At approximately 9:30 a.m., the police kicked in Griffin's front door and found Griffin dead in his living room. The medical examiner estimated that Griffin had been dead for two to three hours before the police found him.

Upon entering the home, police found Griffin's love seat pushed up against the front wall of the house with a "reddish staining." There was also a reddish stain under the love seat, on the wall above the love

1. Edwards originally told police officers that Griffin and the man in the white track suit appeared to be arguing when he first picked the man up from Griffin's home at around 10:00 p.m., but Edwards later testified that the two appeared to be arguing when he later dropped the man in the white track suit off at Griffin's house. This inconsistency in Edwards's testimony is for the jury to consider. *See State v. Benson*, 331 N.C. 537, 544 (1992).

seat, and near the top corner of the front door. Reddish stains were also found in the kitchen, specifically on the kitchen faucet and countertop. The stain on the faucet contained "some type of print in the reddish material." The bag Griffin took to his dialysis appointments was found packed and on the kitchen table. Bags containing a white powdery substance were also found throughout the home. However, Griffin's phone and wallet were not found.

Griffin's body had approximately eight stab wounds to his face and neck and other superficial incised wounds, including defensive wounds, on his face, hands, chest, and abdomen. Griffin ultimately died from a stab wound that cut through his cheek and severed his left common carotid artery. The medical examiner testified that with such a wound, Griffin would have died within "several seconds or minutes." Police found a knife soaking in the kitchen sink, but the medical examiner was unable to determine whether that knife was the murder weapon. However, medical testimony established that the blade used against Griffin was likely two-and-a-quarter to five-and-a-half inches long.

On 25 January 2016, Davenport was arrested. Neither Griffin's cell phone nor his wallet was found on Davenport's person or at Davenport's mother's or brother's home. The white jogging suit was also never recovered. Upon questioning by police, Davenport reported that he was at his mother's home throughout the night of 18 January 2016. His mother and sister confirmed that he was there when they went to bed around midnight and that he was there when they woke up, sometime between 6:45 a.m. and 8:30 a.m.

Following his arrest, Davenport was incarcerated with another inmate, Jeffrey Harrison, who offered to testify as a witness for the State. At trial, Harrison acknowledged that he had a criminal record, had difficulty recalling details, and had initially sought to cooperate with law enforcement in order to be transferred to a prison closer to his family. Harrison testified that Davenport confessed to killing Griffin "to steal . . . $10,000" from him. Harrison also testified that Davenport had caught Griffin cheating on him and that while Davenport "wished he hadn't killed Mike," Davenport was also "glad he did it."

III. Sufficiency of the Evidence for Davenport's Robbery with a Dangerous Weapon Charge

[1] At trial, Davenport filed a motion to dismiss the charge of robbery with a dangerous weapon, which the trial court denied. The Court of Appeals reversed the trial court's order on this issue. *Davenport*, slip op. at 11. Now, on appeal with this Court, the State argues that the Court of

Appeals erred in reaching this conclusion because rather than review evidence favorable to the State "as a whole," *see State v. Thomas*, 296 N.C. 236, 244–45 (1978), the court reviewed the evidence of robbery with a dangerous weapon "in isolation," *see Davenport*, slip op. at 10–11. This was improper under our precedent. *See Thomas*, 296 N.C. at 244–45. Thus, we reverse the decision of the Court of Appeals and hold that the State presented substantial evidence of each essential element of robbery with a dangerous weapon, *see* N.C.G.S. § 14-87(a) (2023), and that Davenport was the perpetrator of that offense. *See State v. Fritsch*, 351 N.C. 373, 378 (2000).

A. Applicable Law

"Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *Id.* (quoting *State v. Barnes*, 334 N.C. 67, 75 (1993)). However, "[i]f the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed." *Id.* (quoting *Barnes*, 334 N.C. at 75). "Whether the State presented substantial evidence of each essential element is a question of law," *State v. Phillips*, 365 N.C. 103, 133–34 (2011), and "[w]e review questions of law de novo," *State v. Khan*, 366 N.C. 448, 453 (2013).

When reviewing sufficiency of the evidence challenges, this Court is required to "view the evidence in the light most favorable to the State [and] give[ ] the State the benefit of all reasonable inferences." *Fritsch*, 351 N.C. at 378–79 (citing *State v. Benson*, 331 N.C. 537, 544 (1992)). Accordingly, "contradictions and discrepancies [in the evidence] do not warrant dismissal of the case"; instead, "they are for the jury to resolve." *Benson*, 331 N.C. at 544 (quoting *State v. Earnhardt*, 307 N.C. 62, 67 (1982)).

The test for sufficiency of the evidence is the same regardless of the type of evidence presented, thus the same test applies "whether the evidence is direct or circumstantial or both." *Fritsch*, 351 N.C. at 379 (quoting *Barnes*, 334 N.C. at 75). In cases involving circumstantial evidence, "the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances." *Id.* (quoting *Barnes*, 334 N.C. at 75). If this standard is met, "then it is for the jury to decide whether the facts *taken singly or in combination*, satisfy it beyond a reasonable doubt that the defendant is actually guilty." *Id.* (cleaned up).

B. Robbery with a Dangerous Weapon

Pursuant to N.C.G.S. § 14-87(a), robbery with a dangerous weapon has three elements: "(1) the unlawful taking or an attempt to take personal property from the person or in the presence of another (2) by use or threatened use of a firearm or other dangerous weapon (3) whereby the life of a person is endangered or threatened." *State v. Hartman*, 344 N.C. 445, 473 (1996) (quoting *State v. Olson*, 330 N.C. 557, 566 (1992)). Moreover, the commission of a robbery "does not depend upon whether the threat or use of violence precedes or follows the taking of the victims' property." *State v. Barden*, 356 N.C. 316, 352 (2002) (quoting *State v. Green*, 321 N.C. 594, 605 (1988)). And "[w]here there is a continuous transaction, the temporal order of the threat or use of a dangerous weapon and the takings is immaterial." *Id.* (quoting *Green*, 321 N.C. at 605). Furthermore, if "the theft and the force are aspects of a single transaction, it is immaterial whether the intention to commit the theft was formed before or after force was used upon the victims." *Id.* (quoting *Green*, 321 N.C. at 605).

At the motion to dismiss stage, recovery of the stolen item is not required to support that a taking occurred. *State v. Palmer*, 334 N.C. 104, 112–13 (1993). In *Palmer*, the indictment charged that the defendant took cash and a gun from the deceased victim, but the defendant argued that there was no evidence to support the robbery. *Id.* Regarding the stolen money, this Court found it sufficient that there was evidence supporting that the victim "always had money," that her purse had been emptied, and that no money was found following a search of the apartment. *Id.* This Court also determined that the defendant's extrajudicial confession to a detective, in which he stated that "after he had shot [the victim], he carried the pistol from the apartment," was sufficient to support "the jury's finding that [the defendant] took the pistol during the course of the robbery." *Id.* at 112.

To be sure, there are special rules surrounding extrajudicial confessions. Namely that, "an extrajudicial confession, standing alone, is not sufficient to sustain a conviction of a crime." *State v. Cox*, 367 N.C. 147, 151 (2013) (quoting *State v. Parker*, 315 N.C. 222, 229 (1985)). In cases where the State relies on a defendant's extrajudicial confession, the doctrine of *corpus delicti* applies, and this inquiry must be completed before consideration of whether the State presented enough evidence to survive a motion to dismiss. *Id.* Under this doctrine, the State must provide "corroborative evidence, independent of the defendant's confession, tending to show that (a) the injury or harm constituting the crime occurred and (b) this injury or harm was done in a criminal manner." *Id.*

But this evidence does not need to "tend to show that the defendant was the guilty party." *Id.* at 152 (cleaned up).

The *corpus delicti* doctrine is grounded in three policy justifications aimed at protecting criminal defendants. *Id.* at 151. First, the rule is intended "to protect against those shocking situations" in which a defendant has confessed to murder but the alleged victim later turns up alive after the defendant has already been convicted or worse, executed. *Id.* (cleaned up). Second, the rule ensures that "confessions that are erroneously reported or construed, involuntarily made, mistaken as to law or fact, or falsely volunteered" by a person with a mental impairment or illness "cannot be used to falsely convict a defendant." *Id.* (cleaned up). Lastly, the rule exists to encourage and "promote good law enforcement practices by requiring thorough investigations of alleged crimes to ensure that justice is achieved and the innocent are vindicated." *Id.* (cleaned up). In essence, this rule is concerned with the trustworthiness of the accused's confession. *See Parker*, 315 N.C. at 237–38.

In *Parker*, this Court expanded the type of corroborating evidence sufficient to show that a confession is "trustworth[y]" under the *corpus delicti* doctrine in noncapital cases. *Id.* at 235. In doing so, this Court explained that "if the accused's confession is supported by substantial independent evidence tending to establish its trustworthiness, including facts that tend to show the defendant had the opportunity to commit the crime," "it is no longer necessary that there be independent proof tending to establish the *corpus delicti* of the crime charged." *Id.* at 236. However, in cases where "independent proof of loss or injury is lacking, there must be strong corroboration of essential facts and circumstances embraced in the defendant's confession." *Id.* (emphases omitted). This helps ensure the trustworthiness of a confession and "protect[s] against convictions for crimes that have not in fact occurred." *Id.*

C. Application to Davenport's Case

1. First Element of Robbery with a Dangerous Weapon

Based on *Palmer*, the State argues that in this case, there was substantial evidence to support the robbery charge because there was evidence Griffin's wallet was full of money and neither the money nor Griffin's cell phone were found during the police officers' search of Griffin's home. This case is similar to *Palmer* because while Griffin's wallet and cell phone were never found at the scene of Griffin's murder, the evidence shows that Griffin's wallet contained a large sum of money the day before the murder and that he did not plan to load that money onto his card until the following day. *See Palmer*, 334 N.C.

at 112–13. There is also evidence that Griffin had possession of his cell phone until the morning of the robbery and murder. Thus, recovery of Griffin's cell phone, wallet, and the money in that wallet were not required to show the first element of robbery with a dangerous weapon, *see id.*, that an "unlawful taking or an attempt to take personal property" occurred "from the person or in the presence of another," *Hartman*, 344 N.C. at 473 (quoting *Olson*, 330 N.C. at 566). We hold that the State presented substantial evidence of the first element of robbery with a dangerous weapon and that when this evidence is viewed in the light most favorable to the State and taken "as a whole," *see Thomas*, 296 N.C. at 245, with the evidence discussed below, there is substantial evidence that Davenport was the perpetrator of that offense. *See Fritsch*, 351 N.C. at 378.

2. Second and Third Elements of Robbery with a Dangerous Weapon

There is also substantial evidence to support elements two and three of the crime of robbery with a dangerous weapon: that there was "use or threatened use of a firearm or other dangerous weapon" and that "the life of a person is endangered or threatened." *See Hartman*, 344 N.C. at 473 (quoting *Olson*, 330 N.C. at 566). This evidence is based on the manner in which Griffin was killed, the fact that a knife was found soaking in the sink, and the fact that there were reddish stains on the kitchen counter and faucet. Moreover, because there is evidence showing that Griffin was killed, this supports that his life was endangered or threatened. *See id.* When this evidence is taken together with Davenport's confession, in the light most favorable to the State, *Fritsch*, 351 N.C. at 378, and "as a whole," *Thomas*, 296 N.C. at 245, there is substantial evidence to support elements two and three of robbery with a dangerous weapon. Accordingly, we hold the State met its burden to present substantial evidence of each element of the charged crime.

Additionally, pursuant to *Parker*, the State contends that Davenport's confession to Harrison is supported by substantial independent evidence tending to establish its trustworthiness, including facts that tend to show Davenport had the opportunity to commit the crime. *See Parker*, 315 N.C. at 236. Indeed, the State emphasizes that even in cases where proof of loss is lacking, if there is a "strong corroboration of essential facts and circumstances" embraced in the defendant's confession, this Court will deem that confession to be trustworthy. *See id.* (emphases omitted).

Here, evidence that Davenport had the opportunity to commit the robbery is supported by witness testimony and the cell phone records

of three different people: Griffin, Davenport, and Edwards. In *Cox*, the crime at issue was possession of a firearm by a felon under N.C.G.S. § 14-415.1. 367 N.C. at 150. Applying the standard in *Parker*, this Court reviewed the evidence to determine whether there were facts "link[ing] defendant temporally and spatially to the firearm." *Id.* at 153.

Here, there is testimony from Edwards and Somers which temporally and spatially link Davenport to the crime scene. Specifically, Somers testified that after 9:00 p.m. the night before the robbery and murder, Griffin called her and said, "Dianne to the house." Because Somers also testified that "Dianne" was code for Davenport, this testimony links Davenport to the scene of the robbery and murder, Griffin's home.

Additionally, Edwards testified that he picked up one of Griffin's friends—a Black man matching Davenport's description with facial tattoos in a white jogging suit with red trim and a hood—from Griffin's home after 10:00 p.m. that same night. This evidence together with the calls Edwards received from Davenport's phone number at 12:43 a.m. and 12:50 a.m., requesting to be taken back to Griffin's home that night, also links Davenport to the scene of the crime. Indeed, perhaps the strongest evidence linking Davenport both spatially and temporally to the crime is Edwards's testimony that the man he picked up and took to Griffin's home sometime after 1:00 a.m. was wearing a "white jogging suit with red trimming" and told Edwards that he had recently been released from prison after serving a thirteen-year sentence. In addition, Edwards testified that after he dropped the man off at Griffin's home, Griffin let the man in. This evidence links Davenport to the robbery and murder and shows that he had the opportunity to commit the charged crime. *See Cox*, 367 N.C. at 153.

Lastly, Davenport's confession to Harrison provided that Davenport was in a sexual relationship with Griffin so that he could steal from him. Specifically, Davenport confessed to Harrison that he stole $10,000 from Griffin. Somers's testimony that on 18 January 2016 Griffin's wallet was so full of money that it would not close, corroborates Davenport's confession to Harrison that he killed Griffin to steal $10,000 from him. Accordingly, Davenport's confession strongly corroborates an essential fact and circumstance of the charged crime. *See Cox*, 367 N.C. at 153; *Parker*, 315 N.C. at 236. Based on this evidence, the State presented substantial evidence showing that Davenport was the perpetrator of the crime charged. *See Fritsch*, 351 N.C. at 378.

Under our precedent "evidence favorable to the State [must] be considered as a whole in order to determine its sufficiency." *Thomas*,

296 N.C. at 244–45. "This is especially necessary in a case, such as ours, when the proof offered is circumstantial, for rarely will one bit of such evidence be sufficient, in itself, to point to a defendant's guilt." *Id.* at 245. In applying this analysis, we reverse the Court of Appeals' holding and hold that when the evidence in this case is "considered as a whole," *id.* at 245, and taken "in the light most favorable to the State" a "reasonable inference[ ]" can be drawn that Davenport committed the crime he was charged with, *see Fritsch*, 351 N.C. at 378–79; *see also id.* at 379 (stating that in cases involving circumstantial evidence "the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances" (quoting *Barnes*, 334 N.C. at 75)). Stated another way, the trial court properly denied Davenport's motion to dismiss the charge of robbery with a dangerous weapon because the State provided substantial evidence of all three elements of the crime charged and that Davenport was the perpetrator of such offense. *See id.* at 378.

IV. Plain Error Review

[2] This Court "has elected to review unpreserved issues for plain error when they involve . . . rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584 (1996). To establish plain error,

> a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518 (2012) (cleaned up). Ultimately, the question a reviewing court must answer is whether without the improperly admitted evidence, the jury probably would have reached a different result. *State v. Reber*, No. 138A23, slip op. at 11 (N.C. May 23, 2024).

The issues subject to plain error review in this case relate to the admission of evidence regarding Davenport's prior incarceration, his gang affiliation, and his tattoos. While Davenport filed a motion in limine objecting to the admission of evidence regarding his prior incarceration, he failed to object each time this evidence was offered. Additionally, Davenport did not object when evidence of his gang affiliation and tattoos was presented. Davenport's failure to continuously object to the admission of these three types of evidence means none of

these issues were properly preserved for appeal. *See State v. Brown*, 327 N.C. 1, 17 (1990).

We hold that the evidence at issue in this case does not meet the prejudice prong of the plain error standard and decline to reach whether evidence of Davenport's prior incarceration, gang affiliation, or tattoos was improperly admitted pursuant to Rule 404(b). Under the second prong of our plain error standard, Davenport must show he suffered prejudice. *See Reber*, slip op. at 11. This is done by showing that without the admission of the evidence in question, the jury probably would have reached a different result. *Id*. The properly admitted evidence in this case tended to show that Davenport and Griffin exchanged several calls leading up to Griffin's robbery and murder, and that someone matching Davenport's description was picked up from Griffin's home the night before Griffin's murder and driven back to Griffin's home after 1:00 a.m. the morning of Griffin's murder. Somers also testified that Griffin called her the night before his murder and said, "Dianne to the house." Thus, this evidence placed Davenport at the scene of the crime the night before and the morning of Griffin's murder. In addition, Harrison testified that Davenport confessed to him that he had killed Griffin "to steal . . . $10,000" from him, and that he both "wished he hadn't killed Mike" and was also "glad" that he did. Accordingly, we cannot say that if the evidence of Davenport's prior incarceration, tattoos, and gang affiliation had been excluded the jury probably would have reached a different result. We reverse the Court of Appeals' holding and hold that the evidence of Davenport's prior incarceration, gang affiliation, and tattoos does not rise to the level of plain error because admission of this evidence was not prejudicial.

V. Hearsay

[3] At issue is Griffin's statement "Dianne to the house." " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.G.S. § 8C-1, Rule 801(c) (2023). Under Rule 802, hearsay is not admissible unless an exception applies. N.C.G.S. § 8C-1, Rule 802 (2023). In Davenport's case, Somers testified that Griffin called her on the evening of 18 January 2016, after 9:00 p.m. and said, "Dianne to the house." While Davenport objected to this statement, the trial court overruled that objection. Somers also testified that Dianne was a code name for Davenport.

Because the statement "Dianne to the house" was offered to prove that Davenport went to Griffin's home the night of Griffin's murder, this

statement is hearsay. *See* N.C.G.S. § 8C-1, Rule 801. However, the Court of Appeals erred in finding that the statement was not admissible under our hearsay rules. Namely because in this case, the excited utterance exception to the hearsay rule applies.

Under Rule 803, an excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." N.C.G.S. § 8C-1, Rule 803(2) (2023). "To qualify as an excited utterance, the statement must relate (1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication." *State v. Nicholson*, 355 N.C. 1, 35 (2002) (cleaned up). We have previously held that testimony about a phone conversation that takes place immediately after a startling event is admissible. *State v. Murillo*, 349 N.C. 573, 587 (1998). Here, Somers described the statement as "hurried" and stated that after Griffin said, "Dianne to the house," she said, "Okay. Bye." Based on the brevity of this statement, it is clear that Griffin called Somers with one urgent purpose: to relay an important piece of information, that Davenport was coming to Griffin's house.

There is evidence that a month before this phone call, Griffin and Davenport experienced conflict in their relationship, which led to a physical altercation involving a knife and subsequent threats by Davenport that if he would have had his gun, he would have killed Griffin at the time of that altercation. The hurried and brief nature of Griffin's phone call to Somers supports that Griffin was startled at learning that Davenport was coming to his home, and this led him to hurriedly call Somers.

Because there is evidence that Griffin and Davenport had experienced some recent conflict in their relationship and the statement Griffin made followed a startling experience and was brief and quick, this statement qualifies as an excited utterance. *See Nicholson*, 355 N.C. at 35. Accordingly, the Court of Appeals erred by concluding "Dianne to the house" was inadmissible hearsay.

VI. Conclusion

We reverse the decision of the Court of Appeals on the three issues before us and hold that: (1) the State presented substantial evidence of each essential element of the charged offense, robbery with a dangerous weapon, and of Davenport's identity as the perpetrator of that offense; (2) admission of evidence of Davenport's prior incarceration, his gang affiliation, and his tattoos does not rise to the level of plain error because admission of this evidence did not prejudice Davenport;

and (3) the statement "Dianne to the house" is admissible under the excited utterance exception to our hearsay rule.

REVERSED.

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

STATE OF NORTH CAROLINA
v.
PHILLIP BRANDON DAW

No. 174PA21

Filed 23 August 2024

1. Appeal and Error—mootness—denial of habeas petition—review of lower appellate court decision—clarification required

The Supreme Court exercised its jurisdiction pursuant to the North Carolina Constitution to review the decision of the Court of Appeals regarding the denial of a habeas corpus petition because, although the case was moot, review was necessary to clarify the scope of the writ of habeas corpus and the public interest exception and to resolve conflicting statements of law between the lower appellate court's opinion and established law.

2. Habeas Corpus—summary denial—final judgment of court of competent jurisdiction—discharge provisions inapplicable

The trial court's summary denial of petitioner's application for a writ of habeas corpus was proper under the plain and definite language of N.C.G.S. § 17-4 because petitioner was detained by virtue of a final judgment of a court of competent criminal jurisdiction. Despite the unambiguous mandate of section 17-4, the Court of Appeals improperly extended its analysis to consider petitioner's argument that the COVID-19 pandemic created conditions making him eligible for discharge under section 17-33(2), and erroneously concluded that section 17-33(2) provided an exception to the general rule contained in section 17-4(2) for parties detained by virtue of criminal process. However, the discharge provisions in section 17-33 apply only to persons detained by virtue of civil process—which does not include criminal convictions—and do not provide an exception to section 17-4 because they only become relevant after

an application to prosecute the writ has been granted and returned and a hearing has been held.

Justice EARLS dissenting.

Justice RIGGS dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 277 N.C. App. 240 (2021), affirming an order entered 15 June 2020 by Judge Craig Croom in Superior Court, Wake County, summarily denying defendant's application for writ of habeas corpus. Heard in the Supreme Court on 13 February 2024.

Joshua H. Stein, Attorney General, by Heidi M. Williams, Assistant Attorney General, for the State-appellant.

W. Rob Heroy for defendant-appellee.

Daniel K. Siegel and Ivy Johnson for American Civil Liberties Union of North Carolina Legal Foundation, North Carolina Advocates for Justice, Disability Rights North Carolina, and the Cato Institute, amici curiae.

BERGER, Justice.

Petitioner Phillip Brandon Daw was sentenced to multiple consecutive terms of imprisonment in the fall of 2019. On 15 June 2020, Daw filed a petition for writ of habeas corpus alleging that he was "unlawfully and illegally detained" because the North Carolina Department of Public Safety was "incapable of ensuring that [he would] not be exposed to COVID-19." According to petitioner, his continued confinement violated the Eighth Amendment to the United States Constitution and Article I, Section 27 of the North Carolina Constitution. The trial court denied petitioner's request, and the Court of Appeals affirmed, but we allowed discretionary review to determine whether the decision below altered the plain language of our habeas corpus statutes. We modify and affirm the decision of the Court of Appeals for the reasons set forth herein.

I. Factual and Procedural Background

Petitioner pleaded guilty and was found guilty of multiple counts of obtaining property by false pretenses in September and November 2019.

He was ultimately sentenced to a total prison term of between forty-one and 107 months for these convictions.

On 15 June 2020, petitioner filed an application for writ of habeas corpus in the Superior Court, Wake County, arguing that he was "unlawfully and illegally detained" and that his continued incarceration violated the Eighth Amendment to the United States Constitution and Article I, Section 27 of the North Carolina Constitution. According to petitioner, the potential viral spread of COVID-19 within the correctional institution, combined with petitioner's medical history and condition, rendered his continued confinement cruel and/or unusual. Petitioner's application did not contest the competency of the trial court's criminal jurisdiction. Instead, petitioner relied on a Court of Appeals opinion, *State v. Leach*, 227 N.C. App. 399 (2013), to argue that competent jurisdiction did not compel summary denial of his application for habeas relief.

The trial court denied the application that same day, noting that N.C.G.S. § 17-4(2) requires that "[a] petition for a writ of habeas corpus shall be denied where a person is held pursuant to a valid final judgment in a criminal case entered by a court with proper jurisdiction," and that petitioner's "judgments are valid final judgments entered by a court with proper jurisdiction." Petitioner sought certiorari from the Court of Appeals, and his petition for writ of certiorari was allowed on 9 July 2020.

The Court of Appeals heard oral argument in this matter on 9 February 2021, but petitioner was released from prison six days later under the Department of Public Safety's Extended Limits of Confinement Program. *State v. Daw*, 277 N.C. App. 240, 243 (2021). The Court of Appeals acknowledged that because petitioner had "received the relief requested in his petition . . . this case is moot," *id.* at 244, but nevertheless held that "the public interest exception to the mootness doctrine applie[d]" and proceeded to the merits of the case, *id.* at 245. The Court of Appeals repudiated the trial court's basis for its decision, holding that the discharge provision in N.C.G.S. § 17-33(2) provided an exception to the plain language of N.C.G.S. § 17-4(2). *Id.* at 260. Nevertheless, the Court of Appeals affirmed the trial court's summary denial on the basis that petitioner's application "did not demonstrate . . . colorable claims for violations of his rights." *Id.* at 269.

This Court allowed the State's petition for discretionary review on 3 March 2023 to determine whether the Court of Appeals erred in holding that subsection 17-33(2) provides an exception to subsection 17-4(2). As this question involves issues of statutory interpretation, we review the decision of the Court of Appeals de novo. *Morris v. Rodeberg*, 385 N.C. 405, 409 (2023).

II. Analysis

A. Mootness

[1] Our State Constitution provides that "[t]he Supreme Court shall have jurisdiction to review upon appeal any decision of the courts below, upon any matter of law or legal inference." N.C. Const. art. IV, § 12. In addition, the General Assembly has provided that this Court has "jurisdiction to review upon appeal decisions of the several courts of the General Court of Justice and of administrative agencies, upon matters of law or legal inference." N.C.G.S. § 7A-26 (2023). "While the federal constitution limits the federal 'Judicial Power' to certain 'Cases' and 'Controversies.' U.S. Const. Art. III, § 2, our Constitution, in contrast, has no such case or controversy limitation to the 'judicial power.' " *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 591 (2021).

"A case is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Chavez v. McFadden*, 374 N.C. 458, 467 (2020) (cleaned up). While this Court generally "do[es] not decide moot cases," *id.*, resolution of an underlying issue does not deprive this Court of jurisdiction where there remains an unresolved matter of law.

For example, the public interest exception applies where "[e]ven if moot," the case implicates "a question that involves a matter of public interest, is of general importance, and deserves prompt resolution." *N.C. State Bar v. Randolph*, 325 N.C. 699, 701 (1989) (per curiam); *see also Harper v. Hall*, 383 N.C. 89, 113–14 (2022) (denying a party's request "to dismiss their own appeal in order to avoid a ruling by this Court" because "th[e] issue is of great significance to the jurisprudence of our state and is squarely and properly before this Court"), *reh'g allowed*, 384 N.C. 1, *and opinion withdrawn and superseded on other grounds on reh'g*, 384 N.C. 292 (2023).

Here, both parties agree that this case is moot. But petitioner now asks this Court to refrain from invoking the same public interest exception relied upon by the Court of Appeals in reaching this issue. Petitioner contends that "[b]ecause the [p]andemic is over, there is no need for this Court to exercise its discretion to unsettle the Court of Appeals['] decision."

But the mootness doctrine is not a shield which prevents this Court from engaging in meaningful review of decisions from the Court of Appeals that, if left undisturbed, would be contrary to established law.

First, although the Court of Appeals' decision to proceed to the merits may have been influenced by COVID-19, its expansive interpretation of this State's habeas corpus statutes was not limited to the COVID-19 context. Second, because the Court of Appeals chose to issue a published opinion in this matter, its interpretation of these statutes is not limited to this singular case; rather, the decision below has precedential effect and is binding on other Court of Appeals' panels and all trial courts in this State. Finally, because the decision below relied on prior decisions of the Court of Appeals interpreting the habeas corpus statutes, dismissing this case and vacating the decision below would not resolve the tension that exists between the plain language of these statutes and the Court of Appeals' interpretation of the same.[1]

For more than five centuries, the writ of habeas corpus has served an essential function of providing relief for those unlawfully restrained of their liberty. *See generally* Dallin H. Oaks, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451, 459–61 (1966). The writ predates the founding of this State and has been enshrined in our Constitution from the outset. Its function and the procedures under which it may issue are therefore matters of public interest, of general importance, and of great significance to the jurisprudence of this state. Questions regarding these topics, especially those involving direct conflict between decisions of the Court of Appeals and established law, must be resolved, and we therefore proceed to the merits.

B. Habeas Corpus

1. The Writ's Origin and Development

[2] Our founding fathers understood that "the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny," and that the writ of habeas corpus was "a remedy for this fatal evil." *The Federalist* No. 84 (Alexander Hamilton). Thus, the writ was enshrined as a fundamental protection of individual liberty against government abuse by the ratification of the United States Constitution. *See* U.S. Const. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

The Supreme Court of the United States initially recognized the writ's historically limited function such that "[a] perceived error in the judgment

1. While our dissenting colleagues take a different view of the public interest exception in this case, we note an evolving attitude towards mooted decisions of the Court of Appeals. *See Brewer v. Rent-A-Center*, 385 N.C. 853, 853 (2024).

or proceedings, under and by virtue of which the party is imprisoned, constituted no ground for relief," and that "a habeas court could examine only the power and authority of the court to act," i.e., the court's jurisdiction, "not the correctness of its conclusions." *Brown v. Davenport*, 142 S. Ct. 1510, 1521 (2022) (cleaned up). But over time, "federal habeas practice began to take on a very different shape," *id.* at 1521, and "[t]he traditional distinction between jurisdictional defects and mere errors in adjudication no longer restrained federal habeas courts," resulting in "an exploding caseload of habeas petitions from state prisoners," *id.* at 1522, that left the Supreme Court struggling to "devis[e] new rules aimed at separating the meritorious needles from the growing haystack," *id.* at 1523.

But the writ in the federal system, shaped by federal statutes and decisions of the Supreme Court of the United States, is largely irrelevant to our consideration of the writ's function within North Carolina. *See Holmes v. Moore*, 384 N.C. 426, 437 (2023) ("[I]t is the duty of the Supreme Court of North Carolina alone to declare what the law is under our Constitution." (citing *Bayard v. Singleton*, 1 N.C. 5 (1787))). Unlike in the federal system, on the state level "the privilege of the writ of habeas corpus was transmitted into American law principally through tradition and the common law" as "[o]nly three of the twelve original states that had written constitutions in the first decade of our national existence included any mention of the writ." Dallin H. Oaks, *Habeas Corpus in the States: 1776–1865*, 32 U. Chi. L. Rev. 243, 247 (1965). One of those three states was North Carolina, with our 1776 Constitution providing that "every freeman, restrained of his liberty, is entitled to a remedy, to inquire into the lawfulness thereof, and to remove the same, if unlawful; and that such remedy ought not to be denied or delayed." N.C. Const. of 1776, Declaration of Rights § XIII.

North Carolina's constitutional provision was initially enforced through our courts' common law authority, with the first legislative action on the subject arriving in 1836. *See* An Act For the Better Security of Personal Liberty, ch. 55, 1 N.C. Rev. Stat. 314 (1836–37). Like "[v]irtually all American habeas corpus legislation," this Act "had its genesis in the English Habeas Corpus Act of 1679," which made the writ accessible "to persons who were committed or detained for criminal or supposed criminal matters." Oaks, *Habeas Corpus*, 32 U. Chi. L. Rev. at 251–52. North Carolina's 1836 Act generally codified the English Habeas Corpus Act of 1679, prohibiting issuance of the writ to "persons convicted, or in execution by legal process." 1 N.C. Rev. Stat. at 315, § 1.

The 1836 Act also extended the availability of the writ beyond the scope of criminal matters. Specifically, the Act provided:

> When any person shall be imprisoned or otherwise restrained of his liberty, for any other cause than the commission of a criminal offence, unless he shall have been committed in execution upon some legal civil process, or upon some mesne process in a civil action, on which he was liable to be arrested and imprisoned, and on which excessive and unreasonable bail shall not have been required, such person shall be entitled, on application by himself or any person in his behalf, and upon its appearing by affidavit that there is a reasonable ground for the complaint, to the same remedy by writ of habeas corpus . . . .

1 N.C. Rev. Stat. at 317, § 10.

Thus, the 1836 Act followed in the historical footsteps of both the common law and the English Habeas Corpus Act of 1679 by ensuring that "a prisoner [who] was held by a valid warrant or pursuant to the execution or judgment of a proper court . . . could not obtain release by habeas corpus." Oaks, *Habeas Corpus*, 32 U. Chi. L. Rev. at 245. The legislature emphasized this principle again in 1854, mandating that upon habeas review a prisoner who "is condemned by judgment given against him, and held in custody by virtue of an execution issued against him, . . . shall not be let to bail, but shall be presently remanded, where he shall remain until discharged in due course of law." N.C. Rev. Code, ch. 31, § 111 (1854).[2]

2. The Writ Today

In 1868, the people of North Carolina ratified a new Constitution which retained the prior guarantee of the writ and expressly provided that "[t]he privilege of the writ of habeas corpus shall not be suspended." N.C. Const. of 1868, Declaration of Rights § 21; *see also id.* § 18. The legislature also enacted a more comprehensive statutory scheme governing the writ's procedures that remains in force today as Chapter 17 of the General Statutes, with only minor changes made in the intervening years.

Chapter 17 provides that the writ may be prosecuted, or applied for, by "[e]very person imprisoned or restrained of his liberty within this State, for any criminal or supposed criminal matter, or on any pretense whatsoever, *except* in cases specified in G.S. 17-4." N.C.G.S. § 17-3 (2023) (emphasis added). This provision thus sets forth a general

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2. In the habeas context, "remand" is the return of a petitioner to confinement and "discharge" is release from such confinement. *See* N.C.G.S. §§ 17-33 to -34 (2023).

rule and an exception; application of the writ is available to any person restrained of their liberty regardless of whether such restraint resulted from a criminal or civil matter, unless the restraint stems from those instances specified in section 17-4. *See id.*; *see also* 1 N.C. Rev. Stat. at 315, § 1 (permitting application for the writ by any person "committed or . . . detained for any crime . . . other than persons convicted, or in execution by legal process"); 1 N.C. Rev. Stat. at 317, § 10 (providing that the writ is available in noncriminal matters, unless the person was "committed in execution upon some legal civil process").

To determine whether the initial hurdle of allowing an application for the writ of habeas corpus has been met, judges must first look to section 17-4, which provides that:

> Application to prosecute the writ shall be denied in the following cases:
>
> (1) Where the persons are committed or detained by virtue of process issued by a court of the United States, or a judge thereof, in cases where such courts or judges have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by the commencement of suits in such courts.
>
> (2) Where persons are committed or detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such final order, judgment or decree.
>
> (3) Where any person has willfully neglected, for the space of two whole sessions after his imprisonment, to apply for the writ to the superior court of the county in which he may be imprisoned, such person shall not have a habeas corpus in vacation time for his enlargement.
>
> (4) Where no probable ground for relief is shown in the application.

N.C.G.S. § 17-4 (2023).

