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LEGAL SPECIALIZATION; BOARD OF LAW EXAMINERS; RULES OF MEDIATION FOR MATTERS BEFORE THE CLERK OF SUPERIOR COURT; STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS; RULES FOR SETTLEMENT PROCEDURES IN DISTRICT COURT FAMILY FINANCIAL CASES; RULES FOR MEDIATED SETTLEMENT CONFERENCES AND OTHER SETTLEMENT PROCEDURES IN SUPERIOR COURT CIVIL ACTIONS; RULES OF THE DISPUTE RESOLUTION COMMISSION

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

APRIL 2, 2025

MAILING ADDRESS: The Judicial Department
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OF
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Filed 31 January 2025

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decision holding that an action—brought against a county board of education (defendant) by three men (plaintiffs) who, as minors, were sexually abused by their high school wrestling coach—did not implicate any constitutionally protected vested right. The statute of limitations applicable to plaintiffs' tort claims fell outside the scope of the vested right doctrine because it affected procedural remedies—rather than property of the sort protected by the Law of the Land Clause—and, having been created by legislation, could be altered by legislation. Further, the text and history of the Ex Post Facto Clause—along with pertinent caselaw—revealed that retroactive civil laws which do not impose taxes are constitutionally permissible. Finally, the Court noted that the lower appellate court's tiered substantive due process framework analysis was immaterial to defendant's argument, and thus, unnecessary. **McKinney v. Goins, 35.**

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STATUTES OF LIMITATION AND REPOSE

Tort claims—child sexual abuse—retroactive alteration of expired statutes of limitations—applicable to enablers of abuse—The Supreme Court, having

held in a companion case (*McKinney v. Goins*) that the revival provision of the SAFE Child Act—allowing victims of child sexual abuse to file otherwise time-barred tort claims during a specified two-year period—was facially constitutional, affirmed the decision of the Court of Appeals that the provision resuscitated claims against parties who allegedly enabled abuse, as well as direct abusers. Given that North Carolina has not recognized a distinct child sexual abuse tort, instead permitting victims to sue for common law torts—such as those grounded in negligence, the statute of limitations for which is found in N.C.G.S. § 1-52—the provision's plain text ("reviv[ing] any civil action for child sexual abuse otherwise time-barred under G.S. 1-52") applied to negligence-based causes of action brought against a Roman Catholic order and diocese (together, defendants) by a man who alleged he suffered sexual abuse as a child by a clergyman employed and supervised by defendants. The revival provision's use of the phrase "for child abuse" identified only the category of tort addressed and did not restrict the theory of tort liability a plaintiff could pursue. **Cohane v. Home Missioners of Am., 1.**

SCHEDULE FOR HEARING APPEALS DURING 2025

NORTH CAROLINA SUPREME COURT

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

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

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

GREGORY COHANE
v.
THE HOME MISSIONERS OF AMERICA D/B/A GLENMARY HOME MISSIONERS,
ROMAN CATHOLIC DIOCESE OF CHARLOTTE, NC, AND AL BEHM

No. 278A23

Filed 31 January 2025

Statutes of Limitation and Repose—tort claims—child sexual abuse—retroactive alteration of expired statutes of limitations—applicable to enablers of abuse

The Supreme Court, having held in a companion case (*McKinney v. Goins*) that the revival provision of the SAFE Child Act—allowing victims of child sexual abuse to file otherwise time-barred tort claims during a specified two-year period—was facially constitutional, affirmed the decision of the Court of Appeals that the provision resuscitated claims against parties who allegedly enabled abuse, as well as direct abusers. Given that North Carolina has not recognized a distinct child sexual abuse tort, instead permitting victims to sue for common law torts—such as those grounded in negligence, the statute of limitations for which is found in N.C.G.S. § 1-52—the provision's plain text ("reviv[ing] any civil action for child sexual abuse otherwise time-barred under G.S. 1-52") applied to negligence-based causes of action brought against a Roman Catholic order and diocese (together, defendants) by a man who alleged he suffered sexual abuse as a child by a clergyman employed and supervised by defendants. The revival provision's use of the phrase "for child abuse" identified only the category of tort addressed and did not restrict the theory of tort liability a plaintiff could pursue.

On discretionary review pursuant to N.C.G.S. § 7A-31 of the decision of a divided panel of the Court of Appeals, 290 N.C. App. 378 (2023), reversing an order entered on 27 October 2021 by Judge Daniel Kuehnert in Superior Court, Mecklenburg County, and remanding the case. Heard in the Supreme Court on 18 September 2024.

White & Stradley, PLLC, by J. David Stradley and Leto Copeley, for plaintiff-appellee.

Troutman Pepper Hamilton Sanders LLP, by Joshua D. Davey and Mary K. Grob, for defendant-appellant Roman Catholic Diocese of Charlotte, NC; and Steven B. Epstein for defendant-appellant the Home Missioners of America d/b/a Glenmary Home Missioners.

Sam McGee for CHILD USA, amicus curiae.

Jeff Jackson, Attorney General, by Ryan Y. Park, Solicitor General, Nicholas S. Brod, Deputy Solicitor General, and Orlando L. Rodriguez, Special Deputy Attorney General, for the State of North Carolina, amicus curiae.

Nelson Mullins Riley & Scarborough, LLP, by Lorin J. Lapidus, G. Gray Wilson, Denise M. Gunter, and D. Martin Warf; and Bell, Davis & Pitt, P.A., by Kevin G. Williams, for Young Men's Christian Association of Northwest North Carolina d/b/a Kernersville Family YMCA, amicus curiae.

EARLS, Justice.

This is a companion case to *McKinney v. Goins*, No. 109PA22-2 (N.C. Jan. 31, 2025), also announced today. There, we held that the revival provision of the SAFE Child Act facially comports with the North Carolina Constitution. Here, we again address the revival provision. The issue before us is whether section 4.2(b) of the SAFE Child Act, which "revives any civil action for child sexual abuse otherwise time-barred" by the three-year statute of limitations, resuscitates claims against direct abusers as well as those who allegedly enabled the abuse. We hold that it does.

One background feature of North Carolina tort law is that a plaintiff can be made whole by recovering from the individual who directly harmed them as well as those who specially contributed to the harm.

For example, a plaintiff hurt by a negligent truck driver can sue the truck driver directly, as well as the company who employed, supervised, or hired that person with knowledge of their negligent driving practices. A second background feature is that North Carolina has not recognized a distinct "child sexual abuse" tort. Instead, child sexual abuse victims may bring civil actions under traditional common law torts, such as assault or battery. That means that traditional tort principles apply to common law actions to recover for child sexual abuse.

Against this backdrop, the unanimous SAFE Child Act opened a window for adults who experienced sexual abuse as children to recover for that abuse under tort law, even if the statute of limitations on their claims had since passed. *See* An Act to Protect Children From Sexual Abuse and to Strengthen and Modernize Sexual Assault Laws (SAFE Child Act), S.L. 2019-245, § 4.2(b), 2019 N.C. Sess. Laws 1231, 1235. That narrow window provided that, for two years only, "this section revives any civil action for child sexual abuse otherwise time-barred under G.S. 1-52." *Id.* In turn, N.C.G.S. § 1-52 is the three-year statute of limitations that applies to negligence and other types of personal injury torts. *See Misenheimer v. Burris*, 360 N.C. 620, 625 (2006) (noting that common law negligence actions are limited by N.C.G.S. § 1-52).

The issue here is whether the General Assembly meant to distinguish between abusers who personally harmed the plaintiff and those organizations, institutions, and parties that employed or supervised the abuser or otherwise condoned, ratified, or facilitated the abuse (enablers). Defendants would have us hold not only that the revival provision distinguished between the two types of potential defendants but also that it authorized suits against abusers and *not* against enablers, in contravention of background tort law principles. We conclude that such a distinction does not follow from the plain text of the provision, nor does it find support in the SAFE Child Act or related statutory provisions read as a whole.

Because the revival of "any civil action for child sexual abuse otherwise time-barred under G.S. 1-52" really means *any* such action, consistent with applicable tort law principles, we hold that claims against abusers and enablers are equally revived. The decision of the Court of Appeals is affirmed.

I. Background

A. The SAFE Child Act

The SAFE Child Act was passed unanimously by the General Assembly and signed into law by the Governor. Its purpose according

to its title was to "protect children from sexual abuse and to strengthen and modernize sexual assault laws." 2019 N.C. Sess. Laws at 1231.

Part IV of the Act made a number of changes extending civil statutes of limitations. For example, the Act extended the time period by which a plaintiff could file a civil action "for claims related to sexual abuse" that occurred while that person was a minor. *Id.* § 4.1, 2019 N.C. Sess. Laws at 1234. Ordinarily, when a minor experiences a personal injury, the statute of limitations for their civil action tolls until they turn eighteen years old. *See* N.C.G.S. § 1-17(a) (2023). Section 4.1 of the Act extended that tolling period for claims "related to sexual abuse" that occurred while the person was a minor until that person turns twenty-eight years old, giving a prospective plaintiff many more years to bring such suits. *See* SAFE Child Act § 4.1, 2019 N.C. Sess. Laws at 1234.

The Act also granted plaintiffs of all ages a second bite at the civil liability apple where the underlying abuse results in a new criminal conviction: "[A] plaintiff may file a civil action within two years of the date of a criminal conviction for a related felony sexual offense against a defendant for claims related to sexual abuse suffered while the plaintiff was under 18 years of age." *Id.* § 4.2(a), 2019 N.C. Sess. Laws at 1235. The Act further clarified that the statutes of limitations for assault, battery, false imprisonment, and other personal injury tort claims under N.C.G.S. § 1-52(5), (16), and (19) are curtailed to the extent they conflict with those two new sections. *Id.*

In addition to those forward-looking changes extending the statutes of limitation, the Act also offered one backward-looking change. It resurrected already time-barred civil claims if they were brought in a narrow period of time:

> Effective from January 1, 2020, until December 31, 2021, this section revives any civil action for child sexual abuse otherwise time-barred under G.S. 1-52 as it existed immediately before the enactment of this act.

Id. § 4.2(b), 2019 N.C. Sess. Laws at 1235.[1] This so-called "revival provision" gave new life to plaintiff Gregory Cohane's claims for injury.

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1. This temporary provision was never published in the General Statutes, so we reference the session law throughout. *See Custom Molders, Inc. v. Am. Yard Prods., Inc.*, 342 N.C. 133, 137 (1995) (noting that statements in session laws control over codified statements in the General Statutes if there is a conflict).

B. Mr. Cohane's Civil Action

Mr. Cohane makes the following allegations in his complaint, which we accept as true for the purposes of reviewing the Rule 12(b)(6) motions to dismiss filed by Home Missioners of America (Glenmary) and the Roman Catholic Diocese of Charlotte, NC (Diocese). *See State ex rel. Stein v. Kinston Charter Acad.*, 379 N.C. 560, 572 (2021) (noting that at the Rule 12(b)(6) review stage, we view the allegations in a complaint as true and admitted and ask whether they "are sufficient to state a claim upon which relief can be granted under some legal theory" (quoting *Bridges v. Parrish*, 366 N.C. 539, 541 (2013))).

Al Behm was a clergyman in the Roman Catholic order run by defendant Glenmary. Mr. Behm first crossed paths with Mr. Cohane in 1972 at the latter's family home, while the former was an ordained Catholic brother working at the Glenmary Youth Center in Connecticut. Mr. Cohane was nine years old at the time.

Mr. Behm "began grooming" Mr. Cohane at a very early age. Mr. Behm regularly visited Mr. Cohane at his home and later invited Mr. Cohane for overnight stays and overnight trips. Mr. Cohane's parents approved, because they saw the growing relationship "as healthy and positive" and because they trusted Mr. Behm as a clergyman and community member. But during these visits, Mr. Behm began to ask Mr. Cohane for back massages, during which Mr. Behm wore increasingly little clothing, and would tell Mr. Cohane he loved him. Mr. Behm "established himself as the closest loving, kind and supportive adult presence" in Mr. Cohane's life, a stark contrast to his "emotionally and verbally abusive" parents.

While under Glenmary's employ, Mr. Behm's relationship with Mr. Cohane continued for years, eventually turning into a sexually abusive one. During the grooming period, Glenmary reassigned Mr. Behm to a parish in Kentucky. Even still, Mr. Behm maintained his relationship with Mr. Cohane through mail and phone calls. In Kentucky, Mr. Behm was accused of molesting another child. Rather than report the credible allegations of abuse to authorities, Glenmary continued transferring Mr. Behm to other parishes: next to Cincinnati, Ohio. Glenmary later arranged and paid for Mr. Behm to pursue graduate studies in human sexuality in California. Mr. Cohane's parents, ignorant of the child molestation allegations against Mr. Behm, allowed their son to visit him in California. During that visit, Mr. Behm "behaved toward [Mr. Cohane] in a sexually intimate manner." Mr. Cohane was fifteen years old.

After Mr. Behm completed his studies, Glenmary and Diocese assigned him to a new position—campus Catholic clergy at Western

Carolina University (WCU). "In this position, Behm would be in charge of ministering to the spiritual needs of all Catholic students and clergy at WCU, and would be in charge of running the Catholic Student Center and supervising its staff, which was provided by Defendant Diocese." Neither Diocese nor Glenmary ever reported Mr. Behm's string of sexual abuse allegations to WCU. While serving as campus clergy, Mr. Behm had regular, inappropriately intimate calls with Mr. Cohane, who was then in high school. Mr. Behm again invited Mr. Cohane for long visits, which his parents consented to because of their trust in Mr. Bhem, during which Mr. Behm took advantage of Mr. Cohane's trust in him to convince him to engage in sexual acts. Mr. Behm eventually convinced Mr. Cohane to attend WCU and intervened to secure Mr. Cohane's admission to the school. Once Mr. Cohane enrolled as a WCU student, Mr. Behm continued and escalated the sexual abuse. Mr. Behm also introduced Mr. Cohane to drugs and alcohol, exacerbating Mr. Cohane's mental health spiral.

Meanwhile, Glenmary directed Mr. Behm to travel and meet with other clergymen accused of child sexual abuse—a so-called "support group" for the Glenmary clergy. That measure proved futile. In 1984, after receiving reports of sexual misconduct by Mr. Behm at WCU, Glenmary yet again transferred him, this time to Tennessee. The allegations continued during Mr. Behm's time in Tennessee, as he was—once again—accused of child sexual abuse. Still, Glenmary did not alert authorities or fire Mr. Behm—and it was not until 2019 that Diocese or Glenmary publicly admitted that Mr. Behm had been repeatedly, credibly accused of child sexual abuse while in their employ.

Mr. Cohane turned eighteen in 1981, which started the clock on the three-year statute of limitations for personal-injury torts. He did not sue before that window closed in 1984. Instead, he brought suit in July 2021, at age fifty-seven—invoking the revival provision of the SAFE Child Act to do so. His complaint sought relief for harms caused by battery, assault, negligent infliction of emotional distress, and intentional infliction of emotional distress by Mr. Behm, as well as negligence and negligent assignment, supervision, and retention by Diocese and Glenmary.

C. Opinions Below

Defendants Diocese and Glenmary moved to dismiss Mr. Cohane's suit, contending that his claims were time-barred and outside the scope of section 4.2(b). The trial court agreed and granted defendants' motions. In the court's view, section 4.2(b) only revived claims against a direct perpetrator of child sexual abuse. It contrasted section 4.2(b)

with other parts of the SAFE Child Act. Though section 4.2(b) revived "any civil action for child sexual abuse," neighboring provisions like section 4.1 extended "claims related to sexual abuse." SAFE Child Act §§ 4.1, 4.2(b), 2019 N.C. Sess. Laws at 1234–35. That different phrasing—"related to" versus "for"—suggested that "for" in section 4.2(b) was "narrow and limited to claims against alleged perpetrators of child sexual abuse." Since Glenmary and Diocese did not directly abuse Mr. Cohane, the revival provision did not apply to Mr. Cohane's claims against them. Thus, the court dismissed the claims against both institutional defendants as time-barred.

Mr. Cohane appealed, and the Court of Appeals reversed the trial court's order. It emphasized first the role of plain language in statutory interpretation. When a statute "is clear and unambiguous, . . . [its] words are applied in their normal and usual meaning." *Cohane v. Home Missioners of Am.*, 290 N.C. App. 378, 381 (2023) (quoting *Misenheimer*, 260 N.C. at 623). According to the Court of Appeals, the plain language of section 4.2(b) is intentionally broad, according to the "any" modifier. *Id.* at 383. "Had the legislature intended to limit the revival provision to torts by the perpetrator," the court reasoned, "the legislature could have specified the subsections within section 1-52" that it meant to tie the revival provision to. *Id.* It did not so specify. And since Mr. Cohane's claims against Glenmary and Diocese meet the statutory criteria—they were timely filed, "for" child sexual abuse, and otherwise time-barred by section 1-52—the Court of Appeals held that section 4.2(b) revived them. *Id.* We allowed defendants' petition for discretionary review.

II. Analysis

A. Legal Principles

This matter comes to us on review of the Court of Appeals' decision reversing the trial court's order granting Diocese and Glenmary's motions to dismiss under Rule 12(b)(6). To determine whether a Rule 12(b)(6) motion was properly granted, "this Court examines 'whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory.' " *State ex rel. Stein*, 379 N.C. at 572 (quoting *Bridges*, 366 N.C. at 541). Statutory interpretation is reviewed de novo because it presents a question of law. *In re Foreclosure of Vogler Realty, Inc.*, 365 N.C. 389, 392 (2012).

"When called to interpret a statute, legislative intent is the guiding star." *Fearrington v. City of Greenville*, 386 N.C. 38, 52 (cleaned up), *reh'g denied*, 902 S.E.2d 737 (mem.) (2024). "We first look to the plain

language, as the actual words of the legislature are the clearest manifestation of its intent." *Id.* (cleaned up). Our "primary task is to determine legislative intent while giving the language of the statute its natural and ordinary meaning unless the context requires otherwise." *Spruill v. Lake Phelps Volunteer Fire Dep't, Inc.*, 351 N.C. 318, 320 (2000) (quoting *Turlington v. McLeod*, 323 N.C. 591, 594 (1988)); *see also Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 550 (2018) (noting that when the legislature has not supplied a definition, we generally give a term its ordinary meaning). Accordingly, words and phrases are interpreted in their statutory context, *In re Hardy*, 294 N.C. 90, 95–96 (1978), and traditional rules of grammar apply, *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 811 (1999). Where the statute's language is clear and unambiguous, courts must construe it using its plain meaning. *State v. Borum*, 384 N.C. 118, 124 (2023).

B. Application

With these principles in mind, we start our inquiry with the plain language of the revival provision. Section 4.2(b) first narrows its operation to a specific window of time: "Effective from January 1, 2020, until December 31, 2021 . . . ." SAFE Child Act § 4.2(b), 2019 N.C. Sess. Laws at 1235. Within that circumscribed temporal window, "this section revives any civil action." *Id.* The modifier "any" before "civil action" indicates that the statute sweeps broadly and encompasses a range of claims. *See Any*, Webster's Third New International Dictionary 97 (2002) (defining the "any" adjective as "one, no matter what one" synonymous with "every" and "used as a function word esp[ecially] in assertions and denials to indicate one that is selected without restriction or limitation of choice" for example, "[any] child would know that"); *e.g.*, *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 9–10 (2011) (noting that "any" suggests a broad sweep in the statutory phrase "filed any complaint").

The provision then narrows that broad sweep with a final modifier clause: "[F]or child sexual abuse otherwise time-barred under G.S. 1-52 as it existed immediately before the enactment of this act." SAFE Child Act § 4.2(b), 2019 N.C. Sess. Laws at 1235. By referencing N.C.G.S. § 1-52, the provision keys its operation to a specific universe of claims: those covered by the three-year statute of limitations provision. That includes "assault, battery, or false imprisonment," N.C.G.S. § 1-52(19) (2017), claims for "any other injury to the person or rights of another, not arising on contract," *id.* § 1-52(5), and claims for "personal injury," *id.* § 1-52(16). It also includes actions for negligence. *Wilson v. McLeod Oil Co.*, 327 N.C. 491, 507 (1990) (observing that N.C.G.S. § 1-52(5) captures

common law negligence). The revival provision is not limited to any one of those types of claims, as "child sexual abuse" is not a specific subsection in N.C.G.S. § 1-52.

Thus, when section 4.2(b) revives actions "for child sexual abuse" otherwise barred by N.C.G.S. § 1-52—and *any* such actions at that—it necessarily contemplates the array of traditional tort actions under which a plaintiff could recover for harms or injuries stemming from child sexual abuse, so long as they would be time-barred by the three-year limitations period. "For" is the function word making that connection clear. *See For*, Webster's Third New International Dictionary 886 (indicating that "for" is a function word showing the object of something, or is synonymous with "concerning").

Importantly, nothing in the revival provision's language draws distinctions based on the defendant's identity in such an action. Quite the opposite. The claims covered by N.C.G.S. § 1-52, including claims for negligence and addressing personal injuries, traditionally can be brought against direct abusers and enablers. *E.g.*, *Doe v. Diocese of Raleigh*, 242 N.C. App. 42, 43–44 (2015) (action for negligence against an employer based on sexual abuse committed by an employee). The General Assembly presumably knew that such actions occurred under existing law and intended to revive them, too, by referencing their corresponding statute of limitations provision. *See C Invs. 2, LLC v. Auger*, 383 N.C. 1, 13 (2022) ("The Legislature is presumed to know the existing law and to legislate with reference to it." (quoting *State v. S. Ry. Co.*, 145 N.C. 495, 542 (1907))).

The upshot from the plain language of the provision, considering its text and context, is it revives civil actions for child sexual abuse, whatever their kind or category, so long as they are brought within the requisite time period (2020 to 2021), seek recovery for the targeted harm (for child sexual abuse), and are an action otherwise time-barred by N.C.G.S. § 1-52 before enactment of the SAFE Child Act (those actions falling within the statutory limitation of three years).

Diocese and Glenmary have a contextual argument in response. Other parts of the SAFE Child Act expand the statute of limitations for claims "related to sexual abuse while the plaintiff was under 18 years of age," while the revival provision references claims "for child sexual abuse." "Related to" and "for" are different words, they argue, and must thus have different meanings. And that different meaning must be that claims "for" child sexual abuse reach only abusers, while claims "related to" child sexual abuse reach enabling behavior like negligent supervision, too.

That argument is unavailing for at least three reasons. First, although "for" and "related to" might be materially different in some contexts, they appear to be materially similar in this one. As explained above, "for" in the revival provision is a function word—it shows the subject of the civil actions addressed by the provision. The "related to" language in section 4.1's prospective extension of the statute of limitations is also a function phrase showing the subject of the targeted claims. *See* SAFE Child Act § 4.1, 2019 N.C. Sess. Laws at 1234 (covering "a civil action against a defendant for claims *related to* sexual abuse" (emphasis added)); *id.* (covering "a civil action . . . for a related felony sexual offense against a defendant for claims *related to* sexual abuse" (emphasis added)). That functional similarity cuts against ascribing different meaning to these words under the presumption of consistent usage. That presumption only comes into play when a statute "has used one term in one place, and a *materially different* term in another," which does not occur when two different terms are effectively synonyms in context. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012) (emphasis added).

Second, even if we assume that "related to" and "for" are purposely, materially different, defendants' subsequent logical step still falters. It does not follow that a claim "for" a certain harm in a statute of limitations provision somehow excludes theories of liability. For example, the three-year limitations statute referenced in the revival provision often uses "for" when identifying the cause of action to which the limitation applies. *E.g.*, N.C.G.S. § 1-52(4) (2023) ("For taking, detaining, converting or injuring any goods or chattels . . . ."); *id.* § 1-52(5) ("[F]or any other injury to the person or rights of another, not arising on contract and not hereafter enumerated . . . ."). Yet such actions threaten liability for direct tortfeasors as well as contributing institutions and organizations, for example, through theories of vicarious liability. *E.g.*, *White v. Consol. Plan., Inc.*, 166 N.C. App. 283, 292–95, 305 (2004) (applying the statute of limitations in N.C.G.S. § 1-52 for conversion, negligence, and fraud to claims against a vicariously liable organizational defendant).

Defendants' contrary reading does not make sense, because statutes of limitations and theories of tort liability are different. The former operates against the backdrop of the longstanding common law of torts that aims to "make whole the injury or harm victims" by allowing recovery both from direct tortfeasors and from others who contributed to the harm. *See* 1 Am. L. of Torts § 4:1 (2021). At common law, a person or entity can be liable for "torts actually and physically committed, or omitted, by another [based] on two grounds—or on a combination

of these two grounds." *Id.* The first is direct liability for imputed tortious conduct, for example, negligent "selection, retention, control, or supervision of the actual wrongdoer." *Id.* The second is vicarious liability typically based on theories of agency like ratification, respondeat superior, etc. *Id.* We presume the legislature knows these tort law principles and legislates with them in mind. *See C Invs. 2, LLC*, 383 N.C. at 13; *cf. Wise v. Harrington Grove Cmty. Ass'n, Inc.*, 357 N.C. 396, 401 (2003) ("Statutes in derogation of the common law should be strictly construed." (cleaned up)).

At bottom, defendants' reading of the statute contradicts basic principles of tort law and long-held interpretations of the relevant statutes of limitation. Nothing in the statute's plain language, not even the subtle word "for," suggests the legislature intended to treat torts seeking recovery for child sexual abuse differently from traditional torts by limiting liability for possible defendants under the revival provision.

Third, we have good reason to conclude that if the legislature did intend to distinguish between types of defendants and only revive actions against some of them, it would have said so explicitly. Where the identity of the defendant matters for the relevant statute of limitations, the General Assembly explicitly says so. *E.g.*, N.C.G.S. § 1-52(6) ("Against the sureties of any executor, administrator, collector or guardian on the official bond of their principal . . . ."); *id.* § 1-52(13) ("Against a public officer, for a trespass, under color of his office."). Moreover, other parts of the SAFE Child Act do limit liability for "person[s]." *See* SAFE Child Act § 1(a), 2019 N.C. Sess. Laws at 1232 (amending the scheme for the duty to report crimes against juveniles by granting "good-faith immunity" to a "person" who makes a qualifying report). That there is no "person" limitation in the revival provision further confirms that the General Assembly did not intend to limit that provision's operation based on the defendant's identity. *Cf. H.B. v. M.J.*, 508 P.3d 368, 377 (Kan. 2022) (contrasting "perpetrator-based language" in other states' revival statutes with "harm-based language" in Kansas's statute, which uses language similar to North Carolina's).

In sum, Glenmary and Diocese's reading of the revival provision is unpersuasive. The provision clearly and unambiguously revives Mr. Cohane's claims for child sexual abuse otherwise time-barred against any tortfeasors, including both institutional defendants alleged here to be responsible for the abuse he suffered.

Finally, we need not reach Glenmary and Diocese's constitutional avoidance argument. Such a consideration only comes into play when

a statute has two reasonable constructions. *Delconte v. State*, 313 N.C. 384, 402 (1985). Here, for the reasons explained above, the statute has only one reasonable interpretation, which poses no constitutional problem. *See McKinney*, slip op. at 2–3.

III. Conclusion

The text and context of section 4.2(b) of the SAFE Child Act confirm that the temporary revival provision authorizes claims against alleged sexual abusers of children and their enablers alike. We hold that Mr. Cohane's claims against Diocese and Glenmary are not barred by the statute of limitations in N.C.G.S. § 1-52, pursuant to section 4.2(b) of the Act. The decision of the Court of Appeals is affirmed.

AFFIRMED.

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

JOHN DOE 1K
v.
ROMAN CATHOLIC DIOCESE OF CHARLOTTE
A/K/A ROMAN CATHOLIC DIOCESE OF CHARLOTTE, NC

JOHN DOE
v.
ROMAN CATHOLIC DIOCESE OF CHARLOTTE
A/K/A ROMAN CATHOLIC DIOCESE OF CHARLOTTE, NC

Nos. 167PA22, 168PA22

Filed 31 January 2025

Constitutional Law—North Carolina—separation of powers—child sexual abuse claims—dismissed in prior final judgments—not revived by legislation

In a pair of consolidated cases involving claims of child sexual abuse by Catholic priests, which plaintiffs originally raised over a decade earlier and which were dismissed with prejudice because they were time-barred, plaintiffs' new lawsuits were properly dismissed on the ground that their claims were now barred by principles of res judicata. Although plaintiffs had filed their new suits after

the General Assembly had passed the SAFE Child Act, which revived previously time-barred claims of child sexual abuse by extending the applicable statute of limitations, the Act did not override the earlier final judgments dismissing plaintiffs' claims. Under the North Carolina Constitution and separation of powers principles, the judicial power—which includes the powers to enter and set aside judgments—belongs to the judicial branch alone; therefore, an act of the legislative branch cannot set aside a final judgment entered by the judicial branch.

Consolidated cases on discretionary review pursuant to N.C.G.S. § 7A-31 of unanimous decisions of the Court of Appeals, 283 N.C. App. 171 (2022), and 283 N.C. App. 177 (2022), affirming orders entered on 22 January 2021 by Judge Carla N. Archie in Superior Court, Mecklenburg County. On 21 March 2024, the Supreme Court allowed defendant's conditional petitions for discretionary review as to additional issues. Heard in the Supreme Court on 18 September 2024.

Wilder Pantazis Law Group, PLLC, by Sam McGee, for plaintiff-appellants.

Troutman Pepper Hamilton Sanders LLP, by Joshua D. Davey, for defendant-appellee.

Jeff Jackson, Attorney General, by Ryan Y. Park, Solicitor General, Nicholas S. Brod, Deputy Solicitor General, and Orlando L. Rodriguez, Special Deputy Attorney General, for the State, amicus curiae.

DIETZ, Justice.

In 2019, the General Assembly passed the SAFE Child Act, which revived claims for child sexual abuse that were time-barred by the statute of limitations. As explained in a companion opinion issued today, a law that revives previously time-barred claims by changing the statute of limitations after it already expired is not facially unconstitutional under the Law of the Land Clause in the North Carolina Constitution. *McKinney v. Goins*, No. 109PA22-2 (N.C. Jan. 31, 2025).

This case presents a different constitutional dilemma. Plaintiffs in this case are alleged victims of child sexual abuse in the 1970s and 1980s. The SAFE Child Act would have revived plaintiffs' time-barred claims except for one glaring problem—plaintiffs already brought those

claims over a decade ago and courts already entered final judgments dismissing those claims with prejudice because they were time-barred.

Plaintiffs contend that the SAFE Child Act overrides those earlier judgments and permits them to bring their newly revived claims. As explained in more detail below, the General Assembly does not have the power to set aside a final judgment of the judicial branch. "The power to provide relief against the operation of a former judgment is an integral part of the judicial power." *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 139 (1985). Under well-settled separation of powers principles, "the Legislature has no right, directly or indirectly, to annul, in whole or in part, a judgment or decree of a court already rendered" and "every such attempt of legislative action is plainly an invasion of judicial power, and therefore unconstitutional and void." *Piedmont Mem'l Hosp., Inc., v. Guilford County*, 221 N.C. 308, 313 (1942).

Had plaintiffs returned to the court that entered the judgments and sought relief based on the SAFE Child Act, that court may have exercised its discretion to set aside the judgments in the interests of justice. But plaintiffs chose instead to file entirely new lawsuits and insist that the General Assembly can override final judgments of the judicial branch because "it is not up to the courts to search for some implied constraint on legislative power."

The constraint on the legislative branch at issue here is not an implied one; under Article IV of the North Carolina Constitution, the judicial power belongs to the judicial branch alone. We therefore affirm the decisions of the Court of Appeals, which properly concluded that the SAFE Child Act, like any other act of the General Assembly, cannot overturn a final judgment entered by the judicial branch.

Facts and Procedural History

In 2011, plaintiffs sued the Roman Catholic Diocese of Charlotte in separate actions, alleging that they were sexually abused by Catholic priests many decades ago. In both cases, the trial court granted summary judgment for the Diocese, finding that the applicable statutes of limitations barred plaintiffs' claims. One plaintiff appealed the judgment to the Court of Appeals and lost. The other did not appeal. Both of plaintiffs' judgments became final a decade ago.

In 2019, the General Assembly passed the SAFE Child Act, which included many reforms to protect children from sexual abuse. *See* An Act to Protect Children from Sexual Abuse and to Strengthen and Modernize Sexual Assault Laws, S.L. 2019-245, 2019 N.C. Sess. Laws

1231. Included in the act is a provision that changed the existing statutes of limitations in a way that revived previously time-barred legal claims for child sexual abuse. *See McKinney*, slip op. at 4–5.

In 2020, plaintiffs returned to court and filed entirely new lawsuits asserting the same child sexual abuse claims that were dismissed in the earlier final judgments. Plaintiffs took the position that by "reviving" their claims through the SAFE Child Act, the General Assembly had effectively set aside the earlier judgments and permitted plaintiffs to bring new lawsuits.

The trial court dismissed both newly filed lawsuits with prejudice on the ground that the claims were barred by the res judicata effect of the earlier judgments.

Plaintiffs appealed and the Court of Appeals affirmed. That court, too, held that the newly filed lawsuits were barred by the doctrine of res judicata because our court system already had entered final judgments on the same claims. *Doe 1K v. Roman Cath. Diocese*, 283 N.C. App. 171, 175 (2022); *Doe v. Roman Cath. Diocese*, 283 N.C. App. 177, 181 (2022).

Plaintiffs petitioned for discretionary review. We allowed the petitions and consolidated the cases for appeal.

Analysis

There is perhaps no doctrine in the law more fundamental to the judicial branch than "res judicata"—a Latin phrase meaning "the matter has been decided." *See Poindexter v. First Nat. Bank of Winston-Salem*, 247 N.C. 606, 619 (1958). The doctrine of res judicata was "developed by the courts of our legal system during their march down the corridors of time" and provides that "a final judgment on the merits in a prior action will prevent a second suit based on the same cause of action between the same parties." *Thomas M. McInnis & Assocs., Inc. v. Hall*, 318 N.C. 421, 427–28 (1986).

The key purpose of res judicata is to provide the finality that is necessary to give court judgments their intended effect. *See id.* When a court of competent jurisdiction enters a judgment and all appeals are exhausted, the judgment is final. The rights of the parties vest and they can adjust their expectations knowing that the courts have spoken and the matter is settled. *Garner v. Garner*, 268 N.C. 664, 666–67 (1966).

Here, the Court of Appeals properly held that res judicata applies to the final judgments entered against plaintiffs over a decade ago. First, those judgments were an adjudication on the merits. The judgments

resulted from orders granting defendant's motions for summary judgment and dismissing plaintiffs' claims "with prejudice." This type of dismissal with prejudice "operates as an adjudication upon the merits" under our Rules of Civil Procedure. *See* N.C.G.S. § 1A-1, Rule 41(b) (2023). Likewise, the earlier judgment involved the same causes of action between the same parties. Thus, res judicata bars this second lawsuit. *See McInnis*, 318 N.C. at 427–28.

The crux of plaintiffs' appeal is not that res judicata does not apply, but that it *cannot* apply because the General Assembly overrode it through the SAFE Child Act. Plaintiffs argue that the intent of the legislature was to revive *all* previously time-barred child sexual abuse claims, even those that were subject to an existing final judgment. Plaintiffs insist that there is no "express limitation in the constitutional text" of the North Carolina Constitution that prohibits the legislature from overturning final judgments. They further argue that "it is not up to the courts to search for some implied constraint on legislative power."

We can say beyond any doubt that this is wrong. Article IV of the North Carolina Constitution vests the "judicial power" exclusively in the courts and further states that the "General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government." N.C. Const. art. IV, § 1. The Separation of Powers Clause further provides the "legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6. It is therefore beyond question that the General Assembly cannot wield the judicial power of this state.

The power to enter judgments is the *core* judicial power of the courts. *Gardner v. Gardner*, 300 N.C. 715, 719 (1980). This judicial power extends not only to entering judgments but also to providing relief from them. "The power to provide relief against the operation of a former judgment is an integral part of the judicial power." *Hogan*, 315 N.C. at 139. "Such power is a remedy fashioned by courts to relieve hardships which from time to time arise from a fast and hard adherence to the usual rule that judgments should not be disturbed once entered." *Id.*

Because providing relief from a judgment is a judicial act, "the Legislature has no right, directly or indirectly, to annul, in whole or in part, a judgment or decree of a court already rendered" and "every such attempt of legislative action is plainly an invasion of judicial power, and therefore unconstitutional and void." *Piedmont*, 221 N.C. at 313. Simply put, under the North Carolina Constitution, only the judicial branch may set aside a judgment that it previously entered.

This principle applies regardless of the *reason* that a court entered the final judgment on the merits. For example, we have applied it to final judgments entered based on procedural issues, such as the proper venue for a lawsuit. *Gardner*, 300 N.C. at 719. We have applied it when the legislature believed the courts misunderstood the intent of a statutory enactment and tried to retroactively change the law. *Piedmont*, 221 N.C. at 313. And, most importantly, we have applied it in circumstances analogous to this case. *See Hogan*, 315 N.C. at 139.

In *Hogan*, the Industrial Commission dismissed the plaintiff's workers' compensation claim for brown lung disease based on the determination that the plaintiff's exposure occurred too long ago to permit relief. *Id.* at 129–31. The General Assembly later passed a law providing that claims for brown lung disease "shall be compensable regardless of the employee's date of last injurious exposure." *Id.* at 134.

The plaintiff then argued that the effect of that statute was to permit "a new cause of action" on his brown lung claim—one that essentially ignored the existing judgment. *Id.* at 142. We rejected that argument, explaining that the separation of powers doctrine "precludes the legislature from enacting a statute which alters a result obtained by final judicial decision before the date of the statute's enactment." *Id.*

We are not alone in this view of the separation of powers. The Supreme Court of the United States has addressed an issue nearly identical to the one presented here. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). In *Plaut*, the plaintiffs brought securities fraud claims, and the trial court dismissed those claims as barred by a statute of limitations established by Supreme Court precedent. *Id.* at 213–14. Congress disagreed with the Supreme Court's statute-of-limitations decision and later enacted a law creating a new limitations period. *Id.* at 214–15. This new law stated that any action previously dismissed as time-barred under the court-created statute of limitations "shall be reinstated on motion by the plaintiff." *Id.*

After a lengthy discussion of the history and purpose of the separation of powers, the Supreme Court held that the new law was "unconstitutional to the extent that it requires federal courts to reopen final judgments entered before its enactment" because "separation of legislative and judicial powers denies it the authority to do so." *Id.* at 240.

We agree with the separation of powers discussion in *Plaut*, which reflects the same principles embedded in our state constitutional doctrine. Indeed, our state's separation of powers principles are, if anything, stronger than those in the federal constitution. After all, the

federal doctrine is implied based on the structure of the United States Constitution. *State ex rel. Wallace v. Bone*, 304 N.C. 591, 598 (1982). In the North Carolina Constitution, by contrast, the Declaration of Rights includes an express provision that the "legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6.

In sum, the constitutional issue in this case is neither novel nor unsettled—the rule that the General Assembly cannot by statute provide relief from a final judgment is deeply rooted in our jurisprudence and supported by universal constitutional principles of separation of powers. Accordingly, the Court of Appeals correctly held that res judicata bars plaintiffs' new lawsuits because the SAFE Child Act, like any other act of the legislative branch, cannot set aside a final judgment of the judicial branch.[1] *See Doe 1K*, 283 N.C. App. at 176; *Doe*, 283 N.C. App. at 181.

Conclusion

We affirm the decisions of the Court of Appeals.

AFFIRMED.

1. Nothing in this opinion forecloses or bars plaintiffs from pursuing a Rule 60(b) motion in the trial court and this Court does not express any view on the timeliness or merits of such a motion.

JAMES H.Q. DAVIS TRUST AND WILLIAM R.Q. DAVIS TRUST
v.
JHD PROPERTIES, LLC, BERRY HILL PROPERTIES, LLC,
AND CHARLES B.Q. DAVIS TRUST

No. 32PA24

Filed 31 January 2025

Corporations—limited liability companies—grounds for judicial dissolution—managerial deadlock—continued operations not practicable—factors adopted

In a case involving two family-owned limited liability companies (LLCs), which together owned 68 acres of undeveloped land (the Property), the North Carolina Business Court did not abuse its discretion by judicially dissolving the LLCs pursuant to N.C.G.S. § 57D-6-02(2)(i) where undisputed evidence showed that, because the only two managers of the LLCs were at a complete impasse regarding operating decisions—resulting in no development or active use of the Property for its intended purpose for several years, even though there was some continued financial feasibility of the LLCs—and the LLCs' Operating Agreements did not provide a mechanism for breaking the deadlock, it was "not practicable" for the LLCs to continue operating. The Supreme Court defined the statutory term "not practicable" as "unfeasible" rather than "impossible," and adopted a six-factor balancing test for determining whether it was not practicable for an LLC to continue in accord with its operating agreement.

Appeal pursuant to N.C.G.S. § 7A-27(a) from an order and opinion on cross-motions for summary judgment entered on 14 November 2023, and an amended order and opinion on cross-motions for summary judgment entered on 16 November 2023, by Louis A. Bledsoe III, Chief Business Court Judge, in Superior Court, Wake County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(a). On 12 April 2024, the Supreme Court allowed intervenor Charles B.Q. Davis Trust's petition for writ of certiorari and petition for writ of supersedeas. Heard in the Supreme Court on 29 October 2024.

Everett Gaskins Hancock Tuttle Hash LLP, by E.D. Gaskins Jr., James M. Hash, and Andrew M. Simpson, for plaintiff-appellees.

Meynardie & Nanney, PLLC, by Joseph H. Nanney Jr., for intervenor-defendant-appellant Charles B.Q. Davis Trust.

No brief for defendant-appellants JHD Properties, LLC and Berry Hill Properties, LLC.

Jason R. Page for North Carolina Forestry Association, Inc. and Forest Landowner's Association, Inc., amici curiae.

BARRINGER, Justice.

In this matter, this Court considers whether judicial dissolution under N.C.G.S. § 57D-6-02(2)(i) is an appropriate remedy when the only two managers of two LLCs are at an impasse such that the managers are not able to make decisions regarding the management of the LLCs. Upon careful review, we hold that judicial dissolution is an appropriate remedy in this case as it is "not practicable" for the managers to operate the LLCs in conformance with the operating agreements. Therefore, we conclude that the Business Court did not err in its grant of summary judgment for plaintiffs, and we affirm the amended order and opinion on cross-motions for summary judgment.

I. Factual Background

This dispute arises from disagreements between two brothers who manage two LLCs established by their father, Dr. James H. Davis (Dr. Davis). In 2001 and 2002, Dr. Davis established JHD Properties, LLC (JHD) and Berry Hill Properties, LLC (Berry Hill; together with JHD, the LLCs) as part of his estate plan. Additionally, Dr. Davis established four trusts, one for each of his sons, James H.Q. Davis (Jim), William R.Q. Davis (Tad), Jonathon O.Q. Davis (Jon), and Charles B.Q. Davis (Charles). Each of the trusts holds a 25% equity interest in the LLCs. Charles and Jim are the managers of the LLCs. Tad and Jon have no management authority. The LLCs own approximately sixty-eight acres of undeveloped land, comprising four adjacent tracts of land in Wake County, North Carolina (the Property).

Under the nearly identical operating agreements of the LLCs (the Operating Agreements), neither LLC may take binding action without a majority of the managers coming to an agreement. Since Charles and Jim are the only managers of the LLCs, the Operating Agreements effectively require unanimous agreement of the two managers. According to the Operating Agreements, "[t]he purpose and business of the [LLCs]

shall be to engage in the purchase, development, rental, ownership and sale of real property and in any other lawful business for which the limited liability companies may be organized under the Act."

Since the formation of the LLCs, Charles and Jim have cooperated on tasks necessary for maintaining the LLCs, such as making tax payments, preparing Secretary of State filings, financing the LLCs, and selecting and managing the LLCs' accountant. Part of the Property is dedicated to timber, allowing the LLCs to take advantage of some tax benefits available to timber farms. However, the last—and only—timber sale made by the LLCs was in 2004, before Dr. Davis' death.

Only one of the LLCs, Berry Hill, was subject to a forestry management plan. That plan expired in March 2022. Deposition testimony from Charles and Jim indicates their willingness to hire a forestry manager and continue harvesting timber from the Property. However, there is no evidence in the record that either Jim or Charles has pursued an agreement with the other to make that happen. Nor is there evidence of any plan for the LLCs to engage in timbering in the future.

Disagreement between Charles and Jim regarding the use or disposition of the Property has persisted since 2018 or 2019. From 2018 to 2020, Jim and Charles contemplated using the Property for an agritourism business but could not come to a satisfactory agreement. Subsequently, Jim, Tad, and Jon wished to sell the Property. Charles, however, has consistently opposed the sale of the Property to any outside parties. Charles believed that he had no obligation to consider or approve a sale of the Property, urging the LLCs to "stay the course with their existing businesses, consider new or additional types of business activities, or that the LLCs should negotiate a deal" for him to purchase the Property.

Jim and Charles continued discussing potential options for the future disposition of the Property but were unable to reach any form of agreement over the next two years. By 2020, Jim continued to insist upon selling the Property, while Charles remained committed to his own plan. In April 2020, Charles suggested to Jim that they create a plan to develop the Property. For two months, Jim and Charles discussed proposals, but they never reached agreement. Despite Jim's and Charles' willingness to discuss options, the managers were unable to agree upon even a first step toward development, because Charles insisted upon completing a due diligence investigation first. Jim, on the other hand, wanted to engage with third parties directly before conducting any due diligence.

In October 2021, Jim and Tad wrote to Charles to discuss either selling the Property to Charles or authorizing Jim to sell the Property. In

response, Charles sent a nonbinding term sheet to Jim in April 2022. Jim did not engage with the term sheet in any way and instead forwarded a letter of intent from a real estate developer to Charles in May 2022.

Jim sought Charles' permission to negotiate with the developer, but Charles only responded with a revised term sheet. Charles did not authorize Jim to negotiate with the developer. As a result, the letter of intent expired on 30 June 2022. Jim did not accept Charles' revised term sheet. Instead, Jim sought agreement from Charles to negotiate with the developer again. Charles did not agree. As a result of this inability—for several years—to reach a decision regarding the proper disposition of the Property, there has been no development or active use of the Property.

II. Procedural History

On 12 July 2022, plaintiffs James H.Q. Davis Trust (the Jim Trust) and William R.Q. Davis Trust (the Tad Trust; together with the Jim Trust, plaintiffs) filed this action against the LLCs, seeking their judicial dissolution under N.C.G.S. § 57D-6-02(2)(i). Plaintiffs contend that it has become "impracticable" to conduct the business of the LLCs due to disagreement between Charles and Jim regarding the disposition and use of the Property and that the LLCs should therefore be judicially dissolved.

On 18 August 2022, the Charles B.Q. Davis Trust (the Charles Trust) filed with the Business Court an unopposed amended motion to intervene as a nominal defendant in this action. The Business Court granted the motion. On 18 October 2022, the Charles Trust filed a motion to dismiss, which the Business Court denied in an order and opinion entered on 9 December 2022.

Plaintiffs and the Charles Trust filed cross-motions for summary judgment on 17 July 2023. Following a hearing on the motions, the Business Court issued an amended order and opinion on cross-motions for summary judgment on 16 November 2023, granting plaintiffs' motion for summary judgment.[1] In granting plaintiffs' motion, the Business Court concluded that the managers of the LLCs were unable to agree

> on the use or disposition of the Property and [were unable] to reach agreement for at least three years, [that] there [was] no mechanism in the Operating

1. The Business Court entered an order and opinion on cross-motions for summary judgment on 14 November 2023. Plaintiffs filed a motion for relief due to a clerical error in that order and opinion. The 16 November 2023 order and opinion was entered to correct the clerical error, but it substantively tracks the 14 November order and opinion.

> Agreements to break the deadlock, [that] the LLCs [had] not conducted any economically useful activity since 2004, and [that] there [was] no way for the LLCs to conduct any business, realize any profit, or dispose of any assets so long as the unbreakable deadlock persist[ed].

Based on these findings, the Business Court concluded that it was not practicable to conduct the LLCs' business in conformance with the Operating Agreements, and therefore, judicial dissolution was appropriate.

III. Standard of Review

"On appeal, an order allowing summary judgment is reviewed *de novo*." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470 (2004). 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). A genuine issue is an issue that is "supported by substantial evidence," *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681 (2002), and "[a]n 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," *id.* (alteration in original) (quoting *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518 (1972)).

"The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579 (2002). "Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial." *Gaunt v. Pittaway*, 139 N.C. App. 778, 784–85 (2000).

The responding party may not "rest upon the mere allegations or denials" in the pleadings, and its response "must set forth specific facts showing that there is a genuine issue for trial." N.C.G.S. § 1A-1, Rule 56(e). When considering a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party. *Pennington*, 356 N.C. at 579.

The ultimate decision to judicially dissolve an LLC is discretionary. *Chisum v. Campagna*, 376 N.C. 680, 699 (2021). Thus, this Court reviews

a lower court's dissolution of an LLC under N.C.G.S. § 57D-6-02 for an abuse of discretion. *Id.* A lower court's decision to dissolve an LLC will not be overturned for an abuse of discretion "in the absence of a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *Id.* (extraneities omitted).

IV. Analysis

This Court considers whether the Business Court erred in granting summary judgment to plaintiffs when it determined that the undisputed evidence showed that it is not practicable for the LLCs to conduct business in conformance with the Operating Agreements and therefore, that judicial dissolution is appropriate. For the reasons stated below, we hold that the Business Court did not err.

Under the North Carolina Limited Liability Company Act (the Act), judicial dissolution of a limited liability company is appropriate when "it is established that (i) it is not practicable to conduct the LLC's business in conformance with the operating agreement and [Chapter 57D] or (ii) liquidation of the LLC is necessary to protect the rights and interests of the member." N.C.G.S. § 57D-6-02(2) (2023).

This Court has considered whether dissolution of an LLC was appropriate under the "not practicable" standard. *See Chisum*, 376 N.C. 680. In *Chisum*, this Court affirmed the Business Court's dissolution of two LLCs based on the following findings of fact:

> a. The [defendants] and [the plaintiff had] no direct contact or communications with one another from approximately October of 2010, when [the plaintiff] walked out of the [members meeting of a third LLC], and the filing of [the] lawsuit in July 2016.
>
> b. The [defendants] treated [the plaintiff] as if his membership interests in [the LLCs] had been extinguished beginning in July 2012, but never communicated to [the plaintiff] that they considered his memberships terminated. [One of the defendants] admitted [that the plaintiff] did not fail to meet a capital call or take any specific action which would have terminated [the plaintiff's] membership in [one of the LLCs].
>
> c. The [defendants] filed documents with the Secretary of State of North Carolina representing

> that [one of the LLCs] was dissolved without notifying [the plaintiff], seeking his consent, or making any distribution to [the plaintiff].
>
> d. The [defendants] ceased providing [the plaintiff] with required report and financial information regarding [the LLCs].
>
> e. [The plaintiff's] wife . . . testified that she attempted to visit the [defendants'] offices sometime in 2012–2013 to get information regarding the LLCs, but that [one of the defendants] ordered her to leave the premises in a threatening manner.

Id. at 714.

In *Chisum*, the Business Court also noted its observation of the "level of acrimony and distrust between the [defendants] and [the plaintiff was] extraordinary." *Id.* at 714–15. The Business Court was "convinced that these parties could not ever again be associated with one another in a jointly owned business, let alone conduct the business of [the LLCs]." *Id.* at 715. This Court considered those findings of fact as "ample support for a determination that it is not practicable to conduct the LLCs' business in conformance with the operating agreement and [N.C.G.S. § 57D-6-02(2)]" and that the Business Court "properly ordered the judicial dissolution of the [LLCs] pursuant to clause (i) of N.C.G.S. § 57D-6-02(2)." *Id.* (extraneities omitted).

Even with guidance from *Chisum*, the words "not practicable" remain undefined by statute and by this Court. We take the opportunity to do so now. In its 9 December 2022 order and opinion on the Charles Trust's motion to dismiss, the Business Court considered the meaning of "not practicable." We adopt that reasoning here.

The Business Court began with the standard dictionary definition of "practicable," which Black's Law Dictionary defines as "*reasonably* capable of being accomplished; *feasible* in a *particular* situation." *See Practicable*, Black's Law Dictionary (12th ed. 2024) (emphases added). The Business Court noted that Merriam-Webster and Dictionary.com provide similar definitions as well, defining practicable to mean "capable of being done" or "feasible." *See Practicable*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/practicable (last visited Jan. 10, 2025) (defining "practicable" as "[c]apable of being put into practice or of being done or accomplished: Feasible"); *Practicable*, Dictionary.com, https://www.dictionary.com/browse/practicable (last visited Jan 10,

2025) (defining "practicable" as "capable of being done, effected, or put into practice, with the available means; feasible"); *see also Practicable*, Merriam-Webster's Collegiate Dictionary (11th ed. 2003) (defining "practicable" as "capable of being put into practice or of being done or accomplished: feasible").

We agree with the Business Court that, based upon these definitions, "practicable" is synonymous with "feasible" and does not mean simply "possible." Something may be possible but *not feasible* without extra time or resources in a certain circumstance. By that same logic, "not practicable" is synonymous with "unfeasible" and does not mean "impossible." Accordingly, we hold that "not practicable," as used in N.C.G.S. § 57D-6-02(2)(i), means unfeasible.

Courts from other jurisdictions also agree with this interpretation of "not practicable." *See, e.g.*, *Gagne v. Gagne*, 338 P.3d 1152, 1160 (Colo. App. 2014) (concluding that Colorado's "*not* practicable" standard for judicial dissolution required that the LLC be "unable to pursue the purposes for which the company was formed in a reasonable, sensible, and feasible manner"); *see also Unbridled Holdings, LLC v. Carter*, 607 S.W.3d 188, 197 (Ky. Ct. App. 2020) (noting that if the Kentucky legislature had desired a higher standard for Kentucky's dissolution statute, "it would have used the term 'impossible' instead of 'not reasonably practicable' " and noting that "almost all the outside authorities" permit dissolution under an impracticability standard (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992))); *PC Tower Ctr., Inc. v. Tower Ctr. Dev. Assocs. Ltd. P'ship*, Civ. A. No. 10788, 1989 WL 63901, at *6 (Del. Ch. June 8, 1989) (unpublished) (concluding that Delaware's "not reasonably practicable" standard is "one of reasonable practicability, not impossibility"). Additionally, the Business Court noted that while most states' LLC dissolution statutes provide for dissolution when it is "not *reasonably* practicable" instead of "not practicable," this is a distinction without a difference because the word "practicable" itself connotes reasonableness.

Based on this analysis, the question before this Court is whether the undisputed evidence demonstrates that it is "unfeasible" "to conduct the LLC[s'] business in conformance with the operating agreement[s] and [Chapter 57D]." *See* N.C.G.S. § 57D-6-02(2)(i).

Although *Chisum* offers limited guidance for factually analogous cases, the case before us is distinguishable. Therefore, we take this opportunity to further develop our caselaw as it applies to this case. Therefore, we look to other jurisdictions as instructive in determining

what factors to consider here. We first look to the Delaware Court of Chancery on this subject, as their limited liability company dissolution statute allows for dissolution "whenever it is not reasonably practicable to carry on the business in conformity with a limited liability company agreement." Del. Code Ann. tit. 6, § 18-802 (2019).

The Delaware Court of Chancery found judicial dissolution was appropriate when two 50% members were at an impasse and the operating agreement contained no equitable deadlock-breaking mechanism. *Haley v. Talcott*, 864 A.2d 86, 88–89 (Del. Ch. 2004). In *Haley*, the Delaware Court of Chancery explained that "the presence of a reasonable exit mechanism bears on the propriety of ordering dissolution." *Id.* at 96. The Court of Chancery went on to say:

> When the [operating] agreement itself provides a fair opportunity for the dissenting member who disfavors the inertial status quo to exit and receive the fair market value of her interest, it is at least arguable that the limited liability company may still proceed to operate practicably under its contractual charter because the charter itself provides an equitable way to break the impasse.

Id.

The Delaware Court of Chancery, in an unpublished opinion with facts similar to the case before us, ordered dissolution of an LLC where: "(1) the members' vote [was] deadlocked at the Board level; (2) the operating agreement [gave] no means of navigating around the deadlock; and (3) due to the financial condition of the company, there [was] effectively no business to operate." *In re: GR BURGR, LLC*, C.A. No. 12825-VCS, 2017 WL 3669511, at *5 (Del. Ch. Aug. 25, 2017) (unpublished). In yet another unpublished opinion, the Delaware Court of Chancery concluded that dissolution was appropriate when two managers could not agree on large strategic and operational decisions and the operating agreement provided no equitable means of resolution. *Vila v. BVWebTies LLC*, C.A. No. 4308-VCS, 2010 WL 3866098, at *7 (Del. Ch. Oct. 1, 2010) (unpublished).

Outside of Delaware, other states have also considered what events would make it "not practicable" to operate an LLC. For example, the Colorado Court of Appeals considered several factors when determining whether it was "reasonably practicable to carry on the business of a limited liability company," including:

> (1) whether the management of the entity is unable or unwilling reasonably to permit or promote the purposes for which the company was formed; (2) whether a member or manager has engaged in misconduct; (3) whether the members have clearly reached an inability to work with one another to pursue the company's goals; (4) whether there is deadlock between the members; (5) whether the operating agreement provides a means of navigating around any such deadlock; (6) whether, due to the company's financial position, there is still a business to operate; and (7) whether continuing the company is financially feasible.

Gagne, 338 P.3d at 1160.

The court noted that "[n]o one of these factors is necessarily dispositive" and that a court does not need to "find that all of these factors have been established in order to conclude that it is no longer reasonably practicable for a business to continue operating." *Id.* at 1161.

Finally, New York courts, under a "not reasonably practicable" standard, have determined that dissolution is appropriate when a party can show that "(1) the management of the entity is unable or unwilling to reasonably permit or promote the stated purpose of the entity to be realized or achieved, or (2) continuing the entity is financially unfeasible." *In re 1545 Ocean Ave., LLC*, 72 A.D.3d 121, 131 (N.Y. App. Div. 2010). The New York intermediate appellate court ultimately concluded that the LLC's operating agreement allowed each managing member to operate unilaterally in furtherance of the LLC's purpose. *Id.* This was sufficient to conclude that no deadlock was present. *Id.*, *see also Mizrahi v. Cohen*, 104 A.D.3d 917, 920 (N.Y. App. Div. 2013) (affirming judicial dissolution of an LLC, because it was not reasonably practicable for the LLC to continue to operate, as continuing the LLC was financially unfeasible).

Courts in other states have adopted similar factors. In *Venture Sales, LLC v. Perkins*, the Mississippi Supreme Court affirmed the judicial dissolution of a financially solvent LLC. 86 So. 3d 910, 917 (Miss. 2012). The LLC had existed for ten years, with a purpose of developing and selling property. *Id.* at 916. However, the LLC did not have any plans or the financial wherewithal for any development in the near future. *Id.* at 915–16. Thus, the court concluded, dissolution was appropriate, because it was not reasonably practicable for the LLC to carry on in conformity

with its operating agreement. *Id.* at 917. In *Kirksey v. Grohmann*, the South Dakota Supreme Court held that judicial dissolution of an LLC was appropriate when no procedure existed in the operating agreement to break existing deadlock. 754 N.W.2d 825, 831 (S.D. 2008). Moreover, the LLC was controlled by and favorable to only 50% of the members. *Id.* Thus, the court concluded, it was not reasonably practicable for the LLC to continue in accord with its operating agreement. *Id.*

We find the aforementioned decisions instructive as we adopt factors and reasoning to establish a clear precedent for what constitutes "not practicable" or "unfeasible" under N.C.G.S. § 57D-6-02(2)(i). Accordingly, to determine whether it is "not practicable" for the managers to continue operating the LLCs, we may consider: (1) whether the management of the company is unable or unwilling to work together to reasonably engage in or promote the purpose for which the company was formed; (2) whether there is deadlock between the managers;[2] (3) whether the operating agreement provides a means of navigating around such deadlock; (4) whether, due to the company's financial position, there is still a business to operate; (5) whether continuing the company is financially feasible; and (6) whether a member or manager has engaged in misconduct. We are not constrained by any one factor and do not need to find that all of these factors apply to conclude that it is "not practicable" to operate an LLC in accordance with its operating agreement. Instead, we weigh these factors to determine if judicial dissolution is an appropriate remedy.

Applying these factors to this case, this Court agrees with the Business Court and concludes that its decision to dissolve the LLCs was "manifestly [ ]supported by reason" and was "the result of a reasoned decision." *See Chisum*, 376 N.C. at 699 (extraneity omitted). In this case, the evidence demonstrates that it is "not practicable" to operate the LLCs.[3]

> [T]he core factual allegations of [p]laintiffs' Complaint are undisputed and show that the managers cannot agree on the use or disposition of the Property and have not been able to reach agreement for at least three years, there is no mechanism in the Operating Agreements to break the deadlock, the LLCs have

2. Or members within a member-managed LLC.

3. We cite to the 16 November 2023 amended order and opinion, in which there was a correction to a clerical error in the 14 November 2023 order and opinion but otherwise substantively tracks with that order and opinion.

> not conducted any economically useful activity since 2004, and there is no way for the LLCs to conduct any business, realize any profit, or dispose of any assets so long as the unbreakable deadlock persists.

James H.Q. Davis Tr. v. JHD Props., LLC, 2023 NCBC 78A, 2023 WL 7922656, at *6 (N.C. Super. Ct. Nov. 16, 2023).

As discussed below, while the current operation of the LLCs may be financially feasible, the inability to achieve the purpose of the LLCs, resulting in deadlock, demonstrates that dissolution is appropriate here.

A. The LLCs' Operating Agreements

The Operating Agreements of the LLCs state that the purpose of the LLCs is "to engage in the purchase, development, rental, ownership and sale of real property and in any other lawful business for which limited liability companies may be organized under the Act." The Business Court determined that this language, specifically the active language of "development, rental, . . . and sale," indicates an intent for the Property to be used or sold to maximize its value.

This Court agrees with the Business Court's determination that the purpose clause of the Operating Agreements shows that the Property was to be used as an active real estate business in order to maximize its value. First, these LLCs and trusts were established as estate planning vehicles for a father to pass wealth to his children. Specifically, the active language in these Operating Agreements—"purchase, development, rental, ownership and sale"—clearly demonstrate that the estate plan was intended to be used to provide monetary value to Dr. Davis' sons through an active real estate business.

The purpose of the LLCs could be achieved through any one of these uses, whether developing the land, renting the land to others, or selling the land. The inclusion of the term "ownership" does not defeat the idea that this purpose clause indicates active use, because ownership of property is an essential part of any real estate business.

For these LLCs to engage in active use of the Property, there must at least be an opportunity for the LLCs to develop, rent, sell, or otherwise make use of the land. That purpose does not require the LLCs' land to ultimately be developed or sold. However, at the very least, the LLCs must be able to engage in conversations and negotiations to determine when it is appropriate to develop, rent, or sell.

As the Business Court stated, the "question is not whether the managers are capable of agreement but whether managerial deadlock is

preventing the conduct of the LLCs' businesses." Therefore, to hold that it is "not practicable" to operate the LLCs requires evidence of an inability to engage in activities that would allow the LLCs to conduct the LLCs' business; that is, to consider whether they should develop, rent, or sell the land.

B. Managerial Deadlock

Based on the Operating Agreements, both Jim and Charles must agree for the LLCs to take binding action. Furthermore, the Operating Agreements provide no means of navigating around a deadlock, which can occur anytime the two managers disagree on the proper course of action for the LLCs. Therefore, an inability to reach decisions regarding the operation of the LLCs would evidence a managerial deadlock.

The Charles Trust argues that the evidence displays only one instance of disagreement between the brothers, but the Business Court noted a long record of disagreement and an inability to reach any decisions regarding the disposition or use of the Property. Charles claimed that he has "consistently maintained that [he would] work with [his] brothers" who want to enjoy the benefits of the Property, whether that is through development or sale. However, his actions do not reflect this willingness.

First, Jim and Charles began disagreeing over whether to sell the Property as early as 2018. Additionally, Charles may have engaged in discussions regarding the future of the Property, but he only considered two real outcomes: either they do nothing, or he buys the Property from the LLCs. A willingness to only consider one deviation from the status quo is insufficient to claim that the managers were not deadlocked or that the business was able to properly operate under the Operating Agreements.

Furthermore, Jim and Charles were unable to even reach a consensus on what the first step should be in considering a sale of the Property. Jim wanted to engage directly with third-party developers, while Charles wanted to conduct a thorough due diligence investigation of the Property. Charles insisted upon completing this due diligence investigation before engaging with any outside party. Without Charles' authorization, Jim was unable to even consider negotiations with developers.

By Charles' own admission, he did not believe he had any obligation to consider a sale of the Property.[4] Charles evidenced this belief when he refused to authorize Jim to negotiate with the developer who submitted

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4. Although it was not argued by the parties and is not before this Court, this admission and the actions of the managers raise a question regarding the fiduciary duties of the

the letter of intent. By withholding authorization, Charles stonewalled Jim's ability to engage with third-party developers.

Moreover, Jim's actions indicate that he did not want to engage in a sale of the Property to Charles, evidenced by the fact that Jim completely failed to respond to Charles' term sheet. Jim also stated that he did not trust Charles to actually purchase his and his brothers' interests in the Property. Jim and Charles have both demonstrated an unwillingness to negotiate with the other or even to reasonably consider the offers presented by the other. Jim indicated that he would be willing to consider discussions with Charles regarding an offer to sell the Property to Charles, but that Charles never submitted a binding offer to buy the Property. Finally, mediation between Charles and Jim was unsuccessful and did not break the impasse.

Based on this evidence, the managerial deadlock is preventing the productive conduct of the LLCs' business. Therefore, we affirm the Business Court's decision that it is "not practicable" for the managers to operate the LLCs in accordance with the Operating Agreements. Similar to the parties in *Haley*, Jim and Charles are deadlocked, as they are unable to act without the consent of the other. Consequently, they have been unable to make strategic decisions, such as whether to develop or sell the Property, or take operational action, such as getting the Property appraised or hiring a forestry manager, despite having expressed a willingness to do so. *See Haley*, 864 A.2d at 88–89.

While this Court cannot say that it is impossible that the managers could ever operate the LLCs in accordance with the Operating Agreements, the evidence presented demonstrates that continued operation is "unfeasible," which is all that N.C.G.S. § 57D-6-02(2)(i) requires. Although the communications between the managers are cooperative and cordial in tone, there is no evidence of progress toward a reasonable outcome, which would result in any form of active use of the Property. Charles has only proposed two options at this point: to stay the course and not change any use of the land, or to buy the Property, even though he has never provided any firm offer for the Property. On the other side, Jim insists on selling the Property, but his actions indicate that he has

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managers. Subsection 57D-6-02(2)(ii) allows for dissolution when "liquidation of the LLC is necessary to protect the rights and interests of the member[s]." N.C.G.S. § 57D-6-02(2)(ii). Three of the four brothers favor selling the Property, which means that a majority of the members are interested in selling. Also, as previously discussed, the purpose of the trusts is to actively engage in a real estate business. The interests of the members of an LLC may be an important consideration in the question of dissolution, but it is not determinative here, since the parties did not argue such under N.C.G.S. § 57D-6-02(2)(ii).

no intent to sell the Property to Charles, even when Charles provided a term sheet with a similar purchase price to that of the developer.

Ultimately, the evidence demonstrates that this case satisfies factor one (whether the management of the company is unable or unwilling to work together to reasonably engage in or promote the purpose for which the company was formed) and factor three (whether the operating agreement provides a means of navigating around such deadlock), discussed above. The managers have been unsuccessful in working with one another to pursue the purpose of the Operating Agreements. The managers are unwilling to engage in active conduct of the LLCs' business. Although both managers have expressed a desire to resolve this disagreement, the actions of both Jim and Charles, in refusing to engage with the business proposals of the other, prove otherwise. Further, the Operating Agreements provide no mechanism to break this deadlock; the requirement of unanimous consent has placed the managers at an unbreakable impasse—implicating factor number two (whether there is deadlock between the managers), discussed above. Moreover, the continued financial feasibility of the LLCs, addressed in factor number five, does not outweigh the deadlock. Notably, the Operating Agreements consider judicial dissolution as an appropriate means for dissolution.[5]

The absence of a mechanism to break the managerial deadlock present under these facts has made it "not practicable" for the managers to operate the LLCs in accordance with the Operating Agreements. According to our analysis, factors one through three weigh in favor of dissolution.

C. Forestry Business

The Charles Trust argues that the "forestry business" of the LLCs sufficiently demonstrates that the LLCs are functioning in accordance with the Operating Agreements because forestry makes use of the Property. While this Court agrees with the amici curiae that sound forest management is an economically useful activity, that fact alone does not preclude a conclusion that the managers' deadlock is preventing the LLCs from operating in accordance with their purpose.

First, as discussed above, the managers are deadlocked. This "forestry business" does not change that deadlock. The existing deadlock is

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5. The Operating Agreements specify that the LLCs may be dissolved if all or substantially all of the assets are sold, if all members and a majority of the managers consent to dissolution, if a court adjudicates the LLCs to be bankrupt, if the LLCs' terms expire as set forth in the Operating Agreements, or if a court enters a decree of judicial dissolution.

preventing the managers from taking any productive steps forward in the development or sale of the land, thus preventing the managers from engaging in any further business, whether forestry or otherwise.

Second, the "forestry business" merely provided the means for more favorable property tax treatment. This alone does not satisfy the requirement that each LLC operates in accordance with its purpose. Only one sale of timber, in 2004, has been made. Only one of the LLCs, Berry Hill, was subject to a forestry management plan; there is no evidence that JHD was subject to a forestry management plan. Only one crop of seedlings has been planted on the Property since the initiation of the forestry management plan. Finally, the LLCs have no current plan to harvest timber. These facts demonstrate that the "forestry business" is not operating in accordance with the purpose of the LLCs.

Third, judicial dissolution may be appropriate when an LLC is "technically function[al]" but operates in a "residual, inertial status quo." *Haley*, 864 A.2d at 96. In the context of the "forestry business," the Property has only yielded one timber sale, in 2004, before Dr. Davis' death. Furthermore, the managers initially created a forestry management plan, but that plan has since lapsed. The managers have not taken any concrete steps toward instituting a new forestry management plan or hiring a forestry manager. By their own admission, the managers devoted part of the Property to forestry to gain a more favorable tax treatment. Otherwise, the managers have devoted little to no effort to maintain the forestry status.

This Court agrees that forestry management is an economically useful activity and one that should be valued in our state. However, the present facts indicate that the LLCs' business purpose is not being achieved by the present operation. As a result of the managerial deadlock and the lack of evidence indicating that the current "forestry business" fulfills the LLCs' purpose, judicial dissolution is appropriate in this case.

V. Conclusion

The undisputed evidence supports the Business Court's decision to dissolve the LLCs. Specifically, the presence of managerial deadlock, the lack of an equitable means of resolving that deadlock, and the unwillingness of the managers to permit the LLCs to engage in and pursue the purpose for which they were formed has rendered the situation such that it is "not practicable" for the managers of the LLCs to operate the LLCs in accordance with the Operating Agreements. Accordingly, we affirm the Business Court's order and opinion on cross-motions for summary judgment.

AFFIRMED.

DUSTIN MICHAEL McKINNEY, GEORGE JERMEY McKINNEY, AND JAMES ROBERT TATE; AND STATE OF NORTH CAROLINA, INTERVENOR
v.
GARY SCOTT GOINS AND THE GASTON COUNTY BOARD OF EDUCATION

No. 109PA22-2

Filed 31 January 2025

Constitutional Law—North Carolina—tort claims—child sexual abuse—retroactive alteration of expired statutes of limitations—no vested right

In considering a facial challenge to a provision of the SAFE Child Act allowing victims of child sexual abuse to file otherwise time-barred tort claims during a specified two-year period, the Supreme Court construed the Law of the Land and Ex Post Facto Clauses of the North Carolina Constitution to affirm, as modified, the Court of Appeals' lead decision holding that an action—brought against a county board of education (defendant) by three men (plaintiffs) who, as minors, were sexually abused by their high school wrestling coach—did not implicate any constitutionally protected vested right. The statute of limitations applicable to plaintiffs' tort claims fell outside the scope of the vested right doctrine because it affected procedural remedies—rather than property of the sort protected by the Law of the Land Clause—and, having been created by legislation, could be altered by legislation. Further, the text and history of the Ex Post Facto Clause—along with pertinent caselaw—revealed that retroactive civil laws which do not impose taxes are constitutionally permissible. Finally, the Court noted that the lower appellate court's tiered substantive due process framework analysis was immaterial to defendant's argument, and thus, unnecessary.

Justice EARLS concurring in the result only.

Appeal pursuant to N.C.G.S. § 7A-30(2) (2023) from the decision of a divided panel of the Court of Appeals, 290 N.C. App. 403, 892 S.E.2d 460 (2023), reversing an order entered on 20 December 2021, in Superior Court, Wake County, by a three-judge panel under N.C.G.S. § 1-267.1 (2021), and remanding the case. Heard in the Supreme Court on 18 September 2024.

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Shook, Hardy & Bacon L.L.P., by Caroline Gieser, for American Tort Reform Association and American Property Casualty Insurance Association, amici curiae.

Troutman Pepper Hamilton Sanders LLP, by Mary K. Grob, for Roman Catholic Diocese of Charlotte, amicus curiae.

Nelson Mullins Riley & Scarborough, LLP, by Lorin J. Lapidus, G. Gray Wilson, Denise M. Gunter, and Martin M. Warf; and Bell, Davis & Pitt, P.A., by Kevin G. Williams, for Young Men's Christian Association of Northwest North Carolina d/b/a Kernersville Family YMCA, amicus curiae.

Wilder Pantazis Law Group, by Sam McGee, for CHILD USA, amicus curiae.

Fox Rothschild LLP, by Troy D. Shelton, for Jane Does 1 and 2, amici curiae.

NEWBY, Chief Justice.

This case asks whether our state constitution limits the legislature's authority to revive previously expired tort claims by retroactively altering the applicable statute of limitations. In other words, does the expiration of a tort claim's statute of limitations create a constitutionally protected vested right?

In 2019, the General Assembly unanimously passed the SAFE Child Act, a law that allowed victims of child sexual abuse to file otherwise time-barred lawsuits during a two-year period from January 2020 to December 2021.[1] Defendant, the Gaston County Board of Education,[2] contends that this revival window unlawfully interfered with constitutionally protected vested rights in violation of our state constitution's Law of the Land Clause. *See* N.C. Const. art. I, § 19. The lead opinion at the Court of Appeals rejected defendant's argument.[3] *McKinney v. Goins*, 290 N.C. App. 403, 432, 892 S.E.2d 460, 480 (2023). It reached that conclusion by applying this Court's longstanding approach to constitutional questions, which begins with a presumption of the act's constitutionality and then considers "the text of the constitution, the historical context in which the people of North Carolina adopted the applicable constitutional provision, and our precedents." *Id.* at 412–13, 892 S.E.2d at 468 (quoting *State ex rel. McCrory v. Berger*, 368 N.C. 633, 639, 781 S.E.2d 248, 252 (2016)). Because we hold that there is no constitutionally protected vested right in the running of a tort claim's statute of limitations, we affirm the decision of the Court of Appeals as modified.

I. Background and Procedural History

Plaintiffs are three former East Gaston High School students who competed on the school's wrestling team during the mid-1990s and early 2000s. Their coach, Gary Scott Goins, repeatedly subjected them to sexual abuse, physical violence, and psychological harm. *See generally*

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1. We address other aspects of the SAFE Child Act in a pair of cases released with this one. *See Cohane v. Home Missioners of Am.*, No. 278A23 (N.C. Jan. 31, 2025) (answering questions of statutory interpretation); *Doe 1K v. Roman Cath. Diocese*, Nos. 167PA22 & 168PA22 (N.C. Jan. 31, 2025) (considering the effect of res judicata).

2. On 25 March 2022, plaintiffs voluntarily dismissed their claims against defendant Gary Scott Goins without prejudice. He is currently serving a prison sentence related to the abuse plaintiffs allege in this lawsuit.

3. We refer to the court's opinion as the "lead opinion" because only the authoring judge joined it. *See McKinney*, 290 N.C. App. at 403, 892 S.E.2d at 480 (opinion of Riggs, J.). One judge concurred in the result only but declined to write separately, *see id.* at 432, 892 S.E.2d at 480 (Gore, J., concurring in the result only without separate opinion), and one judge dissented, *see id.* (Carpenter, J., dissenting).

State v. Goins, 244 N.C. App. 499, 501–11, 781 S.E.2d 45, 48–54 (2015) (describing the evidence presented at Goins's criminal trial). These acts led to Goins's criminal prosecution and conviction in 2014. He was sentenced to more than thirty-four years in prison, a judgment the Court of Appeals later upheld. *Id.* at 511, 528, 781 S.E.2d at 54, 64.

Plaintiffs now seek civil damages from defendant, Goins's former employer, whom they contend knew or should have known about the abuse. At the time of the abuse, our State imposed a three-year statute of limitations on most tort claims, including those filed by victims of child sexual abuse. *See* N.C.G.S. § 1-52 (2019). The three-year clock began running on the victim's eighteenth birthday. N.C.G.S. § 1-17(a) (2019). Consequently, once victims turned twenty-one, the law essentially prohibited them from holding their abusers civilly liable. The claims in this case therefore would have expired no later than 2008, when the youngest of the three plaintiffs turned twenty-one.

In 2019, however, the General Assembly unanimously passed the SAFE Child Act—legislation intended to "strengthen and modernize" North Carolina's protections for victims of child sexual abuse. *See* An Act to Protect Children From Sexual Abuse and to Strengthen and Modernize Sexual Assault Laws (SAFE Child Act), S.L. 2019-245, 2019 N.C. Sess. Laws 1231. Among other noteworthy changes, the Act purported to revive certain time-barred claims. The relevant portion of the statute, section 4.2(b), provides:

> Effective from January 1, 2020, until December 31, 2021, this section revives any civil action for child sexual abuse otherwise time-barred under [N.C.]G.S. [§] 1-52 as it existed immediately before the enactment of this act.

Id. § 4.2(b).

Relying on this provision, plaintiffs sued Goins and defendant on 2 November 2020, bringing tort claims for assault and battery; negligent hiring, retention, and supervision; negligent and intentional infliction of emotional distress; constructive fraud; and false imprisonment. Defendant answered and counterclaimed, seeking a declaratory judgment that section 4.2(b) was facially unconstitutional. It later filed a separate motion to dismiss on the same ground and, in a joint motion with plaintiffs, sought to transfer the constitutional challenge to a three-judge panel of the Superior Court, Wake County. *See* N.C.G.S. § 1-267.1(a1) (2021) ("[A]ny facial challenge to the validity of an act of the General Assembly shall be transferred . . . to the Superior Court

of Wake County and shall be heard and determined by a three-judge panel of the Superior Court of Wake County . . . ."). The trial court granted the motion to transfer on 17 May 2021.

The State then filed for and was granted permission to intervene to defend section 4.2(b)'s constitutionality. On 20 December 2021, a divided superior court panel issued a written order declaring section 4.2(b) facially unconstitutional. The majority based its reasoning almost entirely on its reading of this Court's "vested rights" precedents, holding that defendant possessed a vested right in the previously expired statute of limitations that the legislature could not take away without violating the constitution. The dissent, however, concluded that "the text of the [c]onstitution, the historical context in which the people of North Carolina adopted the applicable constitutional provisions, and our court's unsettled law" demonstrated that section 4.2(b) was constitutional. Plaintiffs appealed the panel's order to the Court of Appeals.

At the Court of Appeals, plaintiffs argued that the relevant text, historical context, and precedents showed that section 4.2(b) did not implicate vested rights. They further argued that "[e]ven if . . . [section 4.2(b)] impacts a right deemed fundamental/vested, that does not automatically invalidate the legislation." Instead, they requested the court apply the "modern substantive due process analysis" to uphold the law. Defendant, however, contended in its response brief that section 4.2(b) impermissibly infringed upon vested rights, which it believed were absolutely immune from legislative interference. It noted that North Carolina's courts adopted substantive due process principles from the federal courts' interpretation of the Fourteenth Amendment to the Federal Constitution, but it maintained that the Court of Appeals should not apply those standards to the vested rights doctrine because the latter provided "broader protections than . . . the Federal Constitution."

Accordingly, defendant stated that "North Carolina has not adopted, and should not adopt, general [Fourteenth] Amendment standards of review in lieu of longstanding state constitutional doctrine in this context." Its position on this matter was unequivocal:

> [Plaintiffs] contend that the strict scrutiny/rational basis analytical framework developed by the federal courts in the context of the Fourteenth Amendment must apply in the analysis of the Revival Window. *This [c]ourt should not rewrite North Carolina law to adopt this federal court approach.*

> While the Fourteenth Amendment to the United States Constitution and the Law of the Land Clause of the North Carolina Constitution share some of the same goals, *the language and jurisprudence are different for each*. . . .
>
> . . . .
>
> If this [c]ourt follows [plaintiffs]' proposed approach and adopts wholesale federal jurisprudence of what substantive due process means, this [c]ourt will forfeit its independence from the Supreme Court of the United States on what is and what is not a fundamental right for citizens of this State. *There is no good reason for this [c]ourt to pursue this line of reasoning*, particularly when our [S]tate has a long, robust history on this very topic under the Law of the Land Clause that can be readily analyzed to inform the decisions of this [c]ourt.

(Emphases added.)[4]

In issuing its decision, the Court of Appeals divided along similar lines as the superior court panel. The lead opinion acknowledged that section 4.2(b) was presumptively constitutional and that defendant would need to prove unconstitutionality beyond a reasonable doubt. *McKinney*, 290 N.C. App. at 412, 892 S.E.2d at 468 (citing *Hart v. State*, 368 N.C. 122, 131, 774 S.E.2d 281, 287 (2015)). It then rigorously examined the constitutional text, historical context, and this Court's precedents.

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4. Defendant made the same arguments and concessions to this Court. For instance, it argued the following in its opening brief:

> As the Court of Appeals dissent noted, fundamental rights and vested rights are not the same. Under federal law, fundamental rights *can* be impaired or taken away by the government under certain circumstances. Not so with vested rights, which are immune to infringement by the [l]egislature. . . .
>
> . . . .
>
> The balancing test framework of the [Fourteenth] Amendment is particularly inappropriate in the context of North Carolina's vested rights doctrine, which imposes a categorical restraint on the [l]egislature. Adopting the federal balancing test would result in the reversal of hundreds of years of jurisprudence in this [S]tate.

Id. at 413–32, 892 S.E.2d at 468–80. This analysis led it to reject the central premise of defendant's argument: that section 4.2(b) impermissibly infringed upon vested rights, which were absolutely immune from legislative interference. Instead, the lead opinion explained that the statute did not affect vested rights at all: "[A] procedural bar to a plaintiff's claim imposed by an expired statute of limitations does not, standing alone, create any property right in the defendant, and said bar may be retroactively lifted without interfering with a defendant's vested rights." *Id.* at 418, 892 S.E.2d at 472 (citing *Hinton v. Hinton*, 61 N.C. (Phil.) 410, 415–16 (1868)). The court therefore held that defendant "failed to show beyond a reasonable doubt that an express provision of [the state constitution] prohibits revivals of statutes of limitation." *Id.* at 432, 892 S.E.2d at 480 (citing *Harper v. Hall*, 384 N.C. 292, 324, 886 S.E.2d 393, 414–15 (2023)).

Despite having rejected the entire basis for defendant's argument, the lead opinion concluded by also considering whether section 4.2(b) "violate[d] constitutional due process under the present law of this State, i.e., the modern substantive due process analysis." *Id.* at 428, 892 S.E.2d at 478 (italics omitted). It decided the statute passed this secondary test as well, because it satisfied "even the highest level of constitutional scrutiny." *Id.* at 432, 892 S.E.2d at 480.

On the other hand, the dissent at the Court of Appeals believed that the running of the statute of limitations created a procedural bar in which defendant had a vested right. *Id.* at 434–35, 892 S.E.2d at 482 (Carpenter, J., dissenting). The dissent recognized that the constitution lacked a textual provision prohibiting the revival window at issue here. *Id.* at 432, 892 S.E.2d at 481. Its review of this Court's precedents, however, led it to conclude that the constitution prohibited the General Assembly from interfering with vested rights under any circumstances. *Id.* The dissent also opined that the lead opinion's substantive due process analysis "would erase our [State's] vested-rights doctrine." *Id.* at 441, 892 S.E.2d at 486. It noted that vested rights were a distinct part of the State's constitutional law and called them "ill-suited" for review under the federal due process standards they predated. *Id.* Defendant appealed to this Court on the basis of the dissent. N.C.G.S. § 7A-30(2) (2023).

II. Fundamental Principles

The question for this Court is whether our state constitution prohibits the legislature from reviving otherwise time-barred tort claims. In other words, does the running of a statute of limitations in a tort claim create a constitutionally protected vested right?

"A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. Const. art. I, § 35. Accordingly, we apply the fundamental approach by which this Court has decided constitutional questions for over two centuries. *See Harper*, 384 N.C. at 378–79, 886 S.E.2d at 448–49; *Cmty. Success Initiative v. Moore*, 384 N.C. 194, 212–13, 886 S.E.2d 16, 32–33 (2023); *Holmes v. Moore*, 384 N.C. 426, 435–39, 886 S.E.2d 120, 129–32 (2023).

A. Presumption of Constitutionality

Our review presumes that legislation is constitutional and that a constitutional limitation on the General Assembly must be explicit in the text and demonstrated beyond a reasonable doubt. *See Harper*, 384 N.C. at 323, 886 S.E.2d at 414; *Cmty. Success*, 384 N.C. at 212, 886 S.E.2d at 32; *Holmes*, 384 N.C. at 435–36, 886 S.E.2d at 129. "The [l]egislature alone may determine the policy of the State, and its will is supreme, except where limited by constitutional inhibition[.] . . . But even then the courts do not undertake to say what the law ought to be; they only declare what it is." *Holmes*, 384 N.C. at 435, 886 S.E.2d at 129 (quoting *State v. Revis*, 193 N.C. 192, 195, 136 S.E. 346, 347 (1927)).

The rationale for this framework is grounded in the structure of the state constitution. Article I, Section 2 of our constitution declares that "[a]ll political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole." N.C. Const. art. I, § 2. The people exercise their inherent political power through their elected representatives in the General Assembly. *State ex rel. Ewart v. Jones*, 116 N.C. 570, 570, 21 S.E. 787, 787 (1895). We have therefore recognized that "the General Assembly serves as 'the agent of the people for enacting laws,' " giving the legislature "the presumptive[, plenary] power to act." *Harper*, 384 N.C. at 323, 886 S.E.2d at 414 (quoting *State ex rel. Martin v. Preston*, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989)).

Moreover, Article I, Section 6 establishes that the powers of the three branches of government "shall be forever separate and distinct from each other." N.C. Const. art. I, § 6. Like other provisions of the Declaration of Rights, the Separation of Powers Clause "is to be considered as a general statement of a broad, albeit fundamental, constitutional principle." *Harper*, 384 N.C. at 321, 886 S.E.2d at 413 (quoting *State v. Furmage*, 250 N.C. 616, 627, 109 S.E.2d 563, 571 (1959)). Later, more specific portions of the constitutional text expand on this abstract principle: Article II sets forth the legislative power; Article III, the executive; and Article IV, the judicial. *Id.* at 321–22, 886 S.E.2d at 413 (citing John

V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 46 (2d ed. 2013) [hereinafter *State Constitution* (2d ed.)]). The specific language used in Articles II, III, and IV confirms that the legislature, but not the executive or judicial branches, wields plenary power. "Nowhere was it stated that the three powers or branches had to be equal. In fact, although the balance occasionally shifted, the preponderant power has always rested with the legislature." *Harper*, 384 N.C. at 322, 886 S.E.2d at 413 (quoting *State Constitution* (2d ed.) 50).