This provision mandates summary denial of an application to prosecute the writ when the applicant is, among other things, imprisoned due to a final judgment or order of a court possessing jurisdiction over the

matter, regardless of whether the matter is criminal or civil in nature. *Id.*; *see also* 1 N.C. Rev. Stat. at 315, 317, §§ 1, 10. When read in conjunction with section 17-3, the law is clear. Every person imprisoned in this State, regardless of whether such imprisonment stems from a criminal or civil matter, may apply for the writ of habeas corpus.

But section 17-4 serves a gatekeeping function and limits further consideration of the writ's issuance. N.C.G.S. § 17-4; *see also* N.C.G.S. § 17-9 (2023) (stating that the writ shall be granted without delay unless the application or documents attached thereto show the individual is "prohibited from prosecuting the writ"). Thus, the writ of habeas corpus is expressly not available in this State to persons "detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction." *Ledford v. Emerson*, 143 N.C. 527, 536 (1906); *see also* N.C.G.S. § 17-4(2).

3. The Court of Appeals' Decision

Petitioner here never asserted that his detention was unlawful for a jurisdictional defect, and because he was detained by virtue of the final judgments of a competent court of criminal jurisdiction, the trial court correctly relied on section 17-4 when it summarily denied petitioner's application for the writ of habeas corpus. The Court of Appeals, however, went further; even though inquiry into the availability of habeas relief should have ended with the plain language of section 17-4, it entertained petitioner's argument that the conditions associated with his confinement entitled him to habeas relief. This was error.

When interpreting a statute, "it must be presumed that the means employed by the Legislature to express its will are adequate to the purpose and do express that will correctly." *State v. Barco*, 150 N.C. 792, 796 (1909) (cleaned up). It should go without saying that we may not "interpret what has no need of interpretation and, when the words have a definite and precise meaning, [we cannot] go elsewhere in search of conjecture in order to restrict or extend the meaning." *Id.* (cleaned up).

The Court of Appeals violated these basic tenets of statutory construction by ignoring the plain and definite language of section 17-4. *See also* N.C.G.S. § 17-9. North Carolina's habeas statutes require denial of a habeas application where the applicant is detained by virtue of a final judgment entered by a court of competent jurisdiction, as petitioner was here.[3] By "interpret[ing] what has no need of interpretation" and

3. Our dissenting colleague criticizes us for transforming section 17-4 from a "gatekeeper" into a "gate closer." One wonders at the notion of a gatekeeper that allows entry

"go[ing] elsewhere in search of conjecture in order to restrict" or eliminate the applicability of section 17-4, *Barco*, 150 N.C. at 796 (cleaned up), the Court of Appeals judicially rewrote Chapter 17.

Both petitioner and our dissenting colleague rely on section 17-33 to support their contention that section 17-4 does not mean what it plainly says but instead silently establishes a "general rule" subject to exceptions. The relevant portion of section 17-33 provides that "if it appears on the return to the writ that the party is in custody by virtue of *civil process* from any court legally constituted, . . . such party can be discharged only" in one of six circumstances.[4] N.C.G.S. § 17-33 (2023) (emphasis added). One of these circumstances is "[w]here, though the original imprisonment was lawful, yet by some act, omission or event, which has taken place afterwards, the party has become entitled to be discharged." *Id.* § 17-33(2).

Here, because petitioner was "detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction," *id.* § 17-4(2), and therefore was not "in custody by virtue of civil process," *id.* § 17-33, section 17-33 is inapplicable in this matter.[5]

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to all. The role of a gatekeeper, even in the legal context, is to allow passage only for those permitted to enter and to keep out all others—precisely how section 17-4 operates.

4. Petitioner's argument for habeas relief is rooted in subsection 17-33(2). But he has not argued that there is no legal cause for his detention under the first sentence of that subsection. By its plain terms, the remainder of that subsection applies to those in custody by virtue of civil process. Even though our dissenting colleague insists that her dissent is in defense of textualism, she acknowledges that the phrase "civil process" does not apply to criminal defendants and is therefore forced to judicially craft a new argument for petitioner under the first sentence of section 17-33. Her discussion is misleading and particularly irresponsible given the clear and unambiguous language at issue. Rather than focus on the text, a fundamental tenet of textualism, she apparently wants to create a new avenue to post-conviction relief for those barred by the legislature from applying for a writ of habeas corpus. Ignoring the fact that making law is not a proper function of the judiciary, our dissenting colleague's atextual approach is especially egregious as post-conviction review is already independently available through a motion for appropriate relief or federal habeas review.

We also note that our colleague's "exaggerated, hyperbolic dissent," *Walker v. Wake Cty. Sheriff's Dept.*, 385 N.C. 300, 301 (2023) (Dietz, J., concurring), provides ample opportunities to respond in kind, but we decline the invitation to engage in further reductive discourse. It is sufficient to reiterate that because section 17-33 becomes operative only after a writ of habeas corpus has been issued and returned, it is irrelevant to section 17-4's provisions governing *application* for issuance of the writ.

5. The Court of Appeals' interpretation of the phrase "civil process" is simply untenable. Changing the meaning of the phrase "civil process" to include criminal convictions requires us to insert words into a statute, *see In re B.O.A.*, 372 N.C. 372, 380 (2019), otherwise "extend the meaning" of words actually used, *Barco*, 150 N.C. at 796, and presume

However, contrary to these provisions' plain language, the Court of Appeals held, and our dissenting colleague insists, that "§ 17-33(2) provides an exception to the general rule provided by § 17-4(2)." *Daw*, 277 N.C. App. at 260. The Court of Appeals reached this conclusion because subsection 17-4(2)

> appears to require summary denial of a petition where a party is "committed or detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction," when remand would be required, while § 17-33 requires discharge rather than remand if, "though the original imprisonment was lawful, yet by some act, omission or event, which has taken place afterwards, the party has become entitled to be discharged[.]" Reading § 17-4 without reference to § 17-33 could lead a court reviewing a habeas petition to *mistakenly conclude* that a party "committed or detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction" was "prohibited from prosecuting the writ," resulting in summary denial of the petition without resolving whether because of "some act, omission or event, . . . the party has become entitled to be discharged[.]"

Id. at 259 (cleaned up) (emphasis added).

This reasoning disregards the statutes' plain language and fundamentally misunderstands their operation. When interpreting statutes, "[c]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253–54 (1992). In writing for the Supreme Court of the United States, Justice Thomas stated that "[w]hen the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Id.* at 254 (cleaned up). Courts "need not choose between giving effect on the one hand to [one provision] and [effect] on

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that the legislature was incapable of stating the phrase "civil or criminal" when it intended to communicate that meaning. The plain language of Chapter 17 demonstrates precisely the opposite. *See* N.C.G.S. § 17-4(2) (providing that habeas application must be denied when the applicant is "detained by virtue of the final order, judgment or decree of a competent tribunal of *civil* or *criminal* jurisdiction." (emphasis added)); *id.* § 17-34(2) (2023) (same).

the other to [another provision]" unless there is a "positive repugnancy" between the provisions such that they "pose an either-or proposition." *Id.* at 253. Put another way, when confronted with an apparent conflict between two laws "[t]he preferred approach to statutory construction dictates that a reviewing court first determine if the perceived conflict between two laws is real." *Sunshine Dev. v. F.D.I.C.*, 33 F.3d 106, 113 (1st Cir. 1994).

Here, rather than determine if there was a "positive repugnancy" between the statutes such that they "pose[d] an either-or proposition," *Germain*, 503 U.S. at 253, or otherwise analyzing whether "the perceived conflict [wa]s more apparent than real," *Sunshine Dev.*, 33 F.3d at 113, the Court of Appeals stated that section 17-4 "*appears* to conflict" with section 17-33. *Daw*, 277 N.C. App. at 259 (emphasis added). The Court of Appeals made no effort to reconcile this alleged conflict. Instead, based in part on its erroneous determination that section 17-33 applies to parties detained by virtue of criminal process, the Court of Appeals reasoned that it needed to "harmonize the *apparent* conflict between § 17-33(2) and § 17-4(2)" by holding that "§ 17-33(2) provides an exception to the general rule provided by § 17-4(2)." *Id.* at 260 (emphasis added).

Even if section 17-33 applied to persons in custody by virtue of criminal process, which it does not, it would not conflict with section 17-4 because the plain language of these provisions indicates they apply to different classes of applicants and different procedural stages. Subsection 17-4(2) requires summary denial of an *application* where the party is "committed or detained by virtue of the *final order, judgment or decree* of a competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such final order, judgment or decree." N.C.G.S. § 17-4(2) (emphasis added). In contrast, section 17-33 provides a limited set of circumstances under which a party who, after the application is reviewed and the writ is allowed, *see id.* § 17-9, is "in custody by virtue of civil *process* from any court legally constituted, or issued by any officer in the course of judicial proceedings" and may be discharged. *Id.* § 17-33 (emphasis added).

When interpreting a statute, a court must "give every word of the statute effect, presuming that the legislature carefully chose each word used." *N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201 (2009). Thus, when the legislature provides that one statute applies to those "detained by virtue of the final order, judgment or decree," N.C.G.S. § 17-4(2), and another statute applies to those "in custody by virtue of

civil process," *id.* § 17-33, we must presume that the legislature carefully chose to differentiate the applicability of these statutes.[6]

This choice comports with the legal reality that a person detained by virtue of civil process is not a person detained by virtue of a final order, judgment or decree. A person may be "detained by virtue of civil process," *id.*, under a variety of circumstances, including during the pendency of certain civil actions. *See id.* § 1-410 (2023) (listing civil cases in which "[t]he defendant may be arrested"). In addition, "[a]n involuntary commitment proceeding . . . is a proceeding of a civil nature," *In re Underwood*, 38 N.C. App. 344, 347 (1978), and this Court has recognized that "recovery from a mental disease after commitment to an institution would seem to be an 'event which has taken place afterwards,' within the meaning of [section] 17-33(2)[.]" *In re Harris*, 241 N.C. 179, 180–81 (1954); *see also* N.C.G.S. § 122C-261 (2023) (providing procedures for "involuntary commitment of the mentally ill").

Because section 17-33's discharge provisions apply only to persons detained by virtue of civil process—not persons detained by virtue of a final order, judgment or decree—and because applications to prosecute the writ of habeas corpus submitted by such persons are not subject to summary denial under subsection 17-4(2), there is no conflict between these provisions. The Court of Appeals therefore erred in holding that "§ 17-33(2) provides an exception to the general rule provided by § 17-4(2)," *Daw*, 277 N.C. App. at 260, because the "general rule" provided by subsection 17-4(2) does not apply to parties covered by section 17-33. No exception is required.

In addition, the operation of Chapter 17 makes it a practical impossibility for section 17-33 to provide an exception to section 17-4. Because section 17-33 is not relevant until after an application to prosecute the writ has been granted, a return has been made, and a hearing has been held, it cannot practically conflict with section 17-4, a statute which specifically operates to prevent certain applicants from prosecuting the writ. *See* N.C.G.S. § 17-3 (barring persons "imprisoned . . . in cases specified in [N.C.]G.S. § 17-4" from prosecuting the writ of habeas corpus); *id.* § 17-9 (requiring the writ to be granted without delay unless the applicant is "by this Chapter, prohibited from prosecuting the writ."). It would

6. Both petitioner and our dissenting colleague note that the drafters of Chapter 17 were mindful that the statutory scheme may not have been perfect. We doubt that such self-awareness is unique to these drafters, and we decline the dissent's seeming invitation to use drafters' acknowledgment of their own imperfection as a license to ignore or otherwise depart from the plain language in the text of a valid legislative enactment.

be strange indeed for the legislature to place an "exception" twenty-nine sections away from the "general rule," and the plain language of Chapter 17 confirms the legislature did no such thing.

The writ of habeas corpus is a mechanism designed to protect liberty and is a fundamental safeguard against arbitrary detention and abuse of power by the government. But the availability of this remedy is textually limited. Judges and courts are therefore constrained by the explicit language of Chapter 17 in reviewing habeas applications. Failure to abide by these clear requirements subjects judges and courts to charges of unlawfulness and arbitrariness given the unambiguous statutory scheme. Because the Court of Appeals' decision amounted to an exercise of legislative power under the guise of statutory interpretation, we expressly disavow its analysis, especially that portion of the opinion concerning the applicability of section 17-33 and the interpretation of the phrase "civil process."

III. Conclusion

When an applicant for a writ of habeas corpus is "detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction," the habeas court *must* summarily deny the application. N.C.G.S. § 17-4(2). Courts may not thereafter consider a petitioner's application in light of the subsequent provisions of Chapter 17 because the remainder of that chapter applies only when the application is allowed.[7]

Here, the trial court summarily denied petitioner's application under subsection 17-4(2) because it determined that petitioner was in custody by virtue of "valid final judgments entered by a court with proper jurisdiction." Such summary denial was proper, and the Court of Appeals erred when it failed to end its inquiry with the plain language set forth in section 17-4. We, therefore, expressly disavow the language in the Court of Appeals opinion, and we modify and affirm.

MODIFIED AND AFFIRMED.

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7. There may be instances where an application does not trigger the mandatory dismissal provisions in section 17-4 but the judge nevertheless later discovers at the hearing the applicant is detained "[b]y virtue of the final judgment or decree of any competent court of civil or criminal jurisdiction[.]" N.C.G.S. § 17-34. In that case, "[i]t is the duty of the court or judge forthwith to remand the party" to the place of their confinement. *Id.*

Justice EARLS dissenting.

Today, the majority closes a door the legislature left open. It converts an isolated subpart of a single habeas statute into an ironclad rule. According to the majority, subsection 17-4(2) extinguishes habeas for anyone imprisoned under a final criminal judgment—no exceptions. *See* N.C.G.S. § 17-4(2) (2023).

But that cannot be right. Neighboring statutes *require* habeas relief when a defendant's "original imprisonment was lawful" but a later "act, omission or event" demands his discharge. N.C.G.S. § 17-33(2) (2023). There is no way to reconcile that language with the majority's newly minted rule. For under the interpretation adopted today, subsection 17-4(2) bars habeas precisely *because* a defendant's "original imprisonment was lawful."

So one of two things is true: Either the majority is wrong, or the legislature did not mean what it said. Between those options, the choice should be easy. Language and logic cut against the majority's wooden interpretation. Read properly, section 17-33 creates a narrow exception to subsection 17-4(2), allowing defendants like Mr. Daw to challenge the "legal cause" for their "continu[ed]" imprisonment, even if that detention flows from a valid criminal judgment. *See* N.C.G.S. § 17-33. Precedent points the same way. Our courts have recognized section 17-33 as a carve out to subsection 17-4(2)—both expressly and implicitly. History fits hand-in-glove with text and caselaw. The General Assembly enacted sections 17-4 and 17-33 as part of the same package, signaling their compatibility. By reading the former to swallow the latter, the majority creates disjuncture where the legislature intended congruence.

The Court of Appeals interpreted section 17-33 in line with statutory text, history, and precedent. The majority, however, discards that principled approach. It plucks subsection 17-4(2) from context, sculpting a categorical rule from cherry-picked language. And it twists the knife, scolding the Court of Appeals for "judicially rewr[iting] Chapter 17." That criticism is, in truth, a confession. For it is the majority that "radically alter[s] the plain language of our habeas corpus statutes." With lip service to legislative fidelity, the Court subverts the legislature's intent. Respectfully, I dissent.

I. Mr. Daw's claim is moot.

The majority's first misstep is deciding this case at all. It is moot—and has been even before the Court of Appeals decided it. North Carolina's "appellate courts do not decide moot cases." *Chavez v. McFadden*, 374

N.C. 458, 467 (2020). Correctly so. It is "not [our] province"—and it "ought not . . . be [our] desire"—to "decide questions or causes unnecessarily." *Hasty v. Funderburk*, 89 N.C. 93, 94 (1883). A case becomes moot if, "during the course of litigation," the "questions originally in controversy between the parties are no longer at issue" or the "relief sought has been granted." *Pearson v. Martin*, 319 N.C. 449, 451 (1987) (cleaned up); *see also Benvenue Parent-Tchr. Ass'n v. Nash Cnty. Bd. of Educ.*, 275 N.C. 675, 679 (1969) (collecting cases). Both are true here. I thus agree with Justice Riggs' analysis and expand on her central point: In bypassing the usual mootness rules, the majority embarks on an "ill-advised," "ends-driven" crusade to rewrite our habeas statutes.

Mr. Daw filed his habeas petition in June 2020. In it, he sought release from prison based on the worsening COVID-19 pandemic and the state's then-existing policies for managing it. At the time, North Carolina was scrambling to handle the virus. In May 2020, Governor Cooper—like executive officers across the country—declared a state of emergency and ordered measures to limit the virus's spread. *See* Exec. Order No. 116 (Mar. 10, 2020). Other officials acted, too. In April of that year, the Secretary of the Department of Public Safety (DPS) invoked his statutory authority to "allow certain individuals to serve their sentence outside of a DPS prison facility, but under the supervision of community corrections officers and/or special operations officers." *See* Press Release, N.C. Dep't of Pub. Safety, Pandemic Prompts Department of Public Safety to Transition Some Offenders to Supervision in the Community (Apr. 13, 2020), https://www.ncdps.gov/news/press-releases/2020/04/13/pandemic-prompts-department-public-safety-transition-some-offenders.

When the Court of Appeals heard Mr. Daw's case, North Carolina remained under a declaration of emergency. *See* Exec. Order No. 215 (May 14, 2021). But things changed—and fast. Soon after oral argument, the executive branch agreed to the early reentry of thousands of state prisoners. *See* Joint Motion for Stay, *NAACP v. Cooper*, No. 20-CVS-500110 (N.C. Super. Ct. Feb. 25, 2021). Mr. Daw was one of them—he was released just six days after the Court of Appeals heard his case. Things changed inside prisons, too. The state modified and strengthened the very mitigation policies Mr. Daw challenged via habeas. With conditions improved, Governor Cooper lifted the declaration of emergency in August 2022. *See* Exec. Order No. 267 (Aug. 15, 2022).

Mr. Daw and the state agree that this case is moot. So did the Court of Appeals. It conceded that Mr. Daw "ha[d] been released from prison and [was] now serving the remainder of his sentence in the community." *State v. Daw*, 277 N.C. App. 240, 244 (2021). Since Mr. Daw "received the

relief requested in his petition," the controversy was dead. *See id.* But the court below—like the majority today—invoked the public-interest exception to reach the merits. *See id.* at 244–45.

That exception allows courts to decide a technically moot case that "involves a matter of public interest, is of general importance, and deserves prompt resolution." *N.C. State Bar v. Randolph*, 325 N.C. 699, 701 (1989). There is wisdom in that rule. And in proper cases, the public-interest exception serves principles of fairness and judicial economy. But it has limits, as our cases make clear. When abstention offers a more prudent course, we have refused to decide moot cases that raise "matter[s] of significant public interest." *Cape Fear River Watch v. N.C. Env't Mgmt. Comm'n*, 368 N.C. 92, 100 (2015); *see also Benvenue*, 275 N.C. at 680 (declining to "pass upon" important "constitutional questions" raised in appeal but "which have now become abstract questions of law"); *Wikel v. Bd. of Comm'rs*, 120 N.C. 451, 452 (1897) (declining to reach "grave questions of constitutional law" because "the cause of action has been destroyed" and "this Court will not go into a consideration of the abstract question"). Two factors guide when the mootness rule yields to the public-interest exception.[1] First, the exception carries less force in idiosyncratic and fact-specific cases. *See Cape Fear River Watch*, 368 N.C. at 99–100 (withholding public-interest exception in case that involved a narrow subset of coal facilities and raised record-heavy, fact-bound claims). Second, we stay our hand when our decision would not "have any practical impact." *Id.* at 100. In Mr. Daw's case, both factors cut against reaching the merits.

For one, Mr. Daw's case is hyperspecific and fact-bound. He does not seek sweeping relief or unlatch the habeas floodgates. From the start, Mr. Daw has tethered his claim to his specific medical conditions and the specific risks raised by specific prison policies in the face of a specific virus. In the years since his petition, prison policies have changed and COVID-19 has ebbed in magnitude. The facts essential to Mr. Daw's habeas claim have thus evaporated as his appeal has evolved. And since Mr. Daw's petition hinged on his unique medical vulnerabilities to a unique virus, his case has a narrow blast radius.

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1. Our cases have recognized other exceptions to the mootness doctrine, such as when a claim is "capable of repetition, yet evading review." *Chavez v. McFadden*, 374 N.C. 458, 467 (2020). Though the Court of Appeals gestured to alternative bases for reviewing Mr. Daw's case, its substantive analysis dealt exclusively with the public-interest exception. Because other mootness exceptions were not examined below and are, at any rate, not applicable to Mr. Daw's claim, I confine my discussion accordingly.

For more proof on that score, look no further than the Court of Appeals. Despite Mr. Daw's already idiosyncratic claims, the court insisted on even more precision. It affirmed the summary denial of his petition for failing to forecast "admissible evidence individualized to the specific circumstances of [his] case that an 'act, omission or event' had occurred that entitled [him] to be discharged." *Daw*, 277 N.C. App. at 246–47. According to the court, Mr. Daw did not clarify "how [his] medical conditions put him at an elevated risk for serious illness or other medical complications from COVID-19." *Id.* at 264 (emphasis omitted). And without a particularized "evidentiary link between the general information in the application and the specific facts of [his] case," the court held that Mr. Daw did not raise "colorable claims" for habeas relief. *Id.* at 269. In both reasoning and result, the Court of Appeals did not adopt the "expansive interpretation" conjured up by the majority. It required an extra measure of specificity for Mr. Daw's already fact-specific claims. And so the decision below—like Mr. Daw's petition—has little purchase beyond its four corners, thus mitigating the "general importance" of the issues involved. *See Randolph*, 325 N.C. at 701.

Perhaps most strikingly, deciding this dispute will not have "any practical impact." *Cape Fear River Watch*, 368 N.C. at 100. Before the Court of Appeals issued its opinion, the state released Mr. Daw and others like him to serve their sentences at home. Mr. Daw completed his sentence in February 2021—over three years ago. And so the relief sought—discharge from incarceration—is not just past its expiration date, but several years so. Our input "cannot have any practical effect on the existing controversy." *Roberts v. Madison Cnty. Realtors Ass'n*, 344 N.C. 394, 398–99 (1996). Or to be more accurate, it cannot affect the once-existing controversy—Mr. Daw's original dispute "has been settled" and "cease[s] to exist." *See Cochran v. Rowe*, 225 N.C. 645, 646 (1945).

The majority makes clear the real reason for discarding the usual mootness rules: It disagrees with the Court of Appeals and hopes to extirpate its decision, root and branch. Even before touching the merits, the majority excoriates the ruling below as "contrary to established law," in "tension" with statutory language, and in "direct conflict" with entrenched legal precepts. The Court, in other words, starts with the outcome and works backwards from there. That analysis is inverted. It is also an unprincipled assumption of the "law-making role," as Justice Riggs explains. For when a controversy is truly extinguished—as is the case here—we should not gratuitously interject merely "to determine which party should rightly have won in the lower court." *Benvenue*, 275

N.C. at 679. The majority's distaste for habeas does not make this peculiarly dormant case one of public significance. Along with Justice Riggs, I would follow our "usual response" and dismiss the appeal. *See Messer v. Town of Chapel Hill*, 346 N.C. 259, 260 (1997) (per curiam) (quoting *Simeon v. Hardin*, 339 N.C. 358, 370 (1994)).[2]

II. The majority's analysis is textually dishonest, divorced from context, incongruent with precedent, and belied by history.

A. Methodology

The majority is wrong from the ground up. It decides this case by stripping subsection 17-4(2) of context and pronouncing its language unambiguous in isolation. One struggles to classify this divide-and-conquer methodology. It is barely statutory interpretation, as the majority interprets precious little of the relevant statutes. And it is certainly not textualism, as even the strictest textualists concede that "[c]ontext is a primary determinant of meaning." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012). Perhaps "textual gerrymandering" is the best name for the majority's approach. For it "manipulat[es] statutory boundaries," packing and cracking the legislature's words to "sustain a preferred interpretation." *See* William N. Eskridge, Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. Rev. 1718, 1732 (2021).[3]

Whatever the label, the majority's methodology simply is not how courts read laws. To determine legislative intent—the guiding star of statutory analysis—we analyze "the statute as a whole, considering the

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2. I adhere to my view that neither precedent nor prudence require us to reflexively abrogate a Court of Appeals opinion—whether by vacating or "unpublishing" it—whenever a case becomes moot. My other writings address this point in more detail. *See Walker v. Wake Cnty. Sheriff's Dep't*, 385 N.C. 300, 303 (2023) (Earls, J., dissenting) (explaining the problems with this Court "unpublishing" a Court of Appeals decision after the parties settled their dispute and asked us to dismiss the appeal); *see id.* at 307 (clarifying why "unpublishing" an opinion means that "for all intents and purposes, the Court effectively vacates the decision below"); *see also Mole v. City of Durham*, 384 N.C. 78, 91 (2023) (Earls, J., dissenting) (examining this Court's recent fondness for "unpublishing" Court of Appeals opinions and highlighting the procedural, administrative, and fairness concerns with that approach).

3. Textualism is, of course, not the only approach to legal interpretation. *See* Stephen Breyer, *Reading the Constitution: Why I Chose Pragmatism, Not Textualism* (2024). I reference textualism because it appears to be the majority's professed approach and yet even by its own methodology, the majority's analysis is deeply flawed. I do not assert that textualism accurately represents what this Court's precedents establish as the principal or sole method of statutory and constitutional interpretation.

chosen words themselves, the spirit of the act, and the objectives the statute seeks to accomplish." *Brown v. Flowe*, 349 N.C. 520, 522 (1998). We first look to a provision's plain language, as the "actual words of the legislature are the clearest manifestation of its intent." *N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201 (2009). If those words are "clear and unambiguous within the context of the statute, they are to be given their plain and ordinary meanings." *Brown*, 349 N.C. at 522 (citing *Hyler v. GTE Prods. Co.*, 333 N.C. 258, 262 (1993)); *see also Union Carbide Corp. v. Offerman*, 351 N.C. 310, 315 (2000).

But the "plainness or ambiguity of [a] statut[e's] language" cannot "turn solely on dictionary definitions of its component words" viewed in an echo chamber. *Yates v. United States*, 574 U.S. 528, 537 (2015) (cleaned up). As this Court long ago recognized, a "phrase or clause or sentence may vary greatly in color and meaning according to the circumstances of its" invocation. *Watson Indus., Inc. v. Shaw*, 235 N.C. 203, 210 (1952). And so a provision's language draws substance from the "specific context in which [it] is used, and the broader context of the statute as a whole," *Yates*, 574 U.S. at 537 (cleaned up); *see also Deal v. United States*, 508 U.S. 129, 132 (1993) (applying the "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used"). In practical view, legal instruments "typically contain[ ] many interrelated parts that make up the whole," and so the "entirety of the document . . . provides the context for each of its parts." Scalia & Garner, at 167. Meaning, in other words, is a function of context. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) ("The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context."). Which is why, to again quote Justice Scalia, "In textual interpretation, context is everything." Antonin Scalia, *A Matter of Interpretation* 37 (1997).

That principle holds special sway for statutes. *Rodgers, McCabe & Co. v. Bell*, 156 N.C. 378, 385 (1911). And for good reason—the General Assembly does not legislate in fragments but on top of and "with reference to" broader legal schemes. *Raeford Lumber Co. v. Rockfish Trading Co.*, 163 N.C. 314, 317 (1913) (cleaned up). Put simply, the legislature's "chosen words" function within "the statute as a whole." *Brown*, 349 N.C. at 522 (cleaned up). To faithfully interpret that language, judges must "consider the entire text, in view of its structure and of the physical and logical relation of its many parts." Scalia & Garner, at 167. Courts ignore statutory context at their own peril. Reading a provision wrenched from its setting is like measuring an iceberg without looking

beneath the surface. In both cases, the incomplete perspective yields a distorted result divorced from both reality and common sense. Even Justice Scalia bemoaned the "failure to follow the whole-text canon" as an all too common "interpretive fault" that dislocates language from its intended meaning. *Id.*

That lesson is not new. As far back as 1628, Sir Edward Coke explained that "it is the most natural and genuine exposition of a statute to construe one part of the statute by another part of the same statute, for that best expresseth the meaning of the makers." 1 Edward Coke, *The First Part of the Institutes of the Laws of England, or, a Commentary upon Littleton* § 728, at 381a (Dublin, College-Green 14th ed. 1791). Over the centuries, context has retained its primacy, requiring jurists to construe "the entire instrument, and not merely . . . disjointed parts of it." *See* Herbert Broom, *A Selection of Legal Maxims* 440 (Joseph Gerald Pease & Herbert Chitty eds., 8th ed. 1911).

This Court has followed that time-honored maxim. In "determining legislative intent," we have explained, "the words and phrases of a statute must be interpreted contextually"—courts do not read segments of a statute in an echo chamber. *See In re J.E.B.*, 376 N.C. 629, 634 (2021) (cleaned up). We have returned to that principle again and again. Our cases, for example, denounce reading statutes "as detached, unrelated sentences." *State v. Fox*, 262 N.C. 193, 195 (1964). We have rejected "rigid interpretation[s] of isolated provisions" unmoored from "the whole of the statutory text." *In re A.P.*, 371 N.C. 14, 18 (2018). And we have gone further, explaining that courts disserve the legislature's intent by scrutinizing "statutory provisions" in a vacuum "rather than analyzing the relevant statutory language in its entirety."[4] *State v. James*, 371 N.C. 77, 92 (2018).

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4. The importance of linguistic context transcends time and subject matter. A glance through our cases makes it difficult to imagine a more firmly entrenched interpretive principle. *See, e.g.*, *Rodgers, McCabe & Co. v. Bell*, 156 N.C. 378, 385 (1911) ("In order to determine the true intent of the Legislature, the particular clauses and phrases should not be studied as detached and isolated expressions, but the whole and every part of the statute must be considered in fixing the meaning of any of its parts. . . . Having reference to this general principle, it is also well understood that a statute should be so construed as to make it harmonize with the existent body of the law, unless the legislative intent is clearly expressed to the contrary, and that each and every clause shall be allowed significance if this can be done by fair and reasonable interpretation." (cleaned up)); *Victory Cab Co. v. City of Charlotte*, 234 N.C. 572, 576 (1951) ("[T]he language of the statute must be read not textually, but contextually, and with reference to the matters dealt with, the objects and purposes sought to be accomplished, and in a sense which harmonizes with the subject matter."); *Puckett v. Sellars*, 235 N.C. 264, 268 (1952) (instructing courts to adopt a "reasonable construction of [statutory] language" that "is consonant with the general purpose

On top of context, other principles guide our statutory analysis. Specificity, for instance, imports meaning. *See State ex rel. Utils. Comm'n v. Lumbee River Elec. Membership Corp.*, 275 N.C. 250, 260 (1969). For that reason, if "two statutes arguably address the same issue, one in specific terms and the other generally, the specific statute controls." *High Rock Lake Partners, LLC v. N.C. DOT*, 366 N.C. 315, 322 (2012). That interpretive tool is "most common[ly]" needed in cases like this one: Where "a general prohibition"—like subsection 17-4(2)—is "contradicted by a specific permission"—like section 17-33. *See* Scalia & Garner, at 183. More basically, when statutes cover the same "matter or subject," this Court construes them together *in pari materia*. *DTH Media Corp. v. Folt*, 374 N.C. 292, 300 (2020) (cleaned up). Our

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and intent of the Act under consideration, is in harmony with the other provisions of the statute, and serves to effectuate the objective of the legislation"); *Piedmont Canteen Serv., Inc. v. Johnson*, 256 N.C. 155, 160 (1962) (explaining that "part of a statute may not be interpreted out of context" but rather "construed as a part of the whole"); *In re Hardy*, 294 N.C. 90, 95–96 (1978) ("Words and phrases of a statute may not be interpreted out of context, but individual expressions must be construed as a part of the composite whole and must be accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit." (cleaned up)); *Jolly v. Wright*, 300 N.C. 83, 86 (1980) ("Word and phrases of a statute may not be interpreted out of context; rather, individual expressions must be interpreted as part of a composite whole, in a manner which harmonizes with the other provisions of the statute and which gives effect to the reason and purpose of the statute."); *State v. Jones*, 305 N.C. 520, 531 (1982) ("An ordinance or statute must be considered as a whole, and its language should not be isolated in order to find fault with its descriptive character when the general sense and meaning of the statute can be determined from reading such language in proper context and giving the words ordinary meaning."); *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 215 (1990) ("A construction which operates to defeat or impair the object of the statute must be avoided if that can reasonably be done without violence to the legislative language. To this end, the words and phrases of a statute must be interpreted contextually, in a manner which harmonizes with the other provisions of the statute and which gives effect to the reason and purpose of the statute." (cleaned up)); *In re D.S.*, 364 N.C. 184, 187 (2010) ("Legislative intent controls the meaning of a statute; and in ascertaining this intent, a court must consider the act as a whole, weighing the language of the statute, its spirit, and that which the statute seeks to accomplish. The statute's words should be given their natural and ordinary meaning unless the context requires them to be construed differently." (cleaned up)); *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 188 (2004) ("[T]his Court does not read segments of a statute in isolation. Rather, we construe statutes *in pari materia*, giving effect, if possible, to every provision."); *Dickson v. Rucho*, 366 N.C. 332, 342 (2013) ("We read [a provision] in the context of the entire article in which it appears."); *N.C. Dep't of Transp. v. Mission Battleground Park, DST*, 370 N.C. 477, 483 (2018) (reversing Court of Appeals in part for failing to interpret a subsection "holistically with the rest of the statute"); *Town of Pinebluff v. Moore County*, 374 N.C. 254, 256 (2020) (explaining that statutory subsections "must be read in the context of the rest of the statute, since we assume that the Legislature acted with full knowledge of prior and existing law" (cleaned up)); *In re J.E.B.*, 376 N.C. 629, 634 (2021) (admonishing courts from divvying up a provision's language "to the exclusion of the rest of the statute").

interpretation "must sound a harmonious—not a discordant—note in the general tenor of the law." *Watson Indus.*, 235 N.C. at 210. And we must give "effect, if possible, to all provisions without destroying" their meaning. *DTH Media Corp.*, 374 N.C. at, 300 (cleaned up). Above all, statutory analysis must embrace "the spirit of the act" and what it "seeks to accomplish." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664 (2001) (cleaned up).

In discarding those interpretive rules, the majority proves their value. For the statutes that emerge from today's decision are quite different from those the legislature passed. That departure is unjustified.

B. Statutory Text

Start where the majority should have—the language of our habeas statutes viewed in context.[5] When a person files a habeas petition, the court must "grant the writ without delay, unless it appear from the application itself or from the documents annexed" that the applicant is "prohibited from prosecuting the writ." N.C.G.S. § 17-9 (2023). Section 17-4 lists cases in which the "[a]pplication to prosecute the writ shall be denied." N.C.G.S. § 17-4. Most relevant here, subsection 17-4(2) withholds the writ from a petitioner:

> [C]ommitted or detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such final order, judgment or decree

N.C.G.S. § 17-4(2).