But because "[t]he people speak through the express language of their constitution, and only the people can amend it," *id.* at 297, 886 S.E.2d at 398 (citing N.C. Const. art. XIII), the General Assembly cannot exceed the express limits placed on it by the constitutional text, *id.* at 323, 886 S.E.2d at 414; *see also id.* at 297, 886 S.E.2d at 398 ("[T]he state constitution is a limitation on power."). When a legislative act goes beyond these limits, the judiciary must use its "constitutional power of judicial review" to strike it down. *Berger*, 368 N.C. at 650, 781 S.E.2d at 259 (Newby, J., concurring in part and dissenting in part); *see also Bayard v. Singleton*, 1 N.C. (Mart.) 5, 7 (1787) ("[N]o act [of the General Assembly] . . . could by any means alter or repeal the [c]onstitution."); *Cmty. Success*, 384 N.C. at 212, 886 S.E.2d at 32 ("[W]hen a challenger proves the unconstitutionality of a law beyond a reasonable doubt, this Court will not hesitate to pronounce the law unconstitutional and to vindicate whatever constitutional rights have been infringed.").

Still, we must use the power of judicial review with "great reluctance," *Bayard*, 1 N.C. (Mart.) at 6–7, resisting any temptation to intrude into the legislature's policy-making role, *see Holmes*, 384 N.C. at 439, 886 S.E.2d at 132 ("The power to invalidate legislative acts is one that must be exercised by this Court with the utmost restraint . . . ."). Our constitution makes plain that "a restriction on the General Assembly is in fact a restriction on the people." *Berger*, 368 N.C. at 651, 781 S.E.2d at 259 (Newby, J., concurring in part and dissenting in part); *see also Cmty. Success*, 384 N.C. at 211, 886 S.E.2d at 31 (stating that acts of the General Assembly are "expressions of the people's will"). Thus, when the judiciary strikes down a duly enacted law of the General Assembly, it creates tension between the judicial and legislative branches, as well as between the judiciary and the people.

The presumption of constitutionality eases this tension. It is "a critical safeguard that preserves the delicate balance between this Court's role as the interpreter of our [c]onstitution and the legislature's role as the voice through which the people exercise their ultimate power." *Holmes*, 384 N.C. at 435, 886 S.E.2d at 129; *see also Harper*, 384 N.C.

at 299, 886 S.E.2d at 399 ("[T]he people act and decide policy matters through their representatives in the General Assembly. We are designed to be a government of the people, not of the judges."); *Cmty. Success*, 384 N.C. at 211, 886 S.E.2d at 32 (stating that this Court does not strike down an act of the General Assembly "unless it violates federal law or *the supreme expression of the people's will, the North Carolina Constitution*" (emphasis added)).

The party challenging a law's constitutionality—in this case, defendant—bears the burden of overcoming our presumption of validity. *Cmty. Success*, 384 N.C. at 212, 886 S.E.2d at 32. "A facial challenge to the constitutionality of an act," like the one defendant brings here, "is the most difficult challenge to mount successfully." *Id.* (quoting *Hart*, 368 N.C. at 131, 774 S.E.2d at 288). "To succeed in this endeavor, one who facially challenges an act of the General Assembly may not rely on mere speculation. Rather, '[a]n individual challenging the facial constitutionality of a legislative act must establish that no set of circumstances exists under which the act would be valid.' " *Holmes*, 384 N.C. at 436, 886 S.E.2d at 129 (alteration in original) (quoting *State v. Bryant*, 359 N.C. 554, 564, 614 S.E.2d 479, 486 (2005)). "The fact that a statute might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Cmty. Success*, 384 N.C. at 213, 886 S.E.2d at 33 (quoting *State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 282 (1998)). If the challenger fails to meet his burden beyond a reasonable doubt, "we must uphold the statute regardless of whether we agree with the General Assembly's public policy choices." *Id.* at 212, 886 S.E.2d at 32.

These standards are well-settled. From the beginning, North Carolina's courts have exercised judicial review with the utmost caution, only declaring a law unconstitutional if it violated the express constitutional text. *See Bayard*, 1 N.C. (Mart.) at 6; *see also*, *e.g.*, *Lee v. Dunn*, 73 N.C. 595, 601 (1875) ("[I]t is for the appellant to show that the [l]egislature is restricted by the express provisions of the [c]onstitution, or by necessary implication therefrom. And this he must show beyond a reasonable doubt." (first citing *State v. Adair*, 66 N.C. 298, 303 (1872), and then citing *King v. W. & W. R.R. Co.*, 66 N.C. 277, 283 (1872))); *Daniels v. Homer*, 139 N.C. 219, 227–28, 51 S.E. 992, 995 (1905) ("[A] statute will never be held unconstitutional if there is any reasonable doubt." (quoting *State v. Lytle*, 138 N.C. 738, 741, 51 S.E. 66, 68 (1905))); *Cooper v. Berger*, 371 N.C. 799, 810–11, 822 S.E.2d 286, 296 (2018) ("Unless the [c]onstitution expressly or by necessary implication restricts the actions of the legislative branch, the General Assembly is

free to implement legislation as long as that legislation does not offend some specific constitutional provision." (emphases omitted) (quoting *Baker v. Martin*, 330 N.C. 331, 338–39, 410 S.E.2d 887, 891–92 (1991))). This requirement serves as "a necessary protection against abuse of [the judicial review] power by unprincipled or undisciplined judges." *Holmes*, 384 N.C. at 439, 886 S.E.2d at 132. "Policy decisions belong to the legislative branch, not the judiciary." *Harper*, 384 N.C. at 300, 886 S.E.2d at 400.

B. Text, Context, and Precedent

Having outlined our presumption of constitutionality, we now explain the methodology by which we evaluate a constitutional challenge. Every constitutional inquiry examines the text of the relevant provision, the historical context in which the people of North Carolina enacted it, and this Court's precedents interpreting it. *Cmty. Success*, 384 N.C. at 213, 886 S.E.2d at 33; *Berger*, 368 N.C. at 639, 781 S.E.2d at 252; *see Harper*, 384 N.C. at 323, 886 S.E.2d at 414.

We begin with the text of the applicable constitutional provision. *Cmty. Success*, 384 N.C. at 213, 886 S.E.2d at 33 ("[W]here the meaning is clear from the words used, we will not search for a meaning elsewhere." (alteration in original) (quoting *Preston*, 325 N.C. at 449, 385 S.E.2d at 479)). "The constitution is interpreted based on its plain language. The people used that plain language to express their intended meaning of the text when they adopted it." *Harper*, 384 N.C. at 297, 886 S.E.2d at 399. Because all political power in this State derives from the people, *see* N.C. Const. art. I, §§ 2–3, the constitution contains "no hidden meanings or opaque understandings—the kind that can only be found by the most astute justice or academic," *Harper*, 384 N.C. at 297, 886 S.E.2d at 399. Axiomatically, "[t]he constitution was written to be understood by everyone, not just a select few." *Id.*

We then study the historical background against which the people enacted the constitutional text. *Cmty. Success*, 384 N.C. at 213, 886 S.E.2d at 33; *see also Harper*, 384 N.C. at 351, 886 S.E.2d at 341. Our goal here is "to isolate the provision's meaning at the time of its ratification."[5] *Cmty. Success*, 384 N.C. at 213, 886 S.E.2d at 33; *see Sneed*

5. At oral argument, defendant incorrectly framed its historical argument around our most recent constitution, enacted in 1971. But the 1971 constitution did not create the two provisions at issue in this case, the Law of the Land Clause and the Ex Post Facto Clause. Rather, the constitutional drafters largely carried them over from the 1868 constitution, which itself adapted them from the 1776 constitution. John V. Orth, *The North Carolina State Constitution* 37–38, 52–53, 56–59 (1993) [hereinafter *State Constitution*]. The

v. Greensboro City Bd. of Educ., 299 N.C. 609, 613, 264 S.E.2d 106, 110 (1980) ("Inquiry must be had into the history of the questioned provision and its antecedents, the conditions that existed prior to its enactment, and the purposes sought to be accomplished by its promulgation."). "We also seek guidance from any on-point precedents from this Court interpreting the provision." *Cmty. Success*, 384 N.C. at 213, 886 S.E.2d at 33 (citing *Elliott v. State Bd. of Equalization*, 203 N.C. 749, 753, 166 S.E. 918, 921 (1932)). This Court reviews constitutional questions de novo. *Id.* at 210, 886 S.E.2d at 31.

III. Analysis

We turn now to defendant's constitutional challenge in this case. Defendant argues that Article I, Section 19's Law of the Land Clause prohibits the General Assembly from retroactively reviving time-barred tort

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modern text remains consistent with its origins in 1776. Thus, the analysis must begin with the 1776 constitution and the context in which the people adopted the provisions then. *See, e.g.*, *Harper*, 384 N.C. at 351–64, 886 S.E.2d at 431–39 (noting that "[t]he [Free Elections C]lause first appeared in the 1776 constitution," acknowledging its roots in English law, and then explaining how the Clause evolved through the 1868 and 1971 constitutions).

The historical context in which the people enacted the 1971 constitution lacks much persuasive value with respect to defendant's case. The drafters specifically stated that the new constitution "did not intend 'to bring about any fundamental change in the power of state and local government or the distribution of that power.' " *Berger*, 368 N.C. at 643, 781 S.E.2d at 254–55 (quoting N.C. State Const. Study Comm'n, *Report of the North Carolina State Constitution Study Commission* 4 (1968), https://www.ncleg.gov/Files/Library/studies/1968/st12308.pdf). Instead, the primary goal of the 1971 constitution was "editorial pruning, rearranging, rephrasing, and modest amendments," and "the great majority of the changes embraced in the [1971] constitution [took] the form of [non-substantive] deletions or contractions in language." *Id.* at 643, 781 S.E.2d at 255 (quoting *Report of the North Carolina State Constitution Study Commission* 29).

That is especially true of the minor edits made to the Law of the Land Clause and Ex Post Facto Clause. Consider the single change the 1971 constitution made to the Law of the Land Clause: the words "ought to" were replaced with "shall." *Compare* N.C. Const. of 1868, art. I, § 17, *with* N.C. Const. art. I,§ 19. It did the same to the Ex Post Facto Clause, replacing the phrases "ought to be made" and "ought to be passed" with "shall be enacted." *Compare* N.C. Const. of 1868, art. I, § 32, *with* N.C. Const. art. I, § 16. The use of "ought to" traces back to the 1776 constitution. *See* N.C. Const. of 1776, Declaration of Rights, §§ XII, XXIV. North Carolinians at the time would have viewed this language as a command to the government. *See Smith v. Campbell*, 10 N.C. (3 Hawks) 590, 598 (1825) (declaring that "ought" is synonymous with "shall" and noting that "the word ought, in this and other sections of the [1776 constitution], should be understood imperatively").

When the drafters of the 1971 constitution changed "ought to" to "shall," they were not making a substantive change. Instead, they were updating the constitution's words to ensure that its modern meaning remained consistent with how North Carolinians in 1776 and 1868 would have understood its protections. *See Report of the North Carolina State*

claims, contending that it had a "vested right" to rely on the running of the previous statute of limitations. In arguing otherwise, plaintiffs also point to another constitutional provision, the Ex Post Facto Clause of Article I, Section 16. We address these textual provisions in turn.

A. The Law of the Land Clause

The Law of the Land Clause, found at Article I, Section 19, provides that "[n]o 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." N.C. Const. art. I, § 19. The Law of the Land Clause guarantees "the famous trinity of life, liberty, and property." *State Constitution* at 56. It "traces its antecedents back to the Magna Carta," *id.*, and it has existed in similar form in all three iterations of our constitution, *see* N.C. Const. art. I,

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Constitution Study Commission 74–75 ("*In order to make it clear* that the rights secured to the people by the Declaration of Rights are commands and not merely admonitions to proper conduct on the part of the government, the words 'should' and 'ought' have been changed to read 'shall' throughout the Declaration." (emphasis added)); *N.C. State Bar v. DuMont*, 304 N.C. 627, 639, 286 S.E.2d 89, 96–97 (1982) (describing an analogous edit to Article I, Section 25's jury trial right as a "minimal editorial change").

Our precedents have repeatedly cited the Commission's characterization of its edits as non-substantive. In *DuMont*, this Court noted that the *Report* "evince[d] a clear intent on the part of the framers of the new document merely to update, modernize and revise editorially the 1868 [c]onstitution." *DuMont*, 304 N.C. at 636, 286 S.E.2d at 95. The opinion continued:

> An intent to modernize the language of the existing constitution does not, in our opinion, show that the framers of the 197[1] [c]onstitution intended that instrument to enlarge upon the rights granted by the 1868 [c]onstitution. Indeed, we think that such an intent shows that the 197[1] framers intended to preserve intact all rights under the 1868 [c]onstitution.

Id.; *see also, e.g.*, *Sneed v. Greensboro City Bd. of Educ.*, 299 N.C. 609, 616, 264 S.E.2d 106, 112 (1980) (concluding, with respect to the substantive purpose of the 1971 constitution, that "we cannot read into the voice of the people an intent that in all likelihood had no occasion to be born").

Harper recognized this defining aspect of the Commission's edits as well. It explained that the 1971 constitution was "a good government measure" that "represented an attempt to modernize the 1868 constitution and its subsequent amendments with editorial and organizational revisions and amendment proposals." *Harper*, 384 N.C. at 329–30, 886 S.E.2d at 418 (first quoting *State Constitution* (2d ed.) 32; then citing *Report of the North Carolina State Constitution Study Commission* 8–12); *see also id.* at 351–52, 364–65, 368–69, 886 S.E.2d at 432, 439–40, 442. Accordingly, the historical context surrounding the people's ratification of the 1971 constitution tells us very little about how they viewed the Law of the Land Clause and Ex Post Facto Clause.

§ 19; N.C. Const. of 1868, art. I, § 17; N.C. Const. of 1776, Declaration of Rights, § 12.

Relevant here, we have recognized for more than two centuries that the Clause's protections apply when the State interferes with a category of property rights known as "vested rights." *See Trs. of Univ. of N.C. v. Foy*, 5 N.C. (1 Mur.) 58, 87–89 (1805); *Lake v. State Health Plan for Tchrs. & State Emps.*, 380 N.C. 502, 531–32, 869 S.E.2d 292, 315 (2022), *cert. denied*, 143 S. Ct. 111 (2022).This Court has explained that the constitution prohibits the General Assembly from retroactively disturbing or destroying vested rights.[6] *See, e.g.*, *Lester Brothers v. Pope Realty & Ins. Co.*, 250 N.C. 565, 568, 109 S.E.2d 263, 266 (1959) ("A retrospective statute, affecting or changing vested rights, is founded on unconstitutional principles and consequently void." (quoting *Bank of Pinehurst v. Derby*, 218 N.C. 653, 659, 12 S.E.2d 260, 264 (1940))).

But in order for a right to be a "vested right," it must have actually vested. A vested right must be "something more than such a mere expectancy . . . based upon an anticipated continuance of the present general law." *Pinkham v. Unborn Child. of Jather Pinkham*, 227 N.C. 72, 79, 40 S.E.2d 690, 695 (1946). "Stated otherwise, [a] statute may be applied retroactively only insofar as it does not impinge upon a right which is otherwise secured, established, and immune from further legal metamorphosis." *Gardner v. Gardner*, 300 N.C. 715, 718–19, 268 S.E.2d 468, 471 (1980).

Our precedents repeatedly demonstrate that the running of the statute of limitations in a tort claim does not create a vested right.[7] "Statutes of limitations represent the legislature's determination of the point at which the right of a party to pursue a claim must yield to competing interests, such as the unfairness of requiring the opposing party

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6. Of course, we have also recognized that the State may interfere with vested rights to freehold interests in real property through the use of eminent domain. *See N.C. Dep't of Transp. v. M.M. Fowler, Inc.*, 361 N.C. 1, 4, 637 S.E.2d 885, 889 (2006). Eminent domain "is inherent in sovereignty; it is not conferred by constitutions." *Id.* (quoting *State v. Core Banks Club Props., Inc.*, 275 N.C. 328, 334, 167 S.E.2d 385, 388 (1969)). The Law of the Land Clause, however, limits the exercise of eminent domain by requiring the State to justly compensate the property owner. *Id.*; *see also Johnston v. Rankin*, 70 N.C. 550, 555 (1874).

7. Two important distinctions apply here. First, a statute of limitations is not the same as a statute of repose. Unlike a statute of limitations, a statute of repose "establishes a time period in which suit must be brought *in order for the cause of action to be recognized.*" *Boudreau v. Baughman*, 322 N.C. 331, 340–41, 368 S.E.2d 849, 857 (1988) (emphasis added) (quotation omitted). "[T]he repose serves as an unyielding and absolute barrier that prevents a plaintiff's right of action even before his cause of action may accrue[.]"

to defend against stale allegations." *Morris v. Rodeberg*, 385 N.C. 405, 409, 895 S.E.2d 328, 331 (2023) (citing *Ord. of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348–49, 64 S. Ct. 582, 586 (1944)). They are "created by the legislature, and can be removed by the legislature." *Alpha Mills v. Watertown Steam Engine Co.*, 116 N.C. 797, 804, 21 S.E. 917, 918 (1895). Perhaps most importantly, we have described them as "clearly procedural, affecting only the remedy directly and not the right to recover." *Boudreau*, 322 N.C. at 340, 368 S.E.2d at 857. Because the statute of limitations is an affirmative defense, a defendant who fails to plead it at the appropriate procedural stage waives its protections. *Overton v. Overton*, 259 N.C. 31, 36, 129 S.E.2d 593, 596–97 (1963).

These characteristics show that statutes of limitations fall outside the scope of the vested rights doctrine. This Court has explained that "a right created solely by the statute may [generally] be taken away by its repeal or by new legislation." *Pinkham*, 227 N.C. at 78, 40 S.E.2d at 694. Moreover, statutes relating to remedies or modes of procedure ordinarily "do not create new or take away vested rights." *Smith v. Mercer*, 276 N.C. 329, 338, 172 S.E.2d 489, 495 (1970). Unsurprisingly, then, our precedents have continuously rejected arguments that ordinary statutes of limitations implicate vested rights, since these statutes affect procedural remedies rather than property. *See, e.g.*, *Alpha Mills*, 116 N.C. at 804, 21 S.E. at 918; *Hinton*, 61 N.C. (Phil.) at 415 ("There is in this case no interference with vested rights. . . . [The statute of limitations] affects the *remedy* and not the right of property.").

The distinction between property and remedies is especially important here. Some of our earliest precedents demonstrate that procedural remedies are not the sort of "property" protected by the Law of the Land Clause. As far back as 1805, this Court held in *Trustees of the University of North Carolina v. Foy* that a freehold interest in real property was

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Hargett v. Holland, 337 N.C. 651, 655, 447 S.E.2d 784, 788 (1994) (quoting *Black v. Littlejohn*, 312 N.C. 626, 633, 325 S.E.2d 469, 474–75 (1985)). The running of the statute of repose forever bars the underlying claim.

Second, the running of the statute of limitations *can* affect property rights on rare occasions. For example, once an adverse possessor takes actual, open, notorious, continuous, and hostile possession of real property for the relevant statutory period, legal title passes to him from the previous owner. *See Hinman v. Cornett*, 386 N.C. 62, 65, 900 S.E.2d 872, 874 (2024); N.C.G.S. §§ 1-38(a), 40 (2023). In other words, the expiration extinguishes the property interest of one party (the previous owner) and vests it in the other (the adverse possessor). Here, however, the expiration of the statute of limitations did not destroy or modify the underlying tort liability. It merely blocked plaintiffs' ability to obtain a remedy for it. *See Hinton*, 61 N.C. (Phil.) at 415–16 (explaining this concept through a hypothetical contract debt).

a vested right. *Foy*, 5 N.C. (1 Mur.) at 87. The Court noted that if "the [l]egislature had vested an individual with the [real] property in question," the Law of the Land Clause "would restrain [it] from depriving him of such a right." *Id.* But just five years after *Foy*, this Court's decision in *Oats v. Darden* clarified that statutes prescribing remedies for vested rights violations did not themselves implicate vested rights: "[W]hen an act of [the General] Assembly takes away from a citizen a vested right, its constitutionality may be inquired into; but when it alters the remedy or mode of proceeding as to rights previously vested, it certainly, in that respect, runs in a constitutional channel." 5 N.C. (1 Mur.) 500, 501 (1810).

Several more decisions from the Founding through Reconstruction confirm that this Court's understanding of vested rights did not include civil remedies.[8] To the contrary, these cases described the legislature's power to alter such remedies with words like "settled," *Hinton*, 61 N.C. (Phil.) at 415, and "well[-]established," *State v. Bell*, 61 N.C. (Phil.) 76, 86 (1867). Because the running of a statute of limitations in a tort claim does not create or alter a property right, it is not a vested right. The General Assembly makes policy decisions to create a statute of limitations depending on the nature of the cause of action; generally, the legislature may retroactively alter civil statutes of limitations without offending the vested rights doctrine.

The case of *Hinton v. Hinton* most clearly articulates this concept. *See Hinton*, 61 N.C. (Phil.) at 415–16. This Court decided *Hinton* in 1868, the same year our State adopted its second constitution. The case's facts reflect a tumultuous period of North Carolina's history. The Civil War and its aftermath left many North Carolinians unable to access state courts. *Id.* at 413–14. In recognition of the "extraordinary times" in which the State found itself, the postwar General Assembly enacted several laws suspending statutes of limitations and reviving time-barred actions. *Id.* at 413–15. In *Hinton*, a widow attempted to rely on one such retroactive law to claim her otherwise expired common-law right to dower. *Id.* at 412.

This Court held that the law was "unquestionabl[y]" constitutional. *Id.* at 415. Its rationale hinged on the distinction discussed above. By

8. *See, e.g.*, *State v. Anonymous*, 2 N.C. (1 Hayw.) 28, 28–29 (1794); *Robinson v. Barfield*, 6 N.C. (2 Mur.) 391, 422 (1818); *Harrison v. Burgess*, 8 N.C. (1 Hawks) 384, 391–92 (1821); *Scales v. Fewell*, 10 N.C. (3 Hawks) 18, 18–20 (1824); *Pratt v. Kitterell*, 15 N.C. (4 Dev.) 168, 168–71 (1833); *Battle v. Speight*, 31 N.C. (9 Ired.) 288, 292 (1848); *Green v. Cole*, 35 N.C. (13 Ired.) 425, 428 (1852); *Phillips v. Cameron*, 48 N.C. (3 Jones) 390, 392 (1856); *see also Hoke v. Henderson*, 15 N.C. (4 Dev.) 1, 17–19 (1833) (holding that a right to public office was "property" protected from retroactive interference). *But see Mial v. Ellington*, 134 N.C. 131, 162, 46 S.E. 961, 971 (1903) (overruling *Hoke*).

eliminating the statute of limitations for dower, the General Assembly affected only a remedy, "the right to a writ of dower," not the common-law property interest created by dower itself. *Id.* at 412. The interest at stake in *Hinton* was the right to bring a claim—"*a right conferred by the former statute*"—not the underlying right to the estate. *Id.* at 415. Put differently, the new statute "affect[ed] the *remedy* and not the right of property." *Id.* And as the Court acknowledged, the General Assembly possessed a "settled" power "to pass retroactive statutes affecting remedies." *Id.* Because remedies are not property, the law did not affect vested rights. *Id.*

The difference between remedies and property is subtle but meaningful. *Hinton* attempted to explain it through a hypothetical:

> Suppose a simple contract debt created in 1859. In 1862 the right of action was barred by the general statute of limitations, which did not *extinguish the debt*, but simply barred the right of action. Then comes the act of 1863, providing that the time from 20 May, 1861, shall not be counted. Can the debtor object that this deprives him of a vested right? Surely not. It only takes from him the privilege of claiming the benefit of a former statute, the operation of which is for a season suspended.

Id. at 415–16. In other words, a plaintiff's underlying claim exists regardless of any procedural time bars the General Assembly prescribes for bringing it. The running of the statute of limitations blocks the *plaintiff* from suing. It does not relieve the *defendant* of liability, nor does it create or alter *property* belonging to the defendant. Without an underlying property interest, there cannot be a violation of our vested rights doctrine. *Hinton* shows that there is no vested right to rely on the expiration of a statute of limitations.

B. The Ex Post Facto Clause

Plaintiffs suggest that another part of the constitutional text, the Ex Post Facto Clause, supports their interpretation of the Law of the Land Clause. Because "a constitution cannot violate itself," *Harper*, 384 N.C. at 374, 886 S.E.2d at 446 (quoting *Leandro v. State*, 346 N.C. 336, 352, 488 S.E.2d 249, 258 (1997)), we must construe the Law of the Land and Ex Post Facto Clauses in harmony. Upon doing so, we confirm our earlier conclusion: that the General Assembly is not prohibited from retroactively altering the statute of limitations for tort claims.

The Ex Post Facto Clause, located at Article I, Section 16, reads: "Retrospective laws, punishing acts committed before the existence of such laws and by them only declared criminal, are oppressive, unjust, and incompatible with liberty, and therefore no ex post facto law shall be enacted. No law taxing retrospectively sales, purchases, or other acts previously done shall be enacted." N.C. Const. art. I, § 16. Unlike the analogous provisions of several other state constitutions,[9] North Carolina's Ex Post Facto Clause does not prohibit all forms of retroactive laws. Rather, the plain language of our Ex Post Facto Clause only specifies two restrictions on retroactive legislation: retroactive criminal laws and retroactive tax laws. On its own, the Clause's text therefore implies that the General Assembly may enact retroactive legislation that does not fall into these two prohibited categories—that is, retroactive civil laws that do not impose taxes. *Cf. Cooper*, 371 N.C. at 810–11, 822 S.E.2d at 296 (applying the *expressio unius* canon of construction to interpret the scope of the General Assembly's power); *Harper*, 384 N.C. at 319, 886 S.E.2d at 412 (noting that the existence of a particular provision in another state's constitution shows "it is possible for [North Carolina's] constitution to provide . . . [similarly] explicit guidance" (citing *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507–08 (2019))).

The history of the Ex Post Facto Clause and relevant caselaw further bolster this conclusion. The Clause first appeared in our State's 1776 constitution. At that time, it only prohibited retroactive criminal laws "punishing Facts committed before the Existence of such Laws." N.C. Const. of 1776, Declaration of Rights, § 24. Our early precedents interpreting the Clause indicate that the General Assembly was free to make changes to the law impacting civil liability. *Anonymous*, 2 N.C. (1 Hayw.) at 39 (appearing to accept an argument that the Ex Post Facto Clause "indeed prohibits the passing of a retrospective law so far as it magnifies the *criminality* of a former action" (emphasis added)). In *Anonymous*, North Carolina's Founding-era appellate court considered the constitutionality of a law authorizing the attorney general to retroactively obtain judgments against receivers of public money. *Id.* at 28–29.

9. *See*, *e.g.*, N.H. Const. pt. 1, art. 23 ("Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either *for the decision of civil causes*, or the punishment of offenses." (emphasis added)); Okla. Const. art. V, § 52 ("The Legislature shall have no power to revive *any right or remedy which may have become barred by lapse of time*, or by any statute of this State." (emphasis added)); Tex. Const. art. I, § 16 ("No bill of attainder, ex post facto law, *retroactive law*, or any law impairing the obligation of contracts, shall be made." (emphasis added)).

The Court appeared to agree with the attorney general's argument that retroactive legislation was "frequently necessary" during the Revolution and that the 1776 constitution intentionally permitted retroactive civil laws. *Id.* at 39.

In 1867, this Court affirmed that principle by upholding a retroactive tax statute because it did not violate the express constitutional text. *Bell*, 61 N.C. (Phil.) at 78, 83. Citing the *expressio unius* canon of construction, *Bell* concluded, "The omission of any such prohibition in the [c]onstitution . . . , is a strong argument to show that retrospective laws, merely as such, were not intended to be forbidden." *Id.* at 83. Consistent with the other Founding- and Reconstruction-era caselaw cited here, this Court again acknowledged: "We know that retrospective statutes have been enforced in our courts," *id.* at 83, and the legislature has "a well[-]established right to pass a retrospective law which is not in its nature criminal," *id.* at 86.

Just one year later, North Carolina adopted its second constitution and modified the Ex Post Facto Clause, likely in response to *Bell*. The constitutional drafters kept the Clause's existing prohibition on retroactive criminal laws, but also added a new provision expressly prohibiting laws that retrospectively taxed "sales, purchases, or other acts previously done." N.C. Const. of 1868, art. I, § 32. Because the drafters only added a narrow prohibition on retroactive taxes, we can logically infer that they did not intend to bar all retroactive laws. Rather, they meant to keep the General Assembly's "settled" ability "to pass retroactive statutes affecting remedies" largely intact. *See Hinton*, 61 N.C. (Phil.) at 415. Moreover, given that *Bell*'s holding was explicitly based on *expressio unius*, *Bell*, 61 N.C. (Phil.) at 83, the drafters would have surely had that canon in mind when crafting the updated Ex Post Facto Clause. The relative modesty of their edits is telling. Thus, the express language of the Ex Post Facto Clause, the historical context in which it was enacted, and our precedents confirm that the General Assembly may retroactively amend the statute of limitations for tort claims.

In sum, the text of the Law of the Land Clause, the historical context in which the people enacted it, and our precedents all make plain that the constitution does not prohibit the General Assembly from retroactively altering the statute of limitations for tort claims. The Clause protects, *inter alia*, vested rights in property. But the revival of an otherwise expired statute of limitations merely affects a statutory defense—a mode of procedure. It does not implicate a vested right. *See, e.g.*, *Hinton*, 61 N.C. (Phil.) at 415. Accordingly, defendant fails to demonstrate beyond

a reasonable doubt that the revival of a tort claim's statute of limitations violates a constitutionally protected vested right.[10]

C. *Wilkes County, Jewell,* and Dicta

Defendant contends that this Court effectively overruled *Hinton* in *Wilkes County v. Forester*, 204 N.C. 163, 167 S.E. 691 (1933). Defendant's assertion, however, relies on dicta. Read properly, *Wilkes County* does not overrule *Hinton*.

In *Wilkes County*, the county attempted to foreclose on the defendants after they failed to pay property taxes. *Id.* at 163–64, 167 S.E. at 691–92. When the defendants pointed out that the statute of limitations for bringing foreclosure actions had already passed, the county argued that a new law, enacted *after* the county brought its action, retroactively extended the time for filing. *Id.* at 166, 167 S.E. at 692–93. This Court, looking to the plain text of the new statute, disagreed. *Id.* at 166, 167 S.E. at 693 ("[W]here any action to foreclose has heretofore been instituted or brought for the collection of any tax certificate, prior to the ratification of this act, under the then existing laws, nothing herein shall prevent or prohibit the continuance and suing to completion any of said suit or suits under the laws existing at the time of institution of said action." (emphasis omitted)). Instead, it held that the previous statute of limitations governed the county's lawsuit, since the county sued before the new law went into effect. *Id.* at 168–69, 167 S.E. at 693–94.

Despite resolving the case without needing to consider the general constitutionality of retroactive laws, the opinion continued:

> Whatever may be the holdings in other jurisdictions, we think this jurisdiction is committed to the rule that an enabling statute to revive a cause of action barred by the statute of limitations is inoperative

10. Our decision, which addresses a facial constitutional challenge, does not preclude litigants from bringing as-applied challenges. *See Cmty. Success*, 384 N.C. at 213, 886 S.E.2d at 32 ("In contrast to an as-applied challenge, which represents a plaintiff's protest against how a statute was applied in the particular context in which [that] plaintiff acted or proposed to act, a facial challenge is an attack on a statute itself . . . ." (citations and quotations omitted)). When the General Assembly retroactively alters statutes of limitations to revive decades-old claims, the passage of time may prevent some parties from fairly defending against new accusations. But this would be a case-by-case determination. Section 4.2(b) is not facially unconstitutional.

> and of no avail. It cannot be resuscitated. . . . It takes away vested rights of [the] defendants and therefore is unconstitutional.

Id. at 170, 167 S.E. at 695 (citation omitted). According to defendant, this portion of *Wilkes County* overruled *Hinton*. But as the Court of Appeals correctly decided, this language is nonbinding dicta. *McKinney*, 290 N.C. App. at 423, 892 S.E.2d at 474; *see also Obiter Dictum*, Black's Law Dictionary (12th ed. 2024) ("A judicial comment . . . unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive).").

Even assuming that the above language is not dicta, the opinion as a whole shows *Wilkes County* only discussed vested rights in the context of real and personal property. In considering whether the legislation at issue implicated a vested right, for instance, this Court stated that "the [l]egislature cannot divest a vested right to a defense under the statute of limitations, *whether the case involves the title to real estate or personal property*." *Wilkes County*, 204 N.C. at 169, 167 S.E. at 694 (emphasis added). Thus, the statute affected a vested right because it affected title to property, not because it amended a statute of limitations. Given the rest of *Wilkes County*'s narrow focus on property rights, there is no reason to extend this part of the opinion to the tort-based question before us today. *See Nantahala Power & Light Co. v. Moss*, 220 N.C. 200, 208, 17 S.E.2d 10, 16 (1941) ("The law discussed in any opinion is set within the framework of the facts of that particular case. . . . 'Not infrequently the statements . . . [seem to] universaliz[e] some principle when in truth they are intended to express something peculiar to the case.' " (quoting Jesse Franklin Brumbaugh, *Legal Reasoning and Briefing* 195 (1917))). Defendant's reliance is misplaced.

Defendant also directs us to *Jewell v. Price*, 264 N.C. 459, 142 S.E.2d 1 (1965), a decision it argues applied *Wilkes County* to tort actions. The plaintiffs in that case sued a contractor for negligently installing their furnace over three years prior to bringing suit. *Id.* at 459–60, 142 S.E.2d at 2. At the time the plaintiffs sued, the relevant statute of limitations was three years. *Id.* at 460, 142 S.E.2d at 3. As in *Wilkes County*, however, the plaintiffs in *Jewell* claimed that they could rely on a new law, enacted *after* they brought suit, extending the statute of limitations from three years to six. *Id.* at 460–62, 142 S.E.2d at 2–4.

This Court ultimately ruled for the defendant. *Id.* at 463, 142 S.E.2d at 5. It reasoned that the plaintiffs could not avail themselves of a statute that did not exist when they first brought their claim, mirroring

the holding of *Wilkes County*. *Id.* at 462–63, 142 S.E.2d at 4–5. Indeed, the plain language of the statute at issue in *Jewell*—just like the law in *Wilkes County*—shows that it was not meant to apply retroactively. *See* Act of June 19, 1963, ch. 1030, § 3, 1963 N.C. Sess. Laws 1300, 1301 ("This Act shall be in full force and effect from and after its ratification.").

Defendant's argument about *Jewell* depends upon the following quotation: "If this action was already barred when it was brought . . . , it may not be revived by an act of the legislature, although that body may extend at will the time for bringing actions not already barred by an existing statute." *Jewell*, 264 N.C. at 461, 142 S.E.2d at 3 (citing *Wilkes County*, 204 N.C. at 169, 167 S.E. at 694). But this portion of *Jewell* is dicta. The words "when it was brought" are key here. When the parties in *Wilkes County* and *Jewell* first sued, the applicable statutes of limitations unambiguously barred their lawsuits. *Id.* at 460, 142 S.E.2d at 3; *Wilkes County*, 204 N.C. at 166, 167 S.E. at 692–93. Both cases turned on whether to apply new laws, enacted *after* the original claims were filed, to circumvent the old statutes of limitations. *Jewell*, 264 N.C. at 460–62, 142 S.E.2d at 2–4; *Wilkes County*, 204 N.C. at 166, 167 S.E. at 692–93. Here, however, the General Assembly revived plaintiffs' claims *before* they sued. Therefore, the action in this case was not "already barred when it was brought."[11]

Additional context from *Jewell* confirms that the decision only used *Wilkes County* in dicta:

> *[The p]laintiffs rightly allow that subsection (5) of [N.C.]G.S. [§] 1-50, enacted in 1963, after the institution of this suit, has no application.* If this action was already barred when it was brought *on January 12, 1962*, it may not be revived by an act of the legislature, although that body may extend at will the time for bringing actions not already barred by an existing statute.

Jewell, 264 N.C. at 461, 142 S.E.2d at 3 (emphases added) (citing *Wilkes County*, 204 N.C. at 169, 167 S.E. at 694). This language shows not only that this Court was aware of the statute's purely prospective scope but also that it was not articulating a broad rule derived from *Wilkes County*.

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11. This fact distinguishes the instant case from not only *Wilkes County* and *Jewell*, but also our contemporaneously issued decision in *Doe 1K v. Roman Catholic Diocese*. *See Doe 1K*, slip. op. at 3–4. In *Doe 1K*, we held that section 4.2(b) did not revive claims decided before the SAFE Child Act's passage. *Id.* at 6.

Instead, it was merely commenting on the plaintiffs' concession that the old statute of limitations governed their lawsuit. Thus, defendant's citation to *Jewell* is unpersuasive. *Jewell*'s "rule" is dicta, just like the one presented in *Wilkes County*.

The other cases defendant cites for this proposition fail for similar reasons. Some, like *Wilkes County*, created dicta. *See, e.g.*, *Johnson v. Winslow*, 63 N.C. 552, 553 (1869) (addressing the narrow question of the General Assembly's power to alter nonexpired statutes of limitations but quoting a constitutional treatise's much broader statement that "[h]e who has satisfied a demand, cannot have it revived against him" (citation omitted)); *Whitehurst v. Dey*, 90 N.C. 542, 545 (1884) (analyzing statutes with retroactive procedural effect "within the inhibition of the *[F]ederal [C]onstitution*" (emphasis added)).[12] Others, like *Jewell*, either relied on the aforementioned dicta or built on it with dicta of their own. *See, e.g.*, *Sutton v. Davis*, 205 N.C. 464, 467–69, 171 S.E. 738, 739–40 (1933) (using *Wilkes County* to conclude that the challenged statute, which had no retroactive effect, would be unconstitutional if it *were* retroactive); *Waldrop v. Hodges*, 230 N.C. 370, 373, 53 S.E.2d 263, 265 (1949) (relying on *Johnson*, *Whitehurst*, and *Wilkes County*); *McCrater v. Stone & Webster Eng'g Corp.*, 248 N.C. 707, 710, 104 S.E.2d 858, 860–61 (1958) (citing *Waldrop* but recognizing that it did not apply). But "dicta upon dicta does not the law make," as the lead opinion at the Court of Appeals explained. *McKinney*, 290 N.C. App. at 424–25, 892 S.E.2d at 476 (italics omitted) (citing *Hayes v. Wilmington*, 243 N.C. 525, 539, 91 S.E.2d 673, 684 (1956)).

Defendant therefore fails to show beyond a reasonable doubt that the running of a tort claim's statute of limitations creates a constitutionally protected vested right. *See Harper*, 384 N.C. at 323, 886 S.E.2d at 414; *Cmty. Success*, 384 N.C. at 212, 886 S.E.2d at 32; *Holmes*, 384 N.C. at 435–36, 886 S.E.2d at 129. We take no position on defendant's policy arguments about the general wisdom of retroactive legislation. Those concerns are best addressed to the General Assembly. *See Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169, 594 S.E.2d 1, 8 (2004); *Harper*, 384 N.C. at 321–23, 886 S.E.2d at 413–14 (discussing the purpose of the separation of powers). As we stated in *Community Success*:

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12. Moreover, the Supreme Court of the United States rejected *Whitehurst*'s interpretation of the Federal Constitution less than a year later. *See Campbell v. Holt*, 115 U.S. 620, 628, 6 S. Ct. 209, 213 (1885) ("We certainly do not understand that a right to defeat a just debt by the statute of limitations is a vested right, so as to be beyond legislative power in a proper case.").

> Almost by definition, legislation involves the weighing and accommodation of competing interests, and it is the role of the legislature, rather than this Court, to balance disparate interests and find a workable compromise among them. . . . Put differently, this Court will only measure the balance struck in the statute against the minimum standards required by the constitution.

Cmty. Success, 384 N.C. at 212, 886 S.E.2d at 32 (internal citations and quotations omitted).

D. Substantive Due Process

We close by addressing the portion of the Court of Appeals' lead opinion that applied substantive due process. Despite "[h]aving held that . . . our constitutional text, unique state history, and related jurisprudence" established that laws like section 4.2(b) were not facially unconstitutional beyond a reasonable doubt, the lead opinion also proceeded to analyze the question using the tiered substantive due process approach. *McKinney*, 290 N.C. App. at 428, 892 S.E.2d at 478. It explained these standards as follows:

> In order to determine whether a law violates substantive due process, we must first determine whether the right infringed upon is a fundamental right. If the right is constitutionally fundamental, then the court must apply a strict scrutiny analysis wherein the party seeking to apply the law must demonstrate that it serves a compelling state interest. If the right infringed upon is not fundamental in the constitutional sense, the party seeking to apply it need only meet the traditional test of establishing that the law is rationally related to a legitimate state interest.

Id. at 429–30, 892 S.E.2d at 479 (quoting *State v. Fowler*, 197 N.C. App. 1, 20–21, 676 S.E.2d 523, 540–41 (2009)). The lead opinion then determined that "under even the highest level of scrutiny," section 4.2(b) "passe[d] constitutional muster." *Id.* at 432, 892 S.E.2d at 480.

This alternative line of reasoning was unnecessary. Defendant, as the challenging party, had the burden of proving facial unconstitutionality beyond a reasonable doubt. *Cmty. Success*, 384 N.C. at 212, 886 S.E.2d at 32. Defendant chose to premise its argument on our vested rights doctrine. It believed the ability to rely on an existing statute of limitations was a vested right "immune to infringement by the [l]egislature."

Defendant did not contend in the alternative that section 4.2(b) violated principles of substantive due process. In fact, it expressly asked this Court and the Court of Appeals *not* to apply these principles to its argument—recognizing that "[t]here [was] no good reason . . . to pursue this line of reasoning" and acknowledging that a "balancing test framework" was "particularly inappropriate in the context of North Carolina's vested rights doctrine."

The Court of Appeals correctly concluded that text, context, and precedent did not support defendant's interpretation of the vested rights doctrine. When it did so, it rejected defendant's entire constitutional challenge. Because the tiered substantive due process framework was immaterial to defendant's argument, there was no reason for the court's opinion to apply it.

IV. Conclusion

The text of the relevant constitutional provisions, the historical context in which the people of North Carolina adopted them, and our precedents all confirm that there is no constitutionally protected vested right in the running of a tort claim's statute of limitations. The decision of the Court of Appeals is modified and affirmed.

MODIFIED AND AFFIRMED.

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

Justice EARLS concurring in the result only.

I agree with the majority's outcome affirming the Court of Appeals' judgment upholding the revival provision of the SAFE Child Act. I write separately to underscore where there is consensus among members of the Court and to explain my disagreements with the majority's reasoning.

First and foremost, where we agree: All justices would hold that the political branches may enact remedial legislation that empowers survivors of child sexual abuse to recover for the harm they endured at the hands of their abusers and those that enabled the abuse, through civil litigation of claims that would have otherwise been barred by the statute of limitations. *See also Cohane v. Home Missioners of Am.*, No. 278A23 (N.C. Jan. 31, 2025). We agree that our previous cases do not create a substantive entitlement to a statute of limitations, nor does the Law of the Land Clause impair the legislature's ability to alter remedial provisions

for the defense of one's rights. *See* majority *supra* Section III.A. Today's judgment enables Dustin Michael McKinney, George Jermey McKinney, and James Robert Tate, as well as other plaintiffs who brought revival claims under the SAFE Child Act, to have their day in court, pursuant to a lawful act of the legislature.

Despite this broad consensus, the majority uses this case to expound "the methodology by which we evaluate a constitutional challenge." *See* majority *supra* Section II.B. The majority explains that its interpretive method is *not* to "isolate the [constitutional] provision's meaning at the time of its ratification," as previously thought, *see Cmty. Success Initiative v. Moore*, 384 N.C. 194, 213 (2023), but rather to trace a constitutional provision back in time to its earliest appearance in our constitutions and key its meaning to that time, *see* majority *supra* note 5. Under the majority's approach, precedent is inversely important: older cases have more force as to the meaning of our Constitution than newer ones. Same with the constitutions themselves—the context surrounding ratification of North Carolina's 1971 Constitution "lacks much persuasive value" relative to the 1868 and 1776 constitutions. *Id.*

I disagree strongly with this approach. Not only is it odd as a mode of judicial decision-making in a democracy, since it freezes the meaning of our Constitution in amber according to narrow circumstances in centuries past; but it is also in tension with rule of law principles, by giving greater weight to old caselaw over new, contrary to what is taught in law schools and to what common sense compels.

It is important to understand that this approach is a form of extreme originalism that threatens to bring the law and constitutional protections back to that point in this state's history when slavery was legal and women could not own property or vote.[1] Even Justice Scalia warned that extreme originalism would be "so disruptive of the established state of

1. This critique of extreme originalism is not new in caselaw or legal academic literature. For example, in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), Justice Brennan wrote of the plurality's interpretation of the Fourteenth Amendment in that case:

> The document that the plurality construes today is unfamiliar to me. It is not the living charter that I have taken to be our Constitution; it is instead a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past. *This* Constitution does not recognize that times change, does not see that sometimes a practice or rule outlives its foundations. I cannot accept an interpretive method that does such violence to the charter that I am bound by oath to uphold.

Id. at 141 (Brennan, J., dissenting).

things" that it "w[ould] be useful only as an academic exercise." Antonin Scalia, *A Matter of Interpretation* 139 (Amy Gutmann ed., 1997). It is not how this Court has previously approached interpreting the North Carolina Constitution, despite the majority's attempt to make it so by saying it over and over again since 1 January 2023.[2]

Original intent can certainly be an important consideration, but where the majority goes awry is in cherry-picking facts as a veneer to justify their subjective value judgments. One fact is unassailable: our federal and state constitutions, from their inceptions, were intended to be forward looking towards the promise of a more perfect union, not backward. Our experiment in democracy can be and should be perfected over time towards realizing the Founder's core promises of liberty and equal protection under the law. Attempting to cloak a retreat from these core promises in the pseudo-intellectualism of originalism is, in reality, cynically antithetical to our Founder's intent.[3]

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2. All of the cases cited by the majority that purportedly endorse extreme originalism were decided after this date.

3. For example, Thomas Jefferson acknowledged that "laws and institutions must go hand in hand with the progress of the human mind," otherwise "[w]e might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors." Letter from Thomas Jefferson to Henry Tompkinson (Samuel Kercheval) on July 12, 1816, https://founders.archives.gov/documents/Jefferson/03-10-02-0128-0002 (last visited Jan. 27, 2025). That thinking was reflected by framers ahead of the Convention of 1787. One such framer observed the necessity of employing "essential principles only; lest the operations of government should be clogged by rendering those provisions permanent and unalterable, which ought to be accommodated to times and events," and espoused that the constitution should be comprised of "general propositions, according to the example of the (several) constitutions of the several states." Edmund Randolph, *Draft Sketch of a Constitution* (July 26, 1787), *in Supplement to Max Farrand's The Records of the Federal Convention of 1787*, at 183 (James H. Hutson ed., 1987). After all, "the construction of a constitution necessarily differs from that of law." *Id.*

Scholars have debunked the notion that constitutional framers expected anything like extreme originalism. *See, e.g.*, H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885, 903–04 (1985) ("The framers shared the traditional common law view . . . that the import of the document they were framing would be determined by reference to the intrinsic meaning of its words or through the usual judicial process of case-by-case interpretation." (cleaned up)). "Nearly two years after the Constitution was written, for example, Georgia representative James Jackson took to the floor of the First Congress to draw attention to the amorphous nature of the country's founding document: 'Our constitution,' he said, 'is like a vessel just launched, and lying at the wharf, she is untried, you can hardly discover any one of her properties.' " Erwin Chemerinksy, *Worse Than Nothing* 83 (2022) (cleaned up).

On the political expedience of extreme originalism, see generally Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 Fordham L. Rev. 545 (2006).

This Court has always employed a range of tools that help us interpret our Constitution. Namely we look to constitutional text and structure; historical context, as well as the context of our state as one in a federal system; and importantly for a court of law, precedent. *E.g.*, *State v. Kelliher*, 381 N.C. 558, 578–84 (2022); *State ex rel. McCrory v. Berger*, 368 N.C. 633, 639 (2016); *Stephenson v. Bartlett*, 355 N.C. 354, 378 (2002); *Leandro v. State*, 346 N.C. 336, 352 (1997).[4] We seek harmony among varying provisions of law, keeping in mind that "it is *a constitution* we are expounding." *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819). We are bound by our precedent, or else must give principled reasons for departing from it—reasons that contribute to an overall sense of fairness and coherence necessary to the rule of law. Ultimately, I do not believe that the majority will succeed in its agenda to elevate its confused, extreme, and hypocritical method of constitutional interpretation over the range of interpretive tools long recognized by our Court.

Applying the conventional range of tools here, I would hold that the Constitution does not forbid the General Assembly from restoring a remedy lost by lapse of time. Statutes of limitations are "clearly procedural" devices rather than "substantive definition[s] of rights." *Boudreau v. Baughman*, 322 N.C. 331, 340–41 (1988). The shelter of a limitations defense is procedural, too, and "affect[s] only the remedy directly and not the right to recover." *Id.* at 340. For that reason, there is no absolute entitlement to invoke the statutory time bar. As well, labeling an interest a "vested right" does not remove it from the normal channels of constitutional review. Consistent with its policymaking authority, the legislature may retroactively amend procedural rules if it does so in a reasonable way and for a legitimate purpose.

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4. State and federal constitutional law have long been subject to dynamic interplay. State constitutional framers took notes from peer state constitutions, and federal framers from states. *E.g.*, Scott Douglas Gerber, *A Distinct Judicial Power: The Origins of an Independent Judiciary, 1606–1787*, at 201–02 (2011) (noting John Adams's influence in the formulation of the 1776 North Carolina Constitution and the inspiration for North Carolina's Declaration of Rights from Virginia, Maryland, and Pennsylvania); Akhil Reed Amar, *America's Constitution: A Biography* 5–53 (2007) (tracking the interplay between state and federal actors in the development of the preamble of the Constitution and efforts to commit to form a more perfect union). This interplay continues through modern interpretation. *E.g.*, Goodwin Liu, *State Courts and Constitutional Structure*, 128 Yale L.J. 1304, 1311 (2019) (reviewing Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* (2018)) (arguing that often "state and federal courts are jointly engaged in interpreting shared texts or shared principles within a common historical tradition or common framework of constitutional reasoning" and challenging the perception that "state courts are less protective of individual rights than federal courts").

Section 4.2(b) meets that standard. North Carolina's political branches have a legitimate and indeed laudable interest in giving victims a chance to seek justice, a goal which finds express voice in our Constitution. *See* N.C. Const. art. I, § 18 ("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."). Legislators passed the SAFE Child Act with such remedial concerns in mind. They explained that child sexual abuse is a "silent epidemic" shrouded in misunderstanding and that this change in public policy was designed to track "the brain science" showing that many survivors of such abuse have "the ability to finally come forward only as an adult—as a seasoned adult." *See* H. Deb. on S.L. 2019-245, at 18:45, 33:03 (N.C. June 19, 2019) (statement of Rep. Dennis Riddell), https://ncleg.gov/Documents/9/1548. The SAFE Child Act is a measured response to what the General Assembly deemed to be a pressing public crisis and thus does not unduly infringe on the constitutional rights of defendants to SAFE Child Act actions. Accordingly, I concur in the majority's result only.

I. Background and Analysis

A. The Plaintiffs

During the mid-1990s and early 2000s, plaintiffs Dustin Michael McKinney, George Jermey McKinney, and James Robert Tate were students at East Gaston High School. They were also members of the school's wrestling team. All were coached by Gary Scott Goins. And all were targeted by Goins before joining the wrestling team—Dustin at age eleven, George at fourteen, and James at thirteen. Plaintiffs testified at Goins's criminal trial, recounting how he groomed them and used his position of trust and authority to inflict abuse. *See State v. Goins*, 244 N.C. App. 499, 501, 508–09 (2015).

The allegations paint a disturbing picture. Goins assaulted plaintiffs many times in many places—including classrooms, cars, and athletic offices on school property. He showed his victims pornography to desensitize them to sex. On trips to wrestling tournaments, Goins kept plaintiffs' parents at arm's length to ensure private access to the boys. The trauma, plaintiffs say, has lasted—they report experiencing depression, anxiety, post-traumatic stress disorder, and other symptoms.

In 2014, Goins was convicted on charges linked to his abuse of East Gaston wrestlers and sentenced to 34.5 years in prison. According to plaintiffs, that is only partial justice. They place some responsibility on

the Gaston County Board of Education, which employed Goins from 1993 until his arrest in 2013. During those two decades, plaintiffs allege, the Board received many complaints about Goins's conduct. Yet the Board did little, choosing cursory investigation over real action. The lack of oversight, plaintiffs argue, emboldened Goins and enabled his continued abuse.

Under past law, plaintiffs' claims would be time-barred. Since plaintiffs were minors during Goins's abuse, the three-year statute of limitations tolled until they turned eighteen. *See* N.C.G.S. § 1-17(a)(1) (2023). Dustin's claims thus expired in 2007, George's in 2003, and James's around 2008.

B. The SAFE Child Act

In 2019, however, the SAFE Child Act gave plaintiffs a second chance. That law, unanimously adopted by the General Assembly, aimed to protect children from sexual abuse by strengthening and modernizing the laws surrounding it. Indeed, that purpose was inscribed in the law's title. *See* An Act to Protect Children from Sexual Abuse and to Strengthen and Modernize Sexual Assault Laws (SAFE Child Act), S.L. 2019-245, 2019 N.C. Sess. Laws 1231. Among other changes, the Act amended the time limits for child sexual abuse claims. *See id.* §§ 4.1–4.2(a), 2019 N.C. Sess. Laws at 1234–35. It modified the statutes of limitations for minors' tort suits, extending the time for victims of abuse to sue after they become adults. *See id.* § 4.1, 2019 N.C. Sess. Laws at 1234 (codified at N.C.G.S. § 1-17(d)–(e) (2023)).

The General Assembly also revisited the time bar for claims covered by N.C.G.S. § 1-52. In general terms, that provision gives plaintiffs three years to sue after their cause of action accrues. *See, e.g.*, N.C.G.S. § 1-52(5), (16), (19) (2023). The SAFE Child Act modified three subsections to exempt child sexual abuse actions from that three-year limit. SAFE Child Act § 4.2(a), 2019 N.C. Sess. Laws at 1234–35. Most important to this case, section 4.2(b) of the Act revived certain civil claims barred by the old limitations window:

> Effective from January 1, 2020, until December 31, 2021, this section revives any civil action for child sexual abuse otherwise time-barred under G.S. 1-52 as it existed immediately before the enactment of this act.

Id. § 4.2(b), 2019 N.C. Sess. Laws at 1235.

C. Proceedings Below

Relying on section 4.2(b) of the Act, plaintiffs sued Goins[5] and the Board on 2 November 2020 in Superior Court, Gaston County. Against the Board, in particular, plaintiffs brought claims for assault and battery; negligent hiring, retention, and supervision; negligent infliction of emotional distress; intentional infliction of emotional distress; constructive fraud; false imprisonment; and punitive damages. The Board answered and counterclaimed. It argued that plaintiffs' claims remained time-barred because section 4.2(b) "is facially unconstitutional." On the same ground, the Board later moved to dismiss plaintiffs' suit under Rule 12(b)(6). It also successfully sought to transfer its facial challenge to a three-judge panel, and the State intervened to defend section 4.2(b)'s constitutionality.

The three-judge panel heard the Board's motion to dismiss on 21 October 2021. In a divided decision, the majority held that section 4.2(b) facially violated the Law of the Land Clause by retroactively reviving time-barred claims. Citing this Court's decision in *Wilkes County v. Forester*, 204 N.C. 163 (1933), the majority reasoned that once a limitations period runs, a defendant secures a "vested right" to a limitations defense that the legislature cannot rescind. It thus granted the Board's motion and ordered plaintiffs' suit dismissed. Plaintiffs and the State appealed.

In a divided decision, the Court of Appeals reversed the order and held that section 4.2(b) was facially constitutional. *McKinney v. Goins*, 290 N.C. App. 403, 411 (2023). Drawing on constitutional text, history, and precedent, the majority traced the evolution of the vested rights doctrine and its intersection with the Law of the Land Clause. *See id.* at 413–20. Those sources showed that "no claim to or interest in property invariably stems from a defendant's reliance on the procedural bar provided by the statute of limitations, and thus no vested right is impacted when that bar is lifted." *Id.* at 416. For that reason, the court held that the "revival of a statute of limitations does not *per se* violate the North Carolina Constitution." *Id.* at 417. Nor did *Wilkes County* impose a categorical barrier to statutes like section 4.2(b). *Id.* at 423. Instead, that decision prescribed a property-based rule for "revival statutes where the expired claim was explicitly for *title* to property." *Id.* Properly read, the court concluded, *Wilkes County* did not foreswear the legislature from reviving time-barred civil *tort* claims. *Id.* at 424–28.

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5. Because Goins is serving his prison sentence, he has never appeared in this case, and plaintiffs voluntarily dismissed their claims against him without prejudice.

The Court of Appeals then examined section 4.2(b)'s substantive reasonableness under the tiered due process framework. *See id.* at 428–30. The statute did not implicate a fundamental right, the court explained, and so rational basis was the proper standard. *Id.* at 430. But section 4.2(b) passed even strict scrutiny. *See id.* It advanced a compelling state interest: vindicating "the rights of child victims of sexual abuse—and ensuring abusers and their enablers are justly held to account to their victims for the trauma inflicted." *Id.* And the law was narrowly drawn to achieve those goals—it resuscitated a limited class of time-barred claims for a two-year window without changing the substantive law or burden of proof. *Id.* at 430–31. Because section 4.2(b) passed any level of judicial scrutiny, the Court of Appeals rejected the Board's facial challenge and reversed the three-judge panel's order.

The dissenting judge would have held that "*Wilkes County* and its progeny control this case." *Id.* at 432 (Carpenter, J., dissenting). True, the dissent conceded, the "prohibition of reviving time-barred claims is not a textual one; the text of the North Carolina Constitution lacks such a provision." *Id.* But *Wilkes County* nonetheless doomed section 4.2(b), the dissent concluded, as it "established a broad vested right against revival legislation." *Id.* at 436. Though suggesting that "perhaps *Wilkes* [*County*] should be overruled" given "its lack of support from the text of our state Constitution," the dissent deemed the decision controlling and fatal to section 4.2(b). *Id.* at 442.

The Board appealed to this Court based on the dissent below. *See* N.C.G.S. § 7A-30(2) (2023).

D. Legal Framework

The Board argues that, on its face, section 4.2(b) violates the Law of the Land Clause by retroactively reviving plaintiffs' time-barred claims. I therefore begin by reviewing the legal standards for facial constitutional challenges to a statute. My analysis then turns to the constitutional limits on retroactive laws.

1. Facial Constitutional Challenges

A facial challenge assails a statute "as a whole, rather than as to particular applications." *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2393 (2023). To succeed, the challenger must show "that no set of circumstances exists under which the law would be valid" or that the statute "lacks a plainly legitimate sweep." *Id.* at 2397 (cleaned up); *accord Hart v. State*, 368 N.C. 122, 139 n.12 (2015). Said differently, the question is whether the law is "incapable of any valid application." *Steffel v. Thompson*, 415 U.S. 452, 474 (1974).

This standard aligns with our default "presumption that the laws duly enacted by the General Assembly are valid." *Fearrington v. City of Greenville*, 386 N.C. 38, 54 (2024) (quoting *Hart*, 368 N.C. at 126). This Court does "not lightly assum[e]" that the legislature has discarded the people's will. *State ex rel. Martin v. Preston*, 325 N.C. 438, 448 (1989). After all, "[a]ll power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution." *Id.* at 448–49. Yet "[i]t is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens," including the "security of the citizens in regard to both person and property." *Corum v. Univ. of N.C.*, 330 N.C. 761, 783 (1992). Thus, while this Court has the "authority and responsibility to declare a law unconstitutional," that power is reserved only for "when the violation is plain and clear." *Hart*, 368 N.C. at 126. I note that this authority lies at the heart of what it means to have a constitution. Without some power to enforce constitutional guarantees, they are nothing more than aspirational value statements.[6]

To determine whether the alleged constitutional violation is plain and clear, we look to the constitutional text, context, and our precedents. *Berger*, 368 N.C. at 639. We seek harmony among different constitutional provisions and the constitutional structure, with an eye toward interpreting the document as a whole. *See Stephenson*, 355 N.C. at 378 ("[A]ll constitutional provisions must be read *in pari materia*."); *Leandro*, 346 N.C. at 352 (noting that "a constitution cannot violate itself," so different provisions must be read in harmony).

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6. Historical accounts confirm North Carolina's long tradition of judicial independence and the exercise of judicial review to protect and enforce individual rights. Framers and influencers of the 1776 Constitution insisted on a written separation of powers clause and other tenure and salary protections for judges, reacting in part to capricious and heavy-handed royal proprietors of the early colony. *A Distinct Judicial Power*, at 199–204. Their insistence helped North Carolina constitutionalize the principle of judicial independence earlier than nearly every other state. *Id.* at 204. Other early leaders fought against legislative interference that threatened the judiciary's distinct role, recognizing that judicial independence was essential to "any constitutional order committed to protecting individual rights." *Id.* at 205–06.

Judicial independence and judicial review, of course, go together—without independence from the legislature or executive, judges who exercise judicial review to invalidate legislation that impairs constitutional rights are at risk of removal or salary reductions. *Id.* at 333–34. Especially in constitutions that contain only certain limits on legislative authority, courts must preserve such limitations. Otherwise, "all the reservations of particular rights or privileges would amount to nothing. *Id.* at 342–43 (quoting *The Federalist No. 78*, at 466 (Alexander Hamilton) (Clint Rossiter ed., 1961)).

The presumption of constitutionality is particularly important for facial claims alleging that a law "*always* operates unconstitutionally," *Facial Challenge*, Black's Law Dictionary (12th ed. 2024) (emphasis added), given that policy "arguments are more properly directed to the legislature," *State v. Anthony*, 351 N.C. 611, 618 (2000); *see also Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169–70 (2004) (explaining the legislature's superior institutional capacity to address policy concerns). I review the Board's facial challenge within the framework of this presumption of constitutionality.

2. Constitutional Limits on Retroactive Laws

According to the Board, section 4.2(b) violates the constitutional restraints on retroactive legislation by resuscitating claims after the statute of limitations has elapsed. But that argument is not supported by the text and context of our Constitution, which takes a permissive view toward civil retroactivity.

A law is retroactive if it "alter[s] the legal consequences of conduct or transactions completed prior to its enactment." *Gardner v. Gardner*, 300 N.C. 715, 718 (1980). The constitutional text places only two explicit limits on retroactivity—both in Article I, Section 16. Within that provision, the Ex Post Facto Clause first forbids laws that "punish[ ] acts committed before [their existence] and by them only declared criminal." N.C. Const. art. I, § 16. That safeguard, however, only "applies to matters of a criminal nature." *State v. Bell*, 61 N.C. (Phil.) 76, 81 (1867). Second, Section 16 mentions just one type of civil law: those taxing "sales, purchases, or other acts previously done." N.C. Const. art. I, § 16.

Beyond those express restraints, Section 16 is otherwise silent on civil retroactivity. That silence is significant because of the canon of *expressio unius est exclusio alterius*: where a list contains two or more "situations to which it applies, it implies the exclusion of situations not contained in the list." *Cooper v. Berger*, 371 N.C. 799, 810 (2018) (quoting *Evans v. Diaz*, 333 N.C. 774, 779–80 (1993)). Applying that canon here, that the Constitution specifically limits two types of retroactive legislation, including one specific type of civil retroactive legislation on taxes, suggests that other types of retroactive civil legislation, like changes to civil remedial provisions, are permitted.

Application of this canon to our Constitution depends on context, *see id.* at 810–11, and historical context here confirms this interpretation. As the Court of Appeals below noted, as early as 1794, North Carolina courts recognized that the legislature could pass a law authorizing the attorney general to obtain judgments retroactively against

receivers of public money. *See McKinney*, 290 N.C. App. at 414 (citing *State v. Anonymous*, 2 N.C. (1 Hayw.) 28, 28–29, 39–40 (1794)); *Anonymous*, 2 N.C. (1 Hayw.) at 39 (upholding a law authorizing the attorney general to take judgment against the receivers of public moneys, by motion, after hearing argument by the attorney general that no "part of our Constitution prohibit[s] the passing of a retrospective law"). That understanding was later affirmed by *Bell*, 61 N.C. (Phil.) 76, where the Court upheld a retroactive tax against a constitutional challenge, *id.* at 86, applying the *expressio unius* maxim and concluding, "The omission of any such prohibition in the Constitution of the . . . State, is a strong argument to show that retrospective laws, merely as such, were not intended to be forbidden," *id.* at 83. That permissive approach has been reaffirmed in numerous precedents since. *See Tabor v. Ward*, 83 N.C. 291, 294 (1880) ("Retroactive laws are not only not forbidden by the state constitution but they have been sustained by numerous decisions in our own state.").

Notable too is that the year after *Bell*, North Carolina ratified a new Constitution—this time adding a new limitation that prohibited any "law taxing retrospectively, sales, purchases, or other acts previously done." N.C. Const. of 1868, art. I, § 32. Even as other state constitutions at this time prohibited retrospective laws for civil cases, of any kind or category,[7] North Carolinians chose to enact a narrower limitation on retrospective legislation, targeting only retroactive taxes. This historical context further confirms that the Constitution contemplates the General Assembly's ability to revive time-lapsed civil tort claims.

3. Law of the Land Clause Challenge

Recognizing that there is no express limitation on civil, retroactive legislation under Article I, Section 16, the Board points to Article I, Section 19, which bars the state from depriving citizens of "life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19. This provision, aptly called the Law of the Land Clause, "secure[s] the individual from the arbitrary exercise of the powers of government." *See*

7. *E.g.*, N.H. Const. pt. 1, art. 23 (adopted 1792) ("Retrospective laws are highly injurious, oppressive and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offences."); Tenn. Const. of 1834, art. I, § 20 ("[N]o retrospective law, or law impairing the obligation of contracts, shall be made."); Tex. Const. of 1866, art. I, § 14 ("No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts shall be made . . . ."). Some state constitutions even explicitly bar retroactive remedies. *E.g.*, Okla. Const. art. V, § 52 (adopted 1907) ("The Legislature shall have no power to revive any right or remedy which may have become barred by lapse of time, or by any statute of this State.").

Halikierra Cmty. Servs. LLC v. N.C. Dep't of Health & Hum. Servs., 385 N.C. 660, 663 (2024) (quoting *Gunter v. Sanford*, 186 N.C. 452, 456 (1923)). In practical terms, the Clause "guards against unreasonable government actions that deprive people of life, liberty, or property." *Askew v. City of Kinston*, 386 N.C. 286, 294 (2024).

The Board argues that the Law of the Land Clause places additional restrictions on the legislature's ability to act retroactively, and specifically, it claims a "vested right" protected by that Clause in a statute-of-limitations defense. Once the three-year window closed for plaintiffs to bring their claims, the Board contends, it acquired a vested right to raise the statutory time bar that is immune from retroactive changes. It further cites *Wilkes County* for the proposition that it has a "vested right" in an elapsed statute of limitations that would facially invalidate the revival provision at issue here. But the Board's argument fails at the threshold, because the right to invoke an elapsed statute of limitations in a civil tort claim is not a vested right under our precedent, notwithstanding *Wilkes County*. I would apply the substantive due process analysis to resolve the merits of the Board's claim and hold that the SAFE Child Act withstands such scrutiny.

a. The Vested Rights Doctrine

The interests protected by the Law of the Land Clause, this Court has explained, include "vested rights." *See*, *e.g.*, *Charlotte Consol. Constr. Co. v. Brockenbrough*, 187 N.C. 65, 74–76 (1924); *Armstrong v. Armstrong*, 322 N.C. 396, 402 (1988). A vested right is a fixed entitlement "to the present or future enjoyment of property." *Armstrong*, 322 N.C. at 402 (cleaned up). Once a right vests, it is "secured and protected by the law." *Charlotte Consol.*, 187 N.C. at 74 (cleaned up). A statute "which divests or destroys such rights, unless it be by due process of law, is unconstitutional and void." *Id.* (cleaned up).

Yet not all real and personal property rights are vested rights. We have reserved the latter appellation for those interests with the "inherent qualities that are necessary to give [them] the body and significance of a constitutionally protected property right." *Pinkham v. Unborn Child. of Jather Pinkham*, 227 N.C. 72, 78 (1946). Our vested rights cases have therefore centered on core forms of property like land, deeds, and inheritance. *See*, *e.g.*, *Univ. of N.C. v. Foy*, 5 N.C. (1 Mur.) 58 (1805) (land); *McDonald's Corp. v. Dwyer*, 338 N.C. 445 (1994) (land); *Lowe v. Harris*, 112 N.C. 472 (1893) (land sale contract); *Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51 (1986) (nonconforming land use); *Robinson v. Barfield*, 6 N.C. (2 Mur.) 391 (1818) (deeds); *Booth v. Hairston*, 193 N.C.

278 (1927) (deeds); *Scales v. Fewell*, 10 N.C. (3 Hawks) 18 (1824) (liens on real property); *Pratt v. Kitterell*, 15 N.C. (4 Dev.) 168 (1833) (estate administration); *Battle v. Speight*, 31 N.C. (9 Ired.) 288 (1848) (devises of property by will); *Peele v. Finch*, 284 N.C. 375 (1973) (inheritance).

Moreover, a vested right is one that has vested. It must have matured into an "immediate fixed right of present or future enjoyment." *Pendleton v. Williams*, 175 N.C. 248, 253 (1918). Thus no vested right exists in "a mere expectancy of future benefit, or a contingent interest in property founded on anticipated continuance of existing laws." *Stanback v. Citizens Nat'l Bank of Raleigh*, 197 N.C. 292, 296 (1929) (cleaned up); *see also Pinkham*, 227 N.C. at 78 ("[N]o person has a vested right in a continuance of the common or statute law."). Relatedly, no vested right exists in "any particular mode of procedure for the enforcement or defense of [one's] rights." *Martin v. Vanlaningham*, 189 N.C. 656, 658 (1925) (cleaned up).

That property–procedure distinction recognizes that procedural rules operate on legal remedies rather than substantive rights. *See Tabor*, 83 N.C. at 294–95. Because there is no "vested right in any particular remedy," we have explained, "retroactive legislation is competent to affect remedies." *Id.* (cleaned up); *see also Strickland v. Draughan*, 91 N.C. 103, 104 (1884) (calling it "well settled that the legislature may change the remedy").

These contours of the vested rights doctrine rest on interlocking principles. For one, the legislature has the power to craft procedural rules and to "define the circumstances" in which a remedy is "legally cognizable and those under which it is not." *Rhyne*, 358 N.C at 170 (quoting *Lamb v. Wedgewood S. Corp.*, 308 N.C. 419, 444 (1983)). By distinguishing property rights from procedural benefits furnished by past law, this Court has kept the vested rights doctrine from spilling into the legislature's domain. Cognizant that freezing procedure and remedies in place would stagnate the law "in the face of changing societal conditions," *Lamb*, 308 N.C. at 441 (cleaned up), this Court has allowed the legislature to retroactively modify remedies and amend procedural rules—including statutes of limitations, *see, e.g.*, *Strickland*, 91 N.C. at 104 ("It is well settled that the legislature may change the remedy, and as the statute of limitations applies only to the remedy, that it may also change that, either by extending or shortening the time."). *But see Doe 1K v. Roman Cath. Diocese*, Nos. 167PA22 & 168PA22 (N.C. Jan. 31, 2025) (recognizing that separation of powers principles place independent limits on the legislature's ability to act retroactively and reopen final judgments).

b. The Procedural Benefit of a Limitations Defense

Statutes of limitations play a familiar and important role in our legal system. They encourage timely litigation, promote finality, and spare the courts from stale claims. *See Morris v. Rodeberg*, 385 N.C. 405, 409 (2023). As policy tools, they reflect a legislative balancing act, marking "the point at which the right of a party to pursue a claim must yield to competing interests." *Id.* This Court has repeatedly, and recently, explained that statutes of limitations are "clearly procedural" rules rather than substantive sources of rights. *Taylor v. Bank of Am., N.A.*, 385 N.C. 783, 788 n.4 (2024) (cleaned up). They do not define "whether an injury has occurred," but they instead define when "a party can obtain a remedy for that injury." *Christie v. Hartley Constr., Inc.*, 367 N.C. 534, 538 (2014).

Because limitations periods are procedural mechanisms, their lapse does not generally create substantive entitlements. *See id.*; *see also Boudreau*, 322 N.C. at 340. The statutory time bar "affect[s] only the remedy directly and not the right to recover." *Boudreau*, 322 N.C. at 340. It "merely makes a claim unenforceable," *id.*, creating "a bar when set up to the action of the court" without altering "the rights of the parties" or their underlying liability, *Alpha Mills v. Watertown Steam Engine Co.*, 116 N.C. 797, 804 (1895). *See also id.* ("The statute of limitations is no satisfaction of plaintiff's demand."); *Serv. Fire Ins. Co. v. Horton Motor Lines, Inc.*, 225 N.C. 588, 591 (1945) ("[T]he lapse of time does not discharge the liability. It merely bars recovery."); *Williams v. Thompson*, 227 N.C. 166, 168 (1947) (same). To appreciate this point, consider that the practical consequence of an elapsed statute of limitations for a civil claim is only that the defendant gains an affirmative defense—a court may still issue a judgment, and a plaintiff may still recover, if a defendant could have raised it but did not. *See generally Overton v. Overton*, 259 N.C. 31, 36 (1963); N.C.G.S. § 1A-1, Rule 8(c) (2023).

The exception to the general rule that statutes of limitations are merely procedural is when the expiration of the limitations period itself conveys title to real or personal property. *See Vanderbilt v. Atl. Coast Line R.R. Co.*, 188 N.C. 568, 579–80 (1924); *Booth*, 193 N.C. at 286. Adverse possession is the classic example. A person who continuously occupies land for a statutory period—seven years under color of title or twenty years without—gains legal title to that property. When the statutory window closes, that person acquires ownership of the land, securing a legal right with "the force and effect of an actual title in fee." *Covington v. Stewart*, 77 N.C. 148, 151 (1877). In that case, the lapse of time confers a substantive entitlement that amounts to a property

interest, on which the new owner may rely by making improvements to the land or enjoying other free uses consistent with traditional property rights. *Cf.* 1 William Blackstone, *Commentaries* *138 ("The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land."). Beyond that narrow context, however, a statutory time bar is simply a procedural limit "on the remedy used to enforce rights." *Boudreau*, 322 N.C. at 340. It presents no similar reliance concern, since the parties' underlying rights and liabilities are not extinguished by such procedural limits—that is, unlike receiving entitlement to the bundle of sticks comprising real property rights, a party subject to the statutory time bar never gains the right to commit the underlying tort. *See id.*

We made this general rule and its exception clear in *Hinton v. Hinton*, 61 N.C. (Phil.) 410 (1868). There, this Court upheld a statute that revived widows' time-barred dower claims—or a widow's right to a life estate in her deceased husband's property. *See id.* at 413–14; *Yount v. Yount*, 258 N.C. 236, 241 (1962) (noting that dower is "[t]he portion of or interest in the real estate of a deceased husband that is given by law to his widow during her life"). We emphasized the legislature's "settled" power "to pass retroactive statutes affecting remedies." *Hinton*, 61 N.C. at 415. Because statutes of limitations are procedural, we explained, reopening them "affects the *remedy* and not the right of property." *Id.* Withdrawing a limitations defense "only takes from [a party] the privilege of claiming the benefit of a former statute." *Id.* at 416. The procedural shelter of past law, we concluded, is not a vested property right immune from change. *See id.* at 415–16. The legislature may adjust its scope within the bounds of reason, as *Hinton* and our cases since have explained. *See id.* at 415; *Phillips v. Cameron*, 48 N.C. (3 Jones) 390 (1856); *Morris v. Avery*, 61 N.C. (Phil.) 238 (1867); *Pearsall v. Kenan*, 79 N.C. 472 (1878); *Alpha Mills v. Watertown Steam-Engine Co.*, 116 N.C. 797 (1895); *Graves v. Howard*, 159 N.C. 594 (1912); *Dunn v. Jones*, 195 N.C. 354 (1928); *B-C Remedy Co. v. Unemployment Comp. Comm'n*, 226 N.C. 52 (1946); *Whitted v. Wade*, 247 N.C. 81 (1957); *Overton v. Overton*, 259 N.C. 31 (1963).

Simply put, there is no vested right in "any particular mode of procedure" for the "defense of [one's] rights." *Martin*, 189 N.C. at 658. Absent a transfer of real property, a limitations defense does not, by itself, amount to a vested property right. *See Hinton*, 61 N.C. at 415–16. Applying that long-held rule here, section 4.2(b) does not implicate a vested right because it merely reopens a limitations window for civil tort

claims for child sexual abuse. The Board and other prospective defendants do not have a substantive entitlement to a procedural rule entitling them to an affirmative defense of an elapsed statute of limitations against such claims.

c. Distinguishing Wilkes County

The Board, however, invites us to depart from this tradition. It leans heavily on *Wilkes County*, claiming that our decision in that case turned a limitations defense into a "vested right" against revived tort claims. *See* 204 N.C. at 170. But the Board misreads *Wilkes County* and overstates its holding.

First, the constitutional discussion in *Wilkes County* was extraneous to its holding. The case asked whether a county's untimely suit was revived by a law extending the limitations period for select foreclosure actions. *See id.* at 166. We held that the statute, by its terms, did not apply to the county's claim. *Id.* at 168, 170. For that reason, the county's foreclosure action remained time-barred; the statute did not revive it. *Id.* at 168. Our discussion about constitutional limits on the reopening of lapsed claims, on which the Board relies, was thus irrelevant to the outcome because the statute in question did no such thing. Such remarks then, while interesting, do not bind us or freeze the Constitution's meaning in amber.

The Board points to a smattering of other decisions that cite *Wilkes County*'s constitutional commentary. *See, e.g.*, *Sutton v. Davis*, 205 N.C. 464, 467–69 (1933); *Waldrop v. Hodges*, 230 N.C. 370, 373–74 (1949); *Jewell v. Price*, 264 N.C. 459, 461 (1965). But those cases, like *Wilkes County* itself, did not squarely raise constitutional concerns because the statutes at issue either did not apply to the case or lacked retroactive effect. *See Sutton*, 205 N.C. at 469 (interpreting statutory amendment as "prospective and not retroactive" and "therefore not applicable to this controversy"); *Waldrop*, 230 N.C. at 374 (noting that statute at issue did not reopen a limitations window because "the time within which the bonds may be marketed has been extended and has not yet expired"); *Jewell*, 264 N.C. at 461 (agreeing with the plaintiffs' concession that a nonretroactive change to the limitations period "enacted in 1963, after the institution of this suit, has no application"). These decisions do not convert *Wilkes County*'s commentary into binding law, because our decisions must be understood and applied "within the framework of the facts of that particular case." *See Howard v. Boyce*, 254 N.C. 255, 265 (1961).

Even taking *Wilkes County*'s commentary at face value, it does not stand for the broad rule the Board suggests. For *Wilkes County* adhered

to a long-settled principle: an expired limitations period that transfers title to property is fundamentally different from one that provides only a procedural defense. *See*, *e.g.*, *Booth*, 193 N.C. at 286. The lapsed limitations period in *Wilkes County* gave defendants title to real property—by failing to foreclose by the statutory deadline, the county surrendered its claim to the lot. *Wilkes County*, 204 N.C. at 167–68. The statutory time bar did more than provide a defense; it conveyed ownership of land. Thus *Wilkes County* fits comfortably in the property-based vested rights tradition and is in harmony with *Hinton*'s distinction between a remedy and right of property. *See* discussion *supra* Section I.D.3.b.

d. Harmonizing Wilkes County *with the constitutional framework employed by recent cases*

The Board's reading of *Wilkes County* raises a deeper concern. It construes that decision to create two classes of rights: vested rights, which it argues are untouchable, and everything else, which falls under the state's police power. This binary framework would elevate vested rights above fundamental freedoms, like the rights to free speech, to freedom of religion, and from racial discrimination. In my view, our precedent does not prescribe that far-reaching approach.

If *Wilkes County* left any uncertainty about the status of vested rights, this Court has since dispelled it. Vested rights, this Court has made clear, are not a standalone category of constitutional protection. They fall under the "life, liberty, or property" safeguarded by the text of the Law of the Land Clause. *See Charlotte Consol.*, 187 N.C. at 74; *Godfrey*, 317 N.C. at 62 (explaining that the vested rights "doctrine is rooted in the 'due process of law' and the 'law of the land' clauses of the federal and state constitutions"). Vested rights, like other protected interests, are shielded from arbitrary or irrational government action. The state may not impinge on them unless it acts reasonably and in accord with principles of substantive due process. *See Gunter*, 186 N.C. 452. Since *Wilkes County*, this Court has moved away from asking whether a right is vested, focusing instead on whether the statute in question operates reasonably on the interest at stake.

Indeed, this jurisprudential shift began soon after *Wilkes County*. In the 1940s, cases like *Pinkham* questioned the utility of amorphous labels like "vested rights." *See* 227 N.C. 72. When discussing that class of interests, this Court observed, "text writers and courts are usually forced to define them in terms of themselves, or beg the question." *Id.* at 78 (cleaned up). The same imprecision plagued our own cases. *See id.* This Court noted the lack of a "satisfactory general rule" for identifying

what interests count "as 'vested rights' under constitutional protection." *Id.* And we gestured toward a less categorical approach—one that recognized the legislature's authority to amend procedural rules, so long as it acts reasonably and in the public interest. *See id.* at 79–80.

Gardner continued this move away from a rigid constitutional framework. *See* 300 N.C. 715. Like *Pinkham*, *Gardner* critiqued the concept of vested rights as "tautolog[ical]" and ill-defined. *Id.* at 719. It also declined to analyze retroactive laws by "play[ing] with conclusory labels." *Id.* at 718. In that case, the legislature amended a statute to allow defendants in divorce actions to relitigate venue, even if a court had entered final judgment on that issue. *Id.* at 716–17. The plaintiff challenged the law, claiming that it retroactively interfered with a vested right. *Id.* at 718–19. We acknowledged that the plaintiff's right to her chosen venue, once adjudicated by a court, was a "substantial" or "vested right." *Id.* at 719. The statute unsettled that right by "attaching a new disability" to the plaintiff—the risk that she would lose her selected venue on the defendant's motion. *Id.* at 718 (cleaned up).

But our constitutional "concern" was not simply "the metaphysics of plaintiff's right to her chosen venue." *Id.* at 719. Instead, we focused "on the constitutional requirement that the judgment which accords that right be stable"—in other words, on separation of powers concerns. *Id.* The Constitution "vests the judicial power of the State, including the power to render judgments, in the General Court of Justice, not in the General Assembly." *Id.* For that reason, this Court explained, a "legislative declaration may not be given effect to alter or amend a final exercise of the courts' rightful jurisdiction." *Id.* The amended venue provision, however, altered the "legal effect of previous rulings by the trial court" on the proper forum for the suit. *Id.* at 718. That "aspect of the statute's retroactivity" ran "afoul of constitutional limitation," *id.*, by "invad[ing] the province of the judicial department," *id.* at 719.

Gardner made clear that labeling a right as "vested" does not end the constitutional inquiry. If that were the case, this Court would have stopped after so classifying the plaintiff's right to her chosen venue. Instead, *Gardner* extended the retroactivity analysis beyond "conclusory labels," focusing instead on the reasonableness of the legislative measure and its adherence to constitutional boundaries. *See id.* at 719–20.

This Court's 1988 decision in *Armstrong* endorsed *Gardner*'s logic and reaffirmed the limits of the vested rights regime. 322 N.C. at 401–02. In that case, the defendant-husband, a Marine Corps veteran, earned a military pension for his service and began receiving the pension while he

was married. *Id.* at 397–98. After the couple separated, the plaintiff-wife filed for divorce and equitable distribution. *Id.* at 398. In the window between separation and divorce, the legislature amended the Equitable Distribution Act (EDA) to include military pensions in the pool of divisible marital property. *Id.* at 400–01. The trial court applied the modified statute and ruled that the husband's pension, earned during the marriage and long before the EDA's expansion, was subject to equitable distribution. *Id.* at 399.

The husband challenged this decision, asserting that retroactively applying the amended EDA deprived him of his vested property rights. *Id.* at 400. He argued that his pension was earned long before the statutory change and that he relied on the laws in effect during his service, marriage, and separation. *Id.* To him, the amendment amounted to an unconstitutional taking without compensation. *Id.*

This Court examined this claim under the Law of the Land Clause and rejected it. *Id.* The husband's military pension, while a property interest, was not a vested right immune from legislative adjustment. *Id.* at 402. There is no absolute property interest, we explained, in an "expectation of a continuance of existing law." *Id.* The husband might have hoped to retain the full pension as allowed by past law, but the Constitution does not protect such wishes from legislative change. *See id.* at 401. Remedial statutes—like those governing property division upon divorce—are policy decisions entrusted to the General Assembly. *See id.* Applying the amended EDA to the husband's pension—earned under the earlier law—did not deprive him of a "vested right entitled to protection from legislation." *Id.* at 402.

Continuing our analysis, this Court found the amended EDA to be a reasonable and well-targeted statute in line with valid legislative goals. *See id.* at 401. The common law had left homemaker spouses—usually wives—with little to no property rights upon divorce. *See White v. White*, 312 N.C. 770, 773–74 (1985). The EDA aimed to correct this injustice by adopting a modern view of marriage: a partnership in which both spouses contribute and deserve a fair share of property acquired during the union. *See id.* at 775; *Armstrong*, 322 N.C. at 400–01. Including military pensions in the definition of marital property advanced this purpose by ensuring equal treatment of all forms of property earned during the marriage. *See id.* at 402–03. It also aligned North Carolina's approach with changes in federal law. *See id.* at 401.

Extending the amended EDA to already-acquired property served these goals. If cabined to property secured *after* its enactment, the "full

effect of the Act would not be felt for at least a generation," thus compromising its fairness and undermining its administrability. *Id.* at 403. At the same time, this Court explained, the EDA drew reasonable lines. It did not disturb ownership or restrict how spouses managed their property; it applied only after separation and upon the filing of a claim for equitable distribution. *Id.* at 401–02. This careful approach showed that the legislature acted reasonably, advancing its policy goals without overstepping constitutional boundaries.

Armstrong makes clear that the label of "vested rights" does not hold talismanic power. As discussed above, the *Armstrong* Court reaffirmed the legislature's authority to craft procedural and remedial measures and rejected the idea of a vested right to the perpetual shelter of past laws. *See id.* More importantly, *Armstrong* shifted the focus of the inquiry. Instead of fixating on whether a right qualifies as "vested," the analysis now turns on whether a legislative measure reasonably serves valid public interests.

Cases since *Armstrong* have confirmed its vitality. Most recently, this Court's decision in *Lake v. State Health Plan for Teachers & State Employees* held that a class of retired state employees "enjoyed a constitutionally protected vested right" to remain enrolled in their healthcare plan. 380 N.C. 502, 504 (2022). This right, the Court explained, was shielded by the Law of the Land Clause and the federal Contracts Clause. *See id.* at 504, 531–33. But the analysis did not end after labeling the right as "vested." Instead, we recognized the need for legislative flexibility given the "rapidly changing world of dramatic medical advances and evolutions in how health care is financed." *Id.* at 505. Rather than rigidly treating vested rights as untouchable, we examined whether the state's actions were "a reasonable and necessary means of serving a legitimate public purpose." *Id.* at 530 (cleaned up). This Court ultimately remanded the case, instructing the lower courts to, among other things, "identify [ ] the actual harm the state seeks to cure" and consider "whether the remedial measure adopted by the state is both a reasonable and necessary means of addressing that purpose." *Id.* (cleaned up).

The arc of this Court's cases is striking in both content and consistency. It shows that *Wilkes County* does not convert the bare lapse of time into an absolute property right, as the Board contends. It also confirms that vested rights are not wooden barriers to legislative action. As interests covered by the Law of the Land Clause, vested rights are "secured and protected by the law." *Charlotte Consol.*, 187 N.C. at 74 (cleaned up). Accordingly, the state may not impinge on them "unless it be by due process of law." *Id.* (cleaned up). Said differently, statutory

interference with a vested right must be reasonable and in line with principles of substantive due process.