In effect, the majority begins and ends its analysis with that lone subpart. Intentionally so, as that language—read in a vacuum—yields the majority its preferred result. But subsection 17-4(2) is not the final word on habeas claims; it is but one provision amid a sea of interlocking laws. And its language, placed in the proper setting, takes on a different hue than the majority gives it.

Consider, for instance, section 17-32. When a petitioner "is brought on a writ of habeas corpus" before a "court or judge," that decisionmaker must examine "the cause of the [petitioner's] confinement or restraint." N.C.G.S. § 17-32 (2023). The statute also casts a wide net, embracing habeas petitioners committed "for any criminal or supposed criminal

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5. It is, of course, disappointing that the majority finds it "reductive" to flesh out the basis of a dissent and to offer another perspective on important legal issues. Even so, I believe that our state, its law, and the people we serve merit a full and fair elucidation of the case before us.

matter or not." *Id.*; *cf. In re Bailey*, 203 N.C. 362, 365 (1932), *rev'd on other grounds*, 289 U.S. 412 (1933) (applying contemporary version of section 17-32 to criminal proceeding and interpreting "statutory words" to "preclude the idea that such hearing shall be perfunctory and merely formal"). If "facts are alleged to show that the imprisonment or detention is illegal, or that the party imprisoned is entitled to his discharge," the court must "hear the allegations and proofs on both sides." N.C.G.S. § 17-32. And after taking evidence, it must award the relief to which "justice appertains in delivering, bailing, or remanding" the petitioner. *Id.* The next three provisions track section 17-32's listed remedies, detailing when and why courts must award habeas relief. *See* N.C.G.S. §§ 17-33 (titled: "When party discharged"), -34 (titled: "When party remanded"), -35 (2023) (titled: "When . . . party bailed or remanded").

Key here, section 17-33—the statute cited by Mr. Daw—obliges a court to discharge a habeas petitioner from unlawful imprisonment or its "continuance." N.C.G.S. § 17-33. It opens with a broad command:

> If no legal cause is shown for such imprisonment or restraint, or for the continuance thereof, the court or judge shall discharge the party from the custody or restraint under which he is held.

Id. That language sets no limits—it embraces criminal defendants and civil detainees alike. We know that for three reasons. First, the statute requires discharge from "*such* imprisonment or restraint," *id.* (emphasis added), an adjectival callback to the modes of confinement itemized in section 17-32. *See Such*, *Black's Law Dictionary* 1732 (11th ed. 2019) ("That or those; having just been mentioned"). That matters, in turn, because section 17-32 directs courts to examine the factual and legal basis for a petitioner's "commitment for any criminal or supposed criminal matter or not." N.C.G.S. § 17-32. In light of their textual and spatial nexus, the "imprisonment or restraint" embraced by section 17-33 includes the forms of criminal process reviewable under section 17-32. *See* N.C.G.S. § 17-33.

Section 17-33's second sentence confirms the broad sweep of its first. After requiring discharge if there is no "legal cause" for a petitioner's "imprisonment or restraint," the statute pivots to a specific class of habeas claims:

> But if it appears on the return to the writ that the party is in custody by virtue of civil process from any court legally constituted, or issued by any officer in the course of judicial proceedings before him,

> authorized by law, such party can be discharged only in one of the following cases:

Id. That second sentence starts with the disjunctive "but," making clear its break from the guidance before. *See But*, *The American Heritage College Dictionary* (3d ed. 2000) ("Used to indicate an exception"). In setting specific rules for specific petitioners, though, the legislature kept the general regime that applies to claimants outside that category but within the statute's ambit. So even if section 17-33 provides narrower grounds for relief to those detained "by virtue of civil process," it retains the baseline rule for petitioners excluded from that group but embraced by the statute's first sentence. *See* N.C.G.S. § 17-33. For that reason, petitioners "imprisoned or restrained" by modes other than "civil process" may still test the "legal cause" for their continued custody. *See id.*

Consider an analogy. Suppose a high school's attendance policy says:

> A student's absence from class may be excused if there is a reasonable basis for it. But freshmen and sophomores may only miss class for these reasons: (1) illness or (2) a family emergency.

A person reading that text would understand that juniors and seniors have more leeway than do freshmen and sophomores. The policy follows its general rule with specific strictures on a specific group of students. And the natural takeaway from that structure and language is that students exempt from the enumerated limits are governed by the default "reasonable basis" rule. Otherwise, there would be no reason for the restrictions at all. A senior, for instance, may justifiably miss class to take the SAT or visit a prospective college. But the same senior could also stay home if they caught the flu. Upperclassmen could thus offer a "reasonable basis" to excuse an absence based on grounds broader than—but including—the reasons available to freshmen and sophomores. By singling underclassmen out and fixing specific limits on them, the policy impliedly excludes other students from those strictures, retaining the default standard that generally controls.

The same principle applies to section 17-33. After setting a default rule for petitioners "imprison[ed] or restrain[ed]" in the modes captured by section 17-32, the statute offers specific guidance for people confined "by virtue of civil process" from a "legally constituted" court or authorized judicial officer. *Id.* But though that latter class of habeas petitioner is limited to discrete grounds for relief, detainees outside that group—including criminal defendants—may still challenge the "legal cause" for their imprisonment or its "continuance." *See id.*

Finally, surrounding provisions affirm section 17-33's extension to criminal cases. Take section 17-30, which applies to a petitioner "detained upon any criminal accusation." N.C.G.S. § 17-30 (2023). For those types of claims, the court may withhold an "order for the discharge of such party" until the district attorney has received "sufficient notice" of the proceedings. *Id*. The provision thus contemplates criminal defendants' recourse to habeas discharge, the relief covered and controlled by section 17-33.

The statutes after section 17-33 point the same way. For instance, sections 17-34 and 17-35 flesh out the other remedies listed in section 17-32—namely, remand and bail. Those provisions set rules for "the party" referenced in section 17-32 and accordingly extend their reach to forms of criminal process. *See* N.C.G.S. §§ 17-34, -35. Also notable, if a court discharges a habeas petitioner—the remedy detailed in section 17-33—yet another statute protects that person from being "again imprisoned or detained for the same cause," except by order of the presiding court. N.C.G.S. § 17-38 (2023). Section 17-38 illustrates that "imprisonment" and "detention" are distinct forms of confinement embraced by section 17-33. *See id*. And it underscores the importance the legislature placed on discharge as a remedy. To give effect to that measure of relief, the statute prescribes a $2,500 penalty for anyone who unlawfully reimprisons someone whom habeas has freed. *Id*. In those ways, too, statutory context shows that section 17-33 is part of—and intertwined with—a habeas regime that reaches civil "restraint" and criminal "imprisonment" alike.

Most damning for the majority, section 17-33(2) blesses habeas claims when a defendant's "original imprisonment was lawful," but a later "act, omission or event" requires discharge. N.C.G.S. § 17-33(2). That language prefigures and provides for habeas petitions otherwise precluded by subsection 17-4(2). A "lawful" prison sentence is, by necessity, one authorized by a "final judgment" from a "competent" court. *See In re Swink*, 243 N.C. 86, 90 (1955) (explaining that the "lawful imprisonment of a person who pleads or is found guilty of a criminal offense" must rest on a "valid judgment of a court of competent jurisdiction"); *see also In re Burton*, 257 N.C. 534, 540 (1962).

So section 17-33, as written, cannot cohabit with the version of subsection 17-4(2) concocted by the majority. If, as the majority holds, a valid conviction kills habeas petitions at the threshold, then nothing that follows a duly imposed sentence could ever warrant a petitioner's discharge. Whenever a defendant's "original imprisonment was lawful"—and precisely *because* the "original imprisonment was lawful"—the

majority would foreclose habeas relief. By reading subsection 17-4(2) to demand that result, the majority renders section 17-33 a ticket to nowhere—a curious result for an opinion that claims fidelity to plain text. *Cf.* Scalia & Garner, at 174 ("[I]t is no more the court's function to revise by subtraction than by addition").

The majority launders its holding through a hodgepodge of analytical moves, none sound. As its first ploy, the majority wrests subsection 17-4(2) from the statutory scheme and reads it in a vacuum. Measured against itself, the majority proclaims subsection 17-4(2)'s language "definite" and "unambiguous." It then converts that artificial clarity into an airtight rule, mandating that "inquiry into the availability of habeas relief" must end with subsection 17-4(2). But the majority's fragmentary analysis is methodologically infirm and logically bankrupt. In truth, subsection 17-4(2)'s lucidity is manufactured—it appears "definite" and "unambiguous" only because the majority erases everything that says differently.

From that first misstep, the majority makes a second. It scrubs disfavored habeas statutes of relevance, converting subsection 17-4(2) into an impenetrable command. The majority recasts that provision as a flat decree: habeas courts "*must* summarily deny [an] application" from a person detained under a final judgment. Per the majority, every other provision in Chapter 17—including section 17-33—kicks in "only when [an] application is allowed" in line with subsection 17-4(2). Courts must woodenly apply that provision without "consider[ing] a petitioner's application in light of th[ose] subsequent provisions." Translation: subsection 17-4(2) overrides all the statutes that come after. So that provision, as interpreted by the majority, is no mere "gatekeeper"—it is a gate closer for habeas claims that should otherwise proceed.

The majority does not merely shut the habeas doors; it seals them closed. It announces that section 17-33 has no bearing on section 17-4, as the former does not apply to criminal process and "is not relevant until after an application to prosecute the writ has been granted." But in that holding, too, the majority repeats its earlier flaws. As its opening move, the Court selectively excerpts section 17-33's text. It omits the statute's first sentence, insisting that the second is the only "relevant portion." The majority does not justify that excision or explain why just some of the legislature's words are "relevant." But we soon understand the gambit, as the majority offers its carefully snipped text as proof that section 17-33 *only* applies to "civil process."

That conclusion overlooks the statute's full language and its fit with neighboring provisions. True to form, the majority ignores section

17-33's linguistic and spatial nexus to section 17-32, which expressly extends habeas review to "commitment[s] for any criminal or supposed criminal matter." N.C.G.S. § 17-32. It ignores section 17-33's application to "imprisonment," N.C.G.S. § 17-33, the quintessential mode of criminal confinement, *see In re Swink*, 243 N.C. at 90. And it ignores the internal structure and logical mechanics of section 17-33's text.[6]

As explained earlier, section 17-33's mention of "civil process" qualifies, rather than defines, the scope of discharge relief. Recall the provision's opening sentence. In capacious terms, it requires a petitioner's release if there is no "legal cause" for his imprisonment or "the continuance thereof." N.C.G.S. § 17-33. The next sentence tempers the opening rule for petitioners confined "by virtue of civil process."[7] *Id.* For that sliver of habeas petitioners, discharge is proper "only" in specified cases. *Id.* True, that language does not apply to criminal defendants. But section 17-33's first sentence *does*, as those petitioners are "imprison[ed]," *id.*, and "such imprisonment" includes "commitment for any criminal or supposed criminal matter," *see* N.C.G.S. § 17-32. So for petitioners detained through mechanisms other than "civil process," section 17-33's default rule holds firm. Defendants like Mr. Daw may thus seek habeas relief when their "continu[ed]" imprisonment is shorn of "legal cause." N.C.G.S. § 17-33.

Against that backdrop, the majority's cramped reading of subsection 17-4(2) cannot stand. At least, not if the legislature passed the laws

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6. To justify its cherry-picked reading of section 17-33, the majority contends that Mr. Daw "has not argued that there is no legal cause for his detention under the [provision's] first sentence." That observation might matter if it was at all relevant to today's holding. But rather than confining its analysis to a particular part of section 17-33, the majority flatly forecloses the statute's availability for people in Mr. Daw's shoes.

7. This reasoning takes "civil" at face value, accepting for argument's sake that the term imports a distinction between civil versus criminal law. But the precedent and post-Civil War context surrounding section 17-33's enactment suggest that its drafters used "civil" to distinguish civilian courts from the military's justice system. *See*, *e.g.*, *Cox v. Gee*, 2 Win. 131, 132 (1864) (denying habeas petition from soldier in Confederate Army and explaining that a soldier is in "military custody" not reachable "through *civil* tribunals, until at least, his term of enlistment expires") (emphasis added); *id.* at 133 ("Legitimately inquiry in such cases goes only to the extent of ascertaining whether the prisoner is rightfully in the army. If so, the *civil* tribunals leave him to the military, to be dealt with according to their rules and regulations.") (emphasis added); *In re Bryan*, 60 N.C. 1, 42 (1863) (affirming judiciary's jurisdiction and duty to "discharge [a] *citizen* whenever it appears that he is unlawfully restrained of his liberty by an officer of the Confederate States") (emphasis added); *In re Moore*, 64 N.C. 802, 808–10 (1870). Even accepting the civil-criminal dichotomy—as the majority uncritically does—section 17-33's reference to "civil process" does not extinguish the statute's application to criminal proceedings.

it did. And not if bedrock interpretive rules are followed. Properly read, section 17-33 creates an exception to subsection 17-4(2). Though the latter provision generally withholds habeas relief from duly incarcerated petitioners, the former varies that rule in specific cases. So even if a defendant's "original imprisonment was lawful," he may test the "legal cause" for his "continu[ed]" restraint based on an intervening "act, omission or event." *See* N.C.G.S. § 17-33(2). That interpretation accounts for the context and language of the habeas statutes, allowing the "specific" guidance of section 17-33 to supplement the "more general" precept in subsection 17-4(2). *LexisNexis Risk Data Mgmt. v. N.C. Admin. Off. of the Cts.*, 368 N.C. 180, 187 (2015) (cleaned up). It respects the General Assembly's wisdom, presuming that the policy-making branch enacts statutes "with full knowledge of prior and existing law." *Fearrington v. City of Greenville*, 900 S.E.2d 851, 866 (N.C. 2024) (cleaned up). And it harmonizes the legislature's enactments, giving effect to the full statutory scheme and avoiding a construction that renders section 17-33 superfluous. *Id.* ("We presume . . . that the General Assembly does not adopt superfluous legislation." (cleaned up)).

In fact, there is special reason to pursue harmony here. The Drafting Committee of the habeas statutes foretold the "inevitab[ility] that imperfections will be found" in the newly enacted laws. N.C. Code Civ. P. of 1868, Second Report of the Code Commissioners. For courts facing those "imperfections," the Committee requested a "generous criticism of our labors," underscoring that each part was intended "to fit in and harmonize with the other[s]" as a "consistent whole." *Id.* It noted, too, that the separate statutory provisions carry independent force. *See id.* ("[T]here is scarce any part which can be altered without involving alteration in some or numerous others."). In other words, the legislature expressly disclaimed the fragmented approach the majority deploys today.

Allowing Mr. Daw's petition also aligns with settled understandings about the purpose and reach of habeas claims. This Court has long held that habeas is not an error-correcting mechanism. *See State v. Hooker*, 183 N.C. 763, 766 (1922). The writ allows relief from void judgments, not flawed ones. *See In re Burton*, 257 N.C. at 540–41. Subsection 17-4(2) codifies that distinction: If duly convicted, a defendant may not use habeas to relitigate the *merits* of a valid criminal judgment. Put simply, section 17-4 precludes appeals by another name. *See In re Palmer*, 265 N.C. 485, 486 (1965).

But section 17-33 permits—and Mr. Daw raises—a different type of claim. The statute contemplates cases where a defendant's sentence—and the final judgment authorizing it—was lawful when imposed. Even

so, the legislature left the habeas doors ajar if a later "act, omission or event" dissolves the "legal cause" for a once-valid imprisonment. N.C.G.S. § 17-33(2). When an inmate seeks relief under section 17-33, then, a court need not relitigate the merits of the original conviction or sentence. The question, instead, is whether intervening events have changed the nature of the confinement and eroded the legal justification for its "continuance"—an inquiry well-suited for habeas review. *See In re Renfrow*, 247 N.C. 55, 59 (1957) (explaining that the issue raised at a habeas "hearing for *alleged unlawful imprisonment* is whether petitioner is *then* being unlawfully deprived of his liberty") (second emphasis added).

Since section 17-33 claims do not allege error in a conviction, judgment, or original sentence, they fit with subsection 17-4(2)'s general prohibition on repackaged appeals. So read, subsection 17-4(2) can coexist with section 17-33. Even if a habeas petitioner may not attack the merits of a final criminal judgment, he *can* challenge added restraint not authorized by the original judgment—here, the alleged irresponsible exposure to a deadly and novel virus. *See State v. Austin*, 241 N.C. 548, 550–51 (1955) (explaining that a "properly convicted" defendant may, on habeas, attack punishment imposed in "excess of that authorized by law" without "disturbing the valid portion of the sentence"); *see also State v. Stafford*, 274 N.C. 519, 536 (1968) (noting that defendant sentenced in excess of legal bounds was "entitled to his discharge upon a writ of habeas corpus when he had served the time the court could lawfully impose").

Rather than apply the statutes enacted, the majority engineers those it would prefer. It is a regrettable choice—not just for the avenues it seals shut, but also for the interpretive rules it discards. By tunnel-visioning on subsection 17-4(2), the Court elevates an atomized provision into a blanket rule, minting an intratextual hierarchy without legislative blessing. It injects discord where the General Assembly intended harmony. And it exiles section 17-33 to superfluity—both on paper and in practice.

C. Precedent

Precedent cuts in Mr. Daw's favor, too. Our appellate courts have already interpreted the habeas statutes and rejected the majority's myopic reading. Some cases did so expressly, construing section 17-33 to allow habeas relief otherwise barred by subsection 17-4(2). Others did so implicitly by examining the merits of a habeas petition from a person detained under a valid final judgment. That caselaw confirms what the statutes makes clear: Though subsection 17-4(2) sets a general rule, section 17-33 allows habeas claims in a narrow subset of cases. So the

majority does not restore our habeas provisions to their longstanding meaning—it contorts their language and precedent interpreting it.

Begin with express rejections of the majority's new rule. In *In re Harris*, for instance, we endorsed a mental patient's recourse to habeas, "notwithstanding [subsection] 17-4(2)." 241 N.C. 179, 180 (1954). The petitioner in that case was committed to a state mental hospital. *Id.* at 179. After two years, he sought release, alleging that he was "of sound mind and entirely competent and capable of managing his own affairs." *Id.* The petitioner—invoking existing statutes—argued that a jury trial was the "permissible procedure by which he may be declared competent." *Id.* at 180 (cleaned up). We disagreed, explaining that his "remedy is by habeas corpus." *Id.* (emphasis omitted). That conclusion sprang from the same habeas statutes in place today. Section 17-32 obliged courts to examine whether "the party imprisoned is entitled to his discharge." *Id.* (citing N.C.G.S. § 17-32). And that language fit with subsection 17-33(2)—a person may "become entitled to be discharged" based on "some act, omission or event" during his confinement. *Id.* at 181.

Fitting those provisions together, we explained that "recovery from a mental disease after commitment to an institution would seem to be an 'event which has taken place afterwards,' within the meaning of [subsection] 17-33(2), entitling an inmate to discharge under [section] 17-32." *Id.* That "[wa]s so notwithstanding [subsection] 17-4(2)," we observed—in other words, section 17-33 coexisted with and offered a specific carve out to subsection 17-4(2)'s general summary denial rule. *Id.* at 180. Extending that logic, we repudiated earlier decisions barring habeas courts from examining whether a petitioner's current condition permitted their continued detention. *Id.* (citing *Ex parte Chase*, 193 N.C. 450 (1927)). Nor was *Harris* an anomaly—it built on other cases extending habeas relief in the face of subsection 17-4(2). *See State v. Queen*, 91 N.C. 659, 661–62 (1884) (granting habeas relief to a defendant confined under a constitutionally defective sentence, even though the contemporary version of subsection 17-4(2) directed "that the writ should be denied" to petitioners "imprisoned by virtue of the judgment of competent jurisdiction of the crime for which he is imprisoned").

The Court of Appeals has held the same for nearly fifty years. Since 1976, five cases have pointed to section 17-33 as a remedy for "a clear instance of constitutional infirmity," even when the petitioner's original imprisonment was lawful. *In re Stevens*, 28 N.C. App. 471, 474 (1976); *see also Hoffman v. Edwards*, 48 N.C. App. 559 (1980); *Freeman v. Johnson*, 92 N.C. App. 109 (1988); *State v. Leach*, 227 N.C. App. 399 (2013); *State v. Daw*, 277 N.C. App. 240 (2021).

Federal courts have distilled the same teaching from our habeas statutes, allowing validly incarcerated defendants to challenge aspects of their confinement via section 17-33 claims. *See*, *e.g.*, *Warren v. Smith*, No. 5:13-HC-2220-D, 2015 WL 631331, at *3 (E.D.N.C. Feb. 12, 2015) (citing subsection 17-33(2) and explaining that "[u]nder North Carolina law, [petitioner] can seek habeas relief for the alleged lack of due process in his parole revocation hearing and the revocation for failure to pay supervision fees"); *Bey v. Hooks*, No. 5:15-HC-2097-FL, 2018 WL 2465471, at *4 (E.D.N.C. June 1, 2018) (quoting subsection 17-33(2) and reasoning that North Carolina prisoners "may assert constitutional challenges to parole proceedings by filing a petition for writ of habeas corpus in state court"). On questions of state law, of course, federal decisions are not binding authority. But they still hold persuasive value—especially because they cohere with North Carolina precedent. Put simply, state and federal judges have read the same statutes and reached the same conclusion about the viability of section 17-33 claims. The consistency of that trend lays bare the majority's aberration from it.

Implicitly, too, our courts have rejected the majority's rigid interpretation of subsection 17-4(2). Our precedent has allowed duly imprisoned defendants to attack substantive infirmities in their continued incarceration. We have "frequently held" that "where a convicted criminal is detained under a sentence not authorized by law, he is entitled to be heard." *In re Holley*, 154 N.C. 163, 168 (1910). The most obvious case is when a defendant's sentence is "authorized in kind," but "extends in duration beyond what the law expressly permits." *Id*. That prisoner, we have explained, "may be relieved from further punishment" after "serving the lawful portion of the sentence." *Id*.; *see also State v. Phillips*, 185 N.C. 614, 619 (1923); *Austin*, 241 N.C. at 548 (granting habeas relief and ordering inmate discharged because he served the legal portion of his sentence and the remainder was thus excessive); *Ex parte Williams*, 149 N.C. 436, 438–39 (1908) (affirming habeas discharge for defendant pardoned by the governor "after conviction"); *State v. Burnette*, 173 N.C. 734, 736–38 (1917) (allowing defendant jailed under suspended judgments to bring habeas claim "attack[ing] the validity of the sentence" because he "was entitled to a public hearing in the court" rather than "before the trial justice acting privately in his office"); *State v. Massey*, 265 N.C. 579, 580–81 (1965) (per curiam) (reversing denial of habeas petition and ordering defendant released because a misprint in penal statutes "created confusion," leading trial judge to give defendant "excessive sentences" for consolidated misdemeanors and, in turn, three later convictions for escaping prison); *State v. Niccum*, 293 N.C. 276 (1977) (considering habeas challenge to legality

of defendant's continued imprisonment beyond the maximum term for committed youthful offenders).

Key here, we have allowed prisoners to raise constitutional challenges to their ongoing confinement. *See*, *e.g.*, *Queen*, 91 N.C. at 661–62; *Phillips*, 185 N.C. at 619–22 (awarding habeas release on due process grounds because trial court allowed nonjudicial officers to decide whether defendant violated the terms of his suspended sentence without formal process); *State v. McBride*, 240 N.C. 619, 622 (1954) (reversing denial of habeas petition and ordering immediate release on apparent due process grounds because trial court erroneously revoked suspended sentence without any "finding that the defendant violated any one of the conditions upon which his sentence was suspended").

In *Jones*, perhaps our most recent foray, we assessed whether a habeas petitioner serving a life sentence was lawfully imprisoned. *Jones v. Keller*, 364 N.C. 249 (2010). In that case, the petitioner did not dispute the integrity of his original conviction or sentence. Instead, he lodged statutory and constitutional challenges to a Department of Corrections (DOC) policy for awarding good time credits. *Id.* at 251. As a rule, the DOC did not apply those credits to prisoners who—like the petitioner—were serving life sentences. *Id.* at 254. On habeas, the petitioner challenged the DOC's approach. In his view, withholding those time credits violated his "rights to due process and to equal protection." *Id.* at 256. And if his "good time, gain time, and merit time [were] credited to his life sentence"—"statutorily defined as a sentence of eighty years"—he was entitled to release. *Id.* at 251. Because the DOC unconstitutionally refused to apply those time credits, he urged, his continued imprisonment was unlawful and redressable on habeas. *Id.* On the merits, this Court sided with the DOC. *Id.* at 260.

But our reasoning was more important than the result. For *Jones* to make any sense, the petitioner's constitutional arguments must have mattered to the availability of habeas relief. If they did not and subsection 17-4(2) categorically withdraws the writ from lawfully imprisoned defendants, then this Court had no need to consider the constitutional merits. But we did—and thoroughly, too. *Id.* at 255 (deciding case by "only" considering "whether DOC's interpretation that Jones's good time, gain time, and merit time credits were not awarded to him for purposes of unconditional release is statutorily and constitutionally permissible"). *Jones* thus rests on an implicit premise key to this case: A habeas petitioner may attack his continued imprisonment on constitutional grounds, even if his original sentence were lawful.

Our precedent has (or had) good company—other state courts have construed their habeas statutes the same way. New York's highest court, for instance, has blessed habeas challenges to "any *further* restraint *in excess* of that permitted by the judgment or constitutional guarantees." *People ex rel. Brown v. Johnston*, 174 N.E.2d 725, 726 (N.Y. 1961) (cleaned up). Other states have followed suit. *See, e.g.*, *Beacham v. Walker*, 231 Ill. 2d 51, 58 (2008); *Penrod v. Cupp*, 581 P.2d 934, 935 (Or. 1978); *State ex rel. Cole v. Tahash*, 129 N.W.2d 903, 907 (Minn. 1964). And especially relevant here, Colorado's Supreme Court—interpreting a statute nearly identical to ours—has held that "any restriction in excess of legal restraint that substantially infringes on basic rights may be remedied through habeas corpus." *Marshall v. Kort*, 690 P.2d 219, 221–22 (Colo. 1984) (en banc), *overruled in part by Jacobs v. Carmel*, 869 P.2d 211 (Colo. 1994) (en banc); *see also Fahie v. Government of the Virgin Islands*, 73 V.I. 443, 449 (2020) ("[T]he statute specifically provides that a writ may be issued '[w]hen the imprisonment was at first lawful, yet by some act, omission, or event which has taken place afterwards, the party has become entitled to a discharge.' Discovering evidence that was not previously available is by definition 'some act, omission, or event,' and if that evidence is sufficiently conclusive as to a prisoner's innocence it may make the prisoner 'entitled to a discharge.' ").

D. History

The majority pairs its lopsided textual analysis with an equally myopic recitation of history. It flags two stops along habeas' historical journey, noting statutes passed in 1836 and 1854. Both enactments withheld habeas relief to prisoners held under final judgments, as did "the common law and the English Habeas Corpus Act of 1679." But to hear the majority tell it, history ended there. It ignores later developments expanding the writ and extending habeas to petitioners held under a valid criminal judgment. Viewed in its entirety, the historical arc of habeas confirms its embrace of claimants like Mr. Daw.

Habeas corpus has a long pedigree, tracing "its origin long prior to Magna Charta." *In re Holley*, 154 N.C. at 168. Pollinated by the common law, North Carolina embraced the "great writ" as the "most important, perhaps, in our system of government." *Id.* As in England, habeas empowered courts to examine whether a person was "wrongfully imprisoned or restrained of his liberty" and release him "if imprisoned against law." *In re Bryan*, 60 N.C. 1, 45 (1863).

But though a key legal protection, habeas was an imprecise remedy in early North Carolina. Our first Declaration of Rights, for instance,

referenced the writ obliquely, preserving the right of "every Freeman restrained of his Liberty[,] . . . to inquire into the Lawfulness thereof, and to remove the same if unlawful." N.C. Const. of 1776, Declaration of Rights, § XIII. Instead, habeas was a creature of statute—and a diminutive creature at that. The 1854 Revised Code, as the majority recounts, gave the writ a narrow berth, instructing that a petitioner "condemned by judgment given against him" shall "be presently remanded, where he shall remain until discharged in due course of law." N.C. Revised Code of 1854, ch. 31, § 111.

But in 1868, two legal developments cemented the writ's "prominent place in our organic law." *In re Holley*, 154 N.C. at 168. For one, North Carolina adopted a new constitution that expressly guaranteed habeas. *See* N.C. Const. of 1868, art. I, § 21. That same year, the General Assembly chiseled that constitutional guarantee into statutes, adopting a package of habeas provisions that included what is now sections 17-4 and 17-33. *See* Proceedings in Habeas Corpus, ch. 116, §§ 19, 20, 1868–'69 N.C. Public Laws 291, 297–98. The majority gestures to the 1868 expansion of habeas, conceding that the legislature "enacted a more comprehensive statutory scheme." But it ignores *how* the General Assembly enlarged the writ's scope.

Unlike the 1854 Code, the 1868 provisions allowed a prisoner to seek habeas relief when an unforeseen "act, omission or event" entitled him to discharge, even when the original confinement was lawful. *See* Proceedings in Habeas Corpus, ch. 116, § 20(2), 1868–'69 N.C. Public Laws 291, 298. So though the pre-Civil War statute aligned with the majority's reading, the legislature overhauled that regime, extending habeas where it was before foreclosed. As this Court recently explained, the changes "ma[de] to a statute's text over time provide evidence of the statute's intended meaning." *See Wynn v. Frederick*, 385 N.C. 576, 582 (2023). And here, those historical changes point in Mr. Daw's favor—by breaking from earlier provisions, the General Assembly consciously rejected the cramped vision of habeas available at common law and adopted by the majority today. In broader view, too, the legislature adopted section 17-4 and section 17-33 at the same time, betokening those provisions' congruence and independent force. Weighing in on that point, the Drafting Committee confirmed that each part of the newly enacted habeas statutes was intended "to fit in and harmonize with the other[s]" as a "consistent whole." N.C. Code Civ. P. of 1968, Second Report of the Code Commissioners.

Also important is the legislature's tacit approval of habeas claims like Mr. Daw's. This Court invoked subsection 17-33(2) in 1954, endorsing

habeas relief "notwithstanding [subsection] 17-4(2)." *In re Harris*, 241 N.C. at 180. The Court of Appeals took up that torch in 1976—in a string of five cases, it has blessed section 17-33 as an exception to subsection 17-4(2). If the General Assembly disagreed with that reading, it has had seventy years to correct our precedent and forty-eight for the Court of Appeals'. It has not. *Cf. In re G.B.*, 377 N.C. 106, 118 (2021) (pointing to "decades" old precedent and emphasizing that "[a]t no point during th[e] interim time period . . . has the Legislature chosen to amend the pertinent statute to alter our holding").

This is not because the General Assembly ignored habeas altogether. In 1967—over a decade after we endorsed a claim under subsection 17-33(2)—the legislature modified the habeas provisions to remove child-custody cases. *See* An Act to Rewrite the Statutes Relating to Custody and Support of Minor Children, ch. 1153, § 1, 1967 N.C. Sess. Laws 1772, 1772. And over a decade after that amendment, the General Assembly replaced other post-conviction filings with motions for appropriate relief, but expressly preserved recourse through habeas. *See* N.C.G.S. § 15A-1411(c) (1978) ("The availability of relief by motion for appropriate relief is not a bar to relief by writ of habeas corpus."). Reading subsection 17-4(2) to engulf section 17-33 would thus rewrite statutes that the General Assembly has left untouched.

III. Section 17-33 allows Mr. Daw to test the constitutionality of his continued incarceration during COVID-19.

As a matter of statutory interpretation, this case should be straightforward. Though subection 17-4(2) forecloses habeas petitions that simply relitigate the merits of a conviction or sentence, section 17-33 carves a different lane for a different type of claim. Despite the former's "general prohibition," the latter provides "specific permission," *see* Scalia & Garner, at 183, allowing a discrete class of petitioner to test the "legal cause" for their "continu[ed]" imprisonment, N.C.G.S. § 17-33. Harmonizing subsection 17-4(2) with section 17-33 honors the legislature's chosen words, respects the context and interrelation of the habeas provisions, coheres with precedent, and tracks habeas' statutory evolution. On a deeper level, too, it aligns with the purpose of the writ and its role in our constitutional scheme.

The "principal object" of habeas is to free "a party from illegal restraint." *State v. Miller*, 97 N.C. 451, 454 (1887). Above all, it is "an adaptable remedy," not a "static, narrow, formalistic" device. *Boumedienne v. Bush*, 553 U.S. 723, 779–80 (2008) (quoting *Jones v. Cunningham*, 371 U. S. 236, 243 (1963)). From its roots in medieval England, the writ

"has grown to achieve its grand purpose" as a tool against "all manner of illegal confinement." *Id.* (quoting 3 William Blackstone, Commentaries *131). Consistent with that historical sweep, habeas serves to "effect discharge from any confinement contrary to the Constitution or fundamental law, even though imposed pursuant to conviction by a court of competent jurisdiction." *Preiser v. Rodriguez*, 411 U.S. 475, 485 (1973). A prisoner placed "under additional and unconstitutional restraints during his lawful custody" may "arguabl[y]" invoke habeas to "remove the restraints making the custody illegal." *Id.* at 499.

In my view, a duly imprisoned defendant may seek habeas relief when the state violates his constitutional rights and exacts restraint in "excess" of the sentence imposed. *In re Holley*, 154 N.C. at 168. As this Court has recognized, "basic constitutional rights adhere inside as well as outside the prison walls." *State v. Primes*, 314 N.C. 202, 208 (1985). Confinement is thus unlawful—and so habeas available—when a person is "imprisoned contrary to the law of the land." *In re Holley*, 154 N.C. at 168; *see also Phillips*, 185 N.C. at 619 (holding that a habeas petitioner's "sentence [wa]s void, being in contravention of [his] constitutional rights"). That is, when a constitutional violation is layered atop an otherwise valid detention, that extra sanction pushes the confinement into impermissible terrain. *See id.* Or, to use the language of section 17-33, an "act, omission or event" has converted the lawful "original imprisonment" into one without "legal cause." *See* N.C.G.S. § 17-33; *cf. Goble v. Bounds*, 281 N.C. 307, 311 (1972) ("[A] prisoner takes with him into the prison certain rights which may not be denied him.").

That is because a "conviction and incarceration deprive [a defendant] only of such liberties as the law has ordained he shall suffer for his transgressions." *Coffin v. Reichard*, 143 F.2d 443, 445 (6th Cir. 1944) (per curiam). The Constitution itself delimits any incursions on inmates' liberty interests, as "persons sentenced to prison are not stripped of all constitutional rights at the prison gate." *Primes*, 314 N.C. at 208; *see also Johnston*, 174 N.E.2d at 726 (cleaned up) (affirming that a defendant "validly convicted and placed under the jurisdiction of the Department of Correction" is not "divested of all rights and unalterably abandoned and forgotten by the remainder of society"). By necessity, then, the "fact that a person is legally in prison does not prevent the use of habeas corpus to protect his other inherent rights." *Coffin*, 143 F.2d at 445. A defendant "in lawful custody" may invoke the writ when the government violates "some right to which he is lawfully entitled even in his confinement," such as the "right to personal security against unlawful invasion." *Id.* By breaching those constitutional protections, the state

makes "imprisonment more burdensome than the law allows or curtails [a defendant's] liberty to a greater extent than the law permits." *Id.* (cleaned up). In other words, the government exacts "*further* restraint *in excess* of that permitted by the judgment or constitutional guarantees." *Johnston*, 174 N.E.2d at 726. Habeas is thus available to fulfill its traditional role: "alleviat[ing] the oppression of unlawful imprisonment," *id.*, and redressing "[a]ny unlawful restraint of personal liberty," *Coffin*, 143 F.2d at 445.