The SAFE Child Act easily surpasses that standard. To start, the right at issue here—a statute-of-limitations defense—is not fundamental. Limitations windows are procedural tools rather than substantive entitlements. As the U.S. Supreme Court has explained, they are creatures of legislative devise that "go to matters of remedy, not to destruction of fundamental rights." *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945). Because statutory time bars are "good only by legislative grace," they have historically been "subject to a relatively large degree of legislative control." *Id.*; *accord Campbell v. Holt*, 115 U.S. 620, 628 (1885) (rejecting argument that a limitations defense is "a vested right, so as to be beyond legislative power in a proper case" and holding that "no right is destroyed when the law restores a remedy which had been lost"). This Court has said the same. *See Rhyne*, 358 N.C. at 171 (explaining that statutes of limitations fall within the General Assembly's "policy-making authority to define legally cognizable remedies"); *Strickland*, 91 N.C. 103; *Alpha Mills*, 116 N.C. 797; *B-C Remedy Co.*, 226 N.C. 52. As policy-laden procedural tools long entrusted to legislative discretion, the shelter of a limitations defense "has never been regarded as . . . a fundamental right." *Chase Sec.*, 325 U.S. at 314 (cleaned up).

This Court therefore reviews section 4.2(b) under the rational basis standard. Because it brings a facial challenge, the Board must show that the statute lacks a rational relation to "any conceivable legitimate purpose," *see Halikierra*, 385 N.C. at 663 (cleaned up), and is therefore unlawful in all its applications, *see State v. Thompson*, 349 N.C. 483, 491–93 (1998). It has not carried this burden.

The purposes behind section 4.2(b) are not only legitimate but laudable. Protecting "children from sexual abuse" is a "substantial governmental interest" of the highest order. *State v. Packingham*, 368 N.C. 380, 388 (2015), *rev'd on other grounds*, 582 U.S. 98 (2017); *see also State v. Bishop*, 368 N.C. 869, 877 (2016) ("[W]e reaffirm that the State has a compelling interest in protecting the physical and psychological well-being of minors." (cleaned up)). The state also has a legitimate interest in giving victims a chance to seek justice. In fact, this goal is so compelling that it finds express voice in our Constitution. *See* N.C. Const. art. I, § 18 ("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.").

The General Assembly carefully crafted section 4.2(b) to advance these important interests by allowing victims of abuse to expose perpetrators and the institutions that shield them. This, in turn, serves broader public goals by rooting out hidden predators, increasing awareness of abuse, and shifting the costs of abuse onto those responsible. Section 4.2(b) also aligns the law with developing knowledge and restores a remedy unfairly lost. Legislators identified these concerns as they crafted and deliberated on the SAFE Child Act, in general, and section 4.2(b), in particular. *See* H. Deb. on S.L. 2019-245 (N.C. June 19, 2019) (statement of Rep. Dennis Riddell), https://ncleg.gov/Documents/9/1548.

Finally, section 4.2(b) employs reasonable means to achieve its valid goals. It opened a discrete window for a specific category of plaintiffs—victims of child sexual abuse—to bring claims for that abuse. It also applied to a specific type of civil action: those "for child sexual abuse" otherwise time-barred by N.C.G.S. § 1-52. Importantly, the statute does not alter substantive law or change the burden of proof. It simply gave victims a day in court by removing what the General Assembly viewed as an unintended and unjust procedural hurdle. As the House sponsor explained, section 4.2(b) provided "a two-year window of looking back"—a "one-time deal" for victims time-barred by prior law. *Id.* at 33:39.

For these reasons, I would hold that section 4.2(b)—on its face—satisfies rational basis review. It is a reasonable response to evolving knowledge about child sexual abuse—precisely the kind of policy decision entrusted to the legislature. The provision is thus facially, constitutionally permissible under the Law of the Land Clause.

The majority believes that this substantive due process analysis is "unnecessary," since the Board "chose to premise its argument on our vested rights doctrine," and the Court declined to find a vested right. *See* majority *supra* Section III.D. In my view, though, the case before us necessarily implicates the interaction between the vested rights doctrine and the Law of the Land Clause's substantive due process protections under our precedent, for the reasons described above.

Moreover, I believe that the issue is squarely within our appellate jurisdiction on this dissent-based appeal. *See* N.C. R. App. P. 16(b); *Cryan v. Nat'l Council of Young Men's Christian Ass'ns of U.S.*, 384 N.C. 569, 575 (2023). At the Court of Appeals, the dissent disagreed with the lead opinion on how "to mesh the vested-rights doctrine with the fundamental-rights doctrine." *McKinney*, 290 N.C. App. at 441 (Carpenter, J., dissenting). So did the dissenting judge on the superior court three-judge panel. Order at 16, *McKinney v. Goins*, No. 21 CVS 7438 (Wake Cnty.

Super. Ct. Dec. 20, 2021) (McGee, J., dissenting) ("[T]he Fourteenth Amendment of the United States Constitution should be used as guidance [for this challenge] because 'law of the land' is synonymous with 'due process of law.' " (cleaned up)). These opinions clearly articulate a disagreement as to the Law of the Land Clause's protections and the scrutiny required in a vested rights challenge—a disagreement which the majority sidesteps.[8]

II. The Majority's Flawed Approach

Having explained how I would resolve this case, I now turn to the problems I see with the majority's adoption of extreme originalism, or what I will call the "*McKinney* method of constitutional interpretation." While the majority frequently cites *Harper v. Hall*, 384 N.C. 292 (2023), I do not believe the logic of its opinion follows recognizably from that case. Nor do I believe that the new *McKinney* approach adequately addresses *Harper*'s deficiencies—in fact it only serves to underscore them.

A. *Harper v. Hall*

If the majority faithfully applied the approach it first outlined in *Harper*, then this is an open and shut case.

Harper instructed that "the standard of review [for a constitutional challenge] asks whether the [challenged provision enacted] by the General Assembly, which [is] presumed constitutional, violate[s] an express provision of the constitution beyond a reasonable doubt." *Harper*, 384 N.C. at 325. *Harper* continued: "When we cannot locate an express, textual limitation on the legislature, the issue at hand may involve a political question that is better suited for resolution by the policymaking branch." *Id.*

This back-bendingly deferential standard is justified, the majority explained, by the subordinate role of the judicial branch relative to the General Assembly, a branch said to be closest to the people and most accountable to them. *Id.* at 297, 321–25. In the *Harper* majority's view, ours are not coequal branches of government. *Id.* at 322 ("Nowhere was it stated that the three powers or branches had to be equal. In fact, although the balance occasionally shifted, the preponderant power has

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8. It is difficult to reconcile the majority's invocation of waiver here with its simultaneous decision in *State v. Tirado*, No. 267PA21 (N.C. Jan. 31, 2025). There, the Court purports to reach an issue neither party argued on appeal and that both parties expressly disclaimed as before the Court. Here, the Court avoids an issue affirmatively argued by multiple parties on appeal and that formed a core dispute between lower courts in a dissent-based appeal.

always rested with the legislature." (quoting John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 50 (2d ed. 2013))). Rather "the General Assembly possesses plenary power" subject to "various express checks." *Id.* at 322–23.

Applying *Harper* here, the Board's claim fails easily, because nothing in the express text forecloses this act by the General Assembly. As Section III.B of the majority's opinion observes, the text of the Constitution sets two express limits on retroactive laws, beyond which the General Assembly can presumably act freely. There is no structural limitation on such an action, either, absent separation of powers concerns raised by the reopening of final judgments. *See* majority *supra* note 11. And insofar as precedent "confirm[s]" this plain language interpretation, *see Harper*, 384 N.C. at 363, Founding-era and Reconstruction-era cases show that the General Assembly may act retroactively outside of the two narrow express constitutional limits. *See* majority *supra* Section III.B. Case closed.

Notice that *Harper* leaves no space for *Wilkes County*'s conflicting view of retroactivity or the vested rights doctrine. As the dissenting judge at the Court of Appeals speculated, under *Harper*, *Wilkes County* should perhaps be overruled or else disregarded entirely "[g]iven its lack of support from the text of our state Constitution." *See McKinney*, 290 N.C. App. at 442 (Carpenter, J., dissenting) (citing *Harper*, 384 N.C. 292). The vitality of the "vested rights" doctrine as a limitation on the General Assembly's ability to act is dubious, since the words "vested right" do not appear in the express constitutional text, which permits interferences with life, liberty, and property by the "law of the land," and since any violation must be proved "beyond a reasonable doubt." *See Harper*, 384 N.C. at 323.

The problems with *Harper*'s approach are obvious and perhaps help to explain why the Court abandoned it here. To start, *Harper* has no meaningful role for precedent. How could it? *Harper* itself abandoned existing precedent that was "erroneous" or "wrongly decided" in the view of the Court's new personnel. *Id.* at 373, 374. Instead, *Harper* instructs that precedent is analytically useful to the extent it "confirm[s]" the plain language of an express textual provision. *See id.* at 363. But that circular reasoning offers jurists and advocates little guidance. It cannot be true that precedent constrains a court's decision-making if a court only invokes precedent to support its outcome, only to "confirm[ ]" the historical and textual account. *See id.* Put another way, precedent is not a constraint on judicial decision-making if it never actually constrains. And if it cannot constrain, then it has little analytical use; it can only decorate the predetermined outcome.

And what is to be done with precedent that did not follow *Harper*'s approach to constitutional interpretation (as in, the cases that preceded it for hundreds of years)? *Harper* does not say. Nor can it make sense of conflicting precedent on limitations that are not express—for example, it cannot resolve how the Court should harmonize *Hinton* and *Wilkes County* to parse the scope of the judicially implied vested rights doctrine. *Harper* left no space for such implied rights at all.

That means *Harper* offers perilously weak protections for individual constitutional rights against legislative interference. Again, the words "vested rights" do not appear in the text of the Constitution. The text of the Law of the Land Clause does not tell an ordinary reader its scope, it is up to judges to spell it out. Yet *Harper* treats old precedent as the ceiling of protections for constitutional rights. This is deeply flawed, because "[t]he cases that have happened to rule on a specific and limited issue do not, without more, define the entire scope of a constitutional provision." *Id.* at 394 (Earls, J., dissenting). Applying *Harper* here thus has concerning implications, because older precedents offer little protection against most civil retroactive legislation.

B. The *McKinney* Method

Perhaps appreciating *Harper*'s manifold shortcomings, the majority makes frequent citations to *Harper* while inventing a new approach.[9]

To summarize the majority's analytical structure: it starts by emphasizing the presumption of constitutionality and that our Court may only strike an act of the legislature if it violates an express constitutional limitation beyond a reasonable doubt. *See* majority *supra* Part II. At the same time, it string cites cases preceding *Harper* to show that "express constitutional" limitations also include those that exist by "necessary implication," citing *Lee v. Dunn*, 73 N.C. 595, 601 (1875), and *Berger*, 371 N.C. at 810–11. So "express limit" apparently means "express and implied" limits.

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9. The majority actually makes frequent citation to three cases from 2023, implying that its new approach extends from those three cases. *See, e.g.*, majority *supra* Section II.A ("Our review presumes that legislation is constitutional and that a constitutional limitation on the General Assembly must be explicit in the text and demonstrated beyond a reasonable doubt." (first citing *Harper*, 384 N.C. at 323; then citing *Cmty. Success*, 384 N.C. at 212; and then citing *Holmes v. Moore*, 384 N.C. 426, 435–36 (2023))). But the majority's opinion is really about cleaning up *Harper*. Just look to the parties' briefs. Of those that mention any of these three cases (the State's does not), the Board's briefs do not mention *Holmes*, and plaintiffs' brief relies on a single quote from *Holmes* and makes only a passing reference to *Community Success*.

Then, the majority detours into a discourse on judicially implied constitutional protections for vested rights, concluding that an elapsed statute of limitations is not one and largely ignoring our Law of the Land Clause doctrine since the 1980s. *See* majority *supra* Section III.A. It next returns to the constitutional text, to observe by the final third of its opinion that the express text of Article I, Section 16 "implies that the General Assembly may enact retroactive legislation that does not fall into these two prohibited categories—that is, retroactive civil laws that do not impose taxes." *See* majority *supra* Section III.B. Talk about burying the lede.

Finally, the majority returns to judicial precedent on vested rights only to dispense with the Board's key case as dicta and to further disclaim any relevance of the substantive due process analysis.[10]

How the majority can present this circuitous reasoning as consistent with *Harper*'s "express text" dogma is a puzzle.

Another puzzle is which text and whose understanding of it actually matters. In *Community Success*, this Court opined that "the [constitutional] provision's meaning at the time of its ratification" was the relevant inquiry. 384 N.C. at 213. The normative justifications for that approach presumably sounded in judicial populism: *Harper*, announced the same day, declared that "judicial interpretations of [the Constitution] should consistently reflect what the people agreed the text meant when they adopted it," not any meanings derived by "the most astute justice or academic." 384 N.C. at 297. The *Community Success* Court relied in part on the ratification of the 1971 Constitution when it dismissed a challenge to a law governing how people with felony convictions can

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10. It is important to note that the Board's "vested rights" argument was entirely predicated on its assertion that "fundamental rights [for substantive due process] *can* be impaired or taken away by the government under certain circumstances. Not so with vested rights, which are immune to infringement by the Legislature." That distinction between fundamental rights and vested rights, the Board contended, makes the balancing framework of the Fourteenth Amendment "particularly inappropriate in the context of North Carolina's vested rights doctrine." Of course. There is nothing to balance if the interference is categorically prohibited. The majority seems to implicitly acknowledge that we have abandoned this categorical view of vested rights, by noting that this Court's eminent domain precedent permits certain interference with vested rights to freehold interests in real property. *See* majority *supra* note 6.

The Board took no issue with the appropriateness of our longstanding caselaw interpreting the Clause's protections for fundamental and nonfundamental rights consistent with the substantive due process protections of the Fourteenth Amendment. *See, e.g.*, *Rice v. Rigsby*, 259 N.C. 506, 518 (1963) ("The words 'the law of the land' as used in section 17, Article I of the North Carolina Constitution are equivalent to the words 'due process of law' required by section 1 of the Fourteenth Amendment to the United States Constitution.").

regain the right to vote, a law that a trial court had determined to be racially discriminatory. *Id.* at 224, 229. The Court observed that the 1971 ratification was a "historic development" that provided explicit equal protection and nondiscrimination guarantees for the first time in our state Constitution. *Id.* at 224.

Accordingly, here the Board invoked original public understanding of the Clause at the point of ratification. It argued that no one would have thought the legislature had the ability to revive an elapsed statute of limitations when the Constitution was ratified in 1971, based on the language in *Wilkes County* and the cases that cited it.

But the *McKinney* method rejects this approach. The majority corrects that it is not the text as ratified and understood by ordinary North Carolinians that matters, or even what lawyers would have thought based on language in relevant cases. It ignores any notions of public understanding of the Clause during the 1971 ratification. *McKinney* instead asks about the intentions of the constitutional drafters from centuries back, since that is when the Law of the Land Clause first appeared and since its text is largely the same. *See* majority *supra* note 5.[11]

Note that the normative justifications of the *McKinney* method, if there are any, are not specified. That is perhaps not a coincidence. Scholars of many stripes have long recognized that it is untenable for a present generation to be "legally bound to obey another's mere wish or thought." Laurence H. Tribe, Comment, in *A Matter of Interpretation* at 66. Yet that is what results when constitutional interpretation devolves into "imaginative legal anthropology" about what landholding white men in "an eighteenth-century agrarian society . . . would have thought in situations within which they would have been, of course, very different people." Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* 23–24 (1982). Even Justice Scalia resoundingly rejected this kind of originalism. Scalia, *A Matter of Interpretation* at 133 (agreeing with Professor Tribe that "we both regard as irrelevant the intentions of the drafters"). Indeed "most originalists . . . long abandoned original intention," because "surely it was the ratifiers' views that counted because only they had the authority to make the proposed Constitution law."

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11. Counsel for the Board was not alone in misapprehending the interpretive task. Apparently, none of the jurists on the initial three-judge panel, nor the three jurists on the Court of Appeals panel, correctly applied the supposedly "fundamental approach by which this Court has decided constitutional questions for over two centuries." *See* majority *supra* Part II.

Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 Const. Comment. 427, 442, 445 (2007).[12]

How do we know the intent of the early constitutional drafters? Sources of evidence include a book written by the same justice who pens the majority opinion and legislative history, like a report from the North Carolina State Constitution Study Commission. Decisions by this Court from centuries past are also probative, but unfortunately, the *McKinney* method still offers little instruction on how to harmonize early precedent with later—if that matters at all.

The *McKinney* approach is inconsistent with the majority's own decisions in *Community Success* and *Harper*, it is more extreme than modern originalism and normatively unjustified, and it is premised on historical inaccuracy. The majority reasons that it is justified in its anthropological quest as to the intentions of the drafters of the 1776 constitution, because nothing new happened in 1971. This reasoning does not withstand the slightest scrutiny.

To start, the 1971 constitutional ratification was indeed a historic development. The 1968 North Carolina State Constitution Study Commission was the third such commission that century to attempt much needed revisions to the State's Constitution. *See Report of the North Carolina State Constitution Study Commission* 4 (1968). Like those commissions before it, it determined that our foundational text had to be rewritten as a whole given the numerous and interrelated necessary changes. But where other commissions failed by trying to consolidate all "recommendations into a single revised constitutional text which the General Assembly and the voters would have to approve or disapprove as a unit," the new commission framed its work as "a series of ten interrelated but mutually independent amendments for submission to the General Assembly and the voters of the State." *Id.* Breaking the "take it or leave it" approach was key to the effort's success. The first such amendment was a "general editorial revision" full of "deletions, reorganizations, and improvements in the clarity and consistency of language." *Id.* But even these changes were "substantive"

12. I do not mean this point to convey my support for other forms of originalism. While historical understandings, where they exist, can be a helpful consideration for constitutional interpretation, they are certainly not the only or even predominate mode of interpretation, and they are vulnerable to many challenges. *See, e.g.*, Jack N. Rakove, *Original Meanings* 6 (1996) (noting that, from the outset, the Federal Constitution's framing and ratification "reflected a bewildering array of intentions and expectations," such that assertions of "some fixed and well-known meaning" at the moment of adoption invariably "dissolve[ ] into a mirage").

and "important," and indeed the commissioners believed "that the work of this Commission will have been justified if this proposal alone is approved by the General Assembly and the voters." *Id.*

These "editorial amendments" were coupled with a set of nine other "fundamental and substantive changes in the form of separate amendments." *Id.* Among the proposals were new requirements for the judiciary, like a mandatory retirement age and procedures for discipline; measures that strengthened the power of the Governor, like the veto power and the ability to run for successive terms; changes to voter eligibility requirements and jury trial rights; and substantial changes to the organization of administrative agencies in the executive branch; and changes to the mode and selection of state executive officers. *Id.* A further amendment recommended substantial changes to provisions of the Constitution affecting local government finance. *Id.* at 5. Not all recommendations were adopted, but many of them were, as were others independently put forward by the General Assembly concurrent with the proposed constitution and in the years that followed. *N.C. State Bar v. DuMont*, 304 N.C. 627, 636–39 (1982).

Contrary to the majority's assertion, the "editorial" changes in the proposed constitution were noncontroversial precisely because the Commission made clear that although "[s]ome of [those] changes are substantive, . . . ***none is calculated to impair any present right of the individual***." *Report of the North Carolina State Constitution Study Commission* 4 (emphasis added).

The revisions were strictly rights additive. The proposed constitution offered to strengthen the Declaration of Rights, by making it clear that the rights secured by that article are "commands and not merely admonitions to proper conduct on the part of the government." *Id.* at 30. The commission recommended keeping in the Declaration of Rights not only those provisions addressing problems "fresh and meaningful to its authors of 1776 and its revisors of 1868," but also "similar guarantees of a more current character," like freedom of speech, guarantee of equal protection, and prohibition of improper discrimination. *Id.* These new guarantees helped to "augment" the "ancient guarantees of liberty" in earlier versions of our foundational document that were continued into the new Constitution. *Id.* (citing as examples prohibitions against the quartering of troops in private homes and imprisonment for debt). Further, the commission recommended removing provisions that were "clearly invalid because [they were] contrary to the Constitution of the United States." *Id.* at 29. Times had changed since 1776. North Carolina's new constitution recognized as much and sought to "lay

down general principles of government which must be observed amidst changing conditions." *Id.* at 1 (cleaned up). In particular, this forward-looking document endeavored to "protect the rights of the individual from encroachment by the State." *Id.* (cleaned up).

All such changes in the proposed constitution were adopted. *DuMont*, 304 N.C. at 636–37. Indeed our caselaw has recognized that the new constitution's revisions ranged from editorial to substantive, and thus we have taken a case-by-case approach to interpreting them. *See id.* (rejecting an argument that "all rights to jury trial recognized at common law and provided by statute at the time the 1970 Constitution was adopted are now of constitutional dimension" and clarifying that art. I, § 25's changes were editorial only with respect to the challenged issue (emphasis omitted)).

The majority belittles these historic changes. It reasons that the historical context of the "editorial revisions" shows the drafters "were updating the constitution's words to ensure that its modern meaning remained consistent." *See* majority *supra* note 5. Thus the historical context of the *earlier* constitutional provisions is what controls. This reasoning is circular. It only begs the question to assert that the drafters intended to keep the Clause's meaning consistent. What meaning is that? How do we know?

Moreover, the majority's own evidence belies its assertions. The very sources it cites show that the proposed constitution intended to preserve rights that existed, under this Court's precedent and under federal law, at the time the 1971 Constitution was proposed and ratified. Indeed, the commission's report reveals that it understood the new Constitution to, in many cases, incorporate contemporary understandings of the relevant provisions as developed by our Court. *E.g.*, *Report of the North Carolina State Constitution Study Commission* 32 (citing *Sykes v. Clayton*, 274 N.C. 398 (1968) for our Court's clarification as to the meaning of the phrase "other subjects" in the taxing part of art. V, § 1); *id.* at 33 (citing what "[t]he State Supreme Court says" about art. VI, § 6's provisions on the eligibility to office and relying on that meaning to inform its recommended substantive changes). Incorporating these existing judicial interpretations would have helped the 1971 drafters and ratifiers to "consolidate the gains of the prior hundred years and to introduce a number of much needed reforms," as the author of the majority opinion put it. *See* Orth & Newby, *State Constitution*, at 4. The majority cites no evidence to support that the 1971 constitutional framers or ratifiers understood themselves as re-enacting *historical* understandings of the operative provisions. The majority, then, is using historical

context merely as a tool for cloaking its own subjective judgments about the proper way to interpret our Constitution, its values, and the rights it protects.

III. Conclusion

In sum, I understand *McKinney* to partially clean up *Harper*, underscoring that earlier case's deficiencies while failing to adequately address them. The majority's new interpretive quest is to divine the intent of constitutional drafters from many centuries past through legislative history and secondary sources. Precedent apparently matters more under *McKinney* than under *Harper* as a source of meaning, even as we are still not sure precisely how. Older precedents appear to be more persuasive than newer ones, and the same is true of versions of our constitution.

For the reasons I explain here, I do not believe that the *McKinne*y method provides a workable theory of constitutional interpretation—let alone one that could be enshrined as "the methodology by which we evaluate a constitutional challenge." *See* majority *supra* Section II.B. It is an extreme ideology with devastating consequences that is not supported by this Court's precedents beyond the current majority's endorsement. Because of my strong objections to the Court's revolutionary and radical adoption of originalism and the future threats to constitutional rights it signals, I concur in the result only.

STATE OF NORTH CAROLINA
v.
ANDRE EUGENE LESTER

No. 293PA23-2

Filed 31 January 2025

Evidence—cell phone records—strictly computer-generated data —neither hearsay nor testimonial—Confrontation Clause—inapplicable

In a prosecution for multiple sexual offenses against a minor, the trial court did not violate the Confrontation Clause or the rule against hearsay by admitting defendant's cell phone records along with a derivative record showing communications between his and the victim's phones. First, the records consisted of strictly computer-generated data, created without any human judgment or input; therefore, they did not constitute hearsay, which necessarily refers to statements made by a human "declarant" capable of making assertions. Second, even though law enforcement later accessed the records with the primary purpose of producing evidence for defendant's trial, the computer systems that generated the cell phone data as part of the phone company's day-to-day operations could not have created the records for that same primary purpose, especially since machines, by their nature, cannot act with intent at all; therefore, the records were not testimonial either.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 291 N.C. App. 480 (2023), vacating a judgment entered on 21 July 2022 by Judge Thomas H. Lock in Superior Court, Wake County. Heard in the Supreme Court on 31 October 2024.

Jeff Jackson, Attorney General, by Heidi M. Williams, Special Deputy Attorney General, and Tiffany Lucas, Deputy General Counsel, for the State-appellant.

Mark Hayes for defendant-appellee.

EARLS, Justice.

The Sixth Amendment to the United States Constitution commands that "[i]n all criminal prosecutions, the accused shall enjoy the

right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. This "bedrock procedural guarantee"—commonly called the Confrontation Clause—dates to the Roman era and was inscribed in English common law. *Crawford v. Washington*, 541 U.S. 36, 42–43 (2004). But "[m]odern times and technologies" raise new questions about "this old right." *State v. Pabon*, 380 N.C. 241, 253 (2022). This case presents one such question.

Andre Lester was charged and convicted of multiple sex offenses with a minor. At trial, the State offered Verizon phone records to link Mr. Lester to the crimes. Exhibit #2 showed the time, date, and connecting number for every call made to or from the phone allegedly belonging to Mr. Lester. Exhibit #3 featured a subset of that data—to be exact, all communications between Mr. Lester's purported phone and the victim's phone. According to Mr. Lester—and as held by the Court of Appeals—the State violated both the Confrontation Clause and hearsay rules by admitting these exhibits without allowing him to "cross-examine [their] source and assertions." *State v. Lester*, 291 N.C. App. 480, 484 (2023).

That position, however, faces a threshold problem. The Confrontation Clause applies only to testimonial "statements made by people not in the courtroom"—that is, to testimonial hearsay. *Smith v. Arizona*, 602 U.S. 779, 784 (2024). But because "machine-generated raw data, if truly machine-generated, are not statements by a person, they are neither hearsay nor testimonial." *State v. Ortiz-Zape*, 367 N.C. 1, 10 (2013) (cleaned up). So if a computer, rather than a human, produced the contents of Exhibits #2 and #3, admitting that evidence did not violate the Clause or the hearsay rules. Because the Court of Appeals improperly analyzed the exhibits' admissibility, we reverse its decision and remand for consideration of Mr. Lester's remaining issues.

I. Background

A. The Facts

In the summer of 2019, thirteen-year-old Riley (pseudonym) lived in Cary, North Carolina, with her father and fifteen-year-old brother, John. Because their father worked during the day, Riley and John often found themselves home alone. When this happened, John often invited his friends over for "drugs and sex." To use Riley's words, the apartment functioned much like a "crack house."

That same summer, Riley met John's thirty-two-year-old friend nicknamed "Ray-Ray." One day, Riley bumped into Ray-Ray while walking her dog near her family's apartment. The two made "small talk," and

Ray-Ray revealed that he was planning to meet John. Riley volunteered to let him wait in the apartment out of the heat.

Once inside, Riley and Ray-Ray talked for a while before she offered to read his tarot cards. The first card she chose had a naked woman on it, and the conversation turned to sex. Riley then showed Ray-Ray her sex toys. Eventually, she asked Ray-Ray if he wanted to have sex. He agreed and followed Riley into her brother's room.

They twice engaged in oral sex and also had vaginal intercourse. Riley recalls this as a painful experience during which she screamed and sometimes felt like she was choking. After the two dressed, Ray-Ray asked Riley if they were "dating now," to which she offered a noncommittal answer. Ray-Ray kissed her and left the apartment.

John came home "a few minutes after" the encounter, and Riley told him what happened. She did not disclose the event to any adults. Though Riley never saw Ray-Ray again, either she or her brother gave him her phone number. Riley and Ray-Ray kept in touch through texts and maybe "one or two phone calls."

Later that summer, Riley's father took her to the Duke Gender Clinic to receive care for her gender dysphoria. While meeting with a clinic social worker, Riley recounted a sexual experience with a man who was around thirty years old. The social worker, as a mandatory reporter, relayed the information to Riley's father and law enforcement.

B. The Investigation

In September 2019, Riley's case made its way to Cary Police Department (CPD) Detective Armando Bake. He began his investigation by speaking with Riley's father and brother. John identified Ray-Ray as the perpetrator and informed Detective Bake of Ray-Ray's current whereabouts. Based on John's statements, another detective named Mr. Lester as Ray-Ray and supplied Detective Bake with his birth date and phone number. Detective Bake then spoke with Riley. She confirmed that she had texted Ray-Ray and gave the officer his cell phone number.

Armed with that information, Detective Bake got a court order instructing Verizon to disclose the "call detail records" of Ray-Ray's phone number. The company sent Detective Bake a secure link to those records, which he forwarded to Detective John Schneider of CPD's Cyber Intelligence Unit.

At trial, Detective Schneider explained that "call detail records are basically just what the name implies"—that is, "detailed records for any

sort of call or communications made by a device or phone number that are provided by the cellular provider." He testified too that the records turned over by Verizon showed "every single phone call throughout a certain period of time for a certain phone number." In this case, he continued, the phone number was (984) 328-XXXX and the period covered was from May 2019 to July 2019. The records also contained other identifying data, including the time, date, duration, direction, and contacted phone number for all communications to and from Ray-Ray's phone.

After receiving the link to the Verizon cell phone records, Detective Schneider processed them using software called PenLink, which "collect[s] and analyze[s] the data [ ] you put into it." To use the program, the detective uploaded "the original files" without "add[ing] or delet[ing] anything." PenLink, in turn, "helps pare down a lot of the extra information that's contained in the call detail records and [ ] makes it into a more readable and easily accessible format." The program, in essence, allows users to filter a larger data set to "plot particular times, dates, direction for the phones, certainly phone numbers." Detective Schneider narrowed the data set "to just [ ] the communications between" Ray-Ray's and Riley's numbers. PenLink then created a spreadsheet showing about "100 communications" between the two over the captured period. Detective Schneider gave the call detail records and PenLink spreadsheet to Detective Bake.

C. The Trial

Based on this investigation, the State charged Mr. Lester with statutory rape of a child fifteen years or younger, statutory sexual offense with a child fifteen years or younger, and indecent liberties with a child. A Wake County grand jury indicted him on 28 January 2020. Mr. Lester's trial started on 18 July 2022 in Superior Court, Wake County, before the Honorable Thomas H. Lock. The State called Riley as its first witness. It also called Detectives Bake and Schneider to testify about the investigation.

Through the detectives' testimony, the State introduced two exhibits based on the call detail records. Exhibit #2 contained the full set of records provided by Verizon, listing the time, date, and connecting phone number for all calls to and from Ray-Ray's phone between May and July 2019. Those records were paired with a cover letter from Verizon's records custodian, which stated that the digital files provided to CPD were "true and accurate copies of the records created from the information maintained by Verizon in the actual course of business." The letter also explained that "[i]t is Verizon's ordinary practice to maintain such

records, and that said records were made contemporaneously with the transaction and events stated therein, or within a reasonable time thereafter." Exhibit #3 was the PenLink spreadsheet created by Detective Schneider and showing about "100 communications" between Ray-Ray's and Riley's phone numbers.

Mr. Lester objected to both exhibits, arguing that they were hearsay, were not properly authenticated, and violated various constitutional provisions, including the Confrontation Clause. The State argued that the exhibits were business records admissible under Rule of Evidence 803(6) as an exception to the hearsay rule. The trial court disagreed. In its view, the call records did not satisfy Rule 803(6) because the State did not offer an affidavit or other evidence laying the proper foundation for the documents as business records. Nonetheless, the trial court admitted the exhibits under Rule 803(24)—the catch-all hearsay exception. According to the trial court, the records "had equivalent circumstantial guarantees of trustworthiness" and met the other criteria for admission.

On 20 July 2022, the jury convicted Mr. Lester on all counts. He timely appealed.

D. The Appeal

The Court of Appeals unanimously reversed Mr. Lester's convictions and ordered a new trial. In its view, the trial court violated the Confrontation Clause and prejudiced Mr. Lester by admitting Exhibits #2 and #3. *Lester*, 291 N.C. App. at 489–90.

The court used a three-pronged test to analyze the Confrontation Clause claim, asking "whether the evidence admitted was testimonial in nature," "whether the trial court properly ruled the declarant was unavailable," and "whether defendant had an opportunity to cross-examine the declarant." *Id.* at 485. After reciting those factors, the court block-quoted the trial court's discussion of the residual hearsay exception. *See id.* Based on that excerpt, the Court of Appeals concluded that the trial court "answered the first and second factors . . . in the affirmative and the third factor in the negative and these statements are testimonial." *Id.* It also opined that the "primary purpose of the court-ordered production of and preparation of the data records retained and provided by Verizon was to prepare direct testimonial evidence for Defendant's trial." *Id.* at 489. Reasoning that "*Crawford* forbids testimonial evidence not subject to confrontation," the court concluded that Exhibits #2 and #3 "should have been excluded" under the Confrontation Clause. *Id.* at 486.

The Court of Appeals then examined whether Exhibits #2 and #3 were hearsay admissible under Rules 803(6) and 803(24). *Id.* at 486–89.

The court again sided with Mr. Lester, concluding that neither piece of evidence was properly authenticated as a business record because the State failed to submit a "sworn, under seal[, or] notarized" affidavit. *Id.* at 486. As for Rule 803(24)'s catch-all exception, the court opined that the exhibits "were offered and admitted for consideration by the jury as substantive and testimonial evidence." *Id.* at 489. Because the records provided "evidence of a material fact" and Mr. Lester was not "given the prior opportunity or at trial to challenge or cross-examine officials from Verizon, who had purportedly accumulated this evidence," the court concluded that "their admission as such violated [Mr. Lester's] rights under the Confrontation Clause." *Id.* at 489.

That error was prejudicial, the Court of Appeals explained. Because no "physical or direct evidence was admitted to support the State's case," the "jury was left to adjudicate [Mr. Lester's] guilt solely upon Riley's credibility." *Id.* For that reason, the "purported cellular phone contacts between [Mr. Lester] and Riley after the alleged assaults" were critical because they "gave corroboration and credibility to her testimony." *Id.* In the court's view, the State could not show that the "jury would have found Riley's allegations as credible to reach its verdicts" absent "the cellular phone data hearsay or without other physical or direct evidence." *Id.*

Reasoning that admitting Exhibits #2 and #3 was prejudicial error, the Court of Appeals reversed and vacated Mr. Lester's convictions and ordered a new trial. *Id.* at 490. Although Mr. Lester raised other issues on appeal, the court declined to address them given its Confrontation Clause ruling. The State petitioned this Court for discretionary review, which we allowed on 26 June 2024.

II. The Confrontation Clause and the Hearsay Rules

The State argues that the Court of Appeals misapplied the Confrontation Clause analysis. In its view, Exhibit #2 was call data automatically logged by Verizon's computer systems. And Exhibit #3, it claims, was simply a filtered version of the same data. Since both exhibits were computer-generated, the State now insists that they are not testimonial hearsay covered by the Clause. To address this argument, we first examine the scope and purpose of the hearsay rule and Confrontation Clause.

Hearsay, at its core, refers to "out-of-court statements offered to prove the truth of the matter asserted." *Smith*, 602 U.S. at 785 (cleaned up). This type of evidence "lack[s] the conventional indicia of reliability" that attend courtroom testimony. *Chambers v. Mississippi*, 410 U.S.

284, 298 (1973). For that reason, hearsay "is not admissible except as provided by statute or by the North Carolina Rules of Evidence." *State v. Wilson*, 322 N.C. 117, 131–32 (1988); N.C.G.S. § 8C-1, Rule 802 (2023).

The statutory definition of hearsay reflects these concerns. Hearsay means "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). Two facets of that provision stand out. First, the rule applies to a "statement," meaning "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion." *Id.*, Rule 801(a) (2023). The "key to the definition" is the declarant's intent: "nothing is an assertion unless intended to be one" by its maker. *Id.*, Rule 801 cmt. (2023). Second, hearsay must originate from a "declarant"—that is, the "*person* who makes a statement." *Id.*, Rule 801(b) (2023) (emphasis added). The "statement[s]" that count as hearsay—whether spoken, written, or done—mark the intended "assertion[s]" of a "person." *Id.*, Rule 801(a), (b), (c). By its nature, then, the hearsay rule is tied to a human source.

This emphasis on people aligns with the rule's logic. Out-of-court statements, if offered for their truth, are unreliable precisely because they are man-made and "freighted with all the dangers of error in the perception, memory, narration, and veracity of the asserter." Edmund M. Morgan, *The Hearsay Rule*, 12 Wash. L. Rev. & St. B.J. 1, 6 (1937). The safeguards of the courtroom—an oath, cross-examination, and observation of demeanor—are designed to offset those distinctly human shortcomings. *See* 5 John Henry Wigmore, *Wigmore on Evidence: Evidence in Trials at Common Law* § 1362, at 3 (James J. Chadbourn rev., Little, Brown & Co. 1974) ("The theory of the hearsay rule is that the many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the bare untested assertion of a witness, may be best brought to light and exposed by the test of cross-examination.").

The Confrontation Clause targets a subset of hearsay. *See Davis v. Washington*, 547 U.S. 813, 821–22 (2006). By "speaking about 'witnesses'—or 'those who bear testimony'—the Clause confines itself to 'testimonial statements.' " *Smith*, 602 U.S. at 784 (quoting *Davis*, 547 U.S. at 823, 826). Here too, the focus is on human assertions. A "witness," in constitutional terms, is a person who makes a "solemn declaration or affirmation" to "establish or prove some fact." *Davis*, 547 U.S. at 826 (quoting *Crawford*, 541 U.S. at 51). The "testimonial character of the statement" is what makes its declarant a "witness" under the Clause. *Id.* at 821. Non-testimonial hearsay, while covered by ordinary evidentiary

rules, does not trigger the Clause's protections. *See id.*; *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 309–10 (2009).

By focusing on testimonial hearsay, the Confrontation Clause stays true to its text, history, and purpose. The Framers drafted the Clause to address a specific abuse: the use of "*ex parte* examinations" as evidence against the accused. *Crawford*, 541 U.S. at 50. These statements, often made behind closed doors and under shadowy conditions, undermined the fairness of criminal trials. *See id.* at 43–49. They also "flouted the deeply rooted common-law tradition of live testimony in court subject to adversarial testing." *Melendez-Diaz*, 557 U.S. at 315 (cleaned up).

The Clause was the Framers' answer. Its "ultimate goal," *Crawford* explained, was to ensure reliability "by testing [evidence] in the crucible of cross-examination." 541 U.S. at 61. Today the Confrontation Clause remains true to those origins, applying to statements that act as "*ex parte* in-court testimony or its functional equivalent" that "declarants would reasonably expect to be used prosecutorially." *Id.* at 51 (cleaned up). If those assertions were made by people not in the courtroom, the "Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Michigan v. Bryant*, 562 U.S. 344, 354 (2011) (quoting *Crawford*, 541 U.S. at 68).

To separate testimonial hearsay from its non-testimonial counterpart, courts use the "primary purpose test." *Ohio v. Clark*, 576 U.S. 237, 244 (2015). This inquiry looks at "all the relevant circumstances" surrounding how the statement was made and how it relates to future criminal cases. *Smith*, 602 U.S. at 800–01 (cleaned up). A statement is testimonial if its "primary purpose" is to "establish or prove past events potentially relevant to later criminal prosecution"—in other words, to capture evidence for use at trial. *Davis*, 547 U.S. at 822.

In line with the Clause's historic roots, courts give special attention to how closely a statement resembles witness testimony in function or form. *See Crawford*, 541 U.S. at 51–52. If an out-of-court statement serves as a proxy for live testimony—if it mimics a witness recounting events from the stand—it is often testimonial. *See Melendez-Diaz*, 557 U.S. at 310–11 (emphasizing that laboratory analysts' certificates contained the "precise testimony the analysts would be expected to provide if called at trial" and were thus "functionally identical to live, in-court testimony"). A witness's job, after all, is "telling a story about the past" to "nail down the truth about [earlier] criminal events." *Davis*, 547 U.S. at 830–31. When an out-of-court statement does the same thing, the Confrontation Clause promises the defendant a chance to confront its maker. *See id.*

III. Evidentiary Limits on Computer-Generated Data

We next consider how the Confrontation Clause and hearsay rules apply to a unique type of evidence: computer-generated data. On this score, we are in good company. Courts across the nation—state and federal alike—have tackled the same questions. From their decisions a shared understanding emerges.

In general terms, computer-generated data "represent the self-generated record of a computer's operations resulting from [its] programming." *State v. Kandutsch*, 799 N.W.2d 865, 878 (Wisc. 2011). This evidence is unique because it is created entirely by a machine, without any help from humans. *See United States v. Washington*, 498 F.3d 225, 230 (4th Cir. 2007). When triggered, the computer mechanically processes inputs, extracts information, and generates results. The response is encoded in the machine's programming—it is the product of 1s and 0s rather than independent choice. *See Kandutsch*, 799 N.W.2d at 878–80.

Examples include a seismograph monitoring geologic activity or a flight recorder capturing in-flight data. *See State v. Armstead*, 432 So. 2d 837, 840 (La. 1983). For those machines, the "real work is done by the computer program itself," without human judgment or discretion. *See United States v. Lizarraga-Tirado*, 789 F.3d 1107, 1110 (9th Cir. 2015). That process happens in real time too. The machine captures the present—unfiltered and unmediated—as it unfolds. A seismograph, for example, does not narrate an earthquake after the fact—it records the tremors as they happen, without a human telling it what to say. A flight recorder does the same thing. From take-off to landing, it logs location data moment by moment as the plane moves.

The data created by these computers are a neutral, "self-generated record" of information produced via the machine's "electrical and mechanical operations." *Armstead*, 432 So. 2d at 839–40. In turn, a printout of that information is simply a physical representation of what the machine has already done. *Id.*; *see also People v. Holowko*, 486 N.E.2d 877, 879 (Ill. 1985) (explaining that a printout of data is "merely the tangible result of the computer's internal operations"). Because computer-generated data are the fruit of self-sufficient and automated processes, they are the machine's work alone. *See Washington*, 498 F.3d at 230. It is this independence—this freedom from human influence or interpretation—that makes computer-generated data distinct.

That freedom from human input separates this type of evidence from the testimonial hearsay embraced by the Confrontation Clause. Machines are not "person[s]" and so do not rank as hearsay "declarants."

See N.C.G.S. § 8C-1, Rule 801(b). Their raw output—much like a photograph—is the product of "mechanical procedures" rather than an intentional assertion of fact. *See State v. Patterson*, 332 N.C. 409, 417 (1992). For similar reasons, a computer does not create data for the primary purpose of building evidence for criminal prosecution. Machines, by their nature, do not act with intent at all.[1] *Kandutsch*, 799 N.W.2d at 879. They simply log what they are programmed to capture, following preset instructions no matter how their output might be used. Whether the results are destined for a courtroom or a high school science fair, a properly functioning machine will produce the same data. *Cf. Washington*, 498 F.3d at 232 (explaining that a chromatograph's output did not "look forward to later criminal prosecution" because "the machine could tell no difference between blood analyzed for health care purposes and blood analyzed for law enforcement purposes" (cleaned up)).[2]

In other ways too, raw computer data lack the hallmarks of witness testimony. A witness gives a "narrative of past events [ ] delivered at some remove in time" from what their statements describe. *Davis*, 547 U.S. at 832. The witness's testimony, in other words, "tell[s] a story about the past" to chronicle "how potentially criminal past events began and progressed." *Id.* at 830–31. Computer-generated data, by contrast, capture the here and now. Much like a 911 caller describing a present emergency when seeking police help, a machine's raw output records "events *as they were actually happening*, rather than describing past events." *See Bryant*, 562 U.S. at 356–57 (cleaned up) (quoting *Davis*, 547 U.S. at 827). This is a far cry from testimonial statements that recount the past "to nail down the truth about [prior] criminal events." *Davis*, 547 U.S. at 830; *see also Washington*, 498 F.3d at 232 (reasoning that a chromatograph's raw data were not testimonial because they captured "the current condition of the blood in the machines" and "did not involve the relation of a past fact of history as would be done by a witness").

Finally, machine-generated data are a feeble substitute for live, in-court testimony. *See United States v. Lamons*, 532 F.3d 1251, 1264–65

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1. As scholars have observed, the rapid march of technology—artificial intelligence included—might one day cast new light on this principle. *See, e.g.*, Ian Maddox, *Artificial Intelligence in the Courtroom: Forensic Machines, Expert Witnesses, and the Confrontation Clause*, 15 Case W. Rsrv. J.L. Tech. & Internet 416 (2024). This case does not present such questions, and we do not address them.

2. Of course, a machine can be used to create evidence for trial. Crime labs, for example, rely on computerized equipment to analyze forensic evidence for prosecution. But there is a difference between raw computer-generated data and human interpretations drawn from them—a point we address in more detail below.

(11th Cir. 2008). A human witness can take the stand, recount her observations, and have her reliability tested through cross-examination. *See id.* A machine cannot. It has no "mind of its own," no memory to probe, no truthfulness to impugn, and no agenda to uncover. *Kandutsch*, 799 N.W.2d at 879 (explaining that data created by a "computerized or mechanical process cannot lie," "forget," or "misunderstand"); *Armstead*, 432 So. 2d at 840 (noting that a computer's raw output raises "no possibility of a conscious misrepresentation"). A computer cannot sit in the witness chair to explain how it crunched the numbers. *United States v. Moon*, 512 F.3d 359, 362 (7th Cir. 2008) ("[H]ow could one cross-examine a gas chromatograph?"). And haling "spectrographs, ovens, and centrifuges in[to] court would serve no one's interests." *Id.* The very flaws that cross-examination is designed to reveal—ambiguity, dishonesty, or bias—simply do not apply to machines. *See Lamons*, 532 F.3d at 1265; *see also Kandutsch*, 799 N.W.2d at 879. That the Clause's core protection has no work to do suggests that purely machine-made data are not the type of evidence the Clause was designed to address.

In short, a computer's pure output is not made for the "primary purpose of establishing or proving past events potentially relevant to later criminal prosecution." *Bullcoming v. New Mexico*, 564 U.S. 647, 659 n.6 (2011) (cleaned up). Nor are such data "statements by a person." *Ortiz-Zape*, 367 N.C. at 10 (cleaned up). We therefore hold that "machine-generated raw data, if truly machine-generated," are "neither hearsay nor testimonial" under the Confrontation Clause. *Id.* (cleaned up).

Our decision, however, does not green-light the unfettered admission of all electronic evidence. For one, the normal authentication rules remain in place—a party seeking to admit an exhibit must authenticate it with "evidence sufficient to support a finding that the matter in question is what its proponent claims."[3] N.C.G.S. § 8C-1, Rule 901 (2023). Also, we focus here on data produced entirely by the internal operations of a computer or other machine, free from human input or intervention. *See Washington*, 498 F.3d at 230–31. Not all electronic evidence fits that

3. Before the Court of Appeals, Mr. Lester did not argue or otherwise contest the authenticity of Exhibits #2 and #3. As well, his brief to this Court states that: "Authenticity has nothing to do with the issues at bar. Mr. Lester has not argued that the Excel files which the State produced as State's Exhibits #2 and #3 are not what the State's own evidence purported—an Excel file which resulted from a series of transactions: 1) someone at Verizon took its raw data and created a record file of unknown type, which 2) someone at the police station downloaded, which 3) someone at the police station then ran through the PLX program using some undefined standards of relevancy to eventually produce 4) the Excel files which the police printed out for trial." The question of authenticity is therefore not before us. *See* N.C. R. App. P. 28(a).

description. North Carolina courts have distinguished computer-generated data from two other classes of electronic evidence: (1) computer-stored evidence, and (2) human interpretations of computer-produced data. *See State v. Smith*, 287 N.C. App. 191, 197 (2022); *Ortiz-Zape*, 367 N.C. at 9–10; *State v. Craven*, 367 N.C. 51, 54–57 (2013).

The first category—computer-stored records—refers to evidence that originates in substance from a human source but is simply housed in electronic form. *See Smith*, 287 N.C. App. at 197. Despite their digital trappings, computer-stored records "represent[ ] only the by-product of a machine operation which uses for its input 'statements' entered into the machine by out of court declarants." *See Armstead*, 432 So. 2d at 839. Think of emails, spreadsheets, or written documents saved on a computer. Although these items are digitized and preserved via electronic systems, their content relays "the statements and assertions of a human being." *Smith*, 287 N.C. App. at 197 (quoting *Kandutsch*¸ 799 N.W.2d at 878). If "retrieved from the computer and introduced into evidence in printout form," this type of evidence may qualify as a testimonial statement. *See Armstead*, 432 So. 2d at 839. For that reason, computer-stored records must be assessed under the standard principles of hearsay and the Confrontation Clause.

The same is true for human interpretations of computer-generated data. This type of statement draws from a computer's output but ultimately reflects a person's conclusion about "past events and human actions not revealed in raw, machine-produced data." *Bullcoming*, 564 U.S. at 660. Take, for instance, a laboratory machine that analyzes the sugar and insulin levels in a blood sample. A physician might review the data and diagnose a patient with diabetes. The machine's raw results are not testimonial; the diagnosis—a human judgment based on that data—is. *See Moon*, 512 F.3d at 362; *see also Bullcoming*, 564 U.S. at 659–60 (explaining that an analyst's certification of a blood test "reported more than a machine-generated number" because it required "interpretation" and "exercising . . . independent judgment").

If these distinctions sound abstract, consider the example we used in *Ortiz-Zape*. See 367 N.C. at 9. Imagine a drunk driving case in which a gas chromatograph measures a suspect's blood alcohol concentration. The chromatograph's raw data—showing the chemical composition of the blood sample—are simply "the product of a machine." *Id.* A printout of those results is, in turn, just a physical representation of the machine's pre-programmed internal processes. The key point is that no human judgment contributes to producing this information—the machine simply records and reports what it measures.

Next, imagine that an analyst reviews the chromatograph's printout and writes a "lab report certifying [the] defendant's blood-alcohol level." *Id.* That report is no longer the machine's output—rather, it is the "testimonial statement of a person" because it reflects the analyst's judgment and interpretation of the computer data. *Id.* This is the core teaching of *Melendez-Diaz*, 557 U.S. at 310–12, and *Bullcoming*, 564 U.S. at 659–63.

Finally, imagine that the analyst saves her report on her computer's hard drive or emails it to a supervisor. At that point, the report or the email becomes machine-stored data. *See Smith*, 287 N.C. App. at 197. Although the statements exist in electronic form, they do not lose their testimonial nature once saved on a computer or transmitted via email. Their content remains a human-created assertion, even though the computer holds a digital version. *See id.*

These distinctions matter. By drawing them, we preserve the integrity of the Confrontation Clause and hearsay rules, ensuring that testimonial statements—explicit or implicit—do not bypass the procedural safeguards meant to test their reliability. *See Crawford*, 541 U.S. at 65. While truly machine-generated data fall outside the Clause's sweep, electronic evidence relaying testimonial human statements must meet the normal evidentiary and constitutional requirements.

IV. Application to Mr. Lester's Case

The Court of Appeals failed to correctly examine whether Exhibits #2 and #3 were testimonial hearsay that triggered the Confrontation Clause. For one, the decision below blurred the line between computer-generated and computer-stored data, treating evidence created by a machine the same as evidence merely housed on one. That distinction is pivotal. As explained above, a computer's raw output is neither testimonial nor an out-of-court human statement. *See Ortiz-Zape*, 367 N.C. at 10. Properly classifying the exhibits therefore shapes whether the Confrontation Clause and hearsay rules apply. The Court of Appeals erred in eliding this foundational issue.

As well, the Court of Appeals conflated the timing of the records' production with the timing of their creation. The court assumed that because Verizon gave the phone records to police in response to a court order, those records were necessarily testimonial. But the "primary purpose" test focuses on why a statement was made in the first place—not why it was later retrieved and turned over. *See Bryant*, 562 U.S. at 359 (zeroing in on the "circumstances in which the encounter occurs and the statements and actions of the parties"); *Melendez-Diaz*, 557 U. S. at 311 (concluding that certificates of the results of forensic

analysis were testimonial because they were created "under circumstances which would lead an objective witness reasonably to believe that the statement[s] would be available for use at a later trial" (quoting *Crawford*, 541 U.S. at 52)); *Smith*, 602 U.S. at 802 (remanding for lower court to assess whether an analyst had a "focus on court" when she "created the report or notes" at issue (cleaned up)).

Here, then, if Verizon's systems recorded the data in real time as part of the company's day-to-day operations, then that information was probably not created for use in a trial, even if it was later accessed for that reason. The Eleventh Circuit made a similar point when analyzing Sprint's raw billing data burned on a compact disk. *See Lamons*, 532 F.3d at 1262. For Confrontation Clause purposes, the court explained, the key question is not whether police ultimately "requested the production of the evidence." *Id.* at 1263–64. Instead, the "relevant point" is whether a "human intervened at the time the raw billing data was 'stated' by the machine—that is, recorded onto Sprint's data reels." *Id.* at 1264. Similar logic applies here, and the Court of Appeals erred in ignoring these temporal principles.

V. Conclusion

The Court of Appeals improperly examined whether the Confrontation Clause and hearsay rules barred admission of Exhibits #2 and #3. We therefore reverse its decision and remand this case to that court as outlined below. Although we allowed discretionary review on whether the Court of Appeals correctly applied the harmless-error standard, we do not reach that question since we conclude that the lower court's analysis was erroneous. On remand, the Court of Appeals must address the other issues raised by Mr. Lester.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA
v.
FRANCISCO EDGAR TIRADO

No. 267PA21

Filed 31 January 2025

Constitutional Law—Eighth Amendment—juvenile offender—life imprisonment without parole—separate review of state constitutional claim not required

The decision of the Court of Appeals upholding the trial court's imposition of consecutive sentences of life imprisonment without parole—for two first-degree murders committed when defendant was seventeen years old—was affirmed where, contrary to defendant's assertion, the appellate court properly analyzed each of defendant's challenges to his sentences under federal and state constitutional provisions. Even so, since the sentences did not violate the Eighth Amendment to the United States Constitution, which provides greater protections for juvenile offenders than Art. I, sec. 27 of the North Carolina Constitution, and since the Eighth Amendment and section 27 have been interpreted in lockstep, a separate review of defendant's state constitutional claim was unnecessary. Further, defendant's sentences did not implicate—and thus were not in violation of—*State v. Kelliher*, 381 N.C. 558 (2022), because he was not a member of the narrow class of juvenile offenders to which that case applied.

Justice BERGER concurring.

Justices BARRINGER and ALLEN join in this concurring opinion.

Justice EARLS concurring in the result only.

Justice RIGGS joins in this concurring in result only opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, No. COA20-213 (N.C. Ct. App. June 15, 2021), affirming judgments entered on 30 August 2019 by Judge James F. Ammons Jr. in Superior Court, Cumberland County. Heard in the Supreme Court on 25 September 2024.

Jeff Jackson, Attorney General, by Heidi M. Williams, Special Deputy Attorney General, for the State-appellee.

Kellie Mannette for defendant-appellant.

NEWBY, Chief Justice.

In this case we consider whether the Court of Appeals denied merits review of defendant's constitutional challenge to his consecutive sentences of life imprisonment without parole (life without parole) under Article I, Section 27 of the North Carolina Constitution. The Court of Appeals comprehensively addressed all of defendant's arguments, including his constitutional challenge. Because federal courts have interpreted the Eighth Amendment to the United States Constitution to provide greater protections for juvenile offenders than our state constitution's plain text affords, this Court locksteps its application of Article I, Section 27 with that of the Eighth Amendment to ensure that no citizen is afforded lesser rights. Thus, the Court of Appeals did not need to separately consider defendant's claim under the North Carolina Constitution. Finally, because this Court's decision in *State v. Kelliher*, 381 N.C. 558, 873 S.E.2d 366 (2022), does not apply to defendant's case, the resentencing order in this case does not run afoul of that decision. Accordingly, we affirm the decision of the Court of Appeals.

I. Background & Procedural History

Defendant's violent crimes were thoroughly discussed in his first appeal to this Court. *State v. Tirado* (*Tirado I*), 358 N.C. 551, 559–62, 599 S.E.2d 515, 522–24 (2004). In short, in August of 1998, defendant was seventeen years old and a member of the notorious Crips gang. On the night of 16 August 1998, and in the early morning hours of 17 August 1998, defendant actively participated with eight other gang members in the abduction and robbery of three women and the murder of two of them. Defendant attempted to murder the third woman, volunteering to shoot her and expressing disappointment when his gang leader chose another gang member to carry out the execution. Fortunately, the gang member's attempted murder was unsuccessful, and the third woman survived.

Law enforcement arrested defendant, and a grand jury indicted him on numerous charges, including two counts of first-degree murder. On 3 April 2000, a jury found defendant guilty on all charges, and it convicted him of first-degree murder based on premeditation and deliberation as well as the felony-murder rule. Upon the jury's recommendation,

the trial court sentenced defendant to death. Defendant appealed, and this Court vacated defendant's death sentence and remanded for resentencing because of an error in the trial court's poll of the jury. *Id.* at 583–85, 604, 599 S.E.2d at 537–38, 549.[1]

Thereafter, the Supreme Court of the United States held that the Eighth Amendment forbids sentencing juvenile criminal offenders to death, *Roper v. Simmons*, 543 U.S. 551, 575, 578, 125 S. Ct. 1183, 1198, 1200 (2005), so the trial court resentenced defendant to two consecutive, statutorily mandated sentences of life without parole, *see generally* N.C.G.S. § 14-17 (2007). The Supreme Court subsequently held that the Eighth Amendment also prevents sentencing schemes that mandate sentencing juvenile murderers to life without parole. *Miller v. Alabama*, 567 U.S. 460, 465, 470, 479, 489, 132 S. Ct. 2455, 2460–61, 2464, 2469, 2475 (2012). In *Miller*, however, the Supreme Court explained that sentencing schemes that give the trial court discretion to choose between life without parole or a lesser sentence are permissible because they enable trial courts to distinguish between juveniles likely to change and those unlikely to be rehabilitated. *Id.* at 465, 479–80, 132 S. Ct. at 2460, 2469. The Supreme Court stated that sentencing juveniles to life without parole would be "uncommon," imposed upon only "the rare juvenile offender *whose crime* reflects irreparable corruption." *Id.* at 479–80, 132 S. Ct. at 2469 (emphasis added) (quoting *Roper*, 543 U.S. at 573, 125 S. Ct. at 1197).

Following the Supreme Court's ruling in *Montgomery v. Louisiana* that *Miller* announced a substantive rule of constitutional law that must be applied retroactively on collateral review, 577 U.S. 190, 206, 212, 136 S. Ct. 718, 732, 736 (2016), defendant was granted appropriate relief and resentenced under a new statutory sentencing scheme enacted to comply with *Miller*.[2] This *Miller*-Fix Statute gave trial courts the discretion

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1. For each of defendant's twelve other felony convictions, the trial court sentenced him to terms of imprisonment and ordered them to be served consecutively. In his initial appeal to this Court, defendant challenged some of these sentences. *Tirado I*, 358 N.C. at 578, 599 S.E.2d at 534. This Court overruled his assignment of error, however, *id.* at 579, 599 S.E.2d at 534, vacating only his death sentence and remanding for a new capital sentencing proceeding, *id.* at 604, 599 S.E.2d at 549. The present appeal concerns only the life without parole sentences imposed on defendant for his first-degree murder convictions.

2. An Act to Amend the State Sentencing Laws to Comply with the United States Supreme Court Decision in Miller v. Alabama, S.L. 2012-148, § 1, 2012 N.C. Sess. Laws 713, 713–14 (codified at N.C.G.S. §§ 15A-1340.19A to -1340.19D) [hereinafter *Miller*-Fix Statute]; *see also* An Act to Make Technical Corrections to the General Statutes and Session Laws, As Recommended by the General Statutes Commission, and to Make Additional Technical and Other Changes to the General Statutes and Session Laws, S.L. 2013-410, § 3(a), 2013

to determine whether juvenile murderers receive life without parole or the lesser sentence of life imprisonment with parole (life with parole). S.L. 2012-148, § 1, 2012 N.C. Sess. Laws at 713–14 (codified at N.C.G.S. §§ 15A-1340.19B to -1340.19C). In making this determination, the trial court must consider certain enumerated mitigating factors along with "[a]ny other mitigating factor or circumstance" (the *Miller* factors). *Id.* at 713 (codified at N.C.G.S. § 15A-1340.19B(c)).[3]

At defendant's resentencing hearing, the trial court considered the sentencing options, mitigating factors, the evidence presented at the resentencing hearing, and transcripts from defendant's trial and original sentencing. The trial court decided to resentence defendant to two consecutive terms of life without parole. The trial court memorialized defendant's sentences in a written order on 16 March 2020. Therein, the trial court made numerous detailed findings of fact about the crimes and defendant's circumstances, thoroughly evaluated the mitigating evidence, and thoughtfully weighed the *Miller* factors. Ultimately, the trial court expressly concluded that defendant's crimes reflected irreparable corruption rather than transient immaturity. The trial court ordered him to serve consecutive sentences of life without parole. Defendant appealed.

At the Court of Appeals, defendant presented four arguments. First, he challenged several of the trial court's findings of fact, and second, defendant argued that the trial court abused its discretion when it considered the *Miller* factors. Third, in light of the foregoing alleged errors, defendant argued that, contrary to the trial court's conclusion, the evidence established that he was not permanently incorrigible or irreparably corrupt. Thus, defendant argued that under *Miller*, his consecutive sentences of life without parole violated the Eighth Amendment. For the same reasons, defendant argued that his life without parole sentences violated Article I, Section 27 of the North Carolina Constitution. He also summarily contended that the state constitution provided him "even broader protection" than the Federal Constitution. Fourth, defendant argued that the trial court applied incorrect legal standards.

After briefing, but before the Court of Appeals issued an opinion, the Supreme Court of the United States decided *Jones v. Mississippi*,

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N.C. Sess. Laws 1715, 1716 (codified as amended at N.C.G.S. § 14-17) (deleting section 14-17's mandate to sentence juvenile murderers to life without parole).

3. This Court upheld the *Miller*-Fix Statute's sentencing scheme in *State v. James*, 371 N.C. 77, 99, 813 S.E.2d 195, 211 (2018).

141 S. Ct. 1307 (2021). There the Supreme Court held that the Eighth Amendment does not require a trial court to make an express or implicit finding of permanent incorrigibility before sentencing a juvenile murderer to life without parole. *Id.* at 1311, 1313–22.

The Court of Appeals unanimously affirmed defendant's consecutive sentences of life without parole, holding that they withstood scrutiny under both constitutions. *State v. Tirado* (*Tirado II*), No. 20-213, slip op. at 13–14, 17 (N.C. Ct. App. June 15, 2021) (unpublished). The Court of Appeals held that competent evidence supported all challenged findings of fact and that the trial court did not abuse its discretion in its weighing of the *Miller* factors. *Id.* at 8–13. Accordingly, the Court of Appeals rejected defendant's contention that the trial court erred in determining that he was permanently incorrigible or irreparably corrupt. *Id.* at 15. Rather, the Court of Appeals agreed with the trial court, stating that "the evidence shows otherwise." *Id.* The Court of Appeals further concluded that "*Jones* ha[d] no effect on defendant's sentence[s]." *Id.* at 15; *see also id.* at 14 (similar). The Court of Appeals confirmed that the trial court complied with *Miller*, its progeny, and our General Statutes. *Id.* at 14–15. Moreover, it rejected defendant's argument that his two consecutive sentences of life without parole are unconstitutional per se. *Id.* at 15. Having considered defendant's constitutional challenge from all angles, the Court of Appeals concluded that his sentences were constitutionally compliant. *Id.*[4]

Defendant filed a notice of appeal based upon a constitutional question, arguing that the Court of Appeals misconstrued *Jones* to totally foreclose as-applied constitutional challenges to sentences. Defendant additionally filed a petition for discretionary review, seeking review of the same issue as presented in his notice of appeal. He also advanced a second issue in his petition, arguing that the Court of Appeals erred "in misapplying *Jones*, fail[ing] to consider not just [his] as-applied Eighth Amendment claim, but his claim that his sentence was unconstitutional under the more protective North Carolina Constitution." This Court dismissed defendant's notice of appeal but allowed discretionary review of defendant's second proposed issue. This Court also specifically directed the parties to brief whether defendant's resentencing complied with *State v. Kelliher*, 381 N.C. 558, 873 S.E.2d 366 (2022), which was decided in the interim.

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4. The Court of Appeals also held that the trial court applied the correct legal standards, and it rejected defendant's contention that the trial court had improperly compared him to adult offenders. *Tirado II*, slip op. at 15–17.

II. Analysis

Defendant asserts that the Court of Appeals erroneously failed to consider his constitutional challenge to his life without parole sentences under Article I, Section 27 of the North Carolina Constitution. To answer this question, we address defendant's contentions (1) that the Court of Appeals should have considered his claim under "the more protective" state constitution and (2) that the Court of Appeals improperly denied merits review of his constitutional challenge to his sentences. Finally, in accordance with this Court's special directive, we consider whether the trial court's order complied with *Kelliher*. Questions of law are reviewed de novo. *E.g.*, *State v. Khan*, 366 N.C. 448, 453, 738 S.E.2d 167, 171 (2013).

A. Defendant's Assertion That the Cruel or Unusual Punishments Clause Provides "Broader" Protections for Criminal Defendants

We start with defendant's assertion that the Court of Appeals should have conducted an analysis under the state constitution's distinct protections. Defendant sought discretionary review in part because "[t]he Court of Appeals did not consider whether [his] sentence was unconstitutional under Article [I], [Section] 27 of the North Carolina Constitution, *which provides individuals with increased protection*." (Bolding omitted; italics added.) He expressly argued that "[f]ederal case law on federal protections does not control how this Court interprets our own [c]onstitution" and that "the meaning of 'cruel and unusual punishment' . . . should not limit the meaning of 'cruel or unusual punishment.' " Citing *Jones*, 141 S. Ct. at 1322–23, defendant implored us to heed the Supreme Court's "encourage[ment]" for "States to apply their own *additional* procedures and safeguards" in juvenile sentencing. (Emphasis added.) Defendant then proclaimed, "North Carolina is one such state, with broader protections against certain punishments, not just for juveniles, but for all criminal defendants." He concluded, "[T]he Court of Appeals, in misapplying *Jones*, failed to consider not just [defendant's] as-applied Eighth Amendment claim, *but his claim that his sentence was unconstitutional under the more protective North Carolina Constitution*." (Emphasis added.)

By claiming that the state constitution provides *more* protection than the Federal Constitution, which already outlaws life without parole sentences for any juvenile other than those whose crimes reflect irreparable corruption or permanent incorrigibility, defendant effectively posited that life without parole sentences for juveniles are totally forbidden by Article I, Section 27. This would, in effect, render any statute

prescribing life without parole as a permissible punishment for juveniles unconstitutional. Having granted review of this issue,[5] we now reject defendant's contention. To do so, we must consider our constitutional structure as well as the history of our Cruel or Unusual Punishments Clause jurisprudence.

1. Fundamental Principles of Constitutional Interpretation

Because "[a] frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty," N.C. Const. art. I, § 35, we start with fundamental principles. Since 1776, our state constitutions have recognized that all political power fundamentally derives from the people, *id.* art. I, § 2; N.C. Const. of 1868, art. I, § 2; N.C. Const. of 1776, Declaration of Rights, § I, and that "[t]he people of this State have the inherent, sole, and exclusive right of regulating the internal government and police thereof," N.C. Const. art. I, § 3; N.C. Const. of

5. The concurrence in the result (the concurrence) suggests this issue is not before us, pointing to the language of the proposed "issue[ ] to be briefed": "[w]hether the Court of Appeals erred by failing to consider [defendant's] challenge under Article I, [Section] 27 of the North Carolina Constitution." (Emphasis omitted; capitalization changed). It ignores, however, the actual substantive arguments made by defendant in his petition for discretionary review under this proposed issue heading. Therefore, the question of whether the Court of Appeals needed to consider a constitutional challenge under our state constitution's allegedly "broader" protections is before us. This is true notwithstanding defendant's late concession that he would not be entitled to more protections if we were to remand. This concession does not exist in a vacuum; its context clarifies its reach. Defendant filed his petition for discretionary review on 28 July 2021. Almost a year later, this Court issued *State v. Kelliher*, 381 N.C. 558, 873 S.E.2d 366 (2022). And after we allowed discretionary review on 30 August 2023, defendant's position morphed. Nevertheless, defendant does not abandon his fundamental presupposition that, as a general matter, Article I, Section 27 may provide criminal defendants more protections than the Eighth Amendment; rather, he now states simply that on the facts of his case, "Article I, [Section] 27 *independently compels* the *same* substantive requirement provided by" federal caselaw. (Emphasis added). This concession came after *Kelliher*, where this Court unnecessarily uncoupled our application of Article I, Section 27 from the Eighth Amendment only to nevertheless determine that "there [was] no reason to depart from the basic Eighth Amendment analytical framework." *Id.* at 584, 873 S.E.2d at 385. *Kelliher* applied the same standards articulated by federal courts construing the Eighth Amendment to the state constitutional inquiry. *Id.* at 586–87, 873 S.E.2d at 387. Therefore, defendant's late statement that "the change to th[e] historical rule [of lockstepped application of the Eighth Amendment and Article I, Section 27] enunciated in *State v. Kelliher* does not apply to his case" is not a general repudiation of his stance that Article I, Section 27 generally provides more protections to criminal defendants. Rather, it is merely a concession that *Kelliher*'s rote recitation of federal standards as independently stemming from the state constitution "results in his claim being *functionally* analyzed under the North Carolina Constitution just as it would be under the United States Constitution." (Emphasis added). As we explain herein, we agree with defendant's ultimate conclusion that his claims under both constitutions are "functionally" analyzed the same. We arrive at that conclusion, however, for different reasons.

1868, art. I, § 3; *see also* N.C. Const. of 1776, Declaration of Rights, § II. The people "ordain[ed] and establish[ed]" this internal government in their state constitutions, N.C. Const. pmbl.; N.C. Const. of 1868, pmbl., assigning certain tasks to, and expressly limiting the powers of, the different branches of government, *Harper v. Hall*, 384 N.C. 292, 297, 886 S.E.2d 393, 398 (2023).

North Carolinians, however, did not subject themselves to one government alone. Rather, nearly thirteen years after forming their state government, they "affirmatively conferred" some of their political power upon the federal government and "surrendered some of their authority to the United States" by ratifying the United States Constitution in 1789. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 847, 115 S. Ct. 1842, 1876 (1995) (Thomas, J., dissenting). Thus, the citizens of North Carolina are subject to two foundational, governing documents: the United States Constitution and the North Carolina Constitution. This system of dual sovereignty is known as federalism.

Of those two documents, the United States Constitution is "the supreme Law of the Land[,] and the Judges in every State shall be bound thereby." U.S. Const. art. VI, cl. 2. The Federal Constitution's supremacy encompasses many of the guarantees in the Bill of Rights, including those of the Eighth Amendment, because they are equally applicable to the States. *See Robinson v. California*, 370 U.S. 660, 667, 82 S. Ct. 1417, 1420–21 (1962) (applying the Eighth Amendment's provisions to a State through the Due Process Clause of the Fourteenth Amendment).

Unlike the state constitution, which is not a grant of power but rather limitations placed on the "power . . . [that] inheres in the people," *Harper*, 384 N.C. at 323, 886 S.E.2d at 414 (quoting *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961)), the Federal Constitution is a *limited grant* of the people's political power. The federal government may therefore exercise only those powers that the people, through the Federal Constitution, expressly confer upon it. *See, e.g.*, *Reid v. Covert*, 354 U.S. 1, 5–6, 77 S. Ct. 1222, 1225 (1957) (plurality opinion). Accordingly, any "powers not delegated to the United States by the [Federal] Constitution, nor prohibited by it to the States," remain with the people and their state governments. U.S. Const. amend. X. The people of North Carolina control these "reserved" powers and have expressed their will for them in the state constitution. *See U.S. Term Limits*, 514 U.S. at 847–48, 115 S. Ct. at 1876 (Thomas, J., dissenting). Ultimately, this arrangement "preserves the sovereign status of the States." *Alden v. Maine*, 527 U.S. 706, 714, 119 S. Ct. 2240, 2247 (1999).

Notably, the Federal Constitution does not grant any arm of the federal government—even the Supreme Court of the United States—authority to set out the meaning of *state* law, including our state constitutional provisions. That power is thus steadfastly reserved to the people of North Carolina. In turn, the people of North Carolina placed the responsibility of interpreting state law on the judicial branch. *See* N.C. Const. art. IV; *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 6–7 (1787). Therefore, only this Court, as the supreme arbiter of North Carolina law, can answer such questions with finality. *See, e.g.*, *Holmes v. Moore*, 384 N.C. 426, 437, 886 S.E.2d 120, 130 (2023); *State v. Robinson*, 375 N.C. 173, 184, 846 S.E.2d 711, 720 (2020).

Because this Court's construction of state constitutional provisions is final, we interpret the North Carolina Constitution independently of the United States Supreme Court's interpretation of the Federal Constitution. *See Holmes*, 384 N.C. at 437, 886 S.E.2d at 130. We are free to construe our own constitution as providing more, the same, or less protection than the Federal Constitution, even when the state and federal provisions are identical.[6] *State v. Jackson*, 348 N.C. 644, 648, 503 S.E.2d 101, 103–04 (1998). This is particularly true for state constitutional provisions that predate the ratification of the Federal Constitution or have no federal analog. Even when a state constitutional provision provides less protection than a parallel federal provision, however, we must nevertheless apply the Federal Constitution's protections because, as the supreme law of the land, "the rights *it* guarantees must be applied to every citizen by the courts of North Carolina, so no citizen will be 'accorded lesser rights' no matter how we construe the state [c]onstitution." *Id.* at 648, 503 S.E.2d at 103. Thus, even if we were to conclude that Article I, Section 27 provides less protection than the Eighth Amendment, we would nevertheless apply the federal protections.

In our quest to determine the extent of Article I, Section 27's protections, we must apply the fundamental approach by which this Court has decided constitutional questions for over two centuries. *See Harper*, 384 N.C. at 378–79, 886 S.E.2d at 448–49; *Cmty. Success Initiative v. Moore*,

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6. The fact that this Court *may* construe the state constitution to provide less protection than the Federal Constitution does not mean that we are compelled to do so. In some cases, our constitution's text, our state's unique history, and our jurisprudence may very well dictate the same or more protections than those afforded by the Federal Constitution. We simply acknowledge that it may sometimes provide less protection and that we are not obligated to treat our state constitution "as a one-way ratchet to provide only greater rights and remedies than a parallel provision of the United States Constitution." *Iowa v. Brown*, 930 N.W.2d 840, 857 (Iowa 2019) (McDonald, J., concurring).

384 N.C. 194, 211–13, 886 S.E.2d 16, 31–33 (2023); *Holmes*, 384 N.C. at 435–39, 886 S.E.2d at 129–32.

As an initial matter, we always presume that legislation is constitutional, and we require a constitutional limitation on the General Assembly to be explicit in the text and demonstrated beyond a reasonable doubt. *Harper*, 384 N.C. at 323, 886 S.E.2d at 414; *Cmty. Success*, 384 N.C. at 212, 886 S.E.2d at 32; *Holmes*, 384 N.C. at 435, 886 S.E.2d at 129. After all, "[t]he Legislature alone may determine the policy of the State, and its will is supreme, except where limited by constitutional inhibition." *Holmes*, 384 N.C. at 435, 886 S.E.2d at 129 (quoting *State v. Revis*, 193 N.C. 192, 195, 136 S.E. 346, 347 (1927)). "When invoked," such constitutional "exception[s] or limitation[s] . . . present[ ] a question of power for the courts to decide. But even then the courts do not undertake to say what the law ought to be; they only declare what it is." *Id.* (quoting *Revis*, 193 N.C. at 195, 136 S.E. at 347).

The rationale for this framework is grounded in the structure of the state constitution. As discussed above, the people are the repository of all political power. The people exercise their inherent political power through their elected representatives in the General Assembly. *State ex rel. Ewart v. Jones*, 116 N.C. 570, 570, 21 S.E. 787, 787 (1895). We have therefore recognized that "the General Assembly serves as 'the agent of the people for enacting laws,' " giving the legislature "the presumptive[, plenary] power to act." *Harper*, 384 N.C. at 323, 886 S.E.2d at 414 (quoting *State ex rel. Martin v. Preston*, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989)).

Moreover, Article I, Section 6 establishes that the powers of the three branches of government "shall be forever separate and distinct from each other." N.C. Const. art. I, § 6. Like other provisions of the Declaration of Rights, the Separation of Powers Clause "is to be considered as a general statement of a broad, albeit fundamental, constitutional principle." *Harper*, 384 N.C. at 321, 886 S.E.2d at 413 (quoting *State v. Furmage*, 250 N.C. 616, 627, 109 S.E.2d 563, 571 (1959)). Later, more specific portions of the constitutional text expand on this abstract principle: Article II sets forth the legislative power; Article III, the executive; and Article IV, the judicial. *See id.* at 321–22, 886 S.E.2d at 413 (citing John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 46 (2d ed. 2013) [hereinafter *State Constitution* (2d ed.)]); *see also* N.C. Const. arts. II–IV. The specific language used in Articles II, III, and IV confirms that the legislature, but not the executive or judicial branches, wields plenary power. *See Harper*, 384 N.C. at 322, 886 S.E.2d at 413 ("Nowhere was it stated that the three powers or branches had

to be equal. In fact, although the balance occasionally shifted, the preponderant power has always rested with the legislature." (quoting *State Constitution* (2d ed.) 50)).

But because "[t]he people speak through the express language of their constitution, and only the people can amend it," *id.* at 297, 886 S.E.2d at 398 (citing N.C. Const. art. XIII), the General Assembly cannot exceed the express limits placed on it by the constitutional text, *id.* at 323, 886 S.E.2d at 414; *see also id.* at 297, 886 S.E.2d at 398 ("[T]he state constitution is *a limitation on power*." (emphasis added)). When a legislative act goes beyond these limits, the judiciary *must* use its "constitutional power of judicial review" to strike it down. *State ex rel. McCrory v. Berger*, 368 N.C. 633, 650, 781 S.E.2d 248, 259 (2016) (Newby, J., concurring in part and dissenting in part); *see also Bayard*, 1 N.C. (Mart.) at 7 ("[N]o act [of the General Assembly] . . . could by any means repeal or alter the [c]onstitution."); *Cmty. Success*, 384 N.C. at 212, 886 S.E.2d at 32 ("[W]hen a challenger proves the unconstitutionality of a law beyond a reasonable doubt, this Court will not hesitate to pronounce the law unconstitutional and to vindicate whatever constitutional rights have been infringed.").

Still, we must use the power of judicial review with "great reluctance," *Bayard*, 1 N.C. (Mart.) at 6, resisting any temptation to intrude into the legislature's policy-making role, *see Holmes*, 384 N.C. at 439, 886 S.E.2d at 132 ("The power to invalidate legislative acts is one that must be exercised by this Court with the utmost restraint . . . ."). Our constitution makes plain that "a restriction on the General Assembly is in fact a restriction on the people." *Berger*, 368 N.C. at 651, 781 S.E.2d at 259 (Newby, J., concurring in part and dissenting in part); *see also Cmty. Success*, 384 N.C. at 211, 886 S.E.2d at 31 (stating that acts of the General Assembly are "expressions of the people's will"). Thus, when the judiciary strikes down a duly enacted law of the General Assembly, it creates tension not only between the judicial and legislative branches but also between the judiciary and the people.

The presumption of constitutionality eases this tension. It is "a critical safeguard that preserves the delicate balance between this Court's role as the interpreter of our [c]onstitution and the legislature's role as the voice through which the people exercise their ultimate power." *Holmes*, 384 N.C. at 435, 886 S.E.2d at 129; *see also Harper*, 384 N.C. at 299, 886 S.E.2d at 399 ("[T]he people act and decide policy matters through their representatives in the General Assembly. We are designed to be a government of the people, not of the judges."); *Cmty. Success*, 384 N.C. at 211, 886 S.E.2d at 32 (stating that this Court does not strike

down the General Assembly's acts "unless [they] violate[ ] federal law or *the supreme expression of the people's will, the North Carolina Constitution*" (emphasis added)). It is the challenger's burden to overcome this presumption of validity. *Cmty. Success*, 384 N.C. at 212, 886 S.E.2d at 32.

These standards are well-settled. *See Harper*, 384 N.C. at 378–79, 886 S.E.2d at 448–49. From the beginning, North Carolina's courts have exercised judicial review with the utmost caution, only declaring a law unconstitutional if it violated the express constitutional text. *See Bayard*, 1 N.C. (Mart.) at 6–7; *see also Cooper v. Berger*, 371 N.C. 799, 811, 822 S.E.2d 286, 296 (2018) ("Unless the [c]onstitution expressly or by necessary implication restricts the actions of the legislative branch, the General Assembly is free to implement legislation as long as that legislation does not offend some specific constitutional provision." (emphases omitted) (quoting *Baker v. Martin*, 330 N.C. 331, 338–39, 410 S.E.2d 887, 891–92 (1991))). The same is true of our requirement that the challenging party demonstrate unconstitutionality beyond a reasonable doubt, an evidentiary standard that goes back centuries. *See, e.g.*, *State ex rel. Lee v. Dunn*, 73 N.C. 595, 601 (1875) ("[I]t is for the appellant to show that the [l]egislature is restricted by the express provisions of the [c]onstitution, or by necessary implication therefrom. And this he must show beyond a reasonable doubt." (citations omitted) (first citing *State v. Adair*, 66 N.C. 298, 303 (1872); and then citing *King v. W. & W. R.R. Co.*, 66 N.C. 277, 283 (1872))); *Daniels v. Homer*, 139 N.C. 219, 227–28, 51 S.E. 992, 995 (1905) ("A statute will never be held unconstitutional if there is any reasonable doubt." (quoting *State v. Lytle*, 138 N.C. 738, 741, 51 S.E. 66, 68 (1905))). This requirement serves as "a necessary protection against abuse of [the judicial review] power by unprincipled or undisciplined judges." *Holmes*, 384 N.C. at 439, 886 S.E.2d at 132.

Having outlined our presumption of constitutionality, we now explain the methodology by which we evaluate a constitutional challenge. Every constitutional inquiry examines the text of the relevant provision, the historical context in which the people of North Carolina enacted it, and this Court's precedents interpreting it. *Cmty. Success*, 384 N.C. at 213, 886 S.E.2d at 33; *Berger*, 368 N.C. at 639, 781 S.E.2d at 252; *see Harper*, 384 N.C. at 323–70, 886 S.E.2d at 414–43.

We begin with the text of the applicable provision. *Cmty. Success*, 384 N.C. at 213, 886 S.E.2d at 33 ("[W]here the meaning is clear from the words used, we will not search for a meaning elsewhere." (alteration in original) (quoting *Preston*, 325 N.C. at 449, 385 S.E.2d at 479)). "The constitution is interpreted based on its plain language. The people

used that plain language to express their intended meaning of the text when they adopted it." *Harper*, 384 N.C. at 297, 886 S.E.2d at 399. Because "[w]e[ ] the people" enshrined the constitution's protections, N.C. Const. pmbl.; *see also id.* art. I, §§ 2–3, "[t]here are no hidden meanings or opaque understandings—the kind that can only be found by the most astute justice or academic." *Harper*, 384 N.C. at 297, 886 S.E.2d at 399. Axiomatically, "[t]he constitution was written to be understood by everyone, not just a select few." *Id.*

We then study the historical background against which the people enacted the constitutional text. *Cmty. Success*, 384 N.C. at 213, 886 S.E.2d at 33; *see also Harper*, 384 N.C. at 351, 886 S.E.2d at 431. Our goal here is "to isolate the provision's meaning at the time of its ratification." *Cmty. Success*, 384 N.C. at 213, 886 S.E.2d at 33; *see Sneed v. Greensboro City Bd. of Educ.*, 299 N.C. 609, 613, 264 S.E.2d 106, 110 (1980) ("Inquiry must be had into the history of the questioned provision and its antecedents, the conditions that existed prior to its enactment, and the purposes sought to be accomplished by its promulgation."). "We also seek guidance from any on-point precedents from this Court interpreting the provision." *Cmty. Success*, 384 N.C. at 213, 886 S.E.2d at 33 (citing *Elliott v. State Bd. of Equalization*, 203 N.C. 749, 753, 166 S.E. 918, 921 (1932)).

Guided by these state constitutional principles, our sole goal in construing Article I, Section 27 is to "consistently reflect what the people agreed the text meant *when they adopted it*." *Harper*, 384 N.C. at 297, 886 S.E.2d at 399 (emphasis added). We now turn to the provision at issue in this case. Understanding that criminal sentencing, particularly of juveniles, is a subject susceptible to differing viewpoints, we emphasize that we the Justices must leave our personal feelings, and perceptions of popular opinion, to the side.[7] Furthermore, in construing the text, "[i]t is axiomatic that the terms or requirements of a constitution cannot be in violation of the same constitution—a constitution cannot violate itself." *Leandro v. State*, 346 N.C. 336, 352, 488 S.E.2d 249, 258 (1997).

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7. *See State v. Woodson*, 287 N.C. 578, 597, 215 S.E.2d 607, 619 (1975) (Exum, J., concurring) ("[F]or me, the question of the constitutionality of imposing a sentence of death for conviction of first[-]degree murder duly authorized by legislative enactment is for the first time squarely presented. It is not an easy question for I am personally opposed to capital punishment. Maintaining it, even for murder, is not in my view wise public policy. I do not believe, however, that its infliction upon one convicted of premeditated murder or murder committed in the course of another felony which itself is inherently dangerous to human life . . . contravenes the Constitution of . . . North Carolina.").

2. The Cruel or Unusual Punishments Clause's Text

In Article I, Section 27, the people of North Carolina declared, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted." N.C. Const. art. I, § 27. The Cruel or Unusual Punishments Clause predates the Federal Constitution, first appearing in North Carolina's 1776 constitution. N.C. Const. of 1776, Declaration of Rights, § X. The clause has appeared in every subsequent version of our state constitution with little alteration to the text. *Compare* N.C. Const. art. I, § 27 ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted."), *with* N.C. Const. of 1868, amends. of 1875, art. I, § 14 ("Excessive bail should not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted."), *and* N.C. Const. of 1868, art. I, § 14 (same), *and* N.C. Const. of 1776, amends. of 1835, Declaration of Rights, § 10 ("That excessive bail should not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted."), *and* N.C. Const. of 1776, Declaration of Rights, § X (same).

As a textual matter, the Cruel or Unusual Punishments Clause generally forbids the infliction of "cruel" punishments and "unusual" punishments. N.C. Const. art. I, § 27. The text of this provision does not expressly set out, however, what it means for a punishment to be "cruel or unusual." *See, e.g.*, *State v. Driver*, 78 N.C. 423, 429 (1878); *State v. Griffin*, 190 N.C. 133, 136–37, 129 S.E. 410, 412 (1925); *cf.* *Trop v. Dulles*, 356 U.S. 86, 100 & n.32, 78 S. Ct. 590, 598 & n.32 (1958) ("[T]he words of the [Eighth] Amendment are not precise . . . . Whether the word 'unusual' has any qualitative meaning different from 'cruel' is not clear."). Simple reference to the use of the disjunctive "or" does not clarify this obscurity. Indeed, a survey of over one hundred Cruel or Unusual Punishments Clause cases suggests that this Court historically did not treat the use of the disjunctive in our Declaration of Rights as significant or dispositive in the inquiry. Therefore, to fully understand the meaning the people intended, we must turn to the history of the Cruel or Unusual Punishments Clause, our precedents, and other pertinent provisions of the state constitution.