Those principles apply to Mr. Daw's claim, understanding that he may not have been able to prove the alleged facts. He does not dispute his conviction or sentence—by all accounts, his trial was fair and his original punishment just. Instead, he argues that COVID-19 changed the nature of his imprisonment, varying the sentence served from the one authorized by law. His petition highlights the unique danger of COVID-19 for prisoners with respiratory conditions, a danger that threated to turn a term of years into a death sentence. And when Mr. Daw sought release, that risk was real. In June 2020, the prisons were overcrowded and the state's policies inadequate. Because of his medical history and the state's meager response to the pandemic, Mr. Daw urged that his continued imprisonment during COVID-19 was cruel and unusual punishment.

Mr. Daw was sentenced to prison, not COVID-19. Though incarceration carries implicit risks, avoidable exposure to a dangerous virus is not one of them. *See Helling v. McKinney*, 509 U.S. 25, 33 (1993). It is "cruel and unusual punishment to hold convicted criminals in unsafe conditions." *Youngberg v. Romeo*, 457 U. S. 307, 315–16 (1982). For that reason, the state violates the Eighth Amendment by "ignor[ing] a condition of confinement that is sure or very likely to cause serious illness and needless suffering," *Helling*, 509 U.S. at 33. When the state defies that constitutional safeguard, it exacts "*further* restraint *in excess* of that permitted by the judgment or constitutional guarantees." *Johnston*, 9 N.Y.2d at 485. Applied here, if the state deliberately ignored Mr. Daw's exposure to a "serious, communicable disease," then it inflicted "needless suffering" in violation of his rights and beyond his lawful sentence. *Helling*, 509 U.S. at 31–33. On habeas, then, section 17-33 allowed Mr. Daw to test the constitutionality of his continued confinement under the state's COVID-19 policies. Rather than attacking an error in his original conviction or sentence, he sought relief because a later event—his alleged "compelled exposure" to a uniquely dangerous virus—was an "unnecessary and wanton infliction of pain" beyond his lawful punishment. *See Estelle v. Gamble*, 429 U.S. 97, 104–05 (1976) (explaining that the state's "deliberate indifference to serious medical needs of prisoners

constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment" (cleaned up)).

IV. Conclusion

I would dismiss this case as moot rather than weaponizing a long-dead controversy to bar habeas courts from redressing unconstitutional imprisonment. On the merits, I would apply the statutes the legislature enacted, adhere to our precedent, and allow Mr. Daw to file and litigate his habeas petition under section 17-33. The majority effectively erases that provision, replacing the legislature's words with the pre-Civil War version of the law. All the normal tools of statutory interpretation—language, context, precedent, and history—rebuff the majority's stilted reading. Today's holding is the latest effort to turn the Great Writ into a paper tiger. It extinguishes an important safeguard of fundamental freedoms. With respect, I dissent.

Justice RIGGS dissenting.

I agree with Justice Earls' analysis of the mootness exception issue and write separately to emphasize how ill-advised it is for this Court to take cases where our decision has no practical effect and the matter needs no prompt resolution. Indeed, the majority gives such short shrift to its mootness exception analysis that it becomes clear that the majority was determined to issue a decision significantly altering habeas law in this state, regardless of the propriety of the case utilized to do so. This kind of ends-driven jurisprudence is antithetical to the principle of judicial restraint. Making dramatic change to our law via a case in which the issue is no longer justiciable only confirms that this Court believes it is in a law-making role and elevates judicial activism over judicial restraint.

While defendant Philip Brandon Daw raised important questions about the State's responsibility to ensure the physical safety of those confined during a global pandemic, Mr. Daw's situation no longer required this Court to act. Mr. Daw, who suffers from asthma, was incarcerated at Harnett Correctional Institution (HCI) during the summer of 2020—the height of the Coronavirus Pandemic. Due to his chronic lung disease and the documented heightened susceptibility of incarcerated people to the coronavirus, Mr. Daw sought habeas relief. In particular, Mr. Daw's petition argued that the conditions at HCI were "cruel and unusual" and thus, violated the Eighth Amendment to the United States Constitution. The trial court rejected his argument. Mr. Daw then sought

review from the Court of Appeals. While that appeal was pending, the North Carolina Department of Public Safety, acting under N.C.G.S. § 148-4, expanded the qualifications for participation in its Extended Limits of Confinement Program. Among the criteria were having "a 2020 or 2021 release date and underlying health conditions deemed by CDC that increase a person's risk of severe illness from COVID-19." Because Mr. Daw met those criteria, he was subsequently released.

With Mr. Daw no longer incarcerated at HCI, his writ of habeas corpus now seeks no actual relief. Thus, because this case was moot and did not fall under the public interest exception, I dissent.[1]

MOOTNESS & THE PUBLIC INTEREST EXCEPTION

The general rule is simple: Our courts "do not decide moot cases." *Chavez v. McFadden*, 374 N.C. 458, 467 (2020); *see also State ex rel. Martin v. Sloan*, 69 N.C. 128, 128 (1873) (opining that when "neither party has any interest in the case except as to cost[,]" this Court "[is] not in the habit of deciding the case"). Mootness is a creature of "judicial restraint" rather than "a lack of jurisdiction," *Chavez*, 374 N.C. at 467 (quoting *Cape Fear River Watch v. N.C. Env't Mgmt. Comm'n*, 368 N.C. 92, 100 (2015)), and counsels us to avoid "second guess[ing] the actions of the legislative and executive branches," thereby respecting the separation of powers, *Cmty. Success Initiative v. Moore*, 384 N.C. 194, 206–07 (2023). Our "courts will not entertain or proceed with a cause merely to determine abstract propositions of law." *In re Peoples*, 296 N.C. 109, 147 (1978). Moreover, by only sticking to "live controversies, we 'ensur[e] concrete adverseness that sharpens the presentation of issues.' " *Walker v. Wake Cnty. Sheriff's Dep't*, 385 N.C. 300, 304 (2023) (order) (Earls, J., concurring in part and dissenting in part) (alteration in original) (quoting *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 595 (2021)).

But, as with most rules in law and life, there are exceptions. In few words, the majority here says the public interest exception applies. This Court first acknowledged the public interest exception in *North Carolina State Bar v. Randolph*, 325 N.C. 699 (1989) (per curiam), which arose out of an alleged Rules of Professional Conduct violation by a probate attorney who paid himself attorney's fees using the estate's funds. *Id.* at 700. The trial court ordered that the State Bar be added as a party to a lawsuit brought by the estate's administratrix and then ordered the State

1. I agree with Justice Earls that no other exception applies but do not address those exceptions in detail because no other exceptions have been addressed in this case.

Bar to dismiss the grievance filed with it against the probate attorney. *Id.* at 701. The State Bar disputed the trial court's authority to take these actions. *Id.* But because both the trial court and the State Bar exonerated the attorney of any wrongdoing, *id.* at 700, on appeal the defendant probate attorney argued that the case was moot, *id.* at 701. This Court only briefly addressed the mootness question, declaring that it had plenary discretion to "consider a question that involves a matter of public interest, is of general importance, and deserves prompt resolution." *Id.* This Court applied the exception and reversed the trial court because the Court "conclude[d] that a jurisdictional dispute between the superior court and the North Carolina State Bar presents such a question." *Id.*

Since *Randolph*, this Court has considered the public interest exception at least three times, often with little explication of its use of the criteria. *See Granville Cnty. Bd. of Comm'rs v. N.C. Hazardous Waste Comm'n*, 329 N.C. 615 (1991); *Cape Fear*, 368 N.C. 92; *Chavez*, 374 N.C. 458. First, in *Granville*, the County sought to enjoin the North Carolina Hazardous Waste Management Commission from proceeding with designating a site for a newly planned hazardous waste treatment facility. *Granville*, 329 N.C. at 616–17. During this litigation, the Commission halted consideration of the site in controversy, and the State was ultimately "expelled" from further participation in the regional multistate agreement, requiring North Carolina to construct and operate a hazardous waste treatment facility. *Id.* at 621–22. Given these developments, the Court concluded that the case was moot. *Id.* at 622. Nevertheless, the Court reached the merits of the dispute "[b]ecause the process of siting hazard waste facilities involves the public interest and deserves prompt resolution in view of its general importance." *Id.* at 622–23.

Then, in *Cape Fear River Watch*, this Court was tasked with determining whether a trial court erred in partially reversing an Environmental Management Commission declaratory ruling. That ruling addressed the application of groundwater protection rules to coal ash lagoons that received operating permits before a certain date. 368 N.C. at 93. Shortly after the trial court's order, the General Assembly enacted N.C.G.S. § 143-215.1(k), which subjected all coal ash lagoons to the Commission's rule, irrespective of the date the lagoon was first permitted. *Id.* at 98. The Court determined that this new legislation rendered the case moot. *Id.* at 98–100. The Court further refused to invoke the public interest exception because, although "the appropriate response to the environmental issues associated with the operation of coal ash lagoons is clearly a matter of significant public interest," there was no "indication that any

decision [the Court] might make . . . would have any practical impact." *Id.* at 100; *see also id.* at 451 ("[W]e believe that we should refrain from issuing what amounts to an advisory opinion . . . .").

Most recently in *Chavez*, this Court addressed whether state judges had the authority to grant habeas relief for individuals held in custody pursuant to an agreement under section 287(g) of the Immigration and Nationality Act. 374 N.C. at 460–61. Two habeas petitioners challenged their custody in the Mecklenburg County Jail and the trial court ordered that they be immediately brought for a habeas hearing, but the Sheriff refused to produce either petitioner to the trial court. *Id.* at 462. That court then ruled in favor of the petitioners and ordered that they be discharged from custody, but the Sheriff instead delivered them to federal custody. *Id.* at 462–63. Because both petitioners were no longer detained at Mecklenburg County Jail, the parties conceded that the case was moot. *Id.* at 468. Still, this Court invoked the public interest exception and decided the case because (1) "lawful and unlawful immigration have become the subject of much debate in North Carolina in recent years" and (2) "several law enforcement agencies across our State continue to operate pursuant to [section] 287(g) agreements." *Id.* The *Chavez* Court's decision to hear the case boiled down to "the likelihood that [similar] issues . . . [would] continue to arise in the future." *Id.*

In light of this precedent on the public interest exception, I think it is clear that the majority's logic is flawed. The majority begins its brief analysis with factors this Court has never considered in deciding whether the public interest exception applies. The majority expresses concern with the scope of the opinion below, describing it as "expansive" and "not limited to the COVID context" because, despite affirming the trial court's denial of the petition, the Court of Appeals did not hold as this Court does today that Mr. Daw was not entitled to bring the petition. Even assuming this concern somehow speaks to a likelihood that the question will reoccur, which is a stretch, the majority misses the mark because under the public interest exception, this Court focuses on whether similar issues will arise based on similar facts. *See Chavez*, 374 N.C. at 468 (considering whether there is a "likelihood that issues similar to those that have been debated *by the parties to this case* will continue to arise in the future" (emphasis added)). Moreover, the majority's characterization of the scope of the decision is questionable: Just because the Court of Appeals interpreted a law of general applicability does not mean that court issued an expansive opinion unrestricted to Mr. Daw's specific set of facts. *See State v. Daw*, 277 N.C. App. 240, 261 (2021) (denying any relief to Mr. Daw under the habeas statute based on

the petition's evidentiary failures, thus not expanding the applicability of the habeas statute). And regardless, such a consideration is again not relevant to our analysis under our mootness exception precedent.

The majority also reasoned that the public interest exception is necessarily invoked because the opinion below now binds the Court of Appeals and trial courts and the decision below relies on prior Court of Appeals cases. But the majority is off target again. Analysis of the mootness factors and exceptions under this Court's precedent actually supports an opposite result when, as here, the issue presented is mooted by an intervening, unilateral act by one party. *State ex rel. Utils. Comm'n v. S. Bell Tel. & Tel. Co.*, 289 N.C. 286, 288 (1976). In other words, because of Mr. Daw's release from HCI—an intervening event by the State—"a dispute between the parties to this appeal no longer exists." *Id.* Even using the majority's own logic about precedential effect and reliance on prior decisions, the majority should have, at most, limited itself to dismissing this appeal and vacating the judgment below.

Finally, the majority ends its brief analysis of the public interest exception on an ironic note: by noting habeas corpus's "essential function of providing relief for those unlawfully restrained of their liberty" as a justification for why the majority should consider a moot case with no immediate or practical implications. To be clear, this decision eviscerates that function for state post-conviction relief. And in order to achieve this result, the majority had to misapply the public interest exception test to even decide this case.

Specifically, while public health and habeas law generally are matters of public interest, Mr. Daw's specific case no longer had any public interest tied to it. Mr. Daw's habeas petition related to *his* chronic medical condition while he was at HCI during the height of the Coronavirus Pandemic, which has since been significantly mitigated. This situation is markedly different than that in *Chavez*, in which this Court noted that "lawful and unlawful immigration have become the subject of much debate in North Carolina in recent years" and thus ruled that the case concerned the public interest. *Chavez*, 374 N.C. at 468. Today, with the availability of vaccines and better understanding of how the disease is spread, the perception of the physical consequences of confinement of people with certain underlying health conditions and their heightened susceptibility to the coronavirus is different and less concerning when compared with the situation in the summer of 2020.

This case also does not require prompt resolution, which further weighs against invoking the public interest exception. Mr. Daw is no

longer in the State's custody at HCI and thus, is no longer eligible for habeas relief. Mr. Daw's exact situation is unlikely to occur again given that the Coronavirus Pandemic has abated as a result of the development of vaccines and a better understanding of how to prevent transmission. Or, at least, fears of future public health crises and the effect of pre-existing conditions on susceptibility to future viruses are too nonspecific and unsupported to justify invocation of the exception on this record. This case also stands in stark contrast to *Chavez*, in which the Court was particularly concerned with the great likelihood that a similar case would arise in the future because "several law enforcement agencies across our State continue to operate pursuant to § 287(g) agreements." *Id.* at 468.

There is also no need for prompt resolution of this case for the exact reason the majority points out—our General Assembly structured habeas relief by enacting N.C.G.S. §§ 17-4(2) and 17-33(2) over a century ago and has not significantly altered that relief, insofar as it relates to the case here today, since then. *See Cape Fear*, 368 N.C. at 100 (refusing to invoke the public interest exception because the General Assembly already enacted legislation addressing the parties' issue). The majority highlights that the opinion below relied on prior decisions interpreting sections 17-4(2) and 17-33(2), *see*, *e.g.*, *State v. Leach*, 227 N.C. App. 399 (2013); *Hoffman v. Edwards*, 48 N.C. App. 559 (1980); *In re Stevens*, 28 N.C. App. 471 (1976), but in the nearly fifty years that those cases have been on the books, the General Assembly has not acted contrary to those decisions, *see Connette ex rel. Gullatte v. Charlotte-Mecklenburg Hosp. Auth.*, 382 N.C. 57, 80 (2022) (Barringer, J., dissenting) ("Of course, the legislature, which is not bound by stare decisis, could have at any time in the last ninety years enacted a different rule . . . ."). As amici note, our General Assembly's "inactivity in the face of the [judiciary's] repeated pronouncements [on this issue] can only be interpreted as acquiescence by, and implicit approval from, that body." *In re T.R.P.*, 360 N.C. 588, 594 (2006) (second alteration in original) (quoting *Rowan Cnty. Bd. of Educ. v. U.S. Gypsum Co.*, 332 N.C. 1, 9 (1992)); *see also State v. Steen*, 376 N.C. 469, 483 (2020) (affirming the decision of the Court of Appeals because, in part, "the General Assembly ha[d] not taken any action tending to suggest" disagreement with prior appellate decisions interpreting the Statute at issue). If our legislature sees no need to disrupt a liberal construction of a habeas statute—statutes freeing "those unlawfully restrained of their liberty"—I see no need for us to claw back that reading.

Although habeas undoubtedly is of "general importance," it does not follow that a mooted habeas issue automatically qualifies for review

under the public interest exception. *See Chavez*, 374 N.C. at 468–69 (only invoking the public interest exception at the intersection of contentious disagreement over the application of federal immigration law in the habeas context rather than on the importance of habeas alone); *In re Popp*, 298 N.E.2d 529, 531 (Ohio 1973) (refusing to invoke the public interest exception in a habeas case in that "there [was] no confinement" and "[t]here [were] remedies to attack the collateral issues raised by petitioner, other than this high prerogative writ"), *syllabus abrogated by In re Klepper*, 361 N.E.2d 427 (Ohio 1977) (per curiam). As other jurisdictions have acknowledged, if matters of legal importance were per se exceptions to mootness, the exception would swallow the rule. *See, e.g.*, *Commonwealth Edison Co. v. Ill. Com. Comm'n*, 51 N.E.3d 788, 791 (Ill. 2016) ("The public interest exception is narrowly construed and requires a clear showing of each of its criteria. . . . Indeed, the public interest exception is invoked only on 'rare occasions' when there is an extraordinary degree of public interest and concern." (internal citations omitted)).

Thus, I believe the majority improperly invoked the public interest exception to mootness to reach the merits of this case. I agree with Justice Earls that it is inappropriate to rewrite habeas law the way the majority has here. Without making any representations regarding the likelihood of success of Mr. Daw's petition, were the case not moot, I would agree that he is entitled to petition for habeas relief and be heard on the merits of his claims.

STATE v. PHILLIPS

[386 N.C. 513 (2024)]

STATE OF NORTH CAROLINA
v.
ANGELA BENITA PHILLIPS

No. 281A23

Filed 23 August 2024

Assault—with a deadly weapon inflicting serious injury—jury instructions—castle doctrine—proportionality of force used—improper

In a prosecution for assault with a deadly weapon inflicting serious injury arising from defendant having shot the victim after the victim entered defendant's front porch, the trial court erred by instructing the jury that defendant did "not have the right to use excessive force" when defending her home, even under the castle doctrine. Based on the statutory formulation of the castle doctrine, which provides that a lawful occupant of a home who uses deadly force against an intruder is presumed to have had a reasonable fear of imminent death or serious bodily harm, the jury could not consider the proportionality of defendant's force unless it found that: (1) defendant was not entitled to the presumption of reasonable fear, or (2) defendant qualified for the presumption to apply, but the State adequately rebutted the presumption. Instead of granting defendant a new trial, the matter was remanded to the Court of Appeals with instructions to analyze whether the trial court's error was prejudicial.

Justice EARLS concurring in part and dissenting in part.

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

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 290 N.C. App. 660 (2023), vacating judgment entered 11 May 2022 by Judge James F. Ammons, Jr. in Superior Court, Cumberland County and remanding for a new trial. Heard in the Supreme Court on 11 April 2024.

Joshua H. Stein, Attorney General, by Hyrum J. Hemingway, Assistant Attorney General, for the State.

Mary McCullers Reece, for defendant.

BERGER, Justice.

An individual has a fundamental right to defend his or her home from unlawful intrusion. This principle of personal liberty is grounded in natural law and English common law. *See* Semayne's Case (1604) 77 Eng. Rep. 194, 5 Co. Rep. 91 a. (stating "[t]hat the house of every one is to him as his . . . castle and fortress, as well for his defence against injury and violence"). Commonly known as the castle doctrine, the legislature codified and expanded the fundamental right of defense of habitation in Chapter 14 of the North Carolina General Statutes. Thus, the common law may aid our understanding, but statutes set the boundaries of the law in this area. *See News & Observer Publ'g Co. v. State ex rel. Starling*, 312 N.C. 276, 281 (1984) ("When the General Assembly as the policy making agency of our government legislates with respect to the subject matter of any common law rule, the statute supplants the common law and becomes the law of the State.").

This case presents us with the opportunity to clarify the castle doctrine as established by the legislature. For the reasons set forth herein, we modify and affirm the decision of the Court of Appeals.

I. Factual and Procedural Background

On 4 April 2021, Latonya Dunlap approached defendant's home because she believed defendant had complained about her to their landlord. Witness testimony differed as to whether Ms. Dunlap was angry or intoxicated when she entered defendant's front porch and knocked on the door. Witness accounts also differed as to what exactly occurred next, but all generally agreed that a brief confrontation followed, during which defendant either slapped Ms. Dunlap or struck her in the head with a gun.

Accounts of Ms. Dunlap's actions at this point are conflicting, but witnesses agreed that defendant subsequently fired multiple shots at Ms. Dunlap. One of these shots struck Ms. Dunlap's left side under her chest, causing injuries that required removal of her spleen and pancreas and left her permanently disabled.

Defendant was arrested and later indicted for assault with a deadly weapon with intent to kill inflicting serious injury. At trial, defendant asserted the affirmative defenses of self-defense and defense of habitation, also known as the castle doctrine, and requested the relevant pattern jury instructions. The trial court expressed its concern over the

castle doctrine instruction during the charge conference because, in its view, "self-defense is—whatever the form the legislature puts it—self-defense is to preserve life. It's not to give somebody a license to take somebody's life simply because they've come on their property."

The trial court therefore proposed altering the castle doctrine instruction by including an instruction that defendant did "not have the right to use excessive force." When defendant's counsel objected and pointed out that such prohibition "is used in the common law definition . . . , not the statutory law," the trial court asked, "[I]t's your argument that I can use deadly force at my door on anybody including a little Girl Scout selling cookies . . . ?" The trial court then stated, "Well, this is a troubling statute. . . . I still think this is a correct statement of the law and I do have reservations about it, but I have reservations about the whole thing."

As is relevant here, the trial court initially instructed the jury on the castle doctrine as follows:

> If the defendant assaulted the victim to prevent a forcible entry into the defendant's home or to terminate the intruder's unlawful entry the defendant's actions are excused and the defendant is not guilty. The State has the burden of proving to you from the evidence beyond a reasonable doubt that the defendant did not act in lawful defense of the defendant's home. The defendant was justified in using deadly force if such force was being used to prevent a forcible entry into the defendant's home, the defendant reasonably believed the intruder would kill or inflict serious bodily harm to the defendant or others in the home, or intended to commit a felony in the home and the defendant reasonably believed that the degree of force the defendant used was necessary to prevent a forcible entry or to terminate the unlawful entry into the defendant's home.
>
> A defendant does not have the right to use excessive force. The defendant had the right to use only such force as reasonably appeared necessary to the defendant under the circumstances to protect the defendant from death or great bodily harm. In making this determination you should consider the circumstances as you find them to exist from the evidence including the size, age, and strength of

> the defendant as compared to the victim; the fierceness of any assault upon the defendant; and whether the victim possessed a weapon.

Immediately following this portion of the instructions, a juror asked the trial court: "Sir, can you repeat the last." The trial court acknowledged that "[i]t is confusing . . . let me just start over" and began the recitation of instructions again. As is relevant here, the trial court then instructed the jury that:

> [A]bsent evidence to the contrary, the lawful occupant of a home is presumed to have held a reasonable fear of imminent death or serious bodily harm to herself or another when using defensive force that is intended or likely to cause death or serious bodily harm to another if both of the following apply. The person against whom the defensive force was used was in the process of unlawfully and forcefully entering or had unlawfully and forcefully entered a home or if that person had removed or was attempting to remove another person against their will from the home, and two, that the person who uses the defensive force knew or had reasonable grounds to believe that an unlawful and forcible entry or unlawful or forcible act was occurring or had occurred.
>
> However, the defendant does not have the right to use excessive force. The defendant had the right to use only such force as reasonably appeared necessary to the defendant under the circumstances to protect the defendant from death or great bodily harm. In making this determination you should consider the circumstances you find to have existed from the evidence including the size, age, and strength of the defendant as compared to the victim; the fierceness of the assault, if any, upon the defendant; and whether the victim possessed a weapon. Again, you, the jury, determine the reasonableness of the defendant's belief from the circumstances appearing to the defendant at the time.

The jury determined that defendant did not act with the intent to kill Ms. Dunlap, and she was found guilty of assault with a deadly weapon inflicting serious injury. The trial court sentenced defendant to twenty-five to forty-two months incarceration, and defendant timely appealed.

At the Court of Appeals, defendant argued that the trial court "erroneously instructed the jury" on the castle doctrine defense "by including an instruction on the prohibition of excessive force." *State v. Phillips*, 290 N.C. App. 660, 660 (2023). A majority of the Court of Appeals' panel agreed with defendant and determined that "[u]nder the Castle Doctrine, excessive force is impossible unless the State rebuts the Castle Doctrine presumption" that the defendant held a reasonable fear of death or serious injury. *Id.* at 664. The majority reasoned that because the trial court's instruction on excessive force essentially eliminated the jury's ability to resolve the factual issue of whether such presumption was rebutted, the instruction was erroneous. *Id.* at 665. "Because the trial court's instruction was both erroneous and confusing," the majority concluded that defendant was prejudiced by this error, vacated the trial court's judgment, and remanded the matter for a new trial. *Id.* at 665–66.

One judge dissented, arguing that the trial court did not err because the statutory castle doctrine defense "track[s] consistently with . . . common law defenses," including the common law prohibition against excessive force. *Id.* at 668 (Hampson, J., dissenting). The State appealed based on the dissent and argues that the castle doctrine statute preserves the common law's prohibition on excessive force. As this issue involves questions of statutory interpretation, we review de novo. *See State v. Lamp*, 383 N.C. 562, 569 (2022).

II. Analysis

A. The Castle Doctrine's Evolution in North Carolina

"A man's house, however humble, is his castle, and his castle he is entitled to protect against invasion." *State v. Gray*, 162 N.C. 608, 613 (1913) (cleaned up). Thus, it is well-settled that "[a]n attack on the house or its inmates may be resisted by taking life." *Id.* (cleaned up). This fundamental principle of defense of habitation is known as the castle doctrine. Though the law has consistently protected one's right to defend his or her home with deadly force, the circumstances under which this use of force has been permitted by the courts have vacillated and evolved over the last century and a half.

In 1883, this Court considered a case in which the defendant's home was surrounded by an armed "band of young men" who "marched round his house, blowing horns, ringing bells and firing guns and pistols." *State v. Nash*, 88 N.C. 618, 620 (1883). The defendant "submitted to the humiliating indignity and remained within doors, until his little daughter . . . ran to him with her face bleeding." *Id.* Believing that his daughter had been shot, the defendant "seized his gun and went to the

door, saw the flash of fire-arms, and shot into the crowd," wounding one of the men. *Id.*

The trial court denied the defendant's request to testify as to the above information, and he was convicted of assault with a deadly weapon. *Id.* at 622. This Court awarded a new trial, reasoning that even though the defendant's daughter had in fact been injured by running into a table—not by a gunshot—the defendant "ought to have been acquitted" if he "ha[d] reasonable ground to believe that his daughter had been shot, and the assault upon him and his house was continuing." *Id.* at 620.

Thirty years later, this Court decided *Gray*, a case in which the defendant killed a man who, along with three other men, was attempting to break into the defendant's home. 162 N.C. at 612. The trial court instructed the jury that the killing would be justified if the victim was attempting to unlawfully enter the home and if the defendant reasonably believed deadly force was necessary to protect himself or his family, but that such justification would only be available if the jury found that one of the men outside was armed with a pistol. *Id.* at 611. The defendant was convicted of manslaughter and sentenced to three years imprisonment. *Id.* at 612.

This Court awarded the defendant a new trial, holding that the "guilt or innocence of the defendant does not depend upon the presence of a pistol in the hands of the deceased," but rather on the "existence of a reasonable apprehension that [the defendant] or some member of his family was about to suffer great bodily harm" or a "reasonable belief that it was necessary to kill in order to prevent the violent and forceful entry of an intruder into his home." *Id.*

By 1966, this Court recited the evolving common law formulation of the castle doctrine as:

> When a trespasser enters upon a man's premises, makes an assault upon his dwelling, and attempts to force an entrance into his house in a manner such as would lead a reasonably prudent man to believe that the intruder intends to commit a felony or to inflict some serious personal injury upon the inmates, a lawful occupant of the dwelling may legally prevent the entry, even by the taking of the life of the intruder. Under those circumstances, the law does not require such householder to flee or remain in his house until his assailant is upon him, but he may open his door and shoot his assailant, if such course is apparently

> necessary for the protection of himself or family. But the jury must be the judge of the reasonableness of defendant's apprehension. A householder will not, however, be excused if he employs excessive force in repelling the attack, whether it be upon his person or upon his habitation.

State v. Miller, 267 N.C. 409, 411 (1966) (cleaned up).

In 1979, this Court noted that "the distinction between the rules governing defense of habitation and self-defense in the home is a fine one indeed." *State v. McCombs*, 297 N.C. 151, 158 (1979). In an attempt to prevent further blurring of that fine line, this Court concluded that under the common law formulation "the use of deadly force in defense of the habitation is justified only to *prevent* a forcible entry into the habitation," and that "[o]nce the assailant has gained entry . . . the usual rules of self-defense replace the rules governing defense of habitation, with the exception that there is no duty to retreat." *Id.* at 156–57 (emphasis added).

In 1994, the General Assembly, the policy-making branch of our government, spoke on this issue when it enacted N.C.G.S. § 14-51.1. *See* An Act to Permit the Use of Deadly Force Against an Intruder Under Certain Circumstances and to Provide that a Lawful Occupant Does Not Have a Duty to Retreat from an Intruder, as Provided at Common Law, ch. 673, § 1, 1994 N.C. Sess. Laws 360. This statute provided that:

> (a) A lawful occupant within a home or other place of residence is justified in using any degree of force that the occupant reasonably believes is necessary, including deadly force, against an intruder to prevent a forcible entry into the home or residence or to terminate the intruder's unlawful entry (i) if the occupant reasonably apprehends that the intruder may kill or inflict serious bodily harm to the occupant or others in the home or residence, or (ii) if the occupant reasonably believes that the intruder intends to commit a felony in the home or residence.
>
> (b) A lawful occupant within a home or other place of residence does not have a duty to retreat from an intruder in the circumstances described in this section.

> (c) This section is not intended to repeal, expand, or limit any other defense that may exist under the common law.

N.C.G.S. § 14-51.1 (1999) (repealed 2011). In contrast to the common law formulation that permitted the use of deadly force only to "[p]revent a forcible entry into the habitation," *McCombs*, 297 N.C. at 156, the plain language of section 14-51.1 allowed the use of deadly force to "terminate the intruder's unlawful entry." N.C.G.S. § 14-51.1(a) (repealed 2011). Thus, "[i]n enacting N.C.G.S. § 14-51.1, the General Assembly broadened the defense of habitation to make the use of deadly force justifiable whether to *prevent* unlawful entry into the home or to *terminate* an unlawful entry by an intruder." *State v. Blue*, 356 N.C. 79, 89 (2002).

Despite this broadening of the common law formulation, however, section 14-51.1 retained the common law's prohibition against excessive force. *See* N.C.G.S. § 14-51.1(a) (repealed 2011) ("A lawful occupant . . . is justified in using any degree of force that the occupant *reasonably believes* is necessary . . . ." (emphasis added)); *see also Miller*, 267 N.C. at 411 ("A householder will not, however, be excused if he employs excessive force in repelling the attack . . . ."); *Gray*, 162 N.C. at 612 ("The guilt or innocence of the defendant . . . depend[s] upon . . . the reasonable belief that it was necessary to kill."); *Nash*, 88 N.C. at 622 ("The defendant must judge, at the time, of the ground of his apprehension, and he must judge at his peril; for it is the province of the jury on the trial to determine the reasonable ground of his belief.").

In 2011, the General Assembly repealed section 14-51.1 and replaced it with a more detailed statutory scheme that expanded and clarified use of force protections. *See* An Act to Provide When a Person May Use Defensive Force and to Amend Various Laws Regarding the Right to Own, Possess, or Carry a Firearm in North Carolina, S.L. 2011-268, § 2, 2011 N.C. Sess. Laws 1002, 1004. This statutory scheme provides, in relevant part, that:

> [A] person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be if *either* of the following applies:
>
> (1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another.

> (2) Under the circumstances permitted pursuant to G.S. 14-51.2 [the castle doctrine statute].

N.C.G.S. § 14-51.3(a) (2023) (emphasis added). Thus, the State argues that "the common law prohibition on excessive force survives enactment of North Carolina's uniform statutory defensive-force law" and the trial court properly instructed that defendant, "in relying on the statutory Castle Doctrine, was prohibited from using excessive force."

However, as section 14-51.3(a) provides that a person is "justified in the use of deadly force" if they possess a reasonable belief "that such force is necessary" *or* if the force is used "[u]nder the circumstances permitted" by the castle doctrine statute, the statute's plain language allows for two separate grounds justifying the use of deadly force. The former requires the person to demonstrate a reasonable belief that the degree of force used was necessary to prevent imminent death or great bodily harm, or, in other words, that the degree of force used was proportional and not excessive. *See id.* § 14-51.3(a)(1). The latter does not. *See id.* § 14-51.3(a)(2). Instead, it requires *only* that the person demonstrate their use of deadly force occurred "[u]nder the circumstances permitted" by the castle doctrine statute. *Id.* To resolve this case, we must therefore examine what is permitted under the castle doctrine.

B. Operation of Section 14-51.2

The castle doctrine statute, entitled "Home, workplace, and motor vehicle protection; presumption of fear of death or serious bodily harm," is a clear and concise statutory enactment that has yet to be fully interpreted by this Court. *Id.* § 14-51.2. Because this case squarely raises questions of the statute's meaning, we take this opportunity to clarify the scope of the castle doctrine in North Carolina.[1]

As is relevant here, the statute provides:

> (a) The following definitions apply in this section:
>
> (1) Home. — A building or conveyance of any kind, to include its curtilage, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a

1. Although our analysis here focuses on lawful occupants of a home defending against an unlawful and forcible entry, the statute applies equally to lawful occupants of motor vehicles and workplaces. *See* N.C.G.S. § 14-51.2(b). Our analysis and focus on facts particularly relevant to this case should not be construed to dilute applicability in these areas or other statutorily prescribed circumstances.

roof over it, including a tent, and is designed as a temporary or permanent residence.

. . . .

(b) The lawful occupant of a home, motor vehicle, or workplace is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or serious bodily harm to another if both of the following apply:

(1) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a home, motor vehicle, or workplace, or if that person had removed or was attempting to remove another against that person's will from the home, motor vehicle, or workplace.

(2) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

(c) The presumption set forth in subsection (b) of this section shall be rebuttable and does not apply in any of the following circumstances:

(1) The person against whom the defensive force is used has the right to be in or is a lawful resident of the home, motor vehicle, or workplace, such as an owner or lessee, and there is not an injunction for protection from domestic violence or a written pretrial supervision order of no contact against that person.

(2) The person sought to be removed from the home, motor vehicle, or workplace is a child or grandchild or is otherwise in the lawful custody or under the lawful guardianship of the person against whom the defensive force is used.