3. History of the Cruel or Unusual Punishments Clause

With respect to the history of the Cruel or Unusual Punishments Clause, its original intent was to protect against abuses of judicial power in the form of illegal and arbitrary sentencing practices. The clause finds its genesis in the English Bill of Rights of 1689, *e.g.*, *Driver*, 78 N.C. at 424; *see also Griffin*, 190 N.C. at 136, 129 S.E. at 412; *Harper*,

384 N.C. at 360–61, 361 n.22, 886 S.E.2d at 437 & n.22; John V. Orth, *The North Carolina State Constitution* 5, 70 (1993) [hereinafter *State Constitution*], which stated "[t]hat . . . cruell and unusuall Punishments [ought not to be] inflicted," Bill of Rights 1689, 1 W. & M. Sess. 2 c. 2 (Eng.). The English Parliament made this declaration in response to "unprecedented proceedings in the court of [K]ing's [B]ench in the reign of [K]ing James the Second." 4 William Blackstone, *Commentaries* *378 [hereinafter *Commentaries*]. *See generally* Bill of Rights 1689, 1 W. & M. Sess. 2 c. 2 (Eng.) ("King James the Second[,] by the Assistance of diverse evill Councellors[,] Judges[,] and Ministers imployed by him[,] did endeavor to subvert and extirpate . . . the Lawes and Liberties of th[at] Kingdome . . . [b]y . . . [inflicting] illegall and cruell Punishments . . . ."). Specifically, historical evidence suggests that this prohibition was largely targeted at the King's Bench's exercise of "arbitrary sentencing power," including accusations that Lord Chief Justice Jefferys of the King's Bench illegally " 'invent[ed]' special penalties for the King's enemies . . . that were not authorized by common-law precedent or statute." *Harmelin v. Michigan*, 501 U.S. 957, 968, 111 S. Ct. 2680, 2688 (1991) (opinion of Scalia, J., with Rehnquist, C.J.); *see also id.* at 966–75, 111 S. Ct. at 2686–91 (recounting the history of the Eighth Amendment's Cruel and Unusual Punishments Clause).

Early English cases applying the English Bill of Rights's proscription confirm this scope. They were concerned with judges who had ignored "the bounds and limits which the law ha[d] set them," thereby making punishment "depend[ent] upon the judge's pleasure." *Driver*, 78 N.C. at 428–29 (quoting *Lord Devonshire's Case*, 11 How. St. Tr. 1354, 1357, 1361, 1372 (1689) (Eng.)). In other words, the English Bill of Rights aimed to limit judicial discretion in sentencing by limiting permissible punishments to those enacted by statute or derived from the common law. *See Harmelin*, 501 U.S. at 973, 111 S. Ct. at 2690 (opinion of Scalia, J., with Rehnquist, C.J.) ("In all these contemporaneous discussions, as in the prologue of the [English Bill of Rights,] a punishment is . . . considered objectionable . . . because it is 'out of [the Judges'] Power,' 'contrary to Law and ancient practice,' without 'Precedents' or 'express Law to warrant,' 'unusual,' 'illegal,' and imposed by 'Pretence to a discretionary Power.' " (second alteration in original)).[8]

8. This understanding comports with Sir William Blackstone's articulation of the role of judges in criminal sentencing. Blackstone observed that "court[s] must pronounce that judgment, *which the law has annexed to the crime, and which hath been constantly mentioned*." *Commentaries* at *376 (emphasis added). He observed that "one of the glories of . . . English law [was] that the species, though not always the quantity or degree, of

Because the Cruell and Unusuall Punishments Clause's protections were "thought to be so appropriate," our framers enshrined the Cruel or Unusual Punishments Clause into our Declaration of Rights even though "there never ha[d] been anything in our government, [s]tate or [n]ational, to provoke such a provision." *Driver*, 78 N.C. at 427. And because the people adopted "all . . . such parts of the [English] common law" not "inconsistent with the freedom and independence" of North Carolina nor otherwise "abrogated, repealed, or . . . obsolete," 1 Potter's Revisal of 1821, 1778, ch. 133, § 2,[9] the English understanding of the Cruell and Unusuall Punishments Clause is instrumental to our understanding of the Cruel or Unusual Punishments Clause, *see, e.g.*, *Driver*, 78 N.C. at 427–30. Indeed, our earliest cases applying the state constitution's Cruel or Unusual Punishments Clause also understood it to be principally directed at the judiciary and only in cases in which the judge "ha[d] a discretion over the amount of bail, the quantum of the fine, and the nature of the punishment." *State v. Manuel*, 20 N.C. (3 & 4 Dev. & Bat.) 144, 162 (1838)[10]; *State v. Blake*, 157 N.C. 608, 611, 72 S.E. 1080, 1081–82 (1911); *State v. Smith*, 174 N.C. 804, 805, 93 S.E. 910, 911 (1917); *State Constitution* 70.

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punishment [was] *ascertained* for every offense; and that it [was] not left in the breast of any judge, . . . to alter that judgment, which the law ha[d] beforehand ordained." *Id.* at *377. Blackstone remarked that this feature "prevent[ed] oppression" while also "stifl[ing] hopes of impunity or mitigation" based on the "humor or discretion of the court." *Id.* at *377–78. According to Blackstone, the beauty of the English legal system was that "where an *established* penalty [was] annexed to crimes, the criminal [could] read their *certain* consequence in that law, which ought to be the *unvaried* rule, as it is the *inflexible* judge, of his actions." *Id.* at *378 (emphases added). Blackstone acknowledged that "discretionary fines and discretionary lengths of imprisonment which . . . courts are enabled to impose may seem an exception to this rule." *Id.* Blackstone assured his readers, however, that "the general nature of the punishment . . . [was] . . . fixed and determinate," and that "however unlimited the power of the court [to determine the quantum of the fine or punishment] may [have] seem[ed], it [was] far from being wholly arbitrary" because "[*the court's*] *discretion* [*was*] *regulated by law*." *Id.* (emphasis added). Blackstone then specifically highlighted the English Bill of Rights's Cruell and Unusuall Punishments Clause as an outer limit on the judges' discretionary sentencing power. *See id.* ("For the bill of rights has particularly declared that excessive fines ought not to be imposed, nor cruel and unusual punishment inflicted . . . .").

9. The English common law had been declared in force by North Carolina's colonial government. 1 Potter's Revisal of 1821, 1715, ch. 5, § 2. This declaration remains a part of our law, being codified, with amendments, in our current General Statutes. N.C.G.S. § 4-1 (2023).

10. We acknowledge that the law at issue in *Manuel* was deplorable and should have been held unconstitutional because, as the defendant argued, it was "arbitrary, repugnant to the principles of free government," and "not of the character properly embraced within the term 'law of the land.' " 20 N.C. (3 & 4 Dev. & Bat.) at 163. *Manuel* is this Court's only case discussing the scope of the Cruel or Unusual Punishments Clause under the 1776 Constitution, however, and we cite it only to understand the Clause's historical meaning and scope.

Similar to the English's understanding of their Bill of Rights's proscription of "cruell and unusuall punishments," this Court understood the state constitutional proscription of cruel or unusual punishments to forbid judges from imposing sentences "not sanctioned by common law or statute." *Harmelin*, 501 U.S. at 984 n.10, 111 S. Ct. at 2696 n.10 (opinion of Scalia, J., with Rehnquist, C.J.) (first citing *Driver*, 78 N.C. at 425–27; and then citing *Blake*, 157 N.C. at 611, 72 S.E. at 1081–82). In other words, the Cruel or Unusual Punishments Clause required judges to temper their sentencing discretion *by law*, conforming their judgments to the punishments authorized by statute or permitted at common law. *See Driver*, 78 N.C. at 428. Noting that if judges adhered to "what has formerly been expressly done in like cases"—or "for the want of such particular discretion," if they sentenced by "consider[ing] that which comes nearest to it"—this Court stated "the punishment will be such as is 'usual,' and therefore not 'excessive' or 'cruel.' " *Id.* at 430 (quoting *Lord Devonshire's Case*, 11 How. St. Tr. at 1362).

These early cases did not treat the Cruel or Unusual Punishments Clause as completely inapplicable to the other branches of government; rather, they recognized that the proscription had *some* applicability to the legislative branch. *See Manuel*, 20 N.C. (3 & 4 Dev. & Bat.) at 162 ("No doubt the principles of humanity sanctioned and enjoined in this section [(i.e., Article I, Section 27's predecessor)] ought to command the reverence and regulate the conduct of *all* who owe obedience to the constitution."); *State Constitution* 70. Nevertheless, given the legislature's prerogative to prescribe criminal punishment, *Manuel*, 20 N.C. (3 & 4 Dev. & Bat.) at 159, this Court acknowledged it would be hard-pressed to ever declare that an act of the General Assembly imposed a punishment violative of Article I, Section 27's general proscription, *id.* at 162. This Court stated that it could do so only when "the act complained of . . . contains such a flagrant violation of all discretion as to show a disregard of constitutional restraints." *Id.*

Thus, the original meaning of the Article I, Section 27 was principally to place outer limits on judges' sentencing discretion. The Cruel or Unusual Punishments Clause prohibited judges from imposing sentences that disregarded the parameters imposed by statutes or the common law. So long as a punishment comported with the boundaries imposed by law, it was not cruel or unusual in a constitutional sense.[11] And although this Court recognized that Article I, Section 27

11. This understanding was the hallmark of our Cruel or Unusual Punishments Clause jurisprudence from the founding era and throughout the latter half of the twentieth century. *E.g.*, *State v. Wall*, 304 N.C. 609, 616, 286 S.E.2d 68, 73 (1982); *State v. Squire*, 302

(and its predecessors) placed some theoretical strictures on the General Assembly's ability to prescribe punishments, it understood that it could only strike down legislation as inflicting cruel or unusual punishments

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N.C. 112, 121, 273 S.E.2d 688, 694 (1981); *State v. Handsome*, 300 N.C. 313, 317, 266 S.E.2d 670, 674 (1980); *State v. Atkinson*, 298 N.C. 673, 685–86, 259 S.E.2d 858, 865–66 (1979); *State v. Pearce*, 296 N.C. 281, 295, 250 S.E.2d 640, 649–50 (1979); *State v. Fulcher*, 294 N.C. 503, 525, 243 S.E.2d 338, 352 (1978); *State v. Watson*, 294 N.C. 159, 171, 240 S.E.2d 440, 448 (1978); *State v. Jenkins*, 292 N.C. 179, 190–91, 232 S.E.2d 648, 655 (1977); *State v. Barrow*, 292 N.C. 227, 234, 232 S.E.2d 693, 697–98 (1977); *State v. Legette*, 292 N.C. 44, 57–58, 231 S.E.2d 896, 904 (1977); *State v. Sweezy*, 291 N.C. 366, 384–86, 230 S.E.2d 524, 536 (1976); *State v. Slade*, 291 N.C. 275, 283–84, 229 S.E.2d 921, 927 (1976); *State v. Tolley*, 290 N.C. 349, 362, 226 S.E.2d 353, 364 (1976); *State v. Foster*, 284 N.C. 259, 266–67, 200 S.E.2d 782, 788–89 (1973); *State v. Frank*, 284 N.C. 137, 147–48, 200 S.E.2d 169, 176–77 (1973); *State v. Cameron*, 284 N.C. 165, 172–74, 200 S.E.2d 186, 191–92 (1973); *State v. Mitchell*, 283 N.C. 462, 470–72, 196 S.E.2d 736, 741–42 (1973); *State v. Edwards*, 282 N.C. 578, 580, 193 S.E.2d 736, 737–38 (1973) (per curiam); *State v. Cradle*, 281 N.C. 198, 209, 188 S.E.2d 296, 303 (1972); *State v. Williams*, 279 N.C. 515, 521, 184 S.E.2d 282, 286 (1971); *State v. Westbrook*, 279 N.C. 18, 29–30, 181 S.E.2d 572, 578–79 (1971), *vacated on other grounds*, 408 U.S. 939, 92 S. Ct. 2873 (1972) (mem.); *State v. Atkinson*, 278 N.C. 168, 178, 179 S.E.2d 410, 417 (1971), *rev'd on other grounds*, 403 U.S. 948, 91 S. Ct. 2292 (1971) (mem.); *State v. Harris*, 277 N.C. 435, 438–39, 177 S.E.2d 865, 868 (1970); *State v. Benton*, 276 N.C. 641, 659, 174 S.E.2d 793, 805 (1970); *State v. Parrish*, 273 N.C. 477, 479, 160 S.E.2d 153, 154 (1968) (per curiam); *State v. Shoemaker*, 273 N.C. 475, 477, 160 S.E.2d 281, 282 (1968) (per curiam); *State v. Weston*, 273 N.C. 275, 284, 159 S.E.2d 883, 888 (1968); *State v. McCall*, 273 N.C. 135, 136, 159 S.E.2d 316, 316 (1968) (per curiam); *State v. Bethea*, 272 N.C. 521, 522, 158 S.E.2d 591, 592 (1968) (per curiam); *State v. Wright*, 272 N.C. 264, 266–67, 158 S.E.2d 50, 51–52 (1967) (per curiam); *State v. Pardon*, 272 N.C. 72, 74, 157 S.E.2d 698, 700 (1967); *State v. Witherspoon*, 271 N.C. 714, 715, 157 S.E.2d 362, 363 (1967) (per curiam); *State v. Yoes*, 271 N.C. 616, 631, 157 S.E.2d 386, 398 (1967); *State v. Lovelace*, 271 N.C. 593, 594, 157 S.E.2d 81, 81–82 (1967) (per curiam); *State v. Robinson*, 271 N.C. 448, 449–50, 156 S.E.2d 854, 855 (1967); *State v. Hopper*, 271 N.C. 464, 464–65, 156 S.E.2d 857, 857–58 (1967) (per curiam); *State v. Hilton*, 271 N.C. 456, 457–58, 156 S.E.2d 833, 834–35 (1967) (per curiam); *State v. LePard*, 270 N.C. 157, 158, 153 S.E.2d 875, 876 (1967) (per curiam); *State v. Greer*, 270 N.C. 143, 146, 153 S.E.2d 849, 851 (1967) (per curiam); *State v. Carter*, 269 N.C. 697, 699, 153 S.E.2d 388, 389 (1967) (per curiam); *State v. Elliot*, 269 N.C. 683, 686, 153 S.E.2d 330, 332 (1967) (per curiam); *N.C. State Bar v. Frazier*, 269 N.C. 625, 634–35, 153 S.E.2d 367, 373–74 (1967); *State v. Caldwell*, 269 N.C. 521, 527, 153 S.E.2d 34, 38 (1967); *State v. Taborn*, 268 N.C. 445, 447, 150 S.E.2d 779, 780–81 (1966) (per curiam); *State v. Newell*, 268 N.C. 300, 301, 150 S.E.2d 405, 406 (1966) (per curiam); *State v. Bruce*, 268 N.C. 174, 184–86, 150 S.E.2d 216, 224–25 (1966); *State v. Davis*, 267 N.C. 126, 128, 147 S.E.2d 570, 572 (1966) (per curiam); *State v. Hunt*, 265 N.C. 714, 716, 144 S.E.2d 890, 891 (1965) (per curiam); *State v. Slade*, 264 N.C. 70, 72–73, 140 S.E.2d 723, 725 (1965) (per curiam); *State v. Whaley*, 263 N.C. 824, 824, 140 S.E.2d 305, 305 (1965) (per curiam); *State v. Driver*, 262 N.C. 92, 92–93, 136 S.E.2d 208, 209 (1964) (per curiam); *State v. Wright*, 261 N.C. 356, 357–58, 134 S.E.2d 624, 625 (1964); *State v. Blackmon*, 260 N.C. 352, 357, 132 S.E.2d 880, 884 (1963); *Blackmon*, 260 N.C. at 357–59, 132 S.E.2d at 884–86 (Parker, J., dissenting); *State v. Brooks*, 260 N.C. 186, 190, 132 S.E.2d 354, 357 (1963); *State v. Downey*, 253 N.C. 348, 354–55, 117 S.E.2d 39, 44 (1960); *State v. Lee*, 247 N.C. 230, 230–31, 100 S.E.2d 372, 373 (1957); *State v. Smith*, 238 N.C. 82, 88, 76 S.E.2d 363, 367 (1953); *State v. Welch*, 232 N.C. 77, 82–83, 59 S.E.2d 199, 204 (1950); *State v. Stansbury*, 230 N.C. 589, 590–91, 55 S.E.2d 185, 187 (1949); *State v. White*, 230 N.C. 513, 514, 53 S.E.2d 436, 436–37 (1949);

in "extraordinary and exceptional instances." *Smith*, 174 N.C. at 805, 93 S.E. at 911.[12]

4. Article XI

As with other " '[b]asic principles' contained within the Declaration of Rights," the Cruel or Unusual Punishments Clause must be considered "in the context of later articles that give [it] more specific application." *Harper*, 384 N.C. at 352, 886 S.E.2d at 432 (first alteration in original) (quoting *State Constitution* (2d ed.) 46).

State v. Crandall, 225 N.C. 148, 150, 33 S.E.2d 861, 862 (1945); *State v. Richardson*, 221 N.C. 209, 210–11, 19 S.E.2d 863, 863–64 (1942), *overruled on other grounds by Blackmon*, 260 N.C. 352, 132 S.E.2d 880; *State v. Levy*, 220 N.C. 812, 815, 18 S.E.2d 355, 358 (1942); *State v. Parker*, 220 N.C. 416, 419, 17 S.E.2d 475, 477 (1941); *State v. Calcutt*, 219 N.C. 545, 548, 15 S.E.2d 9, 11 (1941); *Calcutt*, 219 N.C. at 560, 564–66, 15 S.E.2d at 20, 23–24 (Clarkson, J., concurring in part and dissenting in part); *State v. Wilson*, 218 N.C. 769, 774, 12 S.E.2d 654, 657 (1941); *State v. Brackett*, 218 N.C. 369, 373, 11 S.E.2d 146, 148–49 (1940); *State v. Moschoures*, 214 N.C. 321, 322, 199 S.E. 92, 93 (1938) (per curiam); *State v. Cain*, 209 N.C. 275, 276, 183 S.E. 300, 300–01 (1936), *overruled on other grounds by Blackmon*, 260 N.C. 352, 132 S.E.2d 880; *State v. Fleming*, 202 N.C. 512, 514, 163 S.E 453, 454 (1932); *State v. Daniels*, 197 N.C. 285, 286, 148 S.E. 244, 244 (1929) (per curiam); *Griffin*, 190 N.C. at 136–38, 129 S.E. at 412–13; *State v. Malpass*, 189 N.C. 349, 353–54, 127 S.E. 248, 251 (1925); *State v. Swindell*, 189 N.C. 151, 151–55, 126 S.E. 417, 417–19 (1925), *overruled on other grounds by Blackmon*, 260 N.C. 352, 132 S.E.2d 880; *State v. Beavers*, 188 N.C. 595, 596–97, 125 S.E. 258, 259 (1924); *State v. Mangum*, 187 N.C. 477, 480–81, 121 S.E. 765, 766–67 (1924); *State v. Spencer*, 185 N.C. 765, 767, 117 S.E. 803, 803 (1923); *State v. Jones*, 181 N.C. 543, 544–45, 106 S.E. 827, 828 (1921); *State v. Stokes*, 181 N.C. 539, 542, 106 S.E. 763, 764 (1921); *Smith*, 174 N.C. at 805–07, 93 S.E. at 911–12; *State v. Woodlief*, 172 N.C. 885, 888–91, 90 S.E. 137, 139–40 (1916); *State v. Knotts*, 168 N.C. 173, 190–91, 83 S.E. 972, 980 (1914); *State v. Shaft*, 166 N.C. 407, 410, 81 S.E. 932, 933 (1914); *State v. Lee*, 166 N.C. 250, 256–57, 80 S.E. 977, 979 (1914); *Blake*, 157 N.C. at 611, 72 S.E. at 1081–82; *In re Watson*, 157 N.C. 340, 350–52, 72 S.E. 1049, 1052–53 (1911); *Garrison v. S. Ry. Co.*, 150 N.C. 575, 593–94, 64 S.E. 578, 585–86 (1909); *State v. Lance*, 149 N.C. 551, 556–57, 63 S.E. 198, 201 (1908); *State v. Dowdy*, 145 N.C. 432, 439, 58 S.E. 1002, 1005 (1907); *State v. Farrington*, 141 N.C. 844, 845, 53 S.E. 954, 954–55 (1906); *State v. Capps*, 134 N.C. 622, 632, 46 S.E. 730, 733 (1904); *State v. Hamby*, 126 N.C. 1066, 1067, 35 S.E. 614, 614 (1900); *State v. Apple*, 121 N.C. 584, 585–86, 28 S.E. 469, 470 (1897); *State v. Haynie*, 118 N.C. 1265, 1269–70, 24 S.E. 536, 536 (1896); *State v. Reid*, 106 N.C. 714, 716–17, 11 S.E. 315, 316 (1890); *State v. Miller*, 94 N.C. 904, 906–08 (1886); *State v. Miller*, 94 N.C. 902, 903–04 (1886); *State v. Pettie*, 80 N.C. 367, 369–70 (1879); *State v. Cannady*, 78 N.C. 539, 543–44 (1878); *Driver*, 78 N.C. at 424–30; *Manuel*, 20 N.C. (3 & 4 Dev. & Bat.) at 161–63.

12. To the extent the Cruel or Unusual Punishments Clause operated to altogether forbid certain modes of punishments that were torturous and barbaric, s*ee Driver*, 78 N.C. at 427–28 ("Nor was [Article I, Section 27's predecessor] intended to warn against merely erratic modes of punishment or torture, but applied expressly to 'bail,' 'fines,' and 'punishments.' "), imprisoning a criminal defendant would not fall under any such prohibition. Moreover, as discussed below, other unique provisions of our state constitution subsequently put the question of which punishments are allowed under the Cruel or Unusual Punishments Clause beyond dispute.

Relevantly, when the people ratified their second constitution in 1868, they established Article XI, which concerned "*Punishments*, *Penal Institutions*[,] and Public Charities." N.C. Const. of 1868, art. XI (emphases added).[13] Enacted in 1971, the current state constitution retains Article XI with the heading "*Punishments*, *Corrections*, and Charities." N.C. Const. art. XI (emphases added). Applicable to all three branches of government, this article contains two relevant sections that define the outer limits of allowable punishments—in other words, punishments that cannot be considered cruel or unusual.

In Article XI, Section 1, which is entitled "Punishments," the people enumerated an exhaustive list of the types of punishments that may be constitutionally inflicted. In the current constitution, that section states:

> The following punishments only shall be known to the laws of this State: *death*, *imprisonment*, fines, suspension of a jail or prison term with or without conditions, restitution, community service, restraints on liberty, work programs, removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under this State.

N.C. Const. art. XI, § 1 (emphases added). By enumerating an exhaustive list of constitutionally allowable punishments, "[t]his provision . . . was intended to stop the use of degrading punishments theretofore inflicted." *Shore v. Edmisten*, 290 N.C. 628, 631, 227 S.E.2d 553, 557 (1976) (citing Albert Coates, *Punishment for Crime in North Carolina*, 17 N.C. L. Rev. 205 (1939)). "[A]s a necessary consequence it also limited the creativity of trial judges in fashioning remedies for crime." *Id.* Therefore, "criminal convictions can result only in the punishments listed in [Article XI, Section 1]." *State Constitution* 157.

The people were even more specific about the availability of the death penalty. In Article XI, Section 2, entitled "Death punishment," the

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13. Prior to 1868, the state constitution did not provide specific application to Article I, Section 27's general proscription of cruel or unusual punishments, save perhaps the provision forbidding ex post facto laws, N.C. Const. of 1776, Declaration of Rights, § XXIV, and the provision forbidding imprisonment for debt "where there is not a strong Presumption of Fraud," N.C. Const. of 1776, § XXXIX. These provisions were carried over into the second constitution, N.C. Const. of 1868, art. I, §§ 16, 32, along with a few new relevant provisions, including a provision forbidding the payment of "costs, jail fees, or necessary witness fees for the defense, unless found guilty," *id.* § 11; a provision outlawing involuntary servitude unless "for crime whereof the parties shall have been duly convicted," *id.* § 33; and, most importantly, Article XI.

people limited the death penalty to certain crimes. N.C. Const. art. XI, § 2. Recognizing the need to balance justice and mercy, the people limited the use of the death penalty to cases of "murder, arson, burglary, and rape, and these only, . . . *if the General Assembly shall so enact*." *Id.* (emphasis added).

Because a constitution cannot violate itself, we must construe Article I, Section 27's proscription of cruel or unusual punishments and Article XI's enumeration of acceptable punishments harmoniously. Logically, therefore, the punishments the people sanctioned in Article XI, Sections 1 and 2 are inherently not "cruel or unusual" in a constitutional sense. *E.g.*, *State v. Jarrette*, 284 N.C. 625, 655–56, 202 S.E.2d 721, 740–41 (1974), *vacated on other grounds by* 428 U.S. 903, 96 S. Ct. 3205 (1976) (mem.); *Westbrook*, 279 N.C. at 30, 181 S.E.2d at 579; *Yoes*, 271 N.C. at 631, 157 S.E.2d at 398; *Revis*, 193 N.C. at 197, 126 S.E. at 349 ("There are those who question the wisdom, and even the right, of the State to take life, or to inflict the death penalty, as a punishment for crime, but, in the face of [Article XI, Section 1,] . . . none can deny the power of the Legislature to prescribe the death penalty."); *see also*, *e.g.*, *State v. Atkinson*, 275 N.C. 288, 319, 167 S.E.2d 241, 260 (1969), *rev'd on other grounds*, 403 U.S. 948, 91 S. Ct. 2283 (1971) (mem.); *State Constitution* 157. Accordingly, an act of the General Assembly cannot violate the Cruel or Unusual Punishments Clause by prescribing a punishment allowable under Article XI, Sections 1 and 2, and similarly, judges cannot violate Article I, Section 27, by handing down a sentence in obedience to such an act. *See*, *e.g.*, *State v. Allen*, 346 N.C. 731, 737, 488 S.E.2d 188, 191 (1997); *Stansbury*, 230 N.C. at 591, 55 S.E.2d at 187; *see also Atkinson*, 278 N.C. at 178, 179 S.E.2d at 417; *Bruce*, 268 N.C. at 185, 150 S.E.2d at 225 (quoting *State v. McNally*, 211 A.2d 162, 164 (Conn. 1965)).[14]

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14. The concurrence posits that this traditional understanding "effectively writes [Article I, Section 27] out of the [c]onstitution." It insists that while Article XI "describes what is permissible in *kind*," Article I, Section 27 is tasked with describing what is "proportional or reasonable in degree." In the concurrence's view, judges may freely interject themselves to strike down legislatively prescribed punishments that otherwise comport with Article XI when they feel such punishments are "unreasonable and disproportionate." This understanding would be surprising to the generations of Justices that have come before us. Indeed, the steadfast position of this Court was that the Cruel or Unusual Punishments Clause was predominantly intended to ensure that judges only inflicted the punishments prescribed by the law, recognizing the legislature's prerogative to set criminal sentencing policy could be interfered with only in truly extraordinary and exceptional circumstances. *See* footnote 11 and accompanying text. And since the ratification of Article XI, this Court has not authorized judges to impose their will on criminal sentencing policy by unilaterally declaring that duly enacted sentences go too far. The cases cited by

Notably, when the people desired to limit the State's ability to inflict punishments, they created and amended the working article of the constitution—Article XI—not the general provision in the Declaration of Rights. *See Shore*, 290 N.C. at 631, 227 S.E.2d at 557. It is therefore unsurprising that unlike the text of the Cruel or Unusual Punishments Clause, which has remained largely unaltered since 1776, the text of Article XI, describing approved punishments, has been altered several times over the years to reflect *the people's* changing understanding of crime and punishment.

For example, the 1868 Constitution included a lengthier and more detailed predecessor to the current Article XI. The original text reflected how North Carolinians of 1868 understood punishment, allowing, for example, "imprisonment, with or without hard labor." N.C. Const. of 1868, art. XI, § 1. In 1875, an amendment further defined the parameters of "imprisonment with hard labor" to authorize only certain types of labor, to exclude from that punishment those with certain underlying convictions, and to keep laborers always under State supervision. N.C. Const. of 1868, amends. of 1875, art. XI, § 1. In our current constitution, however, hard labor was eliminated from Article XI altogether, N.C. Const. art. XI, § 1, because the people accepted the North Carolina State Constitution Study Commission's recommendation to do so, *see* N.C. State Const. Study Comm'n, *Report of the North Carolina State Constitution Study Commission* 65, 88–89 (1968), https://www.ncleg.gov/Files/Library/studies/1968/st12308.pdf. In making this recommendation, the Commission noted that hard labor as punishment was "an obsolete practice." *Id.* at 89.

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the concurrence do not compel a different result. They are either (a) taken out of context, *e.g.*, *Griffin*, 190 N.C. at 137, 129 S.E. at 412; *Woodlief*, 172 N.C. at 891, 90 S.E. at 140; *State v. Burnett*, 179 N.C. 735, 741, 102 S.E. 711, 714 (1920); (b) federal cases that are inapplicable to the meaning of Article I, Section 27, *Robinson*, 370 U.S. at 667, 82 S. Ct. at 1420–21; (c) cases discussing *federal* standards, *State v. Green*, 348 N.C. 588, 603, 502 S.E.2d 819, 828 (1998); (d) obiter dictum that was subsequently refuted by this Court, *compare Lee*, 166 N.C. at 256–57, 80 S.E. at 979 (dictum) ("As we have given a new trial for the errors above stated, we will not now discuss or consider [whether the sentence was cruel or unusual], as to which it is unnecessary that we intimate any opinion."), *with, e.g.*, *Wright*, 261 N.C. at 358, 134 S.E.2d at 625 ("If the sentence is disproportionately long, the Governor and the Board of Paroles have ample authority to make adjustment. This Court, *lacking such authority*, must affirm the judgment." (emphasis added)); or (e) cases interpreting different constitutional provisions altogether, *State ex rel. Bryan v. Patrick*, 124 N.C. 651, 661–62, 33 S.E. 151, 153 (1899) (discussing the Exclusive Emoluments Clause, the Hereditary Emoluments and Honors Clause, and the Perpetuities and Monopolies Clause and making a cursory analogy to Article I, Section 27's predecessor, including its Excessive Bails Clause and Excessive Fines Clause).

In 1996, the people again altered Article XI by adding new, alternative punishments such as probation, restitution, and community service.[15] These reform efforts were intended to improve the offender's chances of rehabilitation and to relieve prison overcrowding. *State Constitution* (2d ed.) 193.

As can be seen, each change to the text of Article XI over the years reflects a decision made by the people—not judges—about what punishments are constitutionally permissible.[16] When the people desired to restrict—and eventually forbid—"degrading" or "obsolete" methods of punishment, or to make specific provision for emerging methods of punishment, they ratified amendments to Article XI, leaving Article I, Section 27 unaltered. As discussed above, by setting the "ceiling" for criminal

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15. An Act to Repeal the Law Providing That a Defendant May Choose Imprisonment Rather Than Probation or An Alternative Punishment and to Amend the Constitution to Provide That Probation, Restitution, Community Service, Work Programs, and Other Restraints on Liberty Are Punishments That May Be Imposed on a Person Convicted of a Criminal Offense, ch. 429, § 2, 1995 N.C. Sess. Laws 1158, 1158 (adding to the text of Article XI alternative punishments such as the "suspension of a jail or prison term with or without conditions, restitution, community service, restraints on liberty, [and] work programs").

16. The concurrence opines that *judges* must periodically alter the constitution's meaning to keep abreast of society. It seemingly would be content, if need be, to excise the people from these calculations and to create constitutional parameters that the people had no voice in shaping. Indeed, in the concurrence's view, Article I, Section 27's protections morph over time, turning on "prevailing beliefs" and "evolving understandings of adolescence and punishment," or "modern science and legal developments." And rather than rely on the citizenry to account for these developments through their legislators changing penal laws or the constitutional amendment process, *see generally* N.C. Const. art. XIII (providing for constitutional amendments and revisions), the concurrence would brazenly empower judges to determine, without direction from the people, when the General Assembly's prescribed punishments have become cruel or unusual.

But because it was "[w]e[ ] the people," not we the Justices, who ordained and established the constitution, N.C. Const. pmbl., this Court must take a different view, *see Atkinson*, 275 N.C. at 320, 167 S.E.2d at 261 ("The constitutionality of a state statute cannot be determined by taking a Gallup poll of the opinion of the public with reference to the efficacy or the morality of a statute authorizing the imposition of [a punishment] . . . . The power of a sovereign . . . to enact legislation is . . . not [to be determined] by public opinion polls or by writings in sociological journals or treatises."). The people, who are the repository of all political power, must be included in this inquiry. If the "prevailing beliefs" about what constitutes a "cruel" or "unusual" punishment have truly changed, the people may express their will through their elected representatives in the General Assembly and, when necessary, a constitutional amendment. The constitution does not empower judges to judicially amend it. *See* N.C. Const. arts. IV, XIII. This truth is particularly applicable in the case of Article I, Section 27. The people did not delegate the power to make penal policy to the judicial branch; rather, they assigned it to their representatives in the General Assembly.

punishments in Article XI, the people gave the General Assembly certain parameters within which it could freely set sentencing policies without transgressing Article I, Section 27's proscription of "cruel or unusual" punishments. In other words, the people prescribe the outer limits on punishment via Article XI, and any punishment within that outer limit is neither cruel nor unusual. As shown, our Cruel or Unusual Punishments Clause cases reflect this understanding. *See*, *e.g.*, *Stansbury*, 230 N.C. at 591, 55 S.E.2d at 187. Thus, because Article XI—which has no counterpart in the Federal Constitution—expressly authorizes imprisonment without limitations based on the age of the offender, it is plain that a statute prescribing life without parole—or a court's sentencing order inflicting a punishment in accordance therewith—cannot be "cruel or unusual" within the meaning of Article I, Section 27, regardless of the age of the offender. *See*, *e.g.*, *Allen*, 346 N.C. at 737, 488 S.E.2d at 191 ("We conclude that the term 'life imprisonment without parole' falls within the meaning of the constitutional term 'imprisonment,' so the sentence was authorized by the [state] [c]onstitution."); *cf. State v. Womble*, 343 N.C. 667, 688, 473 S.E.2d 291, 303 (1996) (holding the defendant's argument that "execution of juveniles constitutes cruel and unusual punishment in violation of the . . . North Carolina Constitution [ ] . . . is without merit" because "[t]his Court has repeatedly held that the North Carolina death penalty statute, which provide[d] that a person *seventeen years old* or older who commits first-degree murder may be sentenced to death, is not unconstitutional" (emphasis added) (citing *State v. Skipper*, 337 N.C. 1, 58, 446 S.E.2d 252, 284 (1994) (collecting cases))), *invalidated on other grounds by Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183 (2005).[17]

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17. The concurrence struggles to overcome this plain reading, and instead it seeks to smuggle in confusion where none exists. Despite the conspicuous absence of *any* limitations based on the age of an offender in Article XI, it would impute one by virtue of the following language: "The object of punishments being not only to satisfy justice, but also to reform the offender and thus prevent crime." N.C. Const. art. XI, § 2. Although this statement does set out the constitution's "penal philosophy," the section then expressly authorizes the death penalty for murder. This evinces the people's determination that those who commit murder—and the other enumerated crimes—may be incapable of reform. *State Constitution* 158. Ultimately, however, the people placed the responsibility of balancing justice, crime prevention, and rehabilitation on the General Assembly, N.C. Const. art. XI, § 2, through which they express their will by the acts of their elected lawmakers, *e.g.*, *Jones*, 116 N.C. at 570, 21 S.E. at 787.

In addition to its strained use of Article XI, Section 2, the concurrence relies on Article I, Section 15, where the people declared their "right to have the privilege of an education" and imposed "the duty of the State to guard and maintain that right." N.C. Const. art. I, § 15. It further cites Article IX, Section 1, which, in full, states, "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools,

5. Interplay with the Eighth Amendment

As stated above, the Eighth Amendment's proscription of the infliction of "cruel and unusual punishments," U.S. Const. amend. VIII, is the supreme law of the land, *id.* art. VI, cl. 2, and applicable to the States, *see Robinson*, 370 U.S. at 666–67, 82 S. Ct. at 1420–21. Therefore, this Court must ensure that the Federal Constitution's protections are given full effect regardless of how we construe the state constitution.

This Court's early cases applying both Article I, Section 27 and the Eighth Amendment continued to apply the traditional rule that a sentence was neither cruel nor unusual so long as it did not exceed the limits fixed by a constitutional statute or common law. *E.g.*, *Greer*, 270 N.C. at 146, 153 S.E.2d at 851. In fact, in several cases, this Court observed that "[t]he [f]ederal rule coincide[d] with the North Carolina rule." *Mitchell*, 283 N.C. at 471, 196 S.E.2d at 742 (citing *Martin v. United States*, 317 F.2d 753, 755 (9th Cir. 1963)); *accord*, *e.g.*, *Frank*, 284 N.C. at 147, 200 S.E.2d at 176; *Tolley*, 290 N.C. at 362, 226 S.E.2d at 364 (collecting cases).[18] Over time, however, federal courts began to

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libraries, and the means of education shall forever be encouraged." N.C. Const. art. IX, § 1. These provisions certainly evince our State's resolve to foster an upright, capable citizenry—even from youth. Textually, however, they tell us nothing about what makes a punishment cruel or unusual.

Similarly, the concurrence's characterization of *James* as an intentional shift towards "modern principles" of juvenile sentencing is patently incorrect. In the first place, *James* did not cite to Article I, Section 27, making its applicability to the present inquiry strained at best. *See* 371 N.C. at 78–99, 813 S.E.2d at 198–211. Moreover, the concurrence seemingly overlooks *James*'s grounding in statutory interpretation, federal caselaw, and constitutional principles rather than nebulous sociological concepts. The Court in *James* discussed *Miller*'s federal requirement that sentencing authorities must consider the relevant differences between children and adults in the context of *James*'s conclusion that the *Miller*-Fix Statute was not "unconstitutionally arbitrary or vague[ ]" under the Eighth Amendment. *Id.* at 94–97, 813 S.E.2d at 207–209. It further held that the statute did not constitute an ex post facto law or create a presumption in favor of the imposition of a sentence of life without parole. *Id.* at 84–93, 97–99, 813 S.E.2d at 201–07, 209–11. Simply put, the concurrence is wrong about *James*'s applicability to how this Court interprets and applies Article I, Section 27.

18. The concurrence insists that we should primarily frame any historical understanding of the Cruel or Unusual Punishments Clause around the 1971 constitution. So framed, the concurrence posits that this Court should consider it significant that in 1971, which was after the Supreme Court recognized that the Eighth Amendment was applicable to the States, the people again chose to use the disjunctive "or." It insists that this means that the people indisputably intended for Article I, Section 27's proscription of cruel or unusual punishments to provide more protection than the Eighth Amendment's proscription of cruel and unusual punishments. The concurrence's position suffers from several flaws.

read more protection into the Eighth Amendment. Thereafter, even if Article I, Section 27 did not provide the same protection, meaning a sentence would have survived the state constitution's traditional scrutiny,

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First, this Court did not adopt the concurrence's view in the early cases interpreting the 1971 constitution. *See, e.g.*, *Mitchell*, 283 N.C. at 471, 196 S.E.2d at 742; *Frank*, 284 N.C. at 147, 200 S.E.2d at 176; *Tolley*, 290 N.C. at 362, 226 S.E.2d at 364.

Second, the 1971 constitution did not create the Cruel or Unusual Punishments Clause. Rather, the 1971 constitution carried over the Clause from Article I, Section 14 of the 1868 constitution, which itself adopted the Clause from Section X of the Declaration of Rights in the 1776 constitution. And as discussed above, the Cruel or Unusual Punishments Clause has even more ancient roots, stemming from the English Bill of Rights. The modern text remains in line with that found in our earlier constitutions. Thus, analysis of Article I, Section 27 must begin with the 1776 constitution and the context in which the people adopted the provision. *See, e.g.*, *Harper*, 384 N.C. at 351–64, 886 S.E.2d at 431–39 (noting that "[t]he [Free Elections C]lause first appeared in the 1776 constitution," acknowledging its roots in English law, and then explaining how the Clause evolved through the 1868 and 1971 constitutions). To pretend that constitutional history began in 1971 would require this Court to turn a blind eye to centuries of constitutional and precedential context paramount in understanding the Cruel or Unusual Punishment Clause's meaning and scope.

Third, the historical context in which the people enacted the 1971 constitution lacks much persuasive value. The Study Commission that proposed the 1971 constitution stated that it was principally concerned with "clarity and consistency of language" and that although "[s]ome of the changes [were] substantive, . . . *none [were] calculated to impair any present right of the individual citizen or to bring about a fundamental change in the power of state and local government or the distribution of that power.*" *Report of the North Carolina State Constitution Study Commission* 10 (emphasis added); *see also Berger*, 368 N.C. at 643, 781 S.E.2d at 255 (stating the primary goal of the 1971 constitution was "editorial pruning, rearranging, rephrasing, and modest amendments" and that "the great majority of the changes embraced in the [1971] constitution [took] the form of [non-substantive] deletions of or contractions in language" (quoting *Report of the North Carolina State Constitution Study Commission* 71, 73)). Our precedents have repeatedly relied on the Study Commission's characterization of its edits as non-substantive. *E.g.*, *N.C. State Bar v. DuMont*, 304 N.C. 627, 636, 286 S.E.2d 89, 95 (1982) ("An intent to modernize the language of the existing constitution does not, in our opinion, show that the framers of the 197[1] [c]onstitution intended that instrument to enlarge upon the rights granted by the 1868 [c]onstitution. Indeed, we think that such an intent shows that the 197[1] framers intended to preserve intact all rights under the 1868 [c]onstitution."); *Sneed*, 299 N.C. at 616, 264 S.E.2d at 112 (concluding, with respect to the substantive purpose of the 1971 constitution, that "we cannot read into the voice of the people an intent that in all likelihood had no occasion to be born").

Fourth, the concurrence's position that the 1971 constitution evinced the people's unquestionable intention to adopt protections above and beyond those afforded by the Eighth Amendment suffers from a practical shortcoming. If the people intended to incorporate the Eighth Amendment's protections by reference and enshrine more protections, there was no reason to reinclude Article XI's provisions concerning the availability of punishments. Indeed, the people would have expected the judicial branch to simply refer to federal caselaw interpreting the Cruel and Unusual Punishments Clause to determine what punishments were allowed or disallowed. But this interpretation would render Article XI superfluous. The people certainly did not intend this meaning.

this Court dutifully invalidated sentences that transgressed the Eighth Amendment's changing safeguards. *See, e.g.*, *State v. Carroll*, 282 N.C. 326, 333–34, 193 S.E.2d 85, 89–90 (1972).

Thus, although the Cruel or Unusual Punishments Clause now generally provides less protection for criminal defendants than its Eighth Amendment counterpart, this Court, "in recognition of the supremacy of the Federal Constitution," has routinely applied Article I, Section 27 the same way as the Eighth Amendment—i.e., in lockstep. *Kelliher*, 381 N.C. at 612, 873 S.E.2d at 403 (Newby, C.J., dissenting); *accord, e.g.*, *Green*, 348 N.C. at 603 & n.1, 502 S.E.2d at 828 & n.1 (rejecting calls to read broader protections into Article I, Section 27, specifically highlighting the lack of "any compelling reason to adopt such a position"); *Medley v. N.C. Dep't of Corr.*, 330 N.C. 837, 842–45, 412 S.E.2d 654, 658–59 (1992) (construing the Eighth Amendment and Article I, Section 27 simultaneously to impose the same nondelegable duty to provide inmates adequate medical care upon the State); *State v. Peek*, 313 N.C. 266, 275–76, 328 S.E.2d 249, 255–56 (1985) (reviewing Eighth Amendment and Article I, Section 27 claims under the same standard and ultimately determining that a defendant's sentence did not violate either constitution). That is, even when a defendant asserts a constitutional challenge to his sentence under the state constitutional proscription of cruel *or* unusual punishments, this Court examines his claims "in light of the general principles enunciated by this Court and the Supreme Court [of the United States] guiding cruel *and* unusual punishment analys[e]s." *Green*, 348 N.C. at 603, 502 S.E.2d at 828 (emphasis added).