(3) The person who uses defensive force is engaged in, attempting to escape from, or using the home, motor vehicle, or workplace to further any criminal offense that involves the use or threat of physical force or violence against any individual.

(4) The person against whom the defensive force is used is a law enforcement officer or bail bondsman who enters or attempts to enter a home, motor vehicle, or workplace in the lawful performance of his or her official duties, and the officer or bail bondsman identified himself or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person entering or attempting to enter was a law enforcement officer or bail bondsman in the lawful performance of his or her official duties.

(5) The person against whom the defensive force is used (i) has discontinued all efforts to unlawfully and forcefully enter the home, motor vehicle, or workplace and (ii) has exited the home, motor vehicle, or workplace.

(d) A person who unlawfully and by force enters or attempts to enter a person's home, motor vehicle, or workplace is presumed to be doing so with the intent to commit an unlawful act involving force or violence.

(e) A person who uses force as permitted by this section is justified in using such force and is immune from civil or criminal liability for the use of such force, unless the person against whom force was used is a law enforcement officer or bail bondsman who was lawfully acting in the performance of his or her official duties and the officer or bail bondsman identified himself or herself in accordance with any applicable law or the person using force knew or reasonably

> should have known that the person was a law enforcement officer or bail bondsman in the lawful performance of his or her official duties.
>
> (f) A lawful occupant within his or her home, motor vehicle, or workplace does not have a duty to retreat from an intruder in the circumstances described in this section.
>
> (g) This section is not intended to repeal or limit any other defense that may exist under the common law.

N.C.G.S. § 14-51.2.

The statute operates as follows. First, any person who "unlawfully and by force enters or attempts to enter" a home is "presumed to be doing so with the intent to commit an unlawful act involving force or violence," and this presumption is non-rebuttable. *Id.* § 14-51.2(d). Second, a lawful occupant of a home who knows or has reason to believe such unlawful entry or attempted entry occurred or is occurring, and who uses force against the intruder that is intended or likely to cause death or serious bodily injury, is "presumed to have held a reasonable fear of imminent death or serious bodily harm" and has no duty to retreat from the intruder. *Id.* § 14-51.2(b), (f). Finally, if a lawful occupant of a home uses deadly force as permitted by this statute, he or she is "immune from civil or criminal liability for the use of such force," subject only to a narrow exception not relevant here. *Id.* § 14-51.2(e).

However, the statutory presumption of a lawful occupant's reasonable fear of death or serious bodily harm is "rebuttable and does not apply in *any* of the . . . circumstances" listed in subsection (c). *Id.* § 14-51.2(c) (emphasis added). The plain language of subsection (c), and the legislature's clear intent to significantly broaden castle doctrine protections by repealing section 14-51.1 and enacting section 14-51.2, compels the conclusion that the presumption of reasonable fear may be rebutted only by the circumstances set forth in subsection (c).

Practically, if the presumption could be rebutted by other circumstances, such as the victim's relative size or strength, it would serve no purpose. There is no meaningful difference between a jury considering whether a victim's inferior strength rebutted the presumption of the defendant's reasonable fear under the castle doctrine statute and a jury considering whether a victim's inferior strength undercut the defendant's attempt to demonstrate his or her reasonable fear under

the general self-defense statute. Accordingly, we hold that the castle doctrine's statutory presumption of reasonable fear may only be rebutted by the circumstances contained in section 14-51.2(c).

The expansive protections afforded to lawful occupants of a home does not mean that the castle doctrine is "a license to kill" or that the statute allows for "open season on Girl Scouts and trick-or-treaters." *State v. Copley*, 900 S.E.2d 904, 913 (N.C. 2024). The castle doctrine's primary legal protection—the presumption of reasonable fear—will only apply when the defendant satisfies the specific statutory requirements as detailed above. *See* N.C.G.S. § 14-51.2(b). However, if those requirements are met and the circumstances in section 14-51.2(c) are not present, the presumption applies, and the individual is "immune from civil or criminal liability."[2] *Id.* § 14-51.2(e).

C. Excessive Force and the Presumption of Reasonable Fear

It is fundamental that a jury must be properly instructed on the law. *See State v. Walston*, 367 N.C. 721, 730 (2014) ("The jury charge is one of the most critical parts of a criminal trial."); *State v. Lee*, 370 N.C. 671, 674 (2018) ("Where competent evidence of self-defense is presented at trial, the defendant is entitled to an instruction on this defense, as it is a substantial and essential feature of the case." (cleaned up)). Thus, absent a pretrial determination of immunity, when a defendant asserts the castle doctrine defense at trial, the jury must first determine whether the defendant is entitled to the presumption as set forth in section 14-51.2(b). If the jury finds that the defendant is not entitled to the presumption, the castle doctrine statute does not apply and the jury must determine the defendant's culpability under section 14-51.3, the general self-defense statute.

Alternatively, if the jury finds that the defendant is entitled to the presumption, it must then determine whether the State has rebutted the presumption by proving any of the circumstances set forth in section 14-51.2(c). If the jury finds that the State has rebutted the presumption, the jury must determine whether the defendant's use of force was proportional. However, if the jury finds that the State failed to rebut the presumption, the defendant *must* be acquitted in accordance with section 14-51.2(e). *See Copley*, 900 S.E.2d at 914 ("When a defendant lawfully defends his home in line with section 14-51.2 and the State does

2. However, justification for defensive force, whether under general self-defense or the castle doctrine, is not available to certain individuals. *See* N.C.G.S. § 14-51.4.

not rebut the statutory presumption of reasonableness, his force is a justified defensive measure immune from criminal culpability.").

In this case, the trial court told defendant's counsel that "self-defense is—*whatever the form the legislature puts it*—self-defense is to preserve life. It's not to give somebody a license to take somebody's life simply because they've come on their property." (Emphasis added.) The trial court then instructed the jury that even if the castle doctrine applied, "the defendant does not have the right to use excessive force" and that "[t]he defendant had the right to use only such force as reasonably appeared necessary . . . to protect the defendant from death or great bodily harm."

Notwithstanding the trial court's seeming acknowledgment that its instruction was contrary to law, the State argues that "the trial court did not err by instructing that defendant, in relying on the statutory Castle Doctrine, was prohibited from using excessive force" because "the common law prohibition on excessive force survives enactment of" section 14-51.2. The State does not "dispute[ ] that the General Assembly possesses the authority to displace the common law through legislative action," *State v. McLymore*, 380 N.C. 185, 190 (2022), or contest our recent holding that "N.C.G.S. § 14-51.3 has supplanted the common law right to perfect self-defense to the extent that it addresses a particular issue." *State v. Benner*, 380 N.C. 621, 632 (2022). Instead, the State argues that because the castle doctrine statute does "not address an aspect of the common law of self-defense," i.e., the prohibition against excessive force, "the common law [prohibition] remains intact." *McLymore*, 380 N.C. at 191 n.2.

The common law prohibition against excessive force is a proportionality requirement under which a defendant must demonstrate their reasonable belief that the degree of force used was necessary to prevent the threatened harm. This common law principle is now codified in the general self-defense statute, which justifies "the use of deadly force" where the defendant "reasonably believe[d] that such force [wa]s necessary to prevent imminent death or great bodily harm to himself or herself or another." N.C.G.S. § 14-51.3(a)(1).

Such is not the case in the castle doctrine context, however. By repealing section 14-51.1 and enacting a more comprehensive statutory scheme, the General Assembly abrogated this principle for the lawful occupants of homes, businesses, and automobiles. As noted above, the legislature has provided that "a person is justified in the use of deadly force and does not have a duty to retreat" in two separate scenarios. *Id.*

§ 14-51.3(a). First, if such person "reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another." *Id.* § 14-51.3(a)(1). Second, if such person uses deadly force "[u]nder the circumstances permitted pursuant to G.S. 14-51.2," the castle doctrine statute. *Id.* § 14-51.3(a)(2).

Thus, where deadly force is used under the circumstances permitted by the castle doctrine statute, the person "is presumed to have held a reasonable fear of imminent death or serious bodily harm." *Id.* § 14-51.2(b). And "[a] person who unlawfully and by force enters or attempts to enter a person's home . . . is presumed to be doing so with the intent to commit an unlawful act involving force or violence." *Id.* § 14-51.2(d).

"Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *State v. Camp*, 286 N.C. 148, 152 (1974) (cleaned up). Further, a "marked difference in . . . two clauses, standing as they do in such close juxtaposition," as is the case with sections 14-51.3(a)(1) and (2), "gives clear indication that the Legislature intended to make a distinction" between the provisions. *Prendergast v. Prendergast*, 146 N.C. 225, 226 (1907).

The plain language of sections 14-51.2 and 14-51.3 demonstrates that if a lawful occupant of a home is cloaked with the protections afforded by the castle doctrine and the State fails to rebut the statutory presumption that the lawful occupant had reasonable fear, he or she is justified in the use of force, including deadly force. This is so because unlike the general self-defense statute, the castle doctrine statute itself provides that it is presumptively reasonable for a lawful occupant of a home to (1) perceive an intruder as a deadly threat and (2) respond to that threat with deadly force.

We therefore agree with the Court of Appeals' statement below that "[u]nder the Castle Doctrine, excessive force is impossible unless that State rebuts the Castle Doctrine presumption" by proving one of the five circumstances listed in section 14-51.2(c). *Phillips*, 290 N.C. App. at 664. Had the General Assembly intended to require lawful occupants to demonstrate a reasonable belief that deadly force was necessary, it would not have written a statute that explicitly provides the contrary.

Here, the trial court twice instructed the jury that even if defendant properly invoked the castle doctrine, she nonetheless "d[id] not have the right to use excessive force." As we have detailed herein, the jury should not have considered the proportionality of defendant's force unless the

jury found that either (1) defendant did not qualify to invoke the castle doctrine, or (2) defendant qualified, but the State properly rebutted the presumption of reasonable fear. Because the trial court's instruction failed to accurately recite the law as defined by the legislature, we affirm the portion of the Court of Appeals' decision concluding that this instruction was erroneous.

However, an error in a criminal trial does not warrant disregarding a jury's finding of guilt unless that error prejudiced the defendant. "A nonconstitutional error," like the instructional error here, "is prejudicial 'when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.' " *State v. Maske*, 358 N.C. 40, 57 (2004) (quoting N.C.G.S. § 15A-1443(a) (2003)). A defendant bears the burden of demonstrating such prejudice under section 15A-1443(a).

Here, the entirety of the Court of Appeals' prejudice analysis was that "[b]ecause the trial court's instruction was both erroneous and confusing, there is a reasonable possibility that the jury would have reached a different result if it received a proper instruction." *Phillips*, 290 N.C. App. at 665. As a determination of error is a prerequisite to reaching the question of prejudice, it appears the sole basis for the Court of Appeals' prejudice reasoning was that the trial court's instruction probably confused the jury. This, standing alone, is insufficient. Because the Court of Appeals failed to conduct an appropriate inquiry, we remand to the Court of Appeals for a proper prejudice analysis.

III. Conclusion

It has long been recognized that an individual has a fundamental right to defend his or her home from unlawful intrusion. The General Assembly, as the policy making branch of our government, has twice chosen to expand that common law principle by broadening the set of circumstances under which deadly force is justified. The Court of Appeals correctly concluded that the trial court below erred by improperly instructing the jury to consider the proportionality of defendant's force even if she was entitled to the castle doctrine defense. However, the Court of Appeals failed to properly analyze whether defendant was prejudiced by such error. Accordingly, we AFFIRM the Court of Appeals' determination of error but VACATE its prejudice determination and REMAND for proper consideration.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

Justice EARLS concurring in part and dissenting in part.

The Court finds error in the trial court's instruction and remands on the issue of prejudice. I agree that the jury instruction was erroneous. As delivered, it muddled the scope and nature of lawful defensive force embraced by the castle doctrine, codified in N.C.G.S. § 14-51.2. As the Court rightfully acknowledges, though, the castle doctrine is not a "license to kill." I expand on that point and explain why section 14-51.2 is not a blank check for violence.

Today a creature of legislation rather than common law, the castle doctrine functions as a "burden-shifting provision." *State v. Copley*, 900 S.E.2d 904, 913 (N.C. 2024) (cleaned up). On the front end, as the majority explains, the statute creates a rebuttable presumption of reasonable fear "when the defendant satisfies the specific . . . requirements" of N.C.G.S. § 14-51.2(b). That presumption is the linchpin of the castle doctrine—or, to borrow the majority's words, its "primary legal protection." It permits defensive force against specific conduct from a specific type of interloper—one who "unlawfully and forcefully enter[s]" a protected space. N.C.G.S. § 14-51.2(b)(1). The statute is also clear that the protected space is not only the interior of a home but also includes its "curtilage."[1] N.C.G.S. § 14-51.2(a)(1).

The logic is as follows: A trespasser who illicitly and forcibly invades another's home, car, or workplace "is presumed to be doing so with the intent to commit an unlawful act involving force or violence." N.C.G.S. § 14-51.2(d). For that reason, an occupant aware of that unlawful and forcible entry is presumed to reasonably fear death or grievous harm at the trespasser's hands. *See* N.C.G.S. § 14-51.2(b). If the presumption applies and goes unrebutted by the State, it permits the occupant to fend off the intruder with deadly force. N.C.G.S. § 14-51.2(f).

At the same time, the presumption of reasonable fear delimits resort to violence. If a person does not "unlawfully and forcefully" enter another's property, their conduct does not fit the conditions listed in subsection 14-51.2(b). In that case, the statutory presumption of reasonable fear does not attach and deadly force is not permitted. Said another way, lethal force is not the appropriate response to a lawful and unforceful

1. "[T]he curtilage of the home will ordinarily be construed to include at least the yard around the dwelling house as well as the area occupied by barns, cribs, and other outbuildings." *State v. Frizzelle*, 243 N.C. 49, 51 (1955); *see also State v. Blue*, 356 N.C. 79, 86 (2002).

entry onto property. Unless an ingress triggers the elements set by subsection 14-51.2(b), it does not activate the castle doctrine.

That is why, as the Court recognizes, the castle doctrine does not declare "open season on Girl Scouts and trick-or-treaters." *Copley*, 900 S.E.2d at 913. When those groups step onto another's porch, their entry is generally lawful because of the "implicit license that typically permits [a] visitor to approach the home by the front path." *Id.* (quoting *State v. Grice*, 367 N.C. 753, 757 (2015) (cleaned up)). That implicit license also extends to a neighbor who knocks on the door to borrow a lawnmower, or a UPS worker who delivers a package. *See Florida v. Jardines*, 569 U.S. 1, 6–7 (2013) (examining general contours of implicit license). In the same vein, the castle doctrine does not shield a homeowner who "invites the victim to his house" and "shoots them as they enter the front gate." *Copley*, 900 S.E.2d at 913. That, too, is because the entry was lawful—the unwitting invitee crossed the threshold with the owner's blessing.

These examples illustrate the castle doctrine's implicit limits. Whether selling cookies, seeking candy, delivering a package, or accepting an owner's invite, each hypothetical entrant came onto another's land lawfully and without force. Since none of those entrants "satisf[y] the specific statutory requirements" of subsection 14-51.2(b), the presumption of reasonable fear would not attach and permit deadly force.

Those examples also underscore the need for lucid and complete jury instructions in cases like Ms. Phillips'.[2] A proper explanation of the law would have given jurors "a clear decision tree" for examining Ms. Phillips' force and, in turn, her criminal liability. *See Copley*, 900 S.E.2d at 915 (Barringer, J., concurring). First, jurors should have decided whether Ms. Dunlap "unlawfully and forcefully entered" Ms. Phillips' porch in line with subsection 14-51.2(b). That inquiry would consider whether an implicit license permitted Ms. Dunlap's entry, the scope of that license, and whether Ms. Dunlap exceeded it, thus rendering

2. Accurate jury instructions are, of course, a necessity in all criminal trials. *See Copley*, 900 S.E.2d at 915 ("Under principles of due process, jury instructions infected with legal error often require a new trial."). But as members of this Court have recently observed, instructions on "the various self-defense provisions that are now in place" have proven uniquely susceptible to confusion. *See id.* (Barringer, J., concurring) ("It is greatly concerning that our State's pattern jury instructions continue to leave jurors confused on what they may or may not consider in self-defense and castle doctrine circumstances . . . Instructions that provide jurors with a clear decision tree are critical for a jury to be able to accurately determine whether the presumptions provided by § 14-51.2 have been rebutted. A jury must intentionally and methodically determine whether that presumption has been rebutted.").

her presence unlawful. The jury's answer on that issue would dictate whether the presumption of reasonable fear attached and whether the castle doctrine applied at all.

For the same reason, it would equip jurors to select and employ the proper self-defense standard. If Ms. Dunlap's entry did not meet the predicates listed in subsection 14-51.2(b), the presumption of reasonable fear would not come into play. That is, if Ms. Dunlap was lawfully on the property, the castle doctrine's key presumption would not apply. *See* N.C.G.S. § 14-51.2(e); *see also Copley*, 900 S.E.2d at 914. In that event, jurors would scrutinize Ms. Phillips' actions under section 14-51.3, rather than section 14-52.2.

On the other hand, if jurors concluded that Ms. Dunlap's entry was "unlawful[ ] and forceful[ ]" as required by subsection 14-51.2(b), that finding would trigger the presumption of reasonableness. *See* N.C.G.S. § 14-51.2(b). It would also point jurors to their next task: Deciding whether the State rebutted the presumption and therefore "dislodged" the castle doctrine's protections. *See Copley*, 900 S.E.2d at 911 (citing N.C.G.S. § 14-51.2(c)). Here, however, the jury instructions did not accurately explain the law, thus depriving jurors of the "clear decision tree" needed to assess the legality of Ms. Phillips' force. *See id.* at 915 (Barringer, J., concurring).

I part ways with the majority on prejudice. In this case, that question is fairly presented and ripe for review—it was teed up by the majority and dissent below, briefed by the parties, and encompassed by the record. Rather than remanding to the Court of Appeals, I would reach and resolve whether Ms. Phillips has shown a reasonable possibility of a different result but for the trial court's error. *See State v. Maske*, 358 N.C. 40, 57 (2004).

Punting the prejudice analysis back to the lower courts is an unnecessary drain on judicial resources. It forces Ms. Phillips and the State to reargue an issue already raised, briefed, and ripe for decision. Throughout our precedent, this Court has declined to remand cases based on the same interests at stake here—"judicial economy," "fairness to the parties," and settling protracted litigation. *See N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 665 (2004); *see also Mann Media, Inc. v. Randolph Cnty. Plan. Bd.*, 356 N.C. 1, 15–16 (2002) (explaining that remand would disserve "the interests of judicial economy" because the "central issue" remaining "involves evaluation of evidence" and the "entire record of the hearing is before us").

Because I would decide whether the trial court's error prejudiced Ms. Phillips, I dissent from the Court's decision to remand.

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

BLUEPRINT 2020 OPPORTUNITY ZONE FUND, LLLP, AND WOODFOREST CEI-BOULOS OPPORTUNITY FUND, LLC

v.

10 ACADEMY STREET QOZB I, LLC; CITISCULPT, LLC; CS-10 SOUTH ACADEMY ST, LLC; CITISCULPT SC, LLC; 10 ACADEMY STREET, LLC; CITISCULPT FUND SERVICES, LLC; 10 ACADEMY OPPORTUNITY ZONE FUND I, L.L.C.; CHARLES LINDSEY MCALPINE; AND MICHAEL J. MILLER

From N.C. Business Court
23CVS001931-590

From Mecklenburg
23CVS001931-590

No. 107A24

ORDER

The parties' joint motion for limited remand and stay is allowed. This matter is remanded to the trial court for the limited purpose of permitting the parties to seek trial court approval of a sale of the subject property to an alternative buyer. This Court retains jurisdiction over the appeal. All proceedings in this Court, including all further briefing deadlines, are stayed until the first of one of the following occurs: (a) the parties jointly file a motion to dismiss the appeal as moot; (b) any party to the appeal files a motion to dissolve the stay for good cause; or (c) two hundred and twenty-five days have elapsed from the date of this Order. If the appeal is not dismissed and the stay is dissolved, the Court will set a deadline for the Appellees' briefs to be filed.

By order of the Court in Conference, this the 1st day of August 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of August 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

COHANE v. HOME MISSIONERS OF AMERICA

[386 N.C. 534 (2024)]

GREGORY COHANE

v.

THE HOME MISSIONERS OF AMERICA D/B/A GLENMARY HOME MISSIONERS, ROMAN CATHOLIC DIOCESE OF CHARLOTTE, NC, AND AL BEHM

From N.C. Court of Appeals
22-143

From Mecklenburg
21CVS10855

No. 278A23

ORDER

Young Men's Christian Association of Northwest North Carolina d/b/a/ Kernersville Family YMCA's Motion for Leave to File Amicus Brief is hereby allowed. Plaintiff-Appellee is allowed leave to file a reply to the Amicus Brief on or before 19 July 2024. Plaintiff's Motion to Strike Brief of Amicus Curiae Young Men's Christian Association of Northwest North Carolina d/b/a/ Kernersville Family YMCA and Motion for Sanctions are hereby denied.

By order of the Court in Conference, this the 5th day of July 2024.

Riggs, J. recused.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 5th day of July 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

COLONIAL PLAZA PHASE TWO, LLC v. CHERRY'S ELEC. TAX SERVS., LLC

[386 N.C. 535 (2024)]

COLONIAL PLAZA PHASE TWO, LLC, D/B/A COLONIAL PLAZA MALL	From N.C. Court of Appeals 23-159
v.	From Edgecombe 15CVD51
CHERRY'S ELECTRONIC TAX SERVICES, LLC	

No. 268P23

ORDER

Defendant's petition for writ of certiorari is allowed for the limited purpose of vacating the Court of Appeals' 25 September 2023 order and remanding the matter to that court for reconsideration in light of *Blevins v. Town of W. Jefferson*, 182 N.C. App. 675 (2007), *rev'd for reasons stated in the dissent*, 361 N.C. 578 (2007) (per curiam).

By order of the Court in Conference, this the 21st day of August 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of August 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

ROY A. COOPER, III, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA

v.

PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; THE STATE OF NORTH CAROLINA; NORTH CAROLINA ENVIRONMENTAL MANAGEMENT COMMISSION; AND JOHN (JD) SOLOMON, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE NORTH CAROLINA ENVIRONMENTAL MANAGEMENT COMMISSION; CHRISTOPHER M. DUGGAN, IN HIS OFFICIAL CAPACITY AS VICE-CHAIR OF THE NORTH CAROLINA ENVIRONMENTAL MANAGEMENT COMMISSION; AND YVONNE C. BAILEY, TIMOTHY M. BAUMGARTNER, CHARLES S. CARTER, MARION DEERHAKE, MICHAEL S. ELLISON, STEVEN P. KEEN, H. KIM LYERLY, JACQUELINE M. GIBSON, JOSEPH REARDON, ROBIN SMITH, KEVIN L. TWEEDY, ELIZABETH J. WEESE, AND BILL YARBOROUGH, IN THEIR OFFICIAL CAPACITIES AS COMMISSIONERS OF THE NORTH CAROLINA ENVIRONMENTAL MANAGEMENT COMMISSION

From N.C. Court of Appeals
24-440

From Wake
23CV28505-910

No. 131P24

ORDER

Plaintiff Roy A. Cooper, III, in his official capacity as Governor of North Carolina, filed a motion and suggestion of recusal seeking the recusal of Justice Philip E. Berger, Jr., in this case. Justice Berger referred the motion to this Court by a special order entered on 24 June 2024. Under this Court's Recusal Procedure Order of 23 December 2021, a justice who receives a recusal or disqualification motion may either (1) rule on the motion or (2) refer the motion to the Court for decision. 379 N.C. 693 (2021). For the reasons explained below, we DENY the motion.

The Governor argues that recusal is necessary pursuant to Canon III.C.(1)(d)(i) and (iii) of the Code of Judicial Conduct because Justice

Berger's father, Senator Philip E. Berger, is a defendant and has a direct, personal, and substantial interest in the outcome of this case.[1] In support of this contention, the Governor notes that the legislation which is the subject of this lawsuit confers certain powers on the President Pro Tempore of the Senate, a post currently held by Senator Berger. For example, Senate Bill 512 authorizes the President Pro Tempore to recommend for Senate approval three—an increase of one—of the Coastal Resources Commission's thirteen members and seven—an increase of four—of the Board of Transportation's twenty members. *See* An Act to Increase the Accountability of Public Boards and Commissions to the Citizens of North Carolina by Changing the Appointment Structure of Those Boards and Commissions, S.L. 2023-136, §§ 4.1.(a), 5.1(a), https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2023-2024/SL2023-136.pdf.

Based on the facts before us, we do not agree that the Code of Judicial Conduct bars Justice Berger's participation in this case. Senator Berger is a party to this litigation solely in his official capacity as President Pro Tempore, not in any personal capacity. State law requires the President Pro Tempore to be joined as a defendant in lawsuits that dispute the constitutionality of statutes. N.C.G.S. § 1A-1, Rule 19(d) (2023). In such litigation, state law regards the President Pro Tempore as a stand-in for the General Assembly.

> It is the public policy of the State of North Carolina that in any action in any North Carolina State court in which the validity or constitutionality of an act of the General Assembly . . . is challenged, the General Assembly, *jointly through the Speaker of the House of Representatives and the President Pro Tempore of the Senate*, constitutes the legislative branch of the State of North Carolina . . . .

N.C.G.S. § 1-72.2(a) (2023) (emphasis added). *See also* N.C.G.S. § 1A-1, Rule 19(d) (2023) ("The Speaker of the House of Representatives and the President Pro Tempore of the Senate, *as agents of the State through the General Assembly*, must be joined as defendants in any civil action challenging the validity of a North Carolina statute . . . ." (emphasis added)).

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1. "On motion of any party, a judge should disqualify himself/herself in a proceeding . . . where . . . [t]he judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person . . . [i]s a party to the proceeding . . . [or] . . . [i]s known by the judge to have an interest that could be substantially affected by the outcome of the proceeding[.]" North Carolina Code of Judicial Conduct, Canon III.C(1)(d)(i), (iii) (2020).

Thus, as a matter of law and public policy, Senator Berger represents the interests of the General Assembly in this case, not his own. *See Mullis v. Sechrest*, 347 N.C. 548, 554 (1998) ("[O]fficial-capacity suits are merely another way of pleading an action against the governmental entity."); *Harwood v. Johnson*, 326 N.C. 231, 238 (1990) ("A suit against defendants in their official capacities, as public officials . . . is a suit against the State.").

Our view is consistent with the substance of the challenged legislation. It grants appointment powers to the office of the President Pro Tempore, not to Senator Berger personally. *E.g.*, S.L. 2023-136, § 5.1.(a) (adding one member of the Coastal Resources Commission to be "appointed by the General Assembly upon recommendation of the President Pro Tempore of the Senate"). Senator Berger will lose those powers the moment he ceases to occupy that office, even if he remains a member of the Senate.[2]

The Governor also argues that Justice Berger's recusal is mandatory under the Due Process Clause of the Fourteenth Amendment.[3] Again, we disagree.

Most recusal determinations do not raise constitutional issues. *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 876 (2009). When it comes to state courts, recusal rules based on familial relationships have traditionally been entrusted to the discretion of state legislatures. *See Tumey v. Ohio*, 273 U.S. 510, 523 (1927) ("[M]atters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion.").

In *Caperton*, the Supreme Court of the United States recognized that due process concerns can oblige a judge to recuse herself "when 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.' " 556 U.S. at 872 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). The Supreme Court identified two categories of cases wherein it had previously held that recusal was constitutionally necessary: (1) cases in which the judge had a

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2. It is possible that different facts would establish a basis for recusal even if Senator Berger were sued in his official capacity as President Pro Tempore. Recusal could be necessary, for instance, if challenged legislation conferred a financial benefit on the President Pro Tempore sufficient to give his close relations "a financial interest in the subject matter in controversy or in a party to the proceeding." North Carolina Code of Judicial Conduct, Canon III.C(1)(c).

3. "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 2.

financial interest in the outcome and (2) criminal contempt proceedings in which the judge "was challenged because of a conflict arising from his participation in an earlier proceeding." *Id.* at 879–80. Based on the principles articulated in those precedents, the Court held that the Due Process Clause required a state supreme court justice to recuse himself from the appeal of a $50 million verdict against a corporation whose chairman had contributed more than $3 million to support the justice's campaign while the appeal was pending. *Id.* at 884–86.

This case does not involve any of the scenarios discussed in *Caperton*. The Governor has not argued that Justice Berger stands to gain anything from the outcome of this litigation or that this case played a role in his election.[4] Given this circumstance and the reality that the claims against Senator Berger are actually claims against the General Assembly, we conclude that the Due Process Clause does not compel Justice Berger's recusal.

"The ultimate question, and indeed the touchstone of all recusal issues, is 'whether the justice can be fair and impartial[.]' " *NAACP v. Moore*, 380 N.C. 263, 264 (2022) (Berger, J.) (internal quotation marks omitted). In his order denying a similar recusal motion in another case, Justice Berger explained that the lawsuit was really against the State, not against his father, and that he was confident in his ability to discharge the duties of his office in a fair and impartial manner. *Id.* We believe that Justice Berger can and will execute his responsibilities in this case fairly and impartially. The motion and suggestion of recusal is hereby DENIED.

By order of the Court in Conference, this the 21st day of August 2024.

/s/ Allen, J.
For the Court

Justice Berger did not participate in the consideration of this motion.

4. The Governor does allege that "Senator Berger is a powerful political ally who has materially supported his son's campaigns." This vague allegation of support falls far short of the detailed contribution records relied on by the Supreme Court in *Caperton*.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of August 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

Justice RIGGS dissenting.

On 11 June 2024, Governor Cooper, the plaintiff in this action, moved to recuse Associate Justice Berger because the challenged legislation gives his father—Senator Phil Berger, the President Pro Tempore of the North Carolina Senate—new control over the Economic Investment Committee and multiple state commissions and boards. On the same day, in parallel litigation challenging a different statute on the same grounds, the Governor also sought the recusal of Justice Berger. Plaintiff-Respondent's Motion and Suggestion of Recusal or Disqualification of Associate Justice Berger, *Cooper v. Berger*, No. 132P24 (N.C. June 11, 2024). In both cases, according to the Governor, the North Carolina Code of Judicial Conduct and the Due Process Clause of the Fourteenth Amendment to the United States Constitution warrant Justice Berger's recusal. Justice Berger referred both motions to this Court. And today, the majority allows Justice Berger to participate in yet another case where his father is a named party with a direct interest in the outcome. *See*, *e.g.*, *Hoke Cnty. Bd. of Educ. v. State*, 385 N.C. 866, 867 (2024) (denying plaintiff's motion for Justice Berger to recuse in a case where "intervenor-defendant Senator Philip E. Berger . . . is a party to th[e] litigation solely in his official capacity as President Pro Tempore of the Senate"). Because I believe the plain language of the Code of Judicial Conduct requires Justice Berger's recusal, I respectfully dissent.

Canon 3C of the Code of Judicial Conduct provides that:

> (1) On a motion of any party a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned, including but not limited to instances where:
>
> . . . .
>
> (d) The judge or the judge's spouse, or a person within the third degree of relationship

> to either of them, or the spouse of such a person:
>
> (i) Is a party to the proceeding, or an officer, director, or trustee of a party;
>
> (ii) Is acting as a lawyer in the proceeding;
>
> (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding[.]
>
> . . . .

N.C. Code Jud. Conduct 3C(1) (emphases added).

Here, there is no question that Senator Berger is a person "within the third degree of relationship" to his son, Justice Berger. *See* N.C.G.S. § 104A-1 (2023) (describing how to compute degrees of kinship). The Code of Judicial Conduct does not exempt a judge from recusal even when their family member is a party in their official capacity. In fact, the plain language points the opposite way. By requiring recusal when a judge's family member is "an officer, director, or trustee of a party," the Code of Judicial Conduct establishes clear recusal standards when the judge's family member is party to a proceeding, even in their official capacity.

This Court has endorsed recusal when the familial relation is even more attenuated than that of a father and son. In a dispute involving the North Carolina Teachers' and State Employees' Retirement System, this Court identified that family members of five of the seven justices were retirees of the public school system. *Lake v. State Health Plan for Tchers. & State Emps.*, 376 N.C. 661, 663–64 (2021). These familial relationships included grandparents, mothers, a father, a mother-in-law, a brother-in-law, and an aunt. *Id.* The Court applied Canon 3D, concluding that the justices were "disqualified from participating in the consideration and decision of this case based upon one or more of the family relationships set forth above unless the parties and their lawyers file a written agreement stipulating that each justice's basis for disqualification is immaterial or insubstantial." *Id.* at 664. In that case, the Court noted that it could invoke the rule of necessity because "actual disqualification of a member of a court of last resort will not excuse such member from performing his official duty if failure to do so would result in a denial of a litigant's constitutional right to have" their case heard and, of course, four justices are required to hear a case. *Id.* (quoting *Boyce v. Cooper*, 357 N.C. 655, 655 (2003)). But in this case, the rule of necessity

does not apply because Justice Berger's recusal would not deny the parties their constitutional right to present a question to this Court.

Justice Berger himself has previously rejected a call for him to recuse in a case where his father was a party. *N.C. State Conf. of the NAACP v. Moore*, 380 N.C. 263, 263–64 (2022). And before this Court's January 2023 change in composition, he decided recusal motions on his own, as is his right. Now, though, Justice Berger has referred the motion to a newly-installed majority, which seemingly borrows from Justice Berger's old logic and approach. But just as Justice Berger's analysis was wrong then, this Court's ruling is wrong now.

The Code of Judicial Conduct is promulgated by this Court, as authorized by the legislature. *See* N.C.G.S. § 7A-10.1 (2023) ("The Supreme Court is authorized, by rule, to prescribe standards of judicial conduct for the guidance of all justices and judges of the General Court of Justice."). Certainly, we *could* change the Code of Judicial Conduct to exempt a judge from recusal when that judge's close family member is party to a case only in their official capacity.[1] But we have not done so. Instead, we have promulgated and enforced conduct rules that plainly require recusal for near-family relationships. Those rules apply to all judges across this state, not just those on this Court.

The wisdom of that approach is clear—both for fair outcomes and public confidence in the judiciary. *See* N.C. Code of Jud. Conduct, pmbl. ("An independent and honorable judiciary is indispensable to justice in our society . . . ."). Imagine a scenario where a defendant walks into a courtroom only to learn that the elected district attorney prosecuting his case is the son of the elected judge presiding over his case. Few defendants would have faith that the judicial system would produce a fair and unbiased outcome—even though both the district attorney and the judge are elected officials acting in their official capacity. And likely the public at large would find this scenario equally problematic, which is why the plain language of our canons do not make any distinction about "official capacity" and require recusal when a close family member is an attorney or party in a proceeding.

To achieve the desired outcome in this case, members of this Court who typically ascribe to a strict textualist philosophy are eager to add words to the Code of Judicial Conduct. I would not so interpret the Code of Judicial Conduct, particularly because the added and inferred

1. To be sure, though, we cannot by rule infringe upon the due process rights of the litigants who appear before us.

language is not fairly disclosed to all members of the judiciary bound by it. I suspect the reason we have not changed these rules is simple—the optics of overhauling existing ethics standards to accommodate Justice Berger and Senator Berger are problematic, to put it mildly. Any changes would have to undermine the canon's current language requiring recusal when a judge's family member is "a party to the proceeding, *or an officer, director, or trustee of a party*." N.C. Code of Jud. Conduct 3C(1)(d)(i) (emphasis added).

Also unavailing is the argument that Justice Berger does not need to recuse because "[m]ore than 2.7 million North Carolinians, knowing or at least having information available to them concerning [his] father's service in the Legislature, elected [Justice Berger] to consider and resolve significant constitutional questions." *N.C. State Conf. of the NAACP*, 380 N.C. at 264. Justice Berger's election to this Court does not exempt him from the same ethical standards that bind all judges. The fact that Justice Berger, just like any other justice, would need to recuse when the Code of Judicial Conduct so requires does not lessen the significance of his election. Importantly, too, while the parties in the case could stipulate or acquiesce to Justice Berger's participation, the Governor has not done so here, instead seeking Justice Berger's recusal. Again, there is no mechanism whereby a popular vote can override a party's right to seek relief under either the Code of Judicial Conduct or the Due Process Clause of the United States Constitution.

Moreover, unlike a case where familial relations are peripheral to the issues before us, *see N.C. State Conf. of the NAACP*, 380 N.C. 263, Senator Berger's prospective power hinges on our ruling in this case. For example, Session Law 2023-136, provides, among other things, a seat for Senator Berger (or his designee) on the Economic Investment Committee. Act of Oct. 10, 2023, Session Law 2023-136 § 1.1. https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2023-2024/SL2023-136.pdf. Session Law 2023-136 also expands Senator Berger's political influence by giving him control over multiple appointments to wide ranging executive and regulatory bodies, such as the Board of Transportation, the Commission for Public Health, the Coastal Resources Commission, the Wildlife Resources Commission, the Board of Directors of the University of North Carolina Health Care System, and the Utilities Commission. *Id.* at §§ 3.1–8.1, 10.1.

In the related case, Session Law 2023-139 gives Senator Berger new authority to nominate two of the eight members on the State Board of Elections, and to appoint the board's chair and executive director if the board fails to elect them. Act of Oct. 10, 2023, S.L. 2023-139 §§ 2.1, 2.5

https://ncleg.gov/EnactedLegislation/SessionLaws/PDF/2023-2024/SL2023-139.pdf. Session Law 2023-139 also gives Senator Berger the power to nominate one of the four members on each of the 100 county boards of election across the state and to appoint a chair if a county board fails to elect one. *Id.* at § 4.1.

Legislative Defendants argue that any benefits from the disputed legislation accrue to the *position* of President Pro Tempore of the North Carolina Senate rather than to Senator Berger himself. That contention is overly formalistic. The position of President Pro Tempore is currently occupied by Senator Berger. A favorable ruling for Legislative Defendants would thus augment Senator Berger's political power and influence for at least some period of time.

By denying the motion to recuse Justice Berger, this Court discards the plain language and clear dictate of Canon 3C. North Carolina is not alone in requiring judicial recusal. Other jurisdictions also require a judge to withdraw in cases of close familial or paternal relationships. *See, e.g.*, *United States v. Rechnitz*, 75 F.4th 131, 143 (2d Cir. 2023) (holding that a district court judge abused his discretion under 28 U.S.C. § 455(a), the federal canon requiring disqualification in any proceeding in which his impartiality might reasonably be questioned by not reassigning a case where the "judge had a close, near-paternal personal relationship with" a cooperating witness who was a participant in the criminal conduct for which the defendant was charged)[2]; *Miss. Comm'n on Jud. Performance v. Bowen*, 123 So.3d 381, 384 (Miss. 2013) (holding a trial judge's failure to recuse from asbestos litigation was judicial misconduct where his parents had previously sued and settled asbestos exposure claims against the defendants "because a reasonable person, knowing all the circumstances, would have doubts regarding [the judge's] impartiality in the case"); *In re Griego*, 181 P.3d 690, 693 (N.M. 2008) (disciplining a judge who gave family members favorable dispositions in traffic court because impartiality "required [the judge] to recuse himself in cases involving family members").

Because I think the Code of Judicial Conduct unequivocally requires recusal here, it is not necessary to even reach the due process grounds

2. Scholars examining judicial recusals in the federal courts have identified close familial relations as a clear-cut basis for recusal. *See* Dane Thorley, *The Failure of Judicial Recusal and Disclosure Rules: Evidence from a Field Experiment*, 117 Nw. U. L. Rev. 1277, 1302 (2023) (recognizing "familial relationships" as a conflict "subject to bright-line [federal] per se recusal rules" in which "less judicial discretion [to refuse recusal] is involved" and where refusal to recuse would "almost certainly result in successful appeal and possibly an ethical sanction").

for the motion. I respectfully dissent from this Court's decision to deny the motion to recuse.

Justice EARLS joins in this dissent.

ROY A. COOPER, III, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA

v.

PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; AND THE STATE OF NORTH CAROLINA

From N.C. Court of Appeals
24-406

From Wake
23CV29308-910

No. 132P24

ORDER

This matter is before the Court on plaintiff's motion and suggestion of recusal or disqualification of Associate Justice Berger. The motion largely restates arguments made in the motion and suggestion of recusal or disqualification filed by plaintiff in *Cooper v. Berger et al.*, No. 131P24. For the reasons set out in our order denying plaintiff's motion in that case, plaintiff's motion and suggestion of recusal or disqualification is hereby DENIED.

By order of the Court in Conference, this the 21 day of August 2024.

/s/ Allen, J.
For the Court

Justice Berger did not participate in the consideration of this motion.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23 day of August 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

Justice RIGGS dissenting.

On 11 June 2024, Governor Cooper, the plaintiff in this action, moved to recuse Associate Justice Berger because the challenged legislation

gives his father—Senator Phil Berger, the President Pro Tempore of the North Carolina Senate—new control over the State Board of Elections and county boards of elections. On the same day, in parallel litigation challenging a different statute on the same grounds, the Governor also sought the recusal of Justice Berger. Plaintiff-Respondent's Motion and Suggestion of Recusal or Disqualification of Associate Justice Berger, *Cooper v. Berger*, No. 131P24 (N.C. June 11, 2024). In both cases, according to the Governor, the North Carolina Code of Judicial Conduct and the Due Process Clause of the Fourteenth Amendment to the United States Constitution warrant Justice Berger's recusal. Justice Berger referred both motions to this Court. And today, the majority allows Justice Berger to participate in yet another case where his father is a named party with a direct interest in the outcome. *See*, *e.g.*, *Hoke Cnty. Bd. of Educ. v. State*, 385 N.C. 866, 867 (2024) (denying plaintiff's motion for Justice Berger to recuse in a case where "intervenor-defendant Senator Philip E. Berger . . . [ ] is a party to th[e] litigation solely in his official capacity as President Pro Tempore of the Senate"). Because I believe the plain language of the Code of Judicial Conduct requires Justice Berger's recusal, I respectfully dissent.

Canon 3C of the Code of Judicial Conduct provides that:

> (1) On motion of any party a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned, including but not limited to instances where:
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> . . . .
>
> (d) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
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> (i) Is a party to the proceeding, or an officer, director, or trustee of a party;
>
> (ii) Is acting as a lawyer in the proceeding;
>
> (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding[.]
>
> . . . .

N.C. Code Jud. Conduct, Canon 3C(1) (emphases added).

Here, there is no question that Senator Berger is a person "within the third degree of relationship" to his son, Justice Berger. *See* N.C.G.S. § 104A-1 (2023) (describing how to compute degrees of kinship). The Code of Judicial Conduct does not exempt a judge from recusal even when their family member is a party in their official capacity. In fact, the plain language points the opposite way. By requiring recusal when a judge's family member is "an officer, director, or trustee of a party," the Code of Judicial Conduct establishes clear recusal standards when the judge's family member is party to a proceeding, even in their official capacity.

This Court has endorsed recusal when the familial relation is even more attenuated than that of a father and son. In a dispute involving the North Carolina Teachers' and State Employees' Retirement System, this Court identified that family members of five of the seven justices were retirees of the public school system. *Lake v. State Health Plan for Tchers. & State Emps.*, 376 N.C. 661, 663–64 (2021). These familial relationships included grandparents, mothers, a father, a mother-in-law, a brother-in-law, and an aunt. *Id.* The Court applied Canon 3D, concluding that the justices were "disqualified from participating in the consideration and decision of this case based upon one or more of the family relationships set forth above unless the parties and their lawyers file a written agreement stipulating that each justice's basis for disqualification is immaterial or insubstantial." *Id.* at 664. In that case, the Court noted that it could invoke the rule of necessity because "actual disqualification of a member of a court of last resort will not excuse such member from performing his official duty if failure to do so would result in a denial of a litigant's constitutional right to have" their case heard, and of course, four justices are required to hear a case. *Id.* (quoting *Boyce v. Cooper*, 357 N.C. 655, 655 (2003)). But in this case, the rule of necessity does not apply because Justice Berger's recusal would not deny the parties their constitutional right to present a question to this Court.

Justice Berger himself has previously rejected a call for him to recuse in a case where his father was a party. *N.C. State Conf. of the NAACP v. Moore*, 380 N.C. 263, 263–64 (2022). And before this Court's January 2023 change in composition, he decided recusal motions on his own, as is his right. Now, though, Justice Berger has referred the motion to a newly-installed majority, which seemingly borrows from Justice Berger's old logic and approach. But just as Justice Berger's analysis was wrong then, this Court's ruling is wrong now.

The Code of Judicial Conduct is promulgated by this Court, as authorized by the legislature. *See* N.C.G.S. § 7A-10.1 (2023) ("The Supreme Court is authorized, by rule, to prescribe standards of judicial

conduct for the guidance of all justices and judges of the General Court of Justice."). Certainly, we *could* change the Code of Judicial Conduct to exempt a judge from recusal when that judge's close family member is party to a case only in their official capacity.[1] But we have not done so. Instead, we have promulgated and enforced conduct rules that plainly require recusal for near-family relationships. Those rules apply to all judges across this state, not just those on this Court.

The wisdom of that approach is clear—both for fair outcomes and public confidence in the judiciary. *See* N.C. Code of Jud. Conduct, pmbl. ("An independent and honorable judiciary is indispensable to justice in our society . . . ."). Imagine a scenario where a defendant walks into a courtroom only to learn that the elected district attorney prosecuting his case is the son of the elected judge presiding over his case. Few defendants would have faith that the judicial system would produce a fair and unbiased outcome—even though both the district attorney and the judge are elected officials acting in their official capacity. And likely the public at large would find this scenario equally problematic, which is why the plain language of our canons do not make any distinction about "official capacity" and require recusal when a close family member is an attorney or party in a proceeding.

To achieve the desired outcome in this case, members of this Court who typically ascribe to a strict textualist philosophy are eager to add words to the Code of Judicial Conduct. I would not so interpret the Code of Judicial Conduct, particularly because the added and inferred language is not fairly disclosed to all members of the judiciary bound by it. I suspect the reason we have not changed these rules is simple—the optics of overhauling existing ethics standards to accommodate Justice Berger and Senator Berger are problematic, to put it mildly. Any changes would have to undermine the canon's current language requiring recusal when a judge's family member is "a party to the proceeding, *or an officer*, *director*, *or trustee of a party*." N.C. Code of Jud. Conduct, Canon 3C(1)(d)(i) (emphasis added).

Also unavailing is the argument that Justice Berger does not need to recuse because "[m]ore than 2.7 million North Carolinians, knowing or at least having information available to them concerning [his] father's service in the Legislature, elected [Justice Berger] to consider and resolve significant constitutional questions." *N.C. State Conf. of the NAACP*, 380 N.C. at 264. Justice Berger's election to this Court does

1. To be sure, though, we cannot by rule infringe upon the due process rights of the litigants who appear before us.

not exempt him from the same ethical standards that bind all judges. The fact that Justice Berger, just like any other justice, would need to recuse when the Code of Judicial Conduct so requires does not lessen the significance of his election. Importantly, too, while the parties in the case could stipulate or acquiesce to Justice Berger's participation, the Governor has not done so here, instead seeking Justice Berger's recusal. Again, there is no mechanism whereby a popular vote can override a party's right to seek relief under either the Code of Judicial Conduct or under the Due Process Clause of the United States Constitution.

Moreover, unlike a case where familial relations are peripheral to the issues before us, *see N.C. State Conf. of the NAACP*, 380 N.C. 263, Senator Berger's prospective power hinges on our ruling in this case. For example, Session Law 2023-139 gives Senator Berger new authority to nominate two of the eight members on the State Board of Elections and to appoint the board's chair and executive director if the board fails to elect them. Act of Oct. 10, 2023, S.L. 2023-139 §§ 2.1, 2.5 https://ncleg.gov/EnactedLegislation/SessionLaws/PDF/2023-2024/SL2023-139.pdf.[2] Additionally, Session Law 2023-139 gives Senator Berger the power to nominate one of the four members on each of the 100 county boards of election across the state and to appoint a chair if a county board fails to elect one. *Id.* at § 4.1.

In the related case, Session Law 2023-136, provides, among other things, a seat for Senator Berger (or his designee) on the Economic Investment Committee. Act of Oct. 10, 2023, Session Law 2023-136 § 1.1 https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2023-2024/SL2023-136.pdf. Further Session Law 2023-136 expands Senator Berger's political influence by giving him control over multiple appointments to wide ranging executive and regulatory bodies, such as the Board of Transportation, the Commission for Public Health, the Coastal Resources Commission, the Wildlife Resources Commission, the Board of Directors of the University of North Carolina Health Care System, and the Utilities Commission. *Id.* at §§ 3.1–8.1, 10.1.

Legislative Defendants argue that any benefits from the disputed legislation accrue to the *position* of President Pro Tempore of the

2. The full name of Session Law 2023-139 is "An Act to Revise the Structures of the North Carolina State Board of Elections and County Board of Elections, to Revise the Emergency Powers of the Executive Director of the State Board of Elections, to Make Clarifying Changes to Senate Bill 512 of the 2023 Regular Session, to Make Additional Conforming and Clarifying Changes to Implement Photo Identification for Voting, and to Amend the Time for Candidates and Vacancy Appointees to File Statements of Economic Interests."

North Carolina Senate rather than to Senator Berger himself. That contention is overly formalistic. The position of President Pro Tempore is currently occupied by Senator Berger. A favorable ruling for Legislative Defendants would thus augment Senator Berger's political power and influence for at least some period of time.

By denying the motion to recuse Justice Berger, this Court discards the plain language and clear dictate of Canon 3C. North Carolina is not alone in requiring judicial recusal. Other jurisdictions also require a judge to withdraw in cases of close familial or paternal relationships. *See*, *e.g.*, *United States v. Rechnitz*, 75 F.4th 131, 143 (2d Cir. 2023) (holding that a district court judge abused his discretion under 28 U.S.C. § 455(a), the federal canon requiring disqualification in any proceeding in which his impartiality might reasonably be questioned by not reassigning a case where the "judge had a close, near-paternal personal relationship with" a cooperating witness who was a participant in the criminal conduct for which the defendant was charged)[3]; *Miss. Comm'n on Jud. Performance v. Bowen*, 123 So.3d 381, 384 (Miss. 2013) (holding a trial judge's failure to recuse from asbestos litigation was judicial misconduct where his parents had previously sued and settled asbestos exposure claims against the defendants "because a reasonable person, knowing all the circumstances, would have doubts regarding [the judge's] impartiality in the case"); *In re Griego*, 181 P.3d 690, 693 (N.M. 2008) (disciplining a judge who gave family members favorable dispositions in traffic court because impartiality "required [the judge] to recuse himself in cases involving family members").

Because I think the Code of Judicial Conduct unequivocally requires recusal here, it is not necessary to even reach the due process grounds for the motion. I respectfully dissent from this Court's decision to deny the motion to recuse.

Justice EARLS joins in this dissent.

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3. Scholars examining judicial recusals in the federal courts have identified close familial relations as a clear-cut basis for recusal. *See* Dane Thorley, *The Failure of Judicial Recusal and Disclosure Rules: Evidence from a Field Experiment*, 117 Nw. U. L. Rev. 1277, 1302 (2023) (recognizing "familial relationships" as a conflict "subject to bright-line [federal] per se recusal rules" in which "less judicial discretion [to refuse recusal] is involved" and where refusal to recuse would "almost certainly result in successful appeal and possibly an ethical sanction").

NORTH CAROLINA BAR AND TAVERN ASSOCIATION, ET AL.

v.

ROY A. COOPER, III, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF NORTH CAROLINA

From N.C. Court of Appeals
22-725

From Wake
20CVS6358

No. 126PA24

ORDER

The parties' Joint Motion to Amend Briefing Schedule is denied; however, the Court on its own motion extends the briefing deadlines as follows. Plaintiffs' brief responding to defendant's opening brief and opening briefing for the issues allowed in plaintiffs' cross-petition is due 28 August 2024. Defendant's brief responding to plaintiffs' opening brief and replying to plaintiffs' response to defendant's opening brief is due 18 September 2024. Plaintiff's reply brief is due 2 October 2024.

By order of the Court in Conference, this the 24th day of July 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 24th day of July 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

THE NORTH CAROLINA STATE BAR	From N.C. Court of Appeals P24-328
v.	
MARK CUMMINGS	From N.C. State Bar 22DHC25

No. 143P24

ORDER

With regard to Defendant's Petition for Writ of Supersedeas, this Court hereby dismisses the Petition for Writ of Supersedeas without prejudice to defendant's ability to seek a writ of supersedeas from the Court of Appeals.

Regarding Plaintiff's Motion to Dissolve the Stay, this Court hereby allows the motion. The temporary stay allowed on 11 June 2024 is hereby dissolved.

By order of the Court in Conference, this the 21st day of August 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of August 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

RODGERS v. NASH HOSPITALS, INC.

[386 N.C. 554 (2024)]

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.

From N.C. Court of Appeals
24-125

From Nash
19CVS820

No. 205P24

ORDER

On 29 July 2024, defendants filed a Joint Petition for Writ of Supersedeas and Motion for Temporary Stay. Defendants also filed a Joint Petition for Writ of Certiorari. This Court allows defendants' Temporary Stay of all further proceedings, including the 9 September 2024 trial and impending payment of monetary sanctions. This Temporary Stay shall remain in place until the Court of Appeals has completed its review of plaintiff's Motion to Dismiss Appeal in COA24-125. The Court of Appeals is hereby directed to rule on plaintiff's Motion to Dismiss Appeal within thirty days of the entry of this order.

By order of the Court in Conference, this the 7th day of August 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 7th day of August 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

STATE EX REL. STEIN v. MV REALTY PBC, LLC

[386 N.C. 555 (2024)]

STATE OF NORTH CAROLINA, EX REL. JOSHUA H. STEIN, ATTORNEY GENERAL V. MV REALTY PBC, LLC, MV REALTY OF NORTH CAROLINA, LLC, MV BROKERAGE OF NORTH CAROLINA, LLC, AMANDA ZACHMAN, ANTONY MITCHELL, DAVID MANCHESTER, AND DARRYL COOK	FROM N.C. BUSINESS COURT 23CV006408-910 FROM WAKE 23CV006408-910

No. 38A24

ORDER

Upon consideration of the brief filed by MV Realty in this matter, the appeal is dismissed *ex mero motu* as interlocutory; the case is remanded to the Business Court for further proceedings not inconsistent with this order of dismissal.

By order of the Court in Conference, this the 21st day of August 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of August 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

STATE v. DIXON

[386 N.C. 556 (2024)]

STATE OF NORTH CAROLINA	From N.C. Court of Appeals 21-471
v.	
NATHANIEL E. DIXON	From Buncombe 16CRS84811-12; 17CRS106

No. 13P24

ORDER

On 12 January 2024, defendant filed a Notice of Appeal Based Upon a Constitutional Question and a Petition for Discretionary Review. On 25 January 2024, the State filed a Motion to Dismiss Appeal. By this order, defendant's Petition for Discretionary Review is denied and the State's Motion to Dismiss Appeal is allowed. There being no majority opinion in the Court of Appeals, by this order that court's opinion in this matter is hereby unpublished.

By order of the Court in Conference, this the 21st day of August 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of August 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

STATE v. RADOMSKI

[386 N.C. 557 (2024)]

STATE OF NORTH CAROLINA	From N.C. Court of Appeals 23-340
v.	
JOSEPH JOHN RADOMSKI, III	From Orange 21CRS51423

No. 137P24

ORDER

Upon consideration of the petition filed on the 25th of June 2024 by the State in this matter for discretionary review of the decision of the Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

Denied by order of the Court in conference, this the 21st day of August 2024.

s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of August 2024.

Grant E. Buckner
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

Justice RIGGS dissenting.

This case raises an important question about the reach of the Second Amendment: Whether the parking lot of a public university is a "sensitive place" in which the government may restrict the use and possession of firearms. *See State v. Radomski*, 901 S.E.2d 908, 914 (N.C. Ct. App. 2024) (opining that a parking lot serving a university healthcare building and adjacent to undergraduate dormitories and a college football stadium is not "educational in nature" and, thus, not a "sensitive place"). The Court of Appeals ruled a state law unconstitutional as applied to Mr. Radomski, but the breadth of the opinion below implicates so many more than just him. *See id.* Rather than provide much needed clarity on a law that reflects the legislature's intent to keep children safe from

gun violence on educational grounds, and thereby provide clarity to law enforcement and school administrators on how to reconcile the duly enacted legislation with the Court of Appeals' ruling, this Court leaves an ambiguous, bare-bones lower court opinion standing. This inaction allows a cloud of uncertainty to potentially endanger our students and most certainly make much more difficult the work of law enforcement officers and school administrators. For the reasons below, I dissent.

I. Sensitive Places Doctrine

The Second Amendment of the United States Constitution protects "the right of the people to keep and bear Arms." U.S. Const. amend. II. The Amendment's applicability to state firearm regulations was largely unexamined until the United States Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008). *See id.* at 625 ("It should be unsurprising that such a significant matter has been for so long judicially unresolved. For most of our history, the Bill of Rights was not thought applicable to the States, and the Federal Government did not significantly regulate the possession of firearms by law-abiding citizens."); *see also State v. Kerner*, 181 N.C. 574, 575 (1921) ("The [S]econd [A]mendment . . . does not apply, for it has been repeatedly held by the United States Supreme Court . . . that the first ten amendments to the United States Constitution are restrictions upon the Federal authority and not upon the states."). In *Heller*, the Court focused heavily on the Second Amendment's meaning and, most important here, concluded that arms-bearing rights have bounds. *See Heller*, 554 U.S. at 626 ("Like most rights, the right secured by the Second Amendment is not unlimited.").

In particular, the *Heller* Court recognized the soundness of "long-standing . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." *Id.*; *see also McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (same); *United States v. Rahimi*, 144 S. Ct. 1889, 1902 (2024) (reiterating *Heller*'s limits on gun rights). Such prohibitions were deemed "presumptively lawful," *Heller*, 554 U.S. at 627 n.26, which is telling coming from a staunchly originalist opinion, *see* Julia Hesse & Kevin Schascheck II, *The Expansive 'Sensitive Places' Doctrine: The Limited Right to 'Keep and Bear' Arms Outside the Home*, 108 Cornell L. Rev. Online 218, 246 (2024) [hereinafter Hesse, *Expansive 'Sensitive Places' Doctrine*] ("The sensitive places doctrine does not call for an originalist inquiry because the doctrine is not the product of an originalist analysis. This is because such a view of the sensitive places doctrine, or any other presumptively lawful category under *Heller*, would fail to make structural sense when reading *Heller* as a whole. *Heller* is a deeply originalist opinion.").

Two years ago, in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022), the United States Supreme Court elaborated on what is now coined the "sensitive places" doctrine:

> [W]e are . . . aware of no disputes regarding the lawfulness of [sensitive place] prohibitions. We therefore can assume it settled that these locations were "sensitive places" where arms carrying could be prohibited consistent with the Second Amendment. And courts can use analogies to those historical regulations of "sensitive places" to determine that modern regulations prohibiting the carry of firearms in *new* and analogous sensitive places are constitutionally permissible.

Id. at 30 (second alteration in original) (emphasis in original) (citations omitted). Applying that framework, *Bruen* held that the New York firearm law at issue did not permissibly regulate a "sensitive place" because it covered areas "where people typically congregate and where law-enforcement and other public-safety professionals are presumptively available." *Id.* at 30–31. To the Court, such an application of the "sensitive place" exception was "far too broad[ ]" and lacked a historical analog. *Id.* at 31; *see also id.* ("Respondents' argument would in effect exempt cities from the Second Amendment and would eviscerate the general right to publicly carry arms for self-defense . . . .").

II. Discussion

In the case at bar, Mr. Radomski was convicted of possessing a firearm on educational property for having in his vehicle—parked on Crescent Parking Lot, which is central to the UNC-Chapel Hill campus—a number of unsecured, long guns.[1] *Radomski*, 901 S.E.2d at 911–12. Using *Bruen* as guidance, the Court of Appeals, in an oddly designated as-applied challenge that was not preserved at trial, considered whether a university parking lot is a "sensitive place." *Id.* at 913–14. More specifically, the Court of Appeals focused on the constitutionality of North Carolina's statutory gun restrictions. *Id.* at 913–15.

In 1971, our General Assembly carefully crafted N.C.G.S. § 14-269.2(b) to limit firearm possession on educational campuses while providing a significant list of exceptions for citizens with permits

1. Mr. Radomski was specifically located at Crescent Parking Lot, *Radomski*, 901 S.E.2d at 911, which neighbors Kenan Stadium, UNC School of Medicine, Taylor Campus Health, and UNC Hospital, *see Crescent Visitor Parking Lot*, Univ. N.C. Chapel Hill, https://maps.unc.edu/parking/crescent-visitor-parking-lot/ (last visited Aug. 22, 2024).

or the need to carry weapons (so long as the weapons are properly secured). *See* An Act to Protect Persons on the Property of Any Public or Private Educational Institution from Persons Carrying Firearms or Other Weapons, ch. 241, § 1, 1971 N.C. Sess. Laws 176–77 (codified as amended at N.C.G.S. § 14-269.2 (2023)). Unlike the sweeping regulation in *Bruen*, section 14-269.2(b) narrowly prohibits firearms specifically on "educational property," barring the carrying or possession of guns on:

> Any school building or bus, school campus, grounds, recreational area, athletic field, or other property owned, used, or operated by any board of education or school board of trustees, or directors for the administration of any school.

N.C.G.S. § 14-269.2(a)(1) (2023).

Yet the Court of Appeals, with alarming brevity, truncated the statute's scope, holding:

> However, [Mr. Radomski] argues, and we agree, that the purpose of the "open-air parking lot situated between the emergency room entrance, a football arena, and another healthcare building[]" is not educational in nature; rather, its function is to provide "parking access to the health care facilities in the area, including the hospital where [Mr. Radomski] was trying to be seen for significant kidney health concerns."

Radomski, 901 S.E.2d at 914 (second alteration in original). According to that court, section 14-269.2(b) was not a presumptively lawful "sensitive place" restriction in Mr. Radomski's case because Crescent Parking Lot was not "educational in nature." *Id.* at 914. That court then continued with *Bruen*'s analogical test, which required the State to provide a sufficient historical analog to section 14-269.2(b) to pass Second Amendment muster. *Id.* at 914–15 ("The State argues that, 'even applying *Bruen*'s analogical test, N.C.G.S. § 14-269.2(b) easily passes constitutional review.' " (alteration accepted)). Because the Court of Appeals was unconvinced that the State met this burden, it concluded that section 14-269.2(b) unconstitutionally restricted Mr. Radomski's Second Amendment rights. *Id.* at 915.

On appeal, the State raises grave concerns about the legal soundness and practical consequences of the Court of Appeals distillation of Second Amendment jurisprudence. It notes that *Heller* specifically carved out the "sensitive place" doctrine to allow firearm regulations in

"schools and government buildings." *Heller*, 554 U.S. at 626. The State argues that doctrine applies here because UNC-Chapel Hill (1) is an educational campus and includes Crescent Parking Lot within its property grounds and (2) is a public research institution, entirely owned and operated by the State of North Carolina. According to the State, had the Court of Appeals properly applied the "sensitive places" analysis, it would have upheld the statute's constitutionality. Other courts have reached that conclusion in similar cases. *See United States v. Class*, 930 F.3d 460, 464 (D.C. Cir. 2019) (ruling that a parking lot roughly 1,000 feet from the entrance of the United States Capitol Building was "sufficiently integrated with the Capitol for *Heller*[ ]'s sensitive places exception to apply"); *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1125 (10th Cir. 2015), *cert. denied*, 577 U.S. 1216 (2016) (concluding that a parking lot was a sensitive place because it should be "considered as a single unit with the postal building," which was attached to and exclusively served by the lot); *United States v. Dorosan*, 350 F. App'x 874, 875 (5th Cir. 2009), *cert. denied*, 559 U.S. 983 (2010) (applying the sensitive places doctrine to a government-owned parking lot after considering the government's ownership of the lot and the lot's government purpose); *State v. Schofield*, No. 1608024954, 2023 WL 7276650, at *3 (Del. Super. Ct. Nov. 3, 2023) (extending the sensitive places doctrine to a public sidewalk in a school zone because *Bruen* broadly categorizes schools as sensitive places), *aff'd*, 314 A.3d 1077 (Del. 2024); *Wade v. Univ. of Mich.*, No. 330555, slip op. at 13 (Mich. Ct. App. July 20, 2023) (rejecting the argument that "the entire campus is not a 'sensitive area' " as "untenable because it would require that certain 'areas' of the University be partitioned off from other areas of the University"), *on remand from* 981 N.W.2d 56 (Mich. 2022); *cf.* Hesse, *Expansive 'Sensitive Places' Doctrine* at 251 ("Whatever courts may eventually decide constitutes a sensitive place, that sensitive place will have a buffer zone around it. Conceptually, the buffer zone includes places that are sensitive by virtue of their proximity to the core sensitive place.").

The Court of Appeals invoked Rule 2 to address the unpreserved constitutional issue because of the "newly percolating and widely occurring issue" of Second Amendment jurisprudence. *Radomski*, 901 S.E.2d at 913. Yet by not taking this case, this Court allows an intermediate appellate court to invalidate a duly enacted state law and provides no clarity on the limits of the "as applied" nature of its invalidation. *See id.* at 919 (concluding vaguely that "[t]he application of N.C.G.S. § 14-269.2(b) to [Mr. Radomski's] conduct under these facts unconstitutionally restricts [his] Second Amendment protections."). Put another way, where is the limit to the Court of Appeals' ruling? Is a library

parking lot not "educational" in nature? Is a dormitory parking lot not "educational" in nature? What about a classroom parking lot? And it is far from clear that the Court of Appeals' ruling is limited to parking lots. Universities offer gymnasiums, food halls, and recreational facilities, among many other amenities, to their students—places outside the classroom that address student well-being. It may very well be a fair reading that the Court of Appeals' decision calls into question whether the State can regulate the possession of unsecured firearms in school gyms. In our inaction, we do a great disservice today to the safety of this state's children, and we undermine the important work of school administrators and law enforcement who are reconciling compliance with our state's laws and our judiciary's rulings.

III. Conclusion

Instead of evaluating the Court of Appeals' application of *Bruen*, this Court stays quiet. That silence is destabilizing and unwarranted. By enacting section 14-269.2(b), the General Assembly aimed to balance public-safety needs with our citizens' Second Amendment rights. *See State v. Conley*, 374 N.C. 209, 219 (2020) (Morgan, J. dissenting, with Newby, J. joining) ("[I]t is clear that the legislature intended that the presence of any gun or other firearm on educational property generate a heightened degree of concern . . . . The obvious legislative intent of this focused statutory enactment is to prevent violence in the schools located in North Carolina."). Whether the legislature struck the right balance is a crucial question, one particularly suited for and worthy of judicial evaluation. *See Rahimi*, 144 S. Ct. at 1898 ("As we explained in *Bruen*, the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition. A court must ascertain whether the new law is relevantly similar to laws that our tradition is understood to permit, applying faithfully the balance struck by the founding generation to modern circumstances." (cleaned up)).

By declining to examine the decision below, this Court dodges important questions about the constitutionality of North Carolina's gun regulations—on school property in particular and in "sensitive spaces" more generally. In other matters, this Court has taken the position that any time the Court of Appeals invalidates an act of the General Assembly, it is a matter of public importance and jurisprudence warranting merits review. *See State v. Grady*, 372 N.C. 509, 521–22 (2019) ("[W]e presume that laws enacted by the General Assembly are constitutional . . . ." (quoting *Cooper v. Berger*, 370 N.C. 392, 413 (2018))); *Hart v. State*, 368 N.C. 122, 126 (2015) ("[W]e begin with a presumption that the laws duly

enacted by the General Assembly are valid." (citing *State ex rel. Martin v. Preston*, 325 N.C. 438, 449 (1989))). Because I believe we should say *something*, I respectfully dissent.

Justice EARLS joins in this dissenting opinion.

ZANDER v. ORANGE CNTY., N.C.

[386 N.C. 564 (2024)]

ELIZABETH ZANDER AND EVAN GALLOWAY	From N.C. Court of Appeals 22-691
v.	From Orange 17CVS166
ORANGE COUNTY, NC AND THE TOWN OF CHAPEL HILL	From Orange 17CVS166

No. 426A18-2

ORDER

Pursuant to N.C. R. App. P. 30(f), this Court hereby allows Plaintiffs' Motion to Submit the Case for Review to the extent that the Court will decide the case on the record and briefs already filed. With regard to Plaintiffs' Motion to Deny Defendants Permission to Participate in Oral Argument, that motion is hereby dismissed as moot.

Defendants' Motion to Preclude Plaintiffs from Participating in Oral Argument is also hereby dismissed as moot. Defendants' Motion in the Alternative to Dismiss Appeal is denied.

By order of the Court in Conference, this the 2nd day of July 2024.

Riggs, J. recused.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 2nd day of July 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

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

23 AUGUST 2024

3P23-7	State of North Carolina v. Joseph Edwards Teague, III	1. Def's Pro Se Motion to Intercede in this Matter 2. Def's Pro Se Motion to Vacate Conviction, Dismiss All Charges, and Correct the Record with Prejudice with Appropriate Relief as the Court May Find Right	1. Dismissed 2. Dismissed
3P24	In re E.P.	1. Respondent Father's Motion for Temporary Stay (COA22-873) 2. Respondent Father's Petition for Writ of Supersedeas 3. Respondent Father's PDR Under N.C.G.S. § 7A-31	1. Denied **01/03/2024** 2. Denied 3. Denied
13P24	State v. Nathaniel E. Dixon	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA21-471) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Special Order 3. Special Order
24P23-4	SCGVIII-Lakepointe, LLC v. Vibha Men's Clothing, LLC; Kalishwar Das	Def's Pro Se Motion for Petition for Comprehensive Review	Dismissed **Dietz, J., recused** **Riggs, J., recused**
25P23-4	Kalishwar Das v. SCGVIII Lakepointe, LLC in c/o Mr. John F. Morgan, Jr. Plt's	Pro Se Motion for Petition for Rehearing	Dismissed **Dietz, J., recused** **Riggs, J., recused**
38A24	State of North Carolina, *ex rel.* Joshua H. Stein, Attorney General v. MV Realty PBC, LLC, MV Realty of North Carolina, LLC, MV Brokerage of North Carolina, LLC, Amanda Zachman, Antony Mitchell, David Manchester, and Darryl Cook	1. Defs' Motion for Temporary Stay 2. Defs' Petition for Writ of Supersedeas 3. Defs' Petition for Writ of Certiorari to Review Order of Business Court 4. Plt's Motion to Amend Response with Additional Authority 5. Defs' Motion to Strike or Disregard Portions of Amicus Brief of the North Carolina Real Estate Commission	1. Allowed **03/07/2024** Dissolved 2. Denied 3. Denied 4. Allowed **03/12/2024** 5. Dismissed as moot

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

23 AUGUST 2024

39A24-2	Chauncey Peele v. Melba Hodges Peele	Def's Pro Se Motion to Dismiss	Dismissed
40P24	State v. Kenneth Dylan Whitehead	Def's Petition for Writ of Certiorari to Review Order of the COA (COAP22-221)	Denied
45P24	State v. Robert Todd Guffey	Def's PDR Under N.C.G.S. § 7A-31 (COA22-1043)	Denied
53P23-2	John P. Cox v. Jessica Sadovnikov (now Impson)	1. Def's Motion for Temporary Stay (COA23-657) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Seal Docket	1. Allowed **06/27/2024** 2. 3. 4. **Dietz, J., recused**
53P24	Sanu Silwal, Gita Devi Silwal and GS2017 RE, LLC v. Akshar Lenoir, Inc.	1. Def's Motion for Temporary Stay (COA23-589) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31 4. Plts' Conditional PDR Under N.C.G.S. § 7A-31	1. Special Order **03/07/2024** 2. Denied 3. Denied 4. Denied
54P24	Stephen Matthew Lassiter, Employee v. Robeson County Sheriff's Department, Alleged Employer, Synergy Coverage Solutions, Alleged Carrier, and Truesdell Corporation, Alleged Employer, The Phoenix Insurance Co., Alleged Carrier	1. Defs' (Truesdell Corporation and The Phoenix Insurance Company) Motion for Temporary Stay (COA23-267) 2. Defs' (Truesdell Corporation and The Phoenix Insurance Company) Petition for Writ of Supersedeas 3. Defs' (Truesdell Corporation and The Phoenix Insurance Company) PDR Under N.C.G.S. § 7A-31	1. Allowed **03/11/2024** 2. Allowed 3. Allowed
61P24	State v. Andrew Webster Boynton	Def's PDR Under N.C.G.S. § 7A-31 (COA23-484)	Denied
64A21-2	State v. Riley Dawson Conner	Def's PDR Under N.C.G.S. § 7A-31 (COA19-1087)	Denied
68A23	State v. Joshua Lee Burgess	Def's Motion to Bypass Court of Appeals	Allowed **07/25/2024**

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

23 AUGUST 2024

75A24	State of North Carolina *ex rel.* NC Utilities Commission, et al. v. Carolina Industrial Group for Fair Utility Rates II, et al.	1. Parties' Joint Motion to Consolidate 2. Parties' Joint Motion to Set Briefing Schedule	1. Allowed **07/05/2024** 2. Allowed **07/05/2024**
85P24-2	Paul Yongo Odindo v. Mary Terry Kanyi	1. Plt's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP23-11) 2. Plt's Pro Se Motion for Appropriate Legal Fees and Costs and Other Damages	1. Denied 2. Denied **Riggs, J., recused**
88P24	Amy Delene Kean v. Warren Paul Kean	1. Def's Motion for Temporary Stay (COA23-46) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31 4. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **04/09/2024** Dissolved 2. Denied 3. Denied 4. Denied
89PA22	Eric Steven Fearrington, Craig D. Malmrose v. City of Greenville, Pitt County Board of Education	Plts' Petition for Rehearing	Denied **07/11/2024** **Dietz, J., recused**
93P24	State v. Jack Labrittan Smith	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA23-575) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed

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

23 AUGUST 2024

94P24	Mike Causey, Commissioner of Insurance of North Carolina, Petitioner v. Southland National Insurance Corporation, Southland National Reinsurance Corporation, Bankers Life Insurance Company, Colorado Bankers Life Insurance Company, North Carolina Domiciled Insurance Companies, Respondents	1. Intervenor's (GBIG Holdings, LLC) PDR Under N.C.G.S. § 7A-31 (COA23-725) 2. Appellees' Motion to Expedite Consideration of PDR 3. Intervenor's (GBIG Holdings, LLC) Motion to Withdraw PDR	1. Dismissed as moot 2. Dismissed as moot 3. Allowed
99P24	State v. Lloyd Michael Stewart	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-291)	Denied
102P19-12	State v. Christopher Lee Neal	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **07/02/2024**
102P24	State v. Warren Douglas Jackson	Def's PDR Under N.C.G.S. § 7A-31 (COA23-727)	Denied
106P24-2	State v. Christopher D. Cromartie, Jr.	1. Def's Pro Se Motion for Certificate of Appealability 2. Def's Pro Se Motion for Appeal of June 26, 2024 Order 3. Def's Pro Se Motion for Second Extension of Time	1. Dismissed 2. Dismissed 3. Dismissed
107A24	Blueprint 2020 Opportunity Zone Fund, LLLP, and Woodforest CEI Boulos Opportunity Fund, LLC v. 10 Academy Street QOZB I, LLC; CitiSculpt, LLC; CS 10 South Academy St, LLC; CitiSculpt SC, LLC; 10 Academy Street, LLC; CitiSculpt Fund Services, LLC; 10 Academy Opportunity Zone Fund I, LLC; Charles Lindsey McAlpine; and Michael J. Miller	Parties' Joint Motion for Limited Remand and Stay	Special Order **08/01/2024**

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

23 AUGUST 2024

109PA22-2	McKinney, et al. v. Goins, et al.	Amici Curiae Jane Does 1 and 2's Motion for Leave to Participate in Oral Argument	Denied **07/22/2024** **Riggs, J., recused**
116P24	State v. Darnell Queen	Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP24-166)	Denied
118P18-3	State v. Maurice L. Stroud	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Mecklenburg County (COAP16-413)	Dismissed
120P24-2	Daniel T. Bryan and Lisa D. Bryan v. Barbara Snow Adams and Pamela Frederes	1. Plts' Pro Se Motion to Reconsider (COA23-714) 2. Plt's Pro Se Motion for Temporary Stay	1. Dismissed 2. Dismissed
121P24	Amanda Wallace v. District Judge Doretta Walker	Petitioner's Petition for Writ of Certiorari to Review Order of the COA (COAP23-854)	Denied
126PA24	North Carolina Bar and Tavern Association, et al. v. Roy A. Cooper, III, in his official capacity as Governor of North Carolina	Parties' Joint Motion to Amend Briefing Schedule	Special Order **07/24/2024**
131P16-32	State v. Somchai Noonsab	Def's Pro Se Motion for Exoneration	Dismissed
131P24	Roy A. Cooper, III, in his official capacity as Governor of the State of North Carolina v. Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate; et al	1. Legislative Defs' PDR Prior to a Determination by the COA (COA24-440) 2. Plt's Motion and Suggestion of Recusal or Disqualification of Associate Justice Berger	1. Denied 2. Special Order

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

23 AUGUST 2024

132P24	Roy A. Cooper, III, in his official capacity as Governor of the State of North Carolina v. Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate; Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives; and the State of North Carolina	1. Legislative Defs' PDR Prior to a Determination by the COA (COA24-406) 2. Plt's Motion and Suggestion of Recusal or Disqualification of Associate Justice Berger	1. Denied 2. Special Order
137P24	State v. Joseph John Radomski, III	1. State's Motion for Temporary Stay (COA23-340) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/07/2024** Dissolved 2. Denied 3. Denied
139A24	State of North Carolina *ex rel.* NC Utilities Commission, et al. v. CIGFUR III, et al.	1. Parties' Joint Motion to Consolidate 2. Parties' Joint Motion to Set Briefing Schedule	1. Allowed **07/05/2024** 2. Allowed **07/05/2024**
141P24	State v. Billy Nelson Wynne	Def's PDR Under N.C.G.S. § 7A-31 (COA23-586)	Denied
143P24	The North Carolina State Bar v. Mark Cummings	1. Def's Motion for Temporary Stay (COAP24-328) 2. Def's Petition for Writ of Supersedeas 3. Plt's Motion to Dissolve the Stay	1. Allowed **06/11/2024** 2. Special Order 3. Special Order
144P21-3	State v. Derrick Jervon Lindsay	Def's Pro Se Motion for Objection to Order of the Court	Dismissed

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

23 AUGUST 2024

144P24	Dr. Darren Masier v. North Carolina State University	1. Respondent's Motion for Temporary Stay (COAP24-318) 2. Respondent's Petition for Writ of Supersedeas 3. Respondent's Motion to Lift Stay Pending Appeal and Temporary Stay Order for the Limited Purpose of Allowing the Superior Court to Consider Motion to Vacate Challenged Order and Dismiss the Underlying Action 4. Respondent's Motion to Withdraw Petition for Writ of Supersedeas	1. Allowed **06/13/2024** 2. Withdrawn **08/06/2024** 3. Allowed **07/22/2024** 4. Allowed **08/06/2024**
146P24	In re Foreclosure of a Deed of Trust Michelle Y. Samuels	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Mecklenburg County	Dismissed
147P24	In re M.G.B., T.J.B., H.E.D., Juveniles	Respondent-Grandmother's Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-853)	Denied
153P24	Kustom U.S., Inc. v. Cathleen Collins Bryant	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-370)	Denied
156P24	In re T.X.W., L.D.W., M.T.W.	1. Respondent-Mother's Pro Se Motion for Appeal of Right (COA17-855) 2. Respondent-Mother's Pro Se Motion to Proceed as Indigent	1. Dismissed 2. Allowed
162P18-3	State v. Ronnie Lee Ford	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Guilford County (COA17-817) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
163P24	State v. Tramella Tineak Hinton	1. Def's Pro Se Petition for Writ of Certiorari to Review Decision of the COA (COA23-673) 2. Def's Pro Se Motion for New Trial	1. Denied 2. Dismissed
164P21-2	State of North Carolina v. Terry Wayne Harris	Def's Pro Se Motion for PDR (COAP23-107)	Denied **Riggs, J., recused**

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166A24	State v. Jonathan Ray Lail	1. State's Motion for Temporary Stay (COA23-845) 2. State's Petition for Writ of Supersedeas 3. Notice of Appeal Based Upon a Dissent	1. Allowed **06/26/2024** 2. Allowed **07/15/2024** 3. ---
167P24	Kimarlo Ragland v. NC Division of Employment Security	1. Petitioner's Pro Se Motion for Notice of Appeal (COAP23-832) 2. Petitioner's Pro Se Petition for Writ of Certiorari to Review Order of the COA	1. Dismissed *ex mero motu* 2. Dismissed
167PA22	John Doe 1k v. Roman Catholic Diocese of Charlotte a/k/a Roman Catholic Diocese of Charlotte, NC	Def's Motion to Hold Oral Argument Contemporaneously with McKinney v Gaston County Board of Education, No. 109PA22-2	Dismissed as moot **06/28/2024**
168P24	Andrew Alderete v. Sunbelt Furniture Xpress, Inc.	1. Def's Motion for Temporary Stay (COA23-896) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/28/2024** 2. Allowed 3. Allowed
168PA22	John Doe v. Roman Catholic Diocese of Charlotte a/k/a Roman Catholic Diocese of Charlotte, NC	Def's Motion to Hold Oral Argument Contemporaneously with McKinney v. Gaston County Board of Education, No. 109PA22-2	Dismissed as moot **06/28/2024**

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169P23-4	State v. Christopher Leon Minor	1. Def's Pro Se Motion for Rule 2 Petition 2. Def's Pro Se Motion to Proceed as Indigent 3. Def's Pro Se Motion for Custody Hearing 4. Def's Pro Se Motion for Post Conviction Discovery 5. Def's Pro Se Motion to Dismiss 6. Def's Pro Se Petition for Writ of Habeas Corpus 7. Def's Pro Se Motion to Proceed as Indigent 8. Def's Pro Se Motion for Custody Hearing 9. Def's Pro Se Motion to Dismiss 10. Def's Pro Se Motion for Post Conviction Discovery	1. Denied **07/15/2024** 2. Allowed **07/15/2024** 3. Dismissed **07/15/2024** 4. Dismissed **07/15/2024** 5. Dismissed **07/15/2024** 6. Denied **07/15/2024** 7. Allowed **07/15/2024** 8. Dismissed **07/15/2024** 9. Dismissed **07/15/2024** 10. Dismissed **07/15/2024** **Riggs, J., recused**
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. 3.
176P24	State v. Jalen O'Keith Watlington	1. State's Motion for Temporary Stay (COA22-972) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **06/28/2024** 2. 3. 4.
177P24	State v. Terry Wayne Norris, Jr.	1. State's Motion for Temporary Stay (COA23-889) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/28/2024** 2. 3.
178P24	Ayabuja Bey a/k/a Omar Clyburn v. David Smith d/b/a David Smith Towning	Plt's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP24-388)	Dismissed

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181P24	State v. Toby Mitchell McDuffie, Jr.	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-836)	Denied
183P24	State v. Kimberly Cable	1. State's Motion for Temporary Stay (COA23-192) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Conditional PDR	1. Allowed **07/08/2024** 2. 3. 4.
184P24	Markese Robinson v. North Carolina Department of Corrections	Petitioner's Pro Se Motion for PDR (COAP24-364)	Dismissed
185P24	State v. Larry T. Whitehurst	1. Def's Pro Se Motion for Notice of Appeal (COAP24-29) 2. Def's Pro Se Motion for PDR	1. Dismissed 2. Dismissed
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. 3. 4.
191P24	In re J.R.S.	1. Respondent-Mother's Motion for Temporary Stay (COA23-976) 2. Respondent-Mother's Petition for Writ of Supersedeas 3. Respondent-Mother's PDR Under N.C.G.S. § 7A-31	1. Allowed **07/16/2024** Dissolved 2. Denied 3. Denied
192P24	State v. James E. Price	1. Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-915) 2. Def's Pro Se Motion to Waive Fees/Costs	1. Denied 2. Allowed **Riggs, J., recused**

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193P24	State v. Anthony Antonio Abraham, Jr.	1. Def's Pro Se Motion for Temporary Stay (COA23-954) 2. Def's Pro Se Petition for Writ of Supersedeas 3. Def's Pro Se Petition for Writ of Habeas Corpus 4. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA 5. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Rowan County	1. Denied **07/16/2024** 2. Denied **07/16/2024** 3. Denied **07/16/2024** 4. Denied **07/16/2024** 5. Dismissed **07/16/2024**
193P24-2	State v. Anthony Antonio Abraham, Jr.	Def's Pro Se Motion for Notice of Appeal (COA23-954)	Dismissed
194P19-4	State v. David Ezell Simpson	Def's Pro Se Motion for PDR (COAP22-360)	Dismissed
194P24	State v. Christopher Harold Orr	1. Def's Pro Se Motion for Temporary Stay 2. Def's Pro Se Petition for Writ of Supersedeas 3. Def's Pro Se Petition for Writ of Certiorari to Review Decision of District Court, Henderson County	1. Denied **07/22/2024** 2. Dismissed **07/22/2024** 3. Dismissed **07/22/2024**
197P24	State v. Arnold Travis Clark	1. Def's Motion for Temporary Stay (COA23-798) 2. Def's Petition for Writ of Supersedeas	1. Denied **07/25/2024** 2.
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. Plts' and Third Party Defs' Motion for Temporary Stay (COA22-776) 2. Plts' and Third Party Defs' Motion for Writ of Supersedeas 3. Plts' 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** 2. 3. 4.

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203P24	Java Warren and Jannifer Warren v. Cielo Ventures, Inc. d/b/a Servpro North Central Mecklenburg County	1. Def's Motion for Temporary Stay (COA22-926) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **07/26/2024** 2. 3.
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. 3.
207P24	Dennis O'Keith Blackwell v. Honorable Senior Judge of Superior County of Pender County	Petitioner's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP22-566)	Denied
263PA21-2	In re J.U.	Def's PDR Under N.C.G.S. § 7A-31 (COA20-812-2)	Denied
268P23	Colonial Plaza Phase Two, LLC, d/b/a Colonial Plaza Mall v. Cherry's Electronic Tax Services, LLC	Def's Petition for Writ of Certiorari to Review Decision of the COA (COA23-159)	Special Order
270P23	State v. Elton Joshua Pritchett, III	Def's PDR Under N.C.G.S. § 7A-31 (COA22-805)	Denied
274P23	State v. Robert Lee Price	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA22-1064) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Hold Appeal in Abeyance 4. State's Motion to Dismiss Appeal 5. Def's Motion to Amend PDR	1. --- 2. Denied 3. Dismissed as moot 4. Allowed 5. Allowed **Riggs, J., recused**

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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	1. Def-Appellants' Motion to Schedule Oral Argument Contemporaneously with McKinney v Gaston County Board of Education, No. 109PA22-2 2. Young Men's Christian Association of Northwest North Carolina d/b/a Kernersville Family YMCA's Motion for Leave to File Amicus Brief 3. Plt's Motion to Strike Brief of Amicus Curiae Young Men's Christian Association of Northwest North Carolina d/b/a Kernersville Family YMCA 4. Plt's Motion for Sanctions	1. Dismissed as moot **06/28/2024** 2. Special Order **07/05/2024** 3. Special Order **07/05/2024** 4. Special Order **07/05/2024** **Riggs, J., recused**
281P06-18	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	Dismissed
296P15-4	In re Ernest James Nichols	Petitioner's Pro Se Petition for Writ of Habeas Corpus	Denied **07/24/2024**
296P15-5	In re Ernest James Nichols	Petitioner's Pro Se Motion for Reconsideration	Dismissed **08/01/2024**
305P23	Jason Levine v. Sharetta S. Carter	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA23-113) 2. Plt's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
307P23	State v. Mario Wilson	1. State's Motion for Temporary Stay (COA21-34) 2. State's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31 4. State's Petition for Writ of Certiorari to Review Decision of COA	1. Allowed **11/14/2023** 2. Allowed 3. Denied 4. Allowed
310P23-3	State v. Rocky J. Bryant	Def's Pro Se Motion for PDR (COAP23-177)	Dismissed **Riggs, J., recused**
323P23-4	Owl House Cafe, LLC, OHCGrill, LLC, Hamza Tebib v. 11th Prosecutorial District Attorney (Granville County)	1. Plt's Pro Se Motion for Victim's Right Enforcement 2. Plt's Pro Se Petition for Writ of Mandamus	1. Denied 2. Denied

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326P23-5	In re D.T.P. & B.M.P.	1. Respondent-Parents' Pro Se Petition for Writ of Certiorari (COA23-29) 2. Respondent-Parents' Pro Se Petition for Writ of Certiorari 3. Respondent-Parents' Pro Se Petition for Writ of Mandamus	1. Dismissed 2. Dismissed 3. Denied
334P09-3	In re Christopher N. Gooch v. Ronney Huneycutt, as Warden of Alexander Correctional Institution, Todd E. Ishee, as Secretary of the North Carolina Department of Adult Corrections	1. Petitioner's Pro Se Petition for Writ of Habeas Corpus 2. Petitioner's Pro Se Motion to Proceed *In Forma Pauperis*	1. Denied **07/09/2024** 2. Allowed **07/09/2024** **Riggs, J., recused**
350P23-2	Abdolhossain Motealleh v. Duke Health, et al.	1. Plt's Pro Se Motion for Temporary Stay 2. Plt's Pro Se Petition for Writ of Supersedeas 3. Plt's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Wake County	1. Dismissed **08/05/2024** 2. Dismissed **08/05/2024** 3. Dismissed **08/05/2024**
353PA23	Cato Corporation, et al. v. Zurich American Insurance Company	1. Plts' Motion to Admit Gail A. McQuilkin Pro Hac Vice 2. Plts' Motion to Admit Benjamin J. Widlanski Pro Hac Vice 3. Plts' Motion to Admit Dwayne A. Robinson Pro Hac Vice	1. Allowed 2. Allowed 3. Allowed
405P11-2	State v. Nicholas Jermaine Steele	1. Def's Pro Se Petition for Writ of Mandamus and Prohibition 2. Def's Pro Se Motion on Procedure to Assert Right of Access 3. Def's Pro Se Petition for Writ of Habeas Corpus and Subpoena Duces Tecum	1. Dismissed **07/30/2024** 2. Dismissed **07/30/2024** 3. Denied **07/30/2024**
416P15-4	State v. Nijel Ramsey Lee	Def's Pro Se Motion for Appeal (COAP24-387)	Dismissed *ex mero motu* **07/12/2024**
416P15-5	Nijel Ramsey Lee v. Warden Ben Anderson	Petitioner's Pro Se Petition for Writ of Habeas Corpus	Denied **08/14/2024**

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426A18-2	Elizabeth Zander and Evan Galloway v. Orange County, NC and the Town of Chapel Hill	1. Plts' Motion to Deny Defs Permission to Participate in Oral Argument 2. Plts' Motion to Submit the Case for Review 3. Defs' Motion to Preclude Plts from Participating in Oral Argument 4. Defs' Motion in the Alternative to Dismiss Appeal	1. Special Order **07/02/2024** 2. Special Order **07/02/2024** 3. Special Order **07/02/2024** 4. Special Order **07/02/2024** **Riggs, J., recused**
475P20-3	State v. Solomon Nimrod Butler	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Cumberland County	Denied
536P20-4	State v. Siddhanth Sharma	Def's Pro Se Petition for Writ of Certiorari to Review Decision of the COA (COA19-591)	Denied
580P05-32	In re David Lee Smith	1. Def's Pro Se Petition for Writ of Mandamus 2. Def's Pro Se Motion for Demand for Remand of Case with Instructions	1. Denied 2. Dismissed **Riggs, J., recused**

THE CHIEF JUSTICE'S FAMILY LAW ADVISORY COMMISSION

The Order establishing the Chief Justice's Family Court Advisory Commission on 25 September 2019 is amended to read as follows:

THE CHIEF JUSTICE'S FAMILY LAW ADVISORY COMMISSION

IN THE SUPREME COURT OF NORTH CAROLINA
BY ORDER OF THE COURT

****

In recognition of the need to monitor North Carolina's approach to family law and to recommend improvements and promote the administration of justice in family law, the Supreme Court of North Carolina hereby amends the Chief Justice's Family Law Advisory Commission.

The Commission's chairperson will be the Chief Justice or the Chief Justice's designee. The Chief Justice will appoint the Commission's other members. The membership of the Commission shall be as follows:

- one justice of the Supreme Court of North Carolina;
- one judge of the North Carolina Court of Appeals;
- Four chief district court judges;
- Two clerks of the superior court;
- two court administrators;
- one staff member from the North Carolina Department of Juvenile Justice and Delinquency Prevention;
- one chief juvenile court counselor;
- one guardian ad litem administrator;
- one representative from a domestic violence program;
- one representative from a local custody mediation program;
- one law professor;
- one practicing attorney who regularly represents a local department of social services;
- two practicing attorneys with expertise in juvenile law; and
- two practicing attorneys with expertise in domestic law.

With the exception of the chairperson, the members of the Commission shall serve for a term of three years.

By virtue of this order, the Court issues to the Commission the following charge:

THE CHIEF JUSTICE'S FAMILY LAW
ADVISORY COMMISSION

- to advise the Chief Justice and the Director of the Administrative Office of the Courts on family law issues;
- to set guidelines and standards of practice for courts that decide family law issues;
- to assure accountability for courts that decide family law issues;
- to make recommendations about future legislative action, including needed statutory changes or budgetary suggestions;
- to review and make recommendations about the interrelationship between family law and court programs, such as guardian ad litem, child custody mediation, family treatment courts, and family financial settlement; and
- to oversee the further development of court training curriculum in family law.

Ordered by the Court in Conference, this the 21st day of August, 2024.

s/Paul Newby

PAUL NEWBY
Chief Justice
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 21st day of August, 2024.

s/Grant E. Buckner

GRANT E. BUCKNER
Clerk of the Supreme Court

JUDICIAL STANDARDS COMMISSION
RULES OF PROCEDURE

ORDER ADOPTING THE RULES OF PROCEDURE IN THE SUPREME COURT IN JUDICIAL STANDARDS CASES

Consistent with Article 30 of Chapter 7A of the General Statutes, the Court hereby adopts the "Rules of Procedure in the Supreme Court in Judicial Standards Cases" (shown below) to supersede the "Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission" (372 N.C. 907–10).

* * *

Rules of Procedure in the Supreme Court in Judicial Standards Cases

Rule 1. Scope

These rules apply to cases governed by Article 30 of Chapter 7A of the General Statutes in which the Judicial Standards Commission has filed a recommendation of judicial discipline with the Supreme Court under Rule 22 of the Rules of the Judicial Standards Commission.

Rule 2. Procedure

(a) **Notice of Briefing and Oral Argument**. If a respondent who is recommended for judicial discipline chooses to exercise his or her right under N.C.G.S. § 7A-377 to file a brief, then the respondent must file a notice of briefing and oral argument no later than 10 days after the commission files its recommendation. The notice must indicate that the respondent will file a brief and specify whether the respondent chooses to exercise his or her right to oral argument. If the respondent does not file a notice of briefing and oral argument, then the Supreme Court will decide the case without briefing and oral argument.

(b) **Briefs**. The respondent must file his or her brief no later than 30 days after the notice of briefing and oral argument is filed. The commission must file its brief no later than 30 days after respondent's brief is filed. The form and content of the briefs should conform as nearly as possible to the rules applicable to briefs in appeals to the Supreme Court. If the respondent does not file a brief, then the Supreme Court will decide the case without briefing and oral argument.

(c) **Oral Argument**. Oral arguments will conform as nearly as possible to the rules applicable to oral arguments in appeals to the Supreme Court.

(d) **Filing**. Documents must be filed electronically at https://www.ncappellatecourts.org. Other items should be filed electronically

if permitted to do so by the electronic-filing site, but they may be filed by hand delivery or mail with the permission of the Clerk of the Supreme Court.

(e) **Service**. Each item filed must include a certificate of service and be served on the other party. Service may be made by e-mail or in the manner provided in Rule 4 of the Rules of Civil Procedure.

Rule 3. Fees and Costs

No fees or costs will be assessed in the Supreme Court.

Rule 4. Confidentiality

Proceedings in the Supreme Court are confidential unless the respondent files a document with the Supreme Court that waives the confidentiality of the proceedings. The proceedings are no longer confidential if the Supreme Court publicly reprimands, censures, suspends, or removes the respondent.

* * *

The Rules of Procedure in the Supreme Court in Judicial Standards Cases are effective immediately and shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 21st day of August 2024.

s/Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 21st day of August 2024.

s/Grant E. Buckner

GRANT E. BUCKNER
Clerk of the Supreme Court

ORDER AMENDING THE RULES OF THE JUDICIAL STANDARDS COMMISSION

Pursuant to subsection 7A-375(g) of the General Statutes of North Carolina, the Court hereby approves the following amendments to the Rules of the Judicial Standards Commission. This order affects Rules 2, 3, 7, 8, 9, 12, 15, 16, 17, 18, 19, 20, and 22.

* * *

Rule 2. Organization and Meetings

(a) **Officers**. The Commission shall have a Chairperson and a Vice-Chairperson, who ~~is~~are the North Carolina Court of Appeals ~~member~~members of the Commission~~, and two Vice-Chairpersons, who are the superior court judge members of the Commission~~. The Executive Director shall serve as the secretary to the Commission and to each panel and shall perform other duties as the Commission or a panel may assign.

(b) **Panels**. The Chairperson shall divide the Commission into 2 panels, designated Panel A and Panel B.

(1) ~~The Chairperson shall be assigned to and serve as the Chairperson of Panel A and Panel B.~~The Chairperson shall be assigned to Panel A or Panel B and preside at the meetings of that panel. The Vice-Chairperson shall be assigned to and preside at the meetings of the other panel. If the Chairperson or Vice-Chairperson is absent from a meeting of their assigned panel, then the other person shall attend and preside at the meeting. If both the Chairperson and Vice-Chairperson are unable to attend a panel meeting, then the superior court judge assigned to that panel with the longest tenure on the Commission shall preside at the meeting unless otherwise designated by the Chairperson or Vice-Chairperson.

(2) The Chairperson shall assign the other members of the Commission to serve on Panel A or Panel B, each panel to include, in addition to either the Chairperson or Vice Chairperson~~,~~ 1 superior court judge~~,~~ and 1 district court judge appointed by the Chief Justice, ~~2 members appointed by the North Carolina State Bar~~1 superior court judge and 1 district court judge appointed by the General Assembly, 1 citizen appointed by the Governor, and 1 citizen appointed by the General Assembly. ~~Other than the Chairperson, no member shall be assigned~~

~~to both Panel A and Panel B for consideration of the same matter.~~

(3) ~~The superior court judge assigned to Panel A or Panel B shall serve as the Vice-Chairperson of the panel, and in the absence or disqualification of the Chairperson, shall preside over panel meetings, whether meeting as an investigative or hearing panel. In the absence or disqualification of both the Chairperson and Vice-Chairperson, the district court judge assigned to the panel shall preside.~~If the Chairperson or Vice-Chairperson is disqualified from considering a matter at a meeting of their assigned panel, then the other person shall attend the meeting and preside over the consideration of that matter. If both the Chairperson and Vice-Chairperson are disqualified from considering a matter, then the superior court judge assigned to that panel with the longer tenure on the Commission shall preside over the consideration of the matter. If the superior court judge is absent or is disqualified from considering the matter, then the other superior court judge assigned to that panel shall preside over the consideration of the matter. A superior court judge who presides over a matter shall have the same authority over the matter that the Chairperson or Vice-Chairperson has under these rules.

(4) Each panel shall serve as an investigative panel at its regular business meetings for purposes of reviewing complaints, ordering investigations, ~~or~~and authorizing the initiation of disciplinary or disability proceedings. Each panel shall also serve as a hearing panel for any disciplinary or disability proceeding authorized by the other panel. No panel may function as both an investigative and a hearing panel in the same matter. A Chairperson or Vice-Chairperson who has considered a matter while serving on an investigative panel may preside over the consideration of that same matter by a hearing panel. However, a Chairperson or Vice-Chairperson who has voted on a motion to charge a judge while serving on an investigative panel may not vote during a hearing panel's consideration of that matter. Otherwise, no member shall be assigned to both an investigative panel and a hearing panel for consideration of the same matter.

(c) **Panel Meetings**. Panel meetings shall occur pursuant to the following requirements:

(1) ~~Panel A and Panel B shall meet in alternating months, unless prevented by exigent circumstances, such as inclement weather, an emergency, or an unresolvable conflict with court calendars.~~Unless prevented by exigent circumstances, Panel A and Panel B shall each meet at least 5 times per calendar year on a rotating schedule promulgated by the Chairperson. Upon the call of the Chairperson, additional or special panel meetings may also be convened as needed to conduct or conclude the panel's business.

(2) Each panel member, including the Chairperson, Vice-Chairperson, or other presiding member, shall be a voting member of the panel unless disqualified from considering a particular matter pursuant to Rule 7.

(3) A quorum for the conduct of the business of a panel, whether sitting as an investigative or hearing panel, shall consist of 5 members present. The affirmative vote of at least 5 members present is required to authorize official action of the panel.

(4) The presiding Chairperson or Vice-Chairperson may direct the reassignment of any matter for initial review to the other panel so long as no action has been taken by the original investigative panel scheduled to review and consider the matter.

(5) In the event that a hearing panel member will be absent for a hearing in a disciplinary or disability proceeding and the member's absence will prevent the formation of a quorum, the Chairperson, Vice-Chairperson, or Executive Director shall request the appointing authority for the absent member to appoint an alternative member for the sole and exclusive purpose of participating as a member of the hearing panel for that disciplinary or disability proceeding.

(d) **Plenary Meetings**. Meetings of the full Commission shall occur pursuant to the following requirements:

(1) The full Commission shall meet on the call of the Chairperson or upon the written request of any 5 members.

(2) A quorum for the conduct of the business of the full Commission shall consist of 9 members present. The affirmative vote of at least 9 members is required to

authorize any Commission action that requires a vote of the full membership.

(3) In the absence of the Chairperson at a plenary meeting, the Vice-Chairperson ~~with the longest tenure on the Commission~~ shall preside at the meeting. In the absence of both the Chairperson and Vice-Chairperson at a plenary meeting, the superior court judge with the longest tenure on the Commission shall preside at the meeting unless otherwise designated by the Chairperson.

(4) Upon the authorization of the Chairperson, the full Commission may conduct votes on specific matters by electronic means, with the votes to be recorded and maintained by the Executive Director.

(e) **Meeting Places**. Panel and plenary meetings of the Commission shall ordinarily meet at the North Carolina Court of Appeals, 1 West Morgan Street, Raleigh, North Carolina. The Chairperson may also direct that meetings be held anywhere in the state or through telephonic or electronic means.

* * *

Rule 3. Commission Staff

(a) **Executive Director**. The Executive Director shall have the duties and responsibilities prescribed by the Commission, including but not limited to:

(1) reviewing complaints and information as to alleged misconduct or disability, and making preliminary evaluations with respect thereof;

(2) providing training and developing educational resources relating to the Code and Commission procedures;

(3) issuing informal advisory opinions to judges and preparing formal advisory opinions as directed by the Commission, as provided in Rule 8;

(4) maintaining the Commission's records concerning the operation of the Commission;

(5) administering funds for the Commission's budget as prepared by the Administrative Office of the Courts;

(6) preparing an annual report and statistical information regarding the Commission's activities for presentation to the Commission, Supreme Court, and public;

(7) employing, with the approval of the Chairperson, the Commission Counsel, Commission Investigator, and other authorized Commission staff;

(8) supervising the Commission staff; and

(9) performing other duties at the direction of the Commission, ~~the~~ Chairperson, or Vice-Chairperson, or as required by these rules.

(b) **Commission Counsel**. The Commission Counsel shall have the duties and responsibilities prescribed by the Commission, including but not limited to:

(1) reviewing complaints and information as to alleged misconduct or disability, and making preliminary evaluations thereof;

(2) conducting limited confidential inquiries with respect to complaints or information as to alleged misconduct or disability as necessary to verify information to be presented to an investigative panel for initial review;

(3) directing investigations as to alleged misconduct or disability and reporting to and advising the appropriate investigative panel as to the investigations;

(4) prosecuting disciplinary and disability proceedings before the Commission and appearing on behalf of the Commission in the Supreme Court in connection with any recommendation made by the Commission;

(5) providing training and developing educational resources relating to the Code and Commission procedures;

(6) issuing informal advisory opinions to judges as provided in Rule 8; and

(7) performing other duties at the direction of the Commission, Chairperson, Vice-Chairperson, or Executive Director, or as required by these rules.

(c) **Commission Investigator**. The Commission Investigator shall have the duties and responsibilities prescribed by the Commission, including but not limited to:

(1) conducting investigations initiated pursuant to these rules;

(2) assisting the Commission Counsel during disciplinary proceedings;

(3) maintaining records of Commission investigations; and

(4) performing other duties at the direction of the Commission, Chairperson, Vice-Chairperson, Executive Director, or Commission Counsel, or as required by these rules.

* * *

Rule 7. Disqualification

(a) **Applicable Standard**. A member of the Commission is disqualified from considering a matter in which disqualification would be required of a judge by the Code or by law. A judge who is a member of the Commission is disqualified from acting in a matter in which the judge is the subject of a complaint, investigation, or disciplinary or disability proceeding, except in his or her own defense.

(b) **Procedure**. At the convening of each panel meeting, whether an investigative panel or a hearing panel, the ~~Chairperson~~presiding member shall remind all members to voluntarily disqualify themselves from consideration of any matter wherein disqualification is required pursuant to subsection (a) of this rule. In the absence of a voluntary disqualification from the matter under consideration, or upon motion of a party to a disciplinary or disability proceeding, the ~~Chairperson~~presiding member shall decide in his or her sole discretion whether disqualification is required in that instance.

* * *

Rule 8. Advisory Opinions

(a) **Formal Advisory Opinions**. A person may request that the Commission issue a formal advisory opinion as to whether actual or contemplated conduct on the part of a judge conforms to the requirements of the Code, subject to the following procedures:

(1) A request for a formal advisory opinion shall be submitted to the Executive Director in writing, who shall present the request to the Commission for consideration.

(2) Upon the affirmative vote of 9 members, the full Commission may issue a formal advisory opinion, which shall be written and shall state its conclusion with respect to the question asked and the reasons therefor.

(3) A formal advisory opinion shall be provided to the Appellate Reporter for publication, and the Reporter

shall, from time to time, as directed by the Commission, publish an index of advisory opinions. The formal advisory opinion shall also be published on the Commission's website.

(4) A formal advisory opinion shall have precedential value in determining whether similar conduct conforms to the Code but shall not constitute controlling precedent or legal authority in the Supreme Court for the purpose of reviewing a disciplinary recommendation. To the extent the Supreme Court expressly nullifies an existing formal advisory opinion, the formal advisory opinion shall be deemed automatically withdrawn.

(5) Other than as provided in subsection (a)(4) of this rule, a formal advisory opinion may be modified or withdrawn by the Commission only upon the affirmative vote of 9 members of the full Commission. Until a formal advisory opinion is modified or withdrawn by the Commission or nullified by the Supreme Court, a judge shall be deemed to have acted in good faith if he or she acts in conformity with the advisory opinion.

(6) Except as published in the formal advisory opinion, information provided to the Commission and work product or communications associated with drafting and issuing the formal advisory opinion shall be confidential.

(b) **Informal Advisory Opinions**. A judge subject to the jurisdiction of the Commission may seek a confidential informal advisory opinion from the Chairperson, Vice-Chairperson, Executive Director, or Commission Counsel as to whether conduct, actual or contemplated, conforms to the requirements of the Code, subject to the following procedures:

(1) An informal advisory opinion may be requested orally or in writing.

(2) Any oral or written communications between the requesting judge and the Commission relating to an informal advisory opinion shall be confidential unless waived in writing by the judge.

(3) If a request for an informal advisory opinion discloses actual conduct that may be actionable as a violation of the Code, then the Chairperson, Vice-Chairperson, Executive Director, or Commission Counsel shall refer

the matter to an investigative panel of the Commission for consideration.

(4) An informal advisory opinion may be issued orally but shall be confirmed in writing and shall approve or disapprove only the matter in issue, shall not otherwise serve as precedent, and shall be confidential.

(5) Informal advisory opinions shall be reviewed at regularly scheduled panel meetings. If upon review, a majority of the panel members present and voting decide that an informal advisory opinion should be withdrawn or modified, then the inquiring judge shall be notified in writing by the Executive Director. Until this notification takes place, the judge shall be deemed to have acted in good faith if he or she acts in conformity with the informal advisory opinion that is later withdrawn or modified.

(6) If an inquiring judge disagrees with the informal advisory opinion issued by the Chairperson, Vice-Chairperson, Executive Director, or Commission Counsel, then the judge may submit a written request in accordance with subsection (a) of this rule for consideration of the inquiry by the full Commission as a formal advisory opinion.

(c) **Protection of Privileged Information**. All inquiries, whether requesting a formal advisory opinion or an informal advisory opinion, shall present in detail all operative facts upon which the inquiry is based but should not disclose privileged information that is not necessary to the resolution of the question presented.

* * *

Rule 9. Procedure on Receipt of Complaint or Information

(a) **Summary Dismissal After Initial Review**. The Executive Director and the Commission Counsel shall review a written complaint received by the Commission to determine whether the complaint discloses facts that, if true, indicate that a judge has engaged in conduct in violation of the Code or suffers from a disability that seriously interferes with the judge's judicial duties. If the initial review does not disclose such facts, or if the allegations in the written complaint are obviously unfounded or frivolous, then the presiding Chairperson or Vice-Chairperson shall summarily dismiss the complaint at the next investigative panel meeting, subject to the right of a member of the panel to review the complaint and request consideration of it pursuant to subsection (b) of this rule.

(b) **Action on Review by the Investigative Panel**. A written complaint not summarily dismissed pursuant to subsection (a) of this rule shall be considered by an investigative panel. The investigative panel shall also consider any complaint brought on the Commission's own motion that is based on credible information received by the Commission disclosing facts that, if true, indicate that a judge has engaged in conduct in violation of the Code or suffers from a disability that seriously interferes with the judge's judicial duties. By the affirmative vote of at least 5 members, the investigative panel may dismiss the complaint or authorize an investigation pursuant to Rule 10.

(c) **Notice to Judge Regarding Complaint**. A judge who is the subject of a complaint pending before the Commission shall not be notified of the filing of the complaint, except:

(1) if notification to the judge is required pursuant to Rule 10, following the authorization of a formal investigation;

(2) if the investigative panel considering the complaint has authorized the Chairperson, Vice-Chairperson, Executive Director, Commission Counsel, or Commission Investigator to notify the judge of the complaint in the interests of the administration of justice; or

(3) if the judge has been notified by the complainant that the complaint was filed, or if the judge has been notified by another state agency of the receipt of a complaint that was received by that agency and forwarded to the Commission as required by law or other rules.

(d) **Notice to Complainant Regarding Commission Action**. A complainant who files a complaint with the Commission shall be notified in writing of:

(1) the Commission's receipt of the complaint;

(2) the initiation of a formal investigation into the complainant's allegations;

(3) a dismissal of the complaint by the investigative panel, if applicable;

(4) the investigative panel's decision with respect to an appropriate request for reconsideration after the dismissal of a complaint; and

(5) the issuance of an order of public discipline by the Supreme Court in the matter.

In cases in which a complaint is dismissed with a private letter of caution pursuant to Rule 11, the complainant shall be notified that the

matter has concluded and that the Commission has taken appropriate action within its authority to address the complainant's concerns of judicial misconduct.

In cases in which disciplinary proceedings against the judge have been initiated, the complainant shall be notified of the proceedings only if the complainant is to be called as a witness, or if the presiding Chairperson or Vice-Chairperson deems notice to be necessary in the interests of the administration of justice.

(e) **Requests for Reconsideration**. Upon dismissal of a complaint, a complainant may request reconsideration of the dismissal, provided that a request for reconsideration will only be considered by the investigative panel that dismissed the complaint if a request includes new or additional information not previously considered by the panel. Multiple requests for reconsideration without new or additional information will be considered an abuse of the Commission's complaint process and may result in a bar order pursuant to subsection (f) of this rule.

(f) **Abuse of the Complaint Process**. At any meeting of an investigative panel, the Commission Counsel may request that the Commission bar a complainant from filing further complaints or requests for reconsideration with the Commission for either a specified period of time or permanently as to allegations against the judge that have already been considered by the Commission. A bar shall be ordered only upon the affirmative vote of at least 5 members of the panel after a finding by clear and convincing evidence that the complainant has abused the complaint process by:

(1) using abusive or threatening language that is directed toward the Commission, Commission members, or Commission staff, or toward specific members of the judiciary;

(2) knowingly filing false information with the Commission;

(3) repeatedly demanding that the Commission rehear a complaint that has already been reviewed and dismissed without providing new or significantly different allegations or evidence, or repeatedly demanding that the Commission consider a complaint that has already been determined to be outside of the time period allowed for review of the alleged misconduct by the Commission or outside of the Commission's jurisdiction; or

(4) filing complaints that maintain the complainant is not subject to the authority of the State of North Carolina, or its laws, rules, or procedures, and that refuse to recognize

the authority of the General Statutes of North Carolina over the Commission's operations and procedures.

* * *

Rule 12. Initiation of Disciplinary or Disability Proceedings

(a) **Authorization of Disciplinary or Disability Proceedings**. After completion of a formal investigation authorized pursuant to Rule 10, and upon the affirmative vote of at least 5 members, the investigative panel considering the matter may authorize the initiation of a disciplinary or disability proceeding against the judge, who thereafter shall be referred to as the Respondent. The authorization to initiate a disciplinary or disability proceeding constitutes a finding that probable cause exists to believe that the Respondent engaged in conduct that warrants public reprimand, censure, suspension, or removal by the Supreme Court or that the Respondent suffers from a disability that warrants suspension or removal by the Supreme Court pursuant to Article 30 of Chapter 7A of the General Statutes of North Carolina.

(b) **Filing of the Statement of Charges**. A disciplinary or disability proceeding is initiated through the filing of a Statement of Charges by the Commission Counsel at the Commission offices. The Statement of Charges shall contain:

(1) a caption entitled "BEFORE THE JUDICIAL STANDARDS COMMISSION, Inquiry Concerning a Judge No. ___.";

(2) a description of the charge or charges in plain and concise language and in sufficient detail to give fair and adequate notice of the nature of the alleged misconduct or disability;

(3) the name of the complainant;

(4) a statement about the Respondent's right to be represented by counsel at the Respondent's expense; and

(5) directions to the Respondent to file a Verified Answer as required pursuant to Rule 13.

(c) **Notice and Service of the Statement of Charges**.

(1) Service of the Statement of Charges shall constitute notice to the Respondent of the initiation of disciplinary or disability proceedings.

(2) Unless waived by the Respondent, a copy of the Statement of Charges shall be personally served upon the Respondent by a person of suitable age and discretion

who has been designated by the Commission. If, after reasonable efforts to do so, personal service upon the Respondent cannot be effected, service may be made to the Respondent's home address by Registered Mail or Certified Mail, return receipt requested. Proof of service in accordance with N.C.G.S. § 1-75.10(a)(4) shall be filed with the Commission.

(d) **Withdrawal of the Statement of Charges**. Upon motion by the Commission Counsel and good cause shown, the investigative panel that authorized the initiation of disciplinary or disability proceedings may withdraw the Statement of Charges upon the affirmative vote of at least 5 members. Notice of withdrawal of the Statement of Charges shall be made in the same manner as service of the Statement of Charges.

(e) **Interim Suspension During Disciplinary or Disability Proceedings**. At any time following the conclusion of a formal investigation, if the investigative panel finds by clear and convincing evidence that a judge has (1) been charged with a felony under state or federal law, or (2) engaged in serious misconduct that poses an ongoing threat of substantial harm to public confidence in the judiciary or to the administration of justice, then the investigative panel may, upon the affirmative vote of at least 5 members, direct the presiding Chairperson or Vice-Chairperson to recommend that the Chief Justice temporarily suspend the judge from the performance of his or her judicial duties with pay pending final disposition of the proceedings. A copy of the recommendation of interim suspension shall be provided to the judge by Certified Mail, return receipt requested, or as otherwise agreed to in writing by the judge. At any time after an interim suspension is issued, the judge shall have the right to submit written objections to the Commission. The Executive Director shall provide the judge's objections to the Chief Justice, along with the Commission's response. The Executive Director shall also provide a copy of the Commission's response to the judge.

* * *

Rule 15. Ex Parte Communications

(a) **During Disciplinary or Disability Proceedings**. Except as provided in subsection (b) of this rule, upon the initiation of a disciplinary or disability proceeding, no member of the Commission shall engage in ex parte communications with the Respondent, Respondent's counsel, Commission Counsel, or witness regarding the facts or merits of the proceeding.

(b) **Administrative and Procedural Matters**. Commission members may communicate with the Executive Director, Commission

Counsel, and Commission staff with respect to procedural and administrative matters involved in a disciplinary or disability proceeding as may be required in these rules. Upon consent of the Respondent, or the Respondent's counsel, if any, the Commission Counsel may also communicate with the presiding Chairperson or Vice-Chairperson regarding administrative and procedural motions submitted on consent of the parties during the course of a disciplinary or disability proceeding.

* * *

Rule 16. Discovery

(a) **Required Disclosures**. Unless extended by order of the presiding Chairperson or Vice-Chairperson, within 60 days of the filing of the Verified Answer, the Commission Counsel and the Respondent shall disclose to the other:

(1) the name, address, and contact information of each witness the party expects to offer at the disciplinary or disability hearing;

(2) a brief summary of the expected testimony of each witness;

(3) written statements provided by a witness to the Commission or the Respondent; and

(4) copies of documentary or other evidence that may be offered at the disciplinary or disability hearing.

(b) **Exculpatory Evidence**. At the same time the Commission Counsel provides the disclosures required under subsection (a) of this rule, the Commission Counsel shall also provide the Respondent with exculpatory evidence that he or she is aware of and that is relevant to the allegations contained in the Statement of Charges or in a defense thereto.

(c) **Other Forms of Discovery**. The taking of depositions, serving of interrogatories, document requests, requests for admissions, and other discovery procedures authorized by the North Carolina Rules of Civil Procedure shall be permitted only by stipulation of the parties or by order of the Chairperson for good cause shown, and shall be completed in the manner and subject to any conditions as the Chairperson may prescribe.

(d) **Discovery Disputes**. Disputes concerning discovery shall be determined by the presiding Chairperson or Vice-Chairperson, whose decision may not be appealed prior to the conclusion of the disciplinary or disability proceeding.

(e) **Failure to Disclose and Duty to Supplement**. Upon the failure of either party to disclose information or evidence as required under subsections (a) and (b) of this rule, the opposing party may move the presiding Chairperson or Vice-Chairperson for an order compelling disclosure. A copy of the motion to compel shall be served on the opposing party and shall be heard before the presiding Chairperson or Vice-Chairperson, who shall decide the motion in his or her sole discretion. A willful or continuing failure to provide required disclosures may result in the exclusion of the testimony of the witness or of the documentary evidence that was not provided. Both the Commission Counsel and the Respondent shall have a continuing duty to supplement information required to be exchanged under this rule.

* * *

Rule 17. Special Rules as to Disability Cases

(a) **Applicability of Rules Relating to Judicial Misconduct**. A proceeding shall be considered a disability proceeding if it is initiated by either a complaint or motion of the Commission alleging a disability of a judge that seriously interferes with the judge's judicial duties. If a disability proceeding is authorized by the investigative panel upon the completion of a formal investigation pursuant to Rule 10, then the disability proceeding shall be conducted in accordance with the procedures for disciplinary proceedings except as provided in this rule.

(b) **Waiver of Medical Privilege**. A judge waives the medical privilege and shall produce to the Commission Counsel the judge's medical records relating to an alleged disability, if the judge:

(1) provides a written waiver to the Commission;

(2) denies the existence of a disability in a proceeding in which the mental or physical condition or health of the judge is in issue; or

(3) asserts the existence of a disability as a defense to a Statement of Charges.

(c) **Physical or Mental Examination**. Upon the affirmative vote of 5 members, the investigative panel may order a judge who is subject to a formal investigation based on alleged disability to submit to a physical or mental examination by one or more qualified licensed physicians, psychologists, or mental health professionals appointed by the presiding Chairperson or Vice-Chairperson to conduct the examination. The examination shall be at the Commission's expense and copies of the report of the examination shall be provided to the judge and the Commission Counsel. The examining physician or health professional

shall be compensated by the Commission in the same manner as experts in civil cases in the General Court of Justice are compensated. If called to testify at a disciplinary proceeding, the Commission shall bear the witness costs of the examining physician or health professional as provided in Rule 20.

(d) Failure or Refusal to Submit to Examination. The failure or refusal of a judge to submit to a physical or mental examination ordered by the investigative panel shall preclude the judge from presenting evidence of the results of a physical or mental examination done at the judge's own expense. An investigative or hearing panel may consider a refusal or failure to submit to a physical or mental examination ordered pursuant to subsection (c) of this rule as evidence that the judge has a disability that seriously interferes with the ability of the judge to perform the duties of the judicial office.

* * *

Rule 18. Stipulated Facts and Agreed Disciplinary or Disability Dispositions

(a) **Factual Stipulations**.

(1) At any time prior to the conclusion of a disciplinary or disability hearing, the Respondent may stipulate to any of the factual allegations in the Statement of Charges and any other agreed upon facts. The factual stipulations shall be in writing and shall be signed by the Respondent, the Respondent's counsel, if any, and by the Commission Counsel. The factual stipulations may include an agreement as described in subsection (b) of this rule.

(2) The presiding Chairperson or Vice-Chairperson of the hearing panel may accept the factual stipulations and any agreement made pursuant to subsection (b) of this rule into the record at the disciplinary hearing upon the ~~Chairperson's~~presiding Chairperson or Vice-Chairperson's satisfaction that they were entered into freely and voluntarily.

(3) At the conclusion of the disciplinary hearing, the hearing panel shall deliberate and may adopt the factual stipulations upon the affirmative vote of at least 5 members present at the disciplinary hearing. Adoption of the factual stipulations constitutes a finding that the facts contained therein are established by clear and convincing evidence.

(4) If the factual stipulations are rejected by the hearing panel, then they shall be deemed withdrawn. In such circumstances, the Executive Director shall promptly notify the Respondent and the Commission Counsel of a date for a full evidentiary hearing.

(b) **Agreements as to Code Violations and Disciplinary Disposition.**

(1) Factual stipulations made pursuant to subsection (a) of this rule may, but are not required to, include an agreement as to specified violations of the Code in exchange for a requested disciplinary disposition. Upon its de novo review, the hearing panel may accept the agreement upon the affirmative vote of at least 5 members.

(2) In the absence of an agreement as to violations of the Code or a requested disciplinary disposition, or in the event the hearing panel rejects the agreement, the Executive Director shall promptly notify the Respondent and the Commission Counsel of a date for a hearing to consider the arguments of the parties with respect to the Code violations and the disciplinary disposition of the matter.

(c) **Consent Order Upon Resignation or Retirement of the Respondent**. At any time prior to the conclusion of a disciplinary or disability proceeding, the Respondent may enter into a consent order, signed by all parties and approved by the presiding Chairperson or Vice-Chairperson, by which the Respondent resigns or retires from judicial office and agrees never to seek judicial office in North Carolina in the future in exchange for dismissal of the Statement of Charges without prejudice and upon any other terms and conditions as the parties may agree. A violation of the consent order shall be deemed a separate and independent violation of the Code.

* * *

Rule 19. Disciplinary and Disability Hearings

(a) **Notice of Hearing**. The Executive Director shall serve a notice of hearing upon the Respondent in the same manner as service of the Statement of Charges under Rule 12, or in any manner otherwise agreed to by the Respondent. The Notice of Hearing shall set forth the date, time, and location of the disciplinary hearing. Unless otherwise agreed to in writing by the Commission Counsel and the Respondent, the disciplinary hearing shall be held no sooner than 60 days after filing

of the Verified Answer or, if no response to the Statement of Charges is filed, 60 days after the expiration of time allowed for its filing.

(b) **Failure of the Respondent to Appear for Hearing**. The disciplinary hearing shall proceed whether or not the Respondent has filed a Verified Answer or appears for the hearing, either in person or through counsel.

(c) **Applicable Rules of Evidence**. The North Carolina Rules of Evidence set forth in Chapter 8C of the General Statutes of North Carolina shall apply in all disciplinary hearings except as otherwise indicated in these rules. Rulings on evidentiary matters shall be made by the presiding Chairperson or Vice-Chairperson, or by the member presiding in the Chairperson or Vice-Chairperson's absence ~~of the Chairperson~~.

(d) **Burden of Proof**. At the disciplinary hearing, the Commission Counsel shall have the burden of proving the existence of grounds for a recommendation of discipline, suspension, or removal based on disability by clear and convincing evidence, as that evidentiary standard is defined by the Supreme Court.

(e) **Additional Rights of the Respondent**. In addition to the rights specified in these rules, the Respondent shall have the right to defend against the charges by the introduction of evidence, by the examination and cross-examination of witnesses, and by the right to address the hearing panel in argument at the conclusion of the disciplinary hearing.

(f) **Record of Hearing**. The disciplinary or disability hearing shall be recorded ~~verbatim by a court reporter~~by an audiovisual recording device. ~~In the event that an evidentiary hearing is held, testimony of witnesses shall also be video recorded.~~The hearing panel of the Commission may engage a court reporter to transcribe a hearing in person or from the recording of the hearing. If a witness testifies at the hearing, public discipline is recommended by the hearing panel, and no court reporter transcribed the hearing in person, then the hearing panel must engage a court reporter to transcribe the hearing from the recording.

* * *

Rule 20. Witnesses; Oaths; Subpoenas

(a) **Witnesses**. The Commission Counsel and the Respondent shall have the right to call fact witnesses, expert witnesses, and character witnesses in accordance with the North Carolina Rules of Evidence, subject to the following limitations:

(1) **Fact and Expert Witnesses**. The Commission Counsel and the Respondent shall have the right to call witnesses to testify about a genuine dispute of material fact between the parties in the disciplinary hearing. The Commission Counsel may call the Respondent as a witness. Expert witnesses may be called at the expense of the party calling the expert and only in accordance with the North Carolina Rules of Evidence.

(2) **Character Witnesses**. The Commission Counsel and the Respondent shall have the right to call witnesses to testify to the character of the Respondent, but neither the Commission Counsel nor the Respondent may call more than 4 character witnesses in a disciplinary proceeding. Additional character witnesses may submit affidavits or be identified and tendered for the record.

(3) **Witness Costs**. Witnesses shall be reimbursed in the manner provided in civil cases in the General Court of Justice, and their expenses shall be borne by the party calling them. Vouchers authorizing disbursements by the Commission for witnesses shall be signed by the presiding Chairperson or Vice-Chairperson or by the Executive Director.

(b) **Oaths**. Every witness who testifies before the hearing panel at a disciplinary hearing shall be required to declare, by oath or affirmation, to testify truthfully. The oath or affirmation may be administered by any member of the Commission or by the Executive Director.

(c) **Subpoenas**. Both the Commission Counsel and the Respondent have the right to the issuance of subpoenas to compel the attendance of witnesses or the production of documents and other evidentiary material for the disciplinary or disability hearing. A subpoena to compel the attendance of a witness at a disciplinary or disability hearing before the Commission, or a subpoena for the production of evidence, shall be issued in the name of the State of North Carolina upon request of the Commission Counsel or the Respondent, and shall be signed by a member of the Commission, by the Executive Director, or by the Commission Counsel. A subpoena shall be served, without fee, by any officer authorized to serve a subpoena under Rule 45(b) of the North Carolina Rules of Civil Procedure.

* * *

Rule 22. Recommendation to the Supreme Court; Record in Support of Recommendation

(a) **Recommendation to the Supreme Court.**

(1) Unless the time is extended by order of the ~~Chair~~presiding Chairperson or Vice-Chairperson, within 60 days of the conclusion of the disciplinary hearing, the Executive Director shall serve upon the Respondent and the Commission Counsel the hearing panel's recommendation to the Supreme Court. Service of the recommendation upon the Respondent shall be in the same manner as service of the Statement of Charges, or in any manner otherwise agreed to by the parties.

(2) The recommendation shall be signed by the presiding Chairperson~~,~~ or Vice-Chairperson ~~in the absence of the Chairperson,~~ and shall contain findings of fact supported by the record, conclusions of law, and a recommended disposition as to the Respondent. If the hearing panel's recommendation is based upon a stipulation and an agreement entered into pursuant to Rule 18, then the conclusions of law and recommendation for the disposition shall rely only upon the factual stipulations, facts that may be properly judicially noticed, and admissions in the Verified Answer.

(b) **Record in Support of Recommendation.**

(1) **Proposed Record**. At the same time and in the same manner that the recommendation is served upon the Respondent, the Executive Director shall also serve a proposed record in support of the recommendation. The proposed record shall include the pleadings, a verbatim transcript of the hearing, a copy of the video recording of any witness testimony at the hearing, and any evidence entered into the record during the hearing and referenced in the recommendation. The name, office address, telephone number, State Bar number, and e-mail address of the Commission Counsel and the Respondent's counsel shall appear at the end of the record. If the Respondent is not represented by counsel, then the record shall include the Respondent's name, address, telephone number, State Bar number, and e-mail address.

(2) **Objections and Settling the Record**. Unless the Respondent files objections to the proposed record

within 10 business days after service of the proposed record, the proposed record shall constitute the official record. If the Respondent files objections, any objections not resolved by the agreement of the parties shall be settled by the presiding Chairperson or Vice-Chairperson upon notice and an opportunity of the Respondent and the Commission Counsel to be heard. In such cases, the record as settled by the presiding Chairperson or Vice-Chairperson shall be the official record.

(c) **Filing of the Recommendation and Record.**

(1) Within 10 business days after the record has been settled, the Executive Director shall file with the Clerk of the Supreme Court the recommendation, the record in support of the recommendation, and a certification that the record has been settled and is the official record of the disciplinary or disability proceeding.

(2) The Executive Director shall concurrently serve upon the Respondent a Notice of Filing giving notice of the recommendation, record, and certification, and specifying the date upon which they were filed in the Supreme Court. The Executive Director shall also transmit to the Respondent copies of the certification along with any changes to the official record occurring as a result of the settlement of the record.

(3) The Executive Director shall serve copies of the filings upon the Respondent in the same manner as service of the Statement of Charges, or in any manner otherwise agreed to by the parties.

(d) **Proceedings in the Supreme Court**. Proceedings in the Supreme Court shall be governed by the Supreme Court's Rules for Review of Recommendations of the Judicial Standards Commission.

* * *

These amendments to the Rules of the Judicial Standards Commission become effective on 3 September 2024.

These amendments shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

JUDICIAL STANDARDS COMMISSION

Ordered by the Court in Conference, this the 21st day of August 2024.

s/Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 21st day of August 2024.

s/Grant E. Buckner

GRANT E. BUCKNER
Clerk of the Supreme Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES GOVERNING THE ADMINISTRATIVE COMMITTEE

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 19, 2024.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 01D, Section .0900, *Procedures for the Administrative Committee*, be amended as shown in the following attachment:

ATTACHMENT 1: 27 N.C.A.C. 01D, Section .0900, Rule .0901,
Transfer to Inactice Status

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 19, 2024.

Given over my hand and the Seal of the North Carolina State Bar, this the 30th day of July, 2024.

s/Alice Neece Mine
Alice Neece Mine, Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 21st day of August, 2024.

s/Paul Newby
Paul Newby, Chief Justice

PROCEDURES FOR
ADMINISTRATIVE COMMITTEE

On this date, the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was entered upon the minutes of the Supreme Court. The amendment shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 21st day of August, 2024.

s/Riggs, J.
For the Court

PROCEDURES FOR
ADMINISTRATIVE COMMITTEE

27 NCAC 01D .0901 TRANSFER TO INACTIVE STATUS

(a) Petition for Transfer from Active to Inactive Status

Any active member who desires to be transferred to inactive status shall file a petition with the secretary addressed to the council setting forth ~~fully~~fully:

(1) the member's name and current address;

(2) the date of the member's admission to the North Carolina State Bar;

~~(3) the reasons why the member desires transfer to inactive status;~~

(3~~4~~) that at the time of filing the petition the member is in good standing having paid all membership fees, Client Security Fund assessments, late fees and costs assessed by the North Carolina State Bar, as well as all past due fees, fines and penalties owed to the Board of Continuing Legal ~~Education~~Education. ~~and without any grievances or disciplinary complaints pending against him or her~~;

(4~~5~~) any other matters pertinent to the petition.

(b) Petition for Transfer from Administrative Suspension Status to Inactive Status

Any member suspended pursuant to Rule .0903 of this subchapter who desires to be reinstated and immediately transferred to inactive status shall file a petition with the secretary addressed to the council setting forth fully:

(1) the member's name and current address;

(2) the date of the member's admission to the North Carolina State Bar;

(3) the date of the member's administrative suspension;

(4) that at the time of filing the petition the member has paid all membership fees, Client Security Fund assessments, late fees and costs assessed by the North Carolina State Bar, as well as all past due fees, fines and penalties owed to the Board of Continuing Legal Education;

(5) that the member acknowledges that any subsequent petition to transfer from inactive status to active status will

require satisfying the requirements for reinstatement from suspension pursuant to Rule .904 of this subchapter, using the effective date of the member's suspension to calculate the requirements of Rule .0904(d)(3) or (4).

(c~~b~~) Conditions Upon Transfer

No member may be voluntarily transferred to disability-inactive status, retired/nonpracticing status, or emeritus pro bono status until:

(1) the member has paid all membership fees, Client Security Fund assessments, late fees, and costs assessed by the North Carolina State Bar or the Disciplinary Hearing Commission, as well as all past due fees, fines and penalties owed to the Board of Continuing Legal Education;

(2) the member acknowledges that the member continues to be subject to the Rules of Professional Conduct and to the disciplinary jurisdiction of the State Bar including jurisdiction in any pending matter before the Grievance Committee or the Disciplinary Hearing Commission; and,

(3) in the case of a member seeking emeritus pro bono status, it is determined by the Administrative Committee that the member is in good standing, is not the subject of any matter pending before the Grievance Committee or the Disciplinary Hearing Commission, and will be supervised by an active member employed by a nonprofit corporation qualified to render legal services pursuant to G.S. 84-5.1.

(d~~c~~) Order Transferring Member to Inactive Status

Upon receipt of a petition which satisfies the provisions of Rule .0901(a) or (b) above, the council may, in its discretion, enter an order transferring the member to inactive status and, where ~~appropriate,~~appropriate for petitions filed pursuant to Rule .0901(a), granting emeritus pro bono status. The order shall become effective immediately upon entry by the council. A copy of the order shall be mailed to the member.

(e~~d~~) Transfer to Inactive Status by Secretary of the State Bar

Notwithstanding paragraph (d~~e~~) of this rule, an active member may petition for transfer to inactive status pursuant to paragraph (a) or (b) of this rule and may be transferred to inactive status by the secretary of the State Bar upon a finding that the active member has complied with

or fulfilled the conditions for transfer to inactive status set forth in paragraph (c~~b~~) of this rule. Transfer to inactive status by the secretary is discretionary. If the secretary declines to transfer a member to inactive status, the member's petition shall be submitted to the Administrative Committee at its next meeting and the procedure for review of the petition shall be as set forth in paragraph (d~~e~~) of this rule.

History Note: *Authority G.S. 84-23;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: March 7, 1996; February 3, 2000; March 6, 2008; March 6, 2014; August 21, 2024
Amendments Approved by the Supreme Court November 2, 2022 and re-entered into the Supreme Court's minutes March 20, 2024.

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

DISCIPLINARY RULE ON THE TRUST ACCOUNT COMPLIANCE PROGRAM

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 19, 2024.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 01B, Section .0100, *Discipline and Disability Rules* be amended as shown in the following attachment:

ATTACHMENT 2- 27 N.C.A.C. 01B, Section .0100, Rule .0132,
Trust Accounts; Audits

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 19, 2024.

Given over my hand and the Seal of the North Carolina State Bar, this the 30th day of July, 2024.

s/Alice Neece Mine
Alice Neece Mine, Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 21st day of August, 2024.

s/Paul Newby
Paul Newby, Chief Justice

On this date, the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was entered upon the minutes of the Supreme Court. The amendment shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 21st day of August, 2024.

s/Riggs, J.
For the Court

27 NCAC 01B .0132 Trust Accounts; Audit

(a) Investigative Subpoena for Reasonable Cause - For reasonable cause, the chairperson of the Grievance Committee is empowered to issue an investigative subpoena to a member compelling the production of any records required to be kept relative to the handling of client funds and property by the Rules of Professional Conduct for inspection, copying, or audit by the counsel or any auditor appointed by the counsel. For the purposes of this rule, circumstances that constitute reasonable cause, include, but are not limited to:

(1) any sworn statement of grievance received by the North Carolina State Bar alleging facts which, if true, would constitute misconduct in the handling of a client's funds or property;

(2) any facts coming to the attention of the North Carolina State Bar, whether through random review as contemplated by Rule .0132(b) below or otherwise, which if true, would constitute a probable violation of any provision of the Rules of Professional Conduct concerning the handling of client funds or property;

(3) two or more grievances received by the North Carolina State Bar over a ~~twelve~~ 12 month period alleging facts which, if true, would indicate misconduct for neglect of a client matter or failure to communicate with a client;

(4) any failure to respond to any notices issued by the North Carolina State Bar with regard to a grievance or a fee dispute;

(5) any information received by the North Carolina State Bar which, if true, would constitute a failure to file any federal, state, or local tax return or pay an federal, state, or local tax obligation; or

(6) any finding of probable cause, indictment, or conviction relative to a criminal charge involving moral turpitude. The grounds supporting the issuance of any such subpoena will be set forth upon the face of the subpoena.

(b) Random Audit ~~Investigative~~ Subpoenas and Investigations - The chairperson of the Grievance Committee may randomly issue investigative subpoenas to members compelling the production of any records required by the Rules of Professional Conduct to be kept relative to the handling of client funds or property ~~by the Rules of Professional Conduct~~ for inspection by the counsel or any auditor appointed by the counsel to

determine compliance with the Rules of Professional Conduct. Any such subpoena will disclose upon its face its random character and contain a verification of the secretary that it was randomly issued. No member will be subject to random selection under this section more than once in three years. Any member whose random audit discloses one or more violations of the Rules of Professional Conduct may be referred by the counsel, by the director of the Trust Account Compliance Department (the department), or by the auditor to the department's Trust Account Compliance Program. Determination of a member's qualification for referral to the Trust Account Compliance Program after random audit shall be made by the counsel, by the director, or by the auditor pursuant to guidelines established by the Council. The counsel, the director, or~~The~~ the auditor may also report any violation of the Rules of Professional Conduct discovered during the random audit to the Grievance Committee for investigation. ~~The auditor may allow the attorney a reasonable amount of time to correct any procedural violation in lieu of reporting the matter to the Grievance Committee.~~ The director of the department and the auditor shall each have authority under the original subpoena for random audit to compel the production of any documents necessary to determine whether the attorney has corrected any violation identified during the audit.

(c) Time Limit - No subpoena issued pursuant to this rule may compel production within five days of service.

(d) Evidence - The rules of evidence applicable in the superior courts of the state will govern the use of any material subpoenaed pursuant to this rule in any hearing before the commission.

(e) Attorney-Client Privilege/Confidentiality - No assertion of attorney-client privilege or confidentiality will prevent an inspection or audit of a trust account as provided in this rule.

History Note: *Authority G.S. 84-23;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: November 16, 2006; September 22, 2016; August 21, 2024.

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