Relevant here, although a truly independent interpretation of the *state constitution* would mean life without parole sentences for juveniles are not "cruel or unusual" punishments, the Eighth Amendment provides juvenile offenders protections that Article I, Section 27 does not, including heavily restricting the availability of life without parole sentences. *See, e.g.*, *Miller*, 567 U.S. at 479–80, 489, 132 S. Ct. at 2469, 2475 (ending mandatory life without parole sentences for juvenile offenders but allowing discretionary life without parole sentences for juvenile offenders); *Montgomery*, 577 U.S. at 208–09, 136 S. Ct. at 733–34 (clarifying that life without parole is forbidden for juvenile offenders whose crimes only "reflect the transient immaturity of youth"). Therefore, the Court of Appeals properly evaluated defendant's constitutional challenge under the general principles guiding the Cruel *and* Unusual Punishment Clause analysis, and defendant's initial argument that the Court of Appeals needed to consider his claims under the "more protective" state constitution fundamentally fails.

B. Merits Review of Defendant's Constitutional Challenge

We now turn to consider defendant's contention that the Court of Appeals totally denied merits review of his constitutional challenge to his sentences. Our review of the Court of Appeals' opinion reveals that it addressed the arguments defendant presented. Indeed, the Court of Appeals fully resolved defendant's challenges to the trial court's findings of fact, weighing of mitigating factors, and application of legal standards and found no error. *Tirado II*, slip op. at 8–13, 15–17. Importantly, the court also fully addressed defendant's constitutional attacks on his sentences, observing that the trial court complied with "*Miller* and its progeny," as well as North Carolina's discretionary sentencing procedure, by "consider[ing] all relevant mitigating circumstances and evidence before deciding whether to impose [life without parole] sentences." *Id.* at 13–15. The Court of Appeals then addressed the heart of defendant's constitutional argument—that consecutive sentences of life without parole were inappropriate because "the 'evidence established that [defendant] was not one of the rare juveniles who is permanently incorrigible or irreparably corrupt.' " *Id.* at 15 (alteration in original). The Court of Appeals rejected this argument, concluding that "the evidence shows otherwise"—namely, that defendant's crimes show he was one of the rare, permanently incorrigible juveniles for whom a sentence of life without parole was appropriate. *Id.* After considering all of defendant's arguments, the Court of Appeals concluded, "In sum, the resentencing in defendant's case complied with binding statutory authority and case law precedent as the sentence imposed was not mandatory and because the trial judge had the discretion to impose a lesser punishment in light of defendant's youth." *Id.*

Defendant's argument that the Court of Appeals declined to perform merits review of his constitutional challenge appears to hang on one concluding sentence in the Court of Appeals' analysis: "For these reasons, and those discussed above, we need not address any as-applied constitutional challenge." *Id.* (citing *State v. Goodman*, 298 N.C. 1, 20, 257 S.E.2d 569, 582 (1979)). As we have shown, however, the Court of Appeals confirmed that defendant received a constitutional sentence under both the United States Constitution and the North Carolina Constitution by ensuring that the trial court complied with all requirements imposed by statute and caselaw, properly considered all the mitigating evidence, and imposed an appropriate, proportional sentence. And contrary to defendant's assertions, the Court of Appeals did not hold that *Jones* foreclosed as-applied challenges to sentences. Any inartful wording notwithstanding, the Court of Appeals provided comprehensive merits review of defendant's constitutional arguments.

C. Compliance with *State v. Kelliher*

Finally, in response to our special order's directive, defendant concedes that on the facts of this case, the trial court's sentencing did not run afoul of *State v. Kelliher*, 381 N.C. 558, 873 S.E.2d 366 (2022). We have conducted an independent review of the trial court's resentencing order and conclude that the order does not implicate *Kelliher* at all for at least two reasons.

First, defendant, whom the trial court expressly found to be irreparably corrupt and sentenced to consecutive sentences of life *without* parole, is not a member of the narrow subset of juvenile homicide offenders to which *Kelliher* could apply. The narrow question before the Court in *Kelliher* was whether sentencing the defendant to two consecutive sentences of life *with* parole for his two first-degree murder convictions was unconstitutional when the trial court expressly found that the defendant was neither incorrigible nor irredeemable. *Id.* at 560–66, 597, 873 S.E.2d at 370–74, 393–94 (forging a theory of de facto life sentences to answer the question affirmatively). Accordingly, *Kelliher* applies only to juvenile homicide offenders whom the trial court (1) expressly finds to be neither incorrigible nor irredeemable and (2) sentences to multiple, consecutive terms of life *with* parole. *Id.* at 561–64, 873 S.E.2d at 371–73. Because defendant does not meet either of these criteria, *Kelliher* is facially inapplicable to his case.

Second, the only portion of the *Kelliher*'s analysis that is arguably applicable to the present case is nonbinding obiter dictum. *See generally*, *e.g.*, *Trs. of Rowan Tech. Coll. v. J. Hyatt Hammond Assocs.*, *Inc.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985) ("Language in an opinion not necessary to the decision is obiter dictum and later decisions are not bound thereby." (emphasis omitted)). *Kelliher* suggested that Article I, Section 27 requires a trial court to "expressly find[ ] that a juvenile homicide offender is one of those 'exceedingly rare' juveniles who cannot be rehabilitated" before sentencing him to life without parole. 381 N.C. at 587, 873 S.E.2d at 387 (dictum). Because the trial court there had expressly found that the defendant was "neither incorrigible nor irredeemable," however, the defendant was already constitutionally ineligible for a life without parole sentence. *See Montgomery*, 577 U.S. at 208–09, 136 S. Ct. at 733–34. Thus, the statement requiring the trial court to make an express finding of incorrigibility before sentencing a defendant to life without parole was unnecessary in determining the outcome of the case. *See State v. Borlase*, 896 S.E.2d 742, 749–50 (N.C. Ct. App. 2024). Therefore, this portion of *Kelliher* was obiter dictum, and regardless of whether the trial court in the present case made an express finding

of defendant's incorrigibility, it did not risk running afoul of *Kelliher*. *Cf. Jones*, 141 S. Ct. at 1313 (concluding separate findings of a juvenile defendant's incorrigibility are not required).

III. Conclusion

In sum, the Court of Appeals properly analyzed defendant's state constitutional objections to his consecutive sentences of life without parole. As we have explained, Article I, Section 27 provides *less* protection for juvenile criminal defendants than the Eighth Amendment. Because North Carolina courts lockstep the application of the Cruel or Unusual Punishments Clause with the federal constitutional analysis to ensure that no citizen is deprived of the Eighth Amendment's guarantees, the Court of Appeals had no reason to separately analyze defendant's constitutional argument under the state constitution. Thus, defendant's assertion that his claim should have been considered under the "more protective" state constitution fails. Furthermore, the Court of Appeals comprehensively addressed all the arguments that defendant presented. Therefore, the Court of Appeals' analysis was proper. Finally, the sentencing order in this case does not implicate, and therefore did not run afoul of, *Kelliher*. For these reasons, the decision of the Court of Appeals is affirmed.

AFFIRMED.

Justice BERGER concurring.

I concur with the majority but write separately because my concurring colleague's discussion of *Kelliher* and the precedential weight to which it is entitled misses the mark. That opinion squarely addressed findings that should be made by a trial court when sentencing juvenile defendants convicted of homicide. But the decoupling of Article I, Section 27 from the Eighth Amendment in *Kelliher* did not cement this ruling as binding precedent because it is wildly inconsistent with our prior case law.

The concurrence acknowledges that "we did indeed take a lockstep approach, treating [Article I,] Section 27 as a carbon copy of the Eighth Amendment" in cases leading up to and including *Green*.[1] In fact, the

1. The concurrence also suggests that *State v. James*, 371 N.C. 77 (2018), is the fork-in-the-road case which supports *Kelliher*'s rationale; however, Article I, Section 27 is never

concurrence also states in a footnote that defendant here has conceded "Section 27 and the Eighth Amendment prescribe identical standards."

So, what in the text of Article I, Section 27 changed between *Green* and *Kelliher*? Well, nothing at all.

While every policy consideration set forth in *Kelliher* and reiterated in the concurrence here "may be very sensible," they are not found in our state Constitution. Antonin Scalia, *Scalia Speaks: Reflections on Law, Faith, and Life Well Lived* 192 (Christopher J. Scalia & Edward Whelen eds., 2017). In addition, and critical to the discussion of precedent, the reasoning in *Kelliher* did not flow from a series of decisions issued by this Court. Because *Kelliher* is an isolated opinion met with a well-reasoned dissent, it is entitled to little precedential weight.

Legal commentators have stated that "the principle of stare decisis proclaims, in effect, that where a principle of law *has become settled by a series of decisions*, it is binding on courts and should be followed in similar cases." Allyson K. Duncan & Frances P. Solari, *North Carolina Appellate Advocacy* § 1–9, at 8 (1989) (emphasis added). Indeed, this Court has stated that, contrary to the creative approach in *Kelliher*, "[t]he principle of stare decisis directs this Court to *adhere to its long-established precedent* to provide consistency and uniformity in the law." *West v. Hoyle's Tire & Axle, LLC*, 383 N.C. 654, 659 (2022) (emphasis added). *See also State v. Ballance*, 229 N.C. 764, 767 (1949) ("[W]here a principle of law has become *settled by a series of decisions*, it is binding on the courts and should be followed in similar cases." (emphasis added)); *Lowdermilk v. Butler*, 182 N.C. 502, 506 (1921) ("[A] point which has *often been adjudged* should be permitted to rest in peace." (emphasis added) (citing *Spicer v. Spicer*, Cro. Jac. 527, 79 Eng. Reprint, 451; 1 Kent's Com. 477)); *Harper v. Hall*, 384 N.C. 292, 374 (2023) ("[The previous opinion of the Court] does not meet any criteria for adhering to *stare decisis*—it is neither long-standing nor has it been relied upon in other cases."); *Williamson v. Rabon*, 177 N.C. 302, 307 (1919) ("[A] single decision can seldom serve as a basis for stare decisis . . . ." (cleaned up)); *State v. Walker*, 385 N.C. 763, 769 (2024) (Berger, J., concurring) ("Put another way, an isolated holding may be persuasive, but it is not binding . . . .").

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referenced in *James*. The only opinions from this Court which depart from lockstepping Article I, Section 27 and the Eighth Amendment are *Kelliher* and *Conner*. Both were issued on the same day, and both are rooted in evolving policy preferences, not reliance on precedent. Discussion of *Kelliher*'s precedential weight herein also applies to *Conner*.

Although we tether our reasoning to prior decisions "both out of respect for the opinions of our predecessors and because it promotes stability in the law and uniformity in its application," *Wiles v. Constr. Co.*, 295 N.C. 81, 85 (1978),[2] "*stare decisis* has never been treated as an inexorable command." *Ramos v. Louisiana*, 590 U.S. 83, 105 (2020) (cleaned up).

"When we are presented with *a single decision* which we believe to have been inadvisedly made, it is encumbent on us to overrule it if we entertain a different opinion on the question submitted." *Sidney Spitzer & Co. v. Comm'rs of Franklin Cnty.*, 188 N.C. 30, 32 (1924) (cleaned up) (emphasis added). *See also Ballance*, 229 N.C. at 767 ("[*S*]*tare decisis* will not be applied . . . to preserve and perpetuate error and grievous wrong."); *Patterson v. McCormick*, 177 N.C. 448, 457 (1919) ("The rule of stare decisis cannot be applied to perpetuate error.").[3]

Kelliher, however, did not suggest that our prior precedent was wrong, only that, as admitted by the concurrence here, our Constitution "evolved" along with other policy considerations. But, a legal rule, like the lockstepping of the Eighth Amendment and Article I, Section 27, does not simply evaporate because constitutional evolutionists decide to chart a new course. We have explicitly recognized that an isolated decision, especially one that departs from long-standing principles, does not carry the binding weight of stare decisis. This ensures that the Court's jurisprudence is built on well-considered and consistent rulings rather than outliers and one-offs. *Kelliher* is an outlier, and this Court appropriately corrects course today.

Justice BARRINGER and Justice ALLEN join in this concurring opinion.

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2. The Supreme Court of the United States has articulated that "[s]tare *decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 916 (2018) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).

3. The concurrence argues, based upon a law review article written after *Kelliher*, that our prior jurisprudence on this issue was the result of a mistake—a claim which, even if true, would not change *Kelliher*'s value as precedent. An isolated opinion, like *Kelliher*, is hardly a settled principle. *See Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 455 (2015) ("An argument that . . . we got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent. Or otherwise said, it is not alone sufficient that we would decide a case differently now than we did then. To reverse course, we require as well what we have termed a 'special justification'—over and above the belief 'that the precedent was wrongly decided.' . . . Respecting stare decisis means sticking to some wrong decisions." (citation omitted)).

Justice EARLS concurring in the result only.

The Court today resolves two narrow questions: whether the Court of Appeals considered Mr. Tirado's claim under Article I, Section 27 of North Carolina's Constitution, and whether Mr. Tirado's sentence complies with *State v. Kelliher*, 381 N.C. 558 (2022). As the majority explains, the Court of Appeals reviewed the merits of Mr. Tirado's state constitutional claim, and his sentence aligns with *Kelliher*. On these points, the Court rightly affirms the decision below. I therefore concur in the result.

But the majority ventures beyond the issues before us to offer a gratuitous and sweeping commentary on Section 27 and its overlap with the Eighth Amendment. This discussion is pure dicta. It strays into areas this Court deliberately excluded from its review and addresses questions the parties do not contest, brief, or argue. This portion of the opinion is logically irrelevant to this Court's ruling and therefore nonbinding. On the merits, too, I disagree with the propositions asserted by the majority about the meaning and scope of Section 27.

I. The Majority's Discussion of Section 27 is Dicta.

A dictum is "an assertion in a court's opinion of a proposition of law which does not explain why the court's judgment goes in favor of the winner." *See* Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. Rev. 1249, 1256 (2006). Said differently, any "[l]anguage in an opinion not necessary to the decision is . . . dictum, and later decisions are not bound thereby." *See Trs. of Rowan Tech. Coll. v. J. Hyatt Hammond Assocs.*, 313 N.C. 230, 242 (1985). This rule rests on principles of pragmatism and judicial restraint. *See Moose v. Bd. of Comm'rs*, 172 N.C. 419, 433–34 (1916). Because judges cannot predict the future or foresee how a decision will "bear[ ] on all other cases," an opinion's language is necessarily tethered to "the facts of the case under consideration." *Id.* at 434 (cleaned up). Relevant, too, is the judiciary's assigned function: deciding the questions "presented to it for solution in the proper course of judicial proceedings." *Hayes v. City of Wilmington*, 243 N.C. 525, 537 (1956) (cleaned up).

In line with that role, "[o]fficial character attaches only to those utterances of a court which bear directly upon the specific and limited questions" properly before it. *Id.* (cleaned up). The inverse is also true—statements "[o]ver and above what is needed for the solution of these questions" are "unofficial." *Id.* (cleaned up); *see also Over-Look Cemetery, Inc. v. Rockingham Cnty.*, 273 N.C. 467, 471 (1968) (explaining that an "expression of opinion upon an incidental question not

presented in the appeal" lacks "the force of an adjudication upon the point" (quoting *Miller v. Lash*, 85 N.C. 51, 56 (1881))). This means that assertions made "by the reviewing court, or by the writing justice, on points arising outside of the case and not embodied in the determination made by the court" are "rendered without jurisdiction or at least extrajudicial." *Hayes*, 243 N.C. at 536–37 (cleaned up).

Under our precedent, a statement is dictum if it (1) goes beyond the "specific and limited questions" that are "actually presented" or (2) is not "necessarily involved in determining the case." *Id.* at 536–37; *see also State v. Spence*, 274 N.C. 536, 542 (1968) (instructing that a statement is dictum if it was not "directly presented" for review or "necessary to a decision"). The majority's Section 27 discussion meets both prongs.

To start, the scope of Section 27's protections is not "directly presented" by Mr. Tirado's appeal. *Id.* This case's path to this Court makes that clear. Mr. Tirado sought discretionary review on two precise issues. This Court, in a special order, allowed just one without changing Mr. Tirado's formulation: "Did the Court of Appeals fail to consider Mr. Tirado's claim under Article I, Section 27 of the North Carolina Constitution?" We also directed the parties to address whether Mr. Tirado's sentence complied with *Kelliher*, 381 N.C. 558. Our review is thus confined to these two discrete questions—nothing more. *See* N.C. R. App. P. 16(a) ("[R]eview in the Supreme Court is limited to consideration of the issues stated in . . . the petition for discretionary review . . . unless further limited by the Supreme Court . . . ."); *Cherry Cmty. Org. v. Sellars*, 381 N.C. 239, 256 (2022) ("Unless a party asserts the right to appeal by virtue of the presence of a dissenting opinion within the Court of Appeals' decision in a case, our review is limited to consideration of the issues stated in the petition for discretionary review and the response thereto and properly presented in the new briefs." (cleaned up)).

Given the scope of our review, this case is straightforward. In response to our special order, Mr. Tirado concedes that his sentence complies with *Kelliher*.[1] The trial court expressly found him to be "permanently

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1. Mr. Tirado has repeated this admission at every turn, including in his opening brief, his reply brief, and at oral argument. *See* Appellant's New Br. at 27, State v. Tirado, No. 267PA21 ("The trial court complied with the procedural requirements laid out in *Kelliher*."); *id.* at 30 (conceding that trial court complied with *Kelliher* but clarifying that the "issue in this matter does not rely on *Kelliher*'s holding that the North Carolina Constitution requires more than the United States Constitution, but rather on the complete denial of appellate review of [Mr. Tirado's] as-applied challenge to his sentence"); *see* Appellant's Reply Br. at 2, State v. Tirado, No. 267PA21 ("As Mr. Tirado acknowledges in his opening brief . . . *Kelliher* does not apply to his case, which inherently results in his

incorrigible," placing him outside *Kelliher*'s protective scope. The State concurs.[2] So the only remaining issue is whether the Court of Appeals failed to review Mr. Tirado's state constitutional claim.[3] The parties disagree on this procedural point. Mr. Tirado contends that the lower court

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claim being functionally analyzed under the North Carolina Constitution just as it would be under the United States Constitution."); Oral Argument at 8:35, *State v. Tirado* (No. 267PA21) (Sept. 25, 2024), https://www.youtube.com/watch?v=PhzjanIaKIU (last visited December 4, 2024) ("The issue I brought was whether the [Court of Appeals] improperly denied merits review of my client's as-applied Article I, Section 27 claim. This Court directed that we address *Kelliher*. Both the State and I agree that *Kelliher* does not have any direct applicability to that question in this case.").

2. *See* Oral Argument at 18:24, *State v. Tirado* (No. 267PA21) (Sept. 25, 2024), https://www.youtube.com/watch?v=PhzjanIaKIU (last visited December 4, 2024) ("Defendant here now concedes in his briefing before this Court that, in his circumstances, the State Constitution provides no broader protection than the Eighth Amendment. So he's essentially said, 'Although this Court has, in *State v. Kelliher* interpreted the Eighth Amendment and Section 27 as not needing to be interpreted in lockstep, they should be interpreted in lockstep for purposes of his case.' So he's conceded that there's not some kind of broader protection that he is entitled to under the State Constitution here."); *id.* at 29:03 ("[T]his Court has directed the parties to address whether or not Defendant's resentencing here complied with this Court's recent decision in *State v. Kelliher*. And again, Defendant has conceded this issue. He's agreed that under the precedent set by *Kelliher*, Defendant's sentence was, was compliant."); *id.* at 31:06 ("Defendant has, in essence, conceded before this Court that he's not entitled to any greater protection under the State Constitution, and he's conceded that the trial judge here complied with the requirements of *Kelliher*.").

3. Again, Mr. Tirado made this clear in his briefs before this Court, as well as during oral argument. *See* Appellant's New Br. at 22, State v. Tirado, No. 267PA21 ("When [Mr. Tirado] brought his claims to the Court of Appeals, they refused to provide merits review of his claim that his sentence of LWOP was unconstitutional as-applied to him. If North Carolina is going to permit trial courts to sentence children to die in prison, surely those children should receive the appellate review to which they are entitled."); *id.* at 30 ("The issue in this matter does not rely on *Kelliher*'s holding that the North Carolina Constitution requires more than the United States Constitution, but rather on the complete denial of appellate review of [Mr. Tirado's] as-applied challenge to his sentence."); *see also* Oral Argument at 8:35, *State v. Tirado* (No. 267PA21) (Sept. 25, 2024), https://www.youtube.com/watch?v=PhzjanIaKIU (last visited December 4, 2024) ("The issue I brought was whether the [Court of Appeals] improperly denied merits review of my client's as-applied Article I, Section 27 claim. This Court directed that we address *Kelliher*. Both the State and I agree that *Kelliher* does not have any direct applicability to that question in this case."); *id.* at 9:34 ("[T]hat is the very narrow issue here: Did Paco Tirado not get appropriate appellate review of his as-applied challenge because the Court of Appeals improperly analyzed the meaning and the holding of *Jones*?"); *id.* at 12:01 ("The State in their brief seems to try to argue that the issue that I have brought to this Court is that difference [between the Eighth Amendment and Section 27]. It is not. The issue to be briefed was was [Mr. Tirado] improperly denied merits review of his Article I, Section 27 claim that his sentence was unconstitutional? That's what we're here for."); *id.* at 35:33 ("This case is simple. The issue to be briefed was whether [Mr. Tirado] was improperly denied merits review of his Article I, Section 27 challenge, and the answer to that is clear. I ask that you remand this case to the Court of Appeals for them to conduct the proper merits review.").

"simply did not review" this issue, while the State maintains that the court "*did* acknowledge and rule on [Mr. Tirado's] state constitutional challenge." Past that narrow dispute, however, the parties see eye to eye. Both agree that Section 27, applied to Mr. Tirado's case, does not extend distinct or broader protections than the Eighth Amendment.[4] And so neither party asks us to wade into the constitutional substance of Section 27 or its interplay with the Eighth Amendment. That issue is simply not before us.

The majority answers the narrow question in dispute, concluding that the Court of Appeals did not withhold review of Mr. Tirado's state constitutional claim. That court, as the majority explains, reached and considered the substance of his constitutional arguments. While some of the opinion's language may have been inartful, the court reviewed the permissibility of Mr. Tirado's sentence under the state and federal constitutions. On this point, I agree.

That should end the matter. With *Kelliher* conceded and the state constitutional claim reviewed, there is nothing left to decide. By affirming the Court of Appeals—both its analysis and the bottom-line decision—the majority resolves everything properly before us. *See Est. of Fennell v. Stephenson*, 354 N.C. 327, 331–32 (2001) (limiting review to issues raised in the petition for discretionary review); *State v. Miller*,

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4. Mr. Tirado admits that, on these facts, Section 27 and the Eighth Amendment prescribe identical standards. *See* Appellant's Reply Br. at 2, State v. Tirado, No. 267PA21 ("As Mr. Tirado acknowledges in his opening brief . . . *Kelliher* does not apply to his case, which inherently results in his claim being functionally analyzed under the North Carolina Constitution just as it would be under the United States Constitution."); *see also* Oral Argument at 7:05, *State v. Tirado* (No. 267PA21) (Sept. 25, 2024), https://www.youtube.com/watch?v=PhzjanIaKIU (last visited December 4, 2024) ("[I]n [Mr. Tirado's] case, these things are the same, the Eighth Amendment and Article I, Section 27."); *id.* at 12:01 ("The State in their brief seems to try to argue that the issue that I have brought to this Court is that difference [between the Eighth Amendment and Section 27]. It is not. The issue to be briefed was [Mr. Tirado] improperly denied merits review of his Article I, Section 27 claim that his sentence was unconstitutional? That's what we're here for."). The State, too, does not ask this Court to address any potential constitutional daylight between Section 27 and the Eighth Amendment. *Id.* at 20:22 ("Again, in the briefing before this Court, Defendant concedes that [the Eighth Amendment and Section 27] should be interpreted in lockstep, and he's not entitled to any greater constitutional protection under Article I, Section 27 as it applies to his case right now."); *id.* at 28:43 ("To the extent that that question—does the State Constitution provide broader protection here to protect [Mr. Tirado's] sentence—[is] the issue this Court granted review on, he's conceded he's not entitled to any special protection, so certainly his sentence should not be reversed on that basis."); *id.* at 31:06 ("Defendant has, in essence, conceded before this Court that he's not entitled to any greater protection under the State Constitution, and he's conceded that the trial judge here complied with the requirements of *Kelliher*.").

369 N.C. 658, 671–72 (2017) (declining to address issues not included in the petition). Our work is done.

The majority then ventures beyond this Court's proper task, gratuitously redefining the scope of Section 27 and its overlap with the Eighth Amendment. To defend its judicial detour, the majority mischaracterizes Mr. Tirado's arguments; it constructs a strawman that it steps in to slay. It starts by pointing to Mr. Tirado's petition for discretionary review, where he contended that "[t]he Court of Appeals did not consider whether [his] sentence was unconstitutional under Article I, [Section] 27 of the North Carolina Constitution, which provides individuals with increased protections." In that same petition, Mr. Tirado also argued that the decision below misapplied *Jones v. Mississippi*, 141 S. Ct. 1307 (2021), by "fail[ing] to consider not just [his] as-applied Eighth Amendment claim, but his claim that his sentence was unconstitutional under the more protective North Carolina Constitution." The majority notes that federal cases have read the Eighth Amendment to limit juvenile life without parole (JLWOP) to the rare child "whose crimes reflect irreparable corruption." By reading the state constitution to "provide[ ] *more* protection," the majority reasons, Mr. Tirado "effectively posit[s]" that Section 27 "totally forbid[s]" JLWOP. So in substance, says the majority, Mr. Tirado launches a facial attack on "any statute prescribing life without parole as a permissible punishment for juveniles."

This reasoning is flawed. Mr. Tirado has centered this appeal—from petition, to briefing, to oral argument—on the Court of Appeals' alleged refusal to consider his constitutional claims at all. The language quoted from his PDR only underscores that focus. True, Mr. Tirado mentioned North Carolina's "increased protection" in passing, as part of a general observation about the scope of state versus federal constitutional rights. But these remarks were ancillary to his core argument. He did not call for this Court to redefine Section 27 but simply contextualized his procedural claim about the alleged denial of appellate review. Most tellingly, Mr. Tirado himself formulated the issues on appeal, asking us to decide whether the Court of Appeals "*fail[ed] to consider*" his Section 27 challenge to his sentence. We allowed review on that question without modifying it, even though we issued a special order directing the parties to brief a related but distinct issue.

The parties' briefs confirm the limited "scope of review on appeal." *See* N.C. R. App. P. 28(a). Neither Mr. Tirado nor the State discuss or probe the contours of Section 27, much less how it measures up to the Eighth Amendment. In fact, Mr. Tirado's brief explicitly disclaims the position the majority attributes to him. He declined to argue that Section

27 imposes a "higher substantive bar" than the Eighth Amendment. Nor does he read our cases to "establish that the North Carolina Constitution precludes sentences of life without parole categorically," distinguishing this state from others like Iowa or Massachusetts. The majority is wrong to insist that Mr. Tirado "effectively posit[s]" these points, when he expressly disavows them.

Lastly, the majority's constitutional commentary is "unnecessary to the decision." *Trustees*, 313 N.C. at 242. Although it ultimately affirms the Court of Appeals' reasoning and result, the majority spends pages justifying why that court should not "have conducted an analysis under the state constitution's distinct protections." But the Court of Appeals did no such thing. Instead, it treated the state and federal claims as aligned and addressed them in tandem. Mr. Tirado and the State agree that Section 27 and the Eighth Amendment impose identical substantive requirements in this case. So as the majority concludes, and the parties concede, the "Court of Appeals properly evaluated [Mr. Tirado's] constitutional challenge" by using the same substantive standard to review the merits of his state and federal claims. The majority's exegesis on Section 27 responds to a counterfactual that never happened—precisely the type of "theoretical speculation" our cases decry as dicta. *See State v. Robinson*, 342 N.C. 74, 88 (1995); *In re Univ. of N.C.*, 300 N.C. 563, 575–76 (1980) (explaining that a decision's "constitutional interpretation" of the public purpose requirement for tax exemption was dicta because the ultimate ruling was "based on the premise" that plaintiff's property was held for public purposes, and it was therefore unnecessary for this Court to speculate on whether the property "would have been constitutionally tax exempt if *not* held for such purposes"); *Chavez v. McFadden*, 374 N.C. 458, 474 n.5 (2020) (concluding that the Court of Appeals' discussion on the authority of sheriffs without 287(g) agreements was dicta, as it addressed hypotheticals unrelated to a case involving a sheriff who acted under a 287(g) agreement at all times).

Fitting the pieces together, the majority's editorial on Section 27 and its overlap with the Eighth Amendment is tangential to the "ultimate holding." *Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 359 (1992); *cf. State v. Jackson*, 353 N.C. 495, 500 (2001) (concluding that an opinion's discussion on whether the inoperability of a gun was an affirmative defense was dicta because it was extraneous to the "actual holding": "that the State did not have to submit evidence of operability" to convict under N.C.G.S. § 14-415.1). The bottom-line rationale for our disposition here—that the Court of Appeals reviewed Mr. Tirado's state constitutional claim and that his sentence complies with *Kelliher*—stands

independent of the majority's musings on Section 27. Excising this surplus commentary "would not require a change in either the court's judgment or the reasoning that supports it." Leval, *Dicta* at 1257. It plays "no functional role in compelling the judgment," *id.*, and is therefore neither "embodied in the determination made by the court" nor "necessarily involved in determining the case." *Hayes*, 243 N.C. at 536–37 (cleaned up); *see also Trustees*, 313 N.C. at 242 (reasoning that an earlier case's discussion of a statute was "unnecessary to the decision and is obiter dictum" because the opinion ultimately "affirmed the Court of Appeals' reversal of summary judgment" by applying a different statutory provision); *In re Z.G.J.*, 378 N.C. 500, 513 n.5 (2021) (explaining that assertions made in an earlier opinion were dicta because they were "irrelevant to our holding" and "had no bearing upon the Court's decision to reverse").

Our role is to decide the questions "presented to [us] for solution in the proper course of judicial proceedings," rather than to opine on "points arising outside of the case." *Hayes*, 243 N.C. at 536–37 (cleaned up). Adhering to that principle here, I concur in the result based on the issues correctly before this Court. Beyond that, though, the majority's commentary should be left where it belongs—on the sidelines.

II. The Majority's Dicta Dilute and Misinterpret Section 27.

The majority purports to read Section 27 as less protective than—but interpreted in lockstep with—the Eighth Amendment. This conclusion, says the majority, derives from constitutional text, history, and precedent. But at each turn, the majority's analysis is selective, incomplete, and normatively flawed.

A. Text

The majority starts by asserting that the people use the "plain language" of constitutional provisions to "express their intended meaning of the text when they adopted it." Extending that logic, the majority reasons that the words inscribed in the Constitution have no "hidden meanings or opaque understandings—the kind that can only be found by the most astute justice or academic." This makes intuitive sense. A constitution created by and for the people should be accessible to the people it governs.

One might think such adulation of plain language would preface a discussion of Section 27's text. Not so. Instead, the majority declares that the words of Section 27 hold little constitutional significance because that provision "does not expressly set out . . . what it means for

a punishment to be 'cruel or unusual.' " Since the "use of the disjunctive 'or' does not clarify this obscurity," we are told, the "meaning the people intended" must be found elsewhere.

This reasoning is baffling. The majority extols "plain language" on one page, only to dismiss the plain language of Section 27 a few pages later. If the people's word choice is the best reflection of their intent, we must faithfully consult the language they used—even if doing so does not yield the preferred result. *See State ex rel. Martin v. Preston*, 325 N.C. 438, 449 (1989). Yet rather than grapple with Section 27's text, the majority sidesteps it.

On one score, though, the majority is correct: Section 27 does not contain a checklist of its meaning. But that is a feature rather than flaw. *See State ex rel. Attorney-General v. Knight*, 169 N.C. 333, 347–48 (1915). Constitutional provisions are written for the ages and "lay down general principles of government which must be observed amid changing conditions." *See Report of the North Carolina State Constitution Study Commission* 150 (1968), available at https://www.ncleg.gov/Files/Library/studies/1968/st12308.pdf. By design, then, they do not resemble "elaborate legislative provisions," but instead set out "briefly and clearly the fundamental principles upon which the government shall proceed." *Id.* And here, the text of Section 27 prescribes state-specific values—both in what it says and what it omits. At a minimum, Section 27's language and its constitutional trajectory confirm that its protections are distinct from, and broader than, those provided by the Eighth Amendment.

Start with Section 27's unique phrasing. Unlike the Eighth Amendment, which forbids only "cruel *and* unusual punishments," Section 27 bars punishments that are either "cruel" or "unusual." *See State v. Conner*, 381 N.C. 643, 667 (2022). This Court has long recognized the significance of disjunctive versus conjunctive language. *See In re Duckett's Claim*, 271 N.C. 430, 437 (1967) ("[T]he disjunctive participle 'or' is used to indicate a clear alternative. The second alternative is not a part of the first, and its provisions cannot be read into the first."); *Routten v. Routten*, 374 N.C. 571, 575–76 (concluding that "the disjunctive term 'or' in N.C.G.S. § 50-13.5(i) establishes that either of the circumstances is sufficient to justify the trial judge's decision to deny visitation"), *cert. denied*, 141 S. Ct. 958 (2020); *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 519 (2004) (noting "that the natural and ordinary meaning of the disjunctive 'or' permits compliance with either condition").

For punishments, in particular, our cases give special weight to disjunctive phrasing. As far back as 1820, we admonished that: "If 'or' could,

under any circumstances, be construed 'and' in a penal law, it must be to lessen, not to aggravate, the evil of punishment." *State v. Kearney*, 8 N.C. (1 Hawks) 53, 55 (1820). In other words, "the word 'or,' in criminal statutes, cannot be interpreted to mean 'and,' when the effect is to aggravate the offense, or increase the punishment." *State v. Walters*, 97 N.C. 489, 490 (1887). This interpretive maxim reflects ordinary language and grammar. *See id.* More fundamentally, though, it embodies a "rule of justice as well as mercy." *Id.*

Applying those principles here, the text of Section 27 casts a wider net than the Eighth Amendment. *See Conner*, 381 N.C. at 667 (explaining that Section 27 "abrogates a range of sentences which is inherently more extensive in number by virtue of the provision's disjunctive term 'or' than the lesser amount of sentences prohibited by the federal constitutional amendment due to its conjunctive term 'and' "). That is because the Eighth Amendment "requires two elements of the punishment to be present for the punishment to be declared unconstitutional ('cruel *and* unusual')," while Section 27 "only requires one of the two elements ('cruel *or* unusual')." *Id.* at 668. So while this disjunctive phrasing does not alone decode Section 27's scope, it does signal a broader sweep than its federal analogue.[5]

The trajectory of Section 27's language confirms that point. When North Carolina adopted its first constitution in 1776, it drew inspiration from its sister states but chose its own path. New Jersey's Constitution, for instance, did not mention punishments at all. *See* N.J. Const. of 1776. Pennsylvania required that punishments be "in general more

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5. Early cases interpreting Section 27 did not examine its distinctive phrasing or how it differed from the Eighth Amendment. In fact, some decisions "paid so little attention to this crucial difference" in language that their recitation of the constitutional standard "incorrectly substituted 'and' for 'or.' " Ben Finholt, *Toward Mercy: Excessive Sentencing and The Untapped Power of North Carolina's Constitution*, 16 Elon L. Rev. 55, 94 (2024); *see*, *e.g.*, *State v. Manuel*, 20 N.C. 144, 36 (1838) ("After what has been said on the subject of excessive fines, it cannot be necessary to say much on the subject of *cruel and unusual punishments*." (emphasis added)); *State v. Reid*, 106 N.C. 714, 716 (1890) ("The defendant invokes the protection guaranteed by Article I, sec. 14, of the Constitution, which forbids excessive bail and the imposition of excessive fines or *cruel and unusual punishments*." (emphasis added)); *State v. Parker*, 220 N.C. 416, 419 (1941) ("It is well settled that when no time is fixed by the statute, an imprisonment for two years will not be held *cruel and unusual*." (emphasis added)); *State v. Greer*, 270 N.C. 143, 146 (1967) ("We have held in case after case that when the punishment does not exceed the limits fixed by statute, it cannot be considered *cruel and unusual* punishment in a constitutional sense." (emphasis added)). Scholars have therefore observed that "North Carolina's tradition of moving in lockstep with the Eighth Amendment is grounded, at least partly, in a simple mistake." *See* Finholt, at 87.

proportionate to the crimes." P.A. Const of 1776, § 38. Foreshadowing the federal provision, Virginia barred "cruel and unusual" punishments. V.A. Declaration of Rights, § 9. Delaware, however, used the "cruel or unusual" language. Del. Const. of 1776 Bill of Rights, § 16. North Carolina followed Delaware's lead, choosing the broader phrasing to outlaw punishments that are either cruel or unusual, not necessarily both. From the start, then, North Carolina signaled that it would chart its own course when it came to constitutional protections against excessive punishment.

For another reason, Section 27's unique language stands out. The first two versions of North Carolina's Constitution, in 1776 and 1868, used the "cruel or unusual" phrasing before the Eighth Amendment applied to the states. This means that when North Carolina crafted and reaffirmed Section 27, the federal Eighth Amendment had no binding effect on state law. At the time, the state constitution was the sole protection against excessive punishment for North Carolinians. The choice of "cruel or unusual" over "cruel and unusual" was a conscious effort to provide a distinct shield where federal law offered none. And this broader protection was no fleeting experiment. The disjunctive language first used in 1776 survived each constitutional overhaul in 1868 and 1971. This even as the Eighth Amendment has kept its narrower phrasing since its ratification in 1789.

The timing of the 1971 constitutional revision is especially significant. By then, the Eighth Amendment had been incorporated against the states in *Robinson v. California*, 370 U.S. 660 (1962), making its "cruel and unusual" standard binding on North Carolina. Yet, knowing this, the people of North Carolina *again* reaffirmed the broader "cruel or unusual" language in Section 27. This decision is critical because it shows that even with the federal Eighth Amendment now in force, North Carolina's citizens chose not to rely solely on federal protections. Instead, they reaffirmed their independent constitutional shield, ensuring that Section 27 provided greater or at least distinct protections than the Eighth Amendment. This choice to keep distinct language after incorporation underscores yet another rejection of federal uniformity on this issue.

Why, then, should North Carolina's broader constitutional language be tethered to a federal provision that our state deliberately avoided? The people of North Carolina made their choice—three times, across almost as many centuries. They rejected the federal phrasing every time, selecting and retaining language distinct from the Eighth Amendment. Yet the majority treats the people's repeated choices as if they mean nothing.

Rather than give independent weight to Section 27, the majority effectively writes it out of the Constitution. It shifts focus to Article XI, Section 1, which provides:

> The following punishments only shall be known to the laws of this State: death, imprisonment, fines, suspension of a jail or prison term with or without conditions, restitution, community service, restraints on liberty, work programs, removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under this State.

N.C. Const. art. XI, § 1.

The majority purports to harmonize that provision with Section 27. Reasoning that Article XI "prescribe[s] the outer limits on punishment," the majority concludes that "any punishment within that outer limit"—that is, mentioned in Article XI—is "inherently not 'cruel or unusual' in a constitutional sense." Section 27, in other words, has no force on its own. So long as a statute prescribes a punishment listed in Article XI, neither that statute nor a sentence imposed under it can be cruel or unusual. That rule, says the majority, does not distinguish between juveniles and adults. Because Article XI lists death and imprisonment without limiting punishments based on an offender's age, the majority concludes that JLWOP cannot violate Section 27. This conclusion is flawed in both reasoning and result.

For one, the majority ignores the structural and functional differences between Article XI and Section 27. Article XI, Section 1 enumerates the forms of punishment the state may impose—death, imprisonment, fines, and others. It is a catalog of permissible options, meant to prevent the state from reviving archaic punishments like branding or the stocks. *See* Albert Coates, *Punishment for Crime in North Carolina*, 17 N.C. L. Rev. 205, 206 (1939). But this list is not a constitutional blank check. It merely describes what is permissible in *kind*—not what is proportional or reasonable in degree.

That task belongs to Section 27. As this Court has repeatedly emphasized, Section 27 sets substantive limits on *how* and *on whom* punishments may be applied. *See State v. Driver*, 78 N.C. 423, 430 (1878) (exhorting "our duty so to declare" that a sentence of five-years imprisonment for assault and battery "is not only 'unusual' but unheard of, and that it is 'cruel' "). Yes, the legislature enjoys broad authority to define the scope of criminal penalties. But the nature of constitutional rights limits that discretion. *State v. Griffin*, 190 N.C. 133, 137 (1925). Section 27

fills that role here, requiring that "a criminal sentence fixed by the legislature must be proportionate to the crime committed." *State v. Green*, 348 N.C. 588, 609 (1998), *cert. denied*, 525 U.S. 1111 (1999), *overruled on other grounds*, *State v. Kelliher*, 381 N.C. 558 (2022). This means that a penalty listed in Article XI must, in application, be reasonable and proportionate to the offender and the offense. *See State v. Woodlief*, 172 N.C. 885, 891 (1916) ("Whether the punishment [i]s cruel or unusual depends upon the nature of the crime and the circumstances under which it was committed and other relevant facts."); *State v. Lee*, 166 N.C. 250, 257 (1914) (noting constitutional concerns because a sentence did "not commend itself to us as being at all commensurate with the offense," since "neither aggravation nor circumstances" justified that degree of severity).

To borrow an example, "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual." *Robinson*, 370 U.S. at 667. In practice, though, "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Id.* The same reasoning applies here. Section 27 ensures that a punishment authorized in *form*—be it imprisonment, death, or a fine—is not "excessive, cruel and unusual" in application. *See Driver*, 78 N.C. at 426; *accord State ex rel. Bryan v. Patrick*, 124 N.C. 651, 662 (1899) ("Bail may be required, fines imposed, and punishments inflicted, but if they are excessive, unusual, or grossly unreasonable, a remedy will be found under such provisions of the organic law."). Section 27's layered relationship with Article XI thus constrains the government's power to punish—specifying the range of criminal sanctions while forbidding excessive and disproportionate punishment. *State v. Burnett*, 179 N.C. 735, 741 (1920) (explaining that Article XI and Section 27 are "both restrictive of the severity of punishment" and circumscribe the legislature's choices about "the question of crime, and its punishment and whether to impose or withdraw it").

Constitutional structure reinforces this point. Article I, the Declaration of Rights, is the bedrock of individual liberties in North Carolina. Our cases enshrine "the supremacy of rights protected in Article I" as a core principle of the state's constitutional framework. *Corum v. Univ. of N.C.*, 330 N.C. 761, 783 (1992). These rights were crafted to ensure that no actor invested with the powers of the state—whether legislative, executive, or judicial—could violate them. *Id.* Indeed, Article I was so important to the framers that they approved it "the day before the Constitution itself was adopted," underscoring its primacy. *Id.* at 782. Rights like Section 27 are thus "logically, as well as

chronologically, prior to the constitutional text." John V. Orth & Paul M. Newby, *The North Carolina Constitution* 5–6 (2d ed. 2013).

Like other provisions following Article I, Article XI deals with the mechanics of governance and spells out the state's powers and duties. It delineates the range of available punishments but does not—and cannot—supersede the rights enshrined in the Declaration of Rights. *See Blankenship v. Bartlett*, 363 N.C. 518, 525 (2009) (explaining that the right to vote for superior court judges guaranteed in Article IV "must be construed in conjunction with the Equal Protection Clause" in Article I, Section 19 to "prevent internal conflict"); *Stephenson v. Bartlett*, 355 N.C. 354, 378 (2002) (construing constitutional provisions in Article II "in conjunction with" a provision in Article I "in such a manner as to avoid internal textual conflict"); *accord In re Peoples*, 296 N.C. 109, 159–63 (1978). To suggest otherwise would invert the Constitution's design, downgrading fundamental rights to second-class status. This principle is grasped in every other realm of constitutional law. By analogy, imagine if a statute reserved life imprisonment for defendants of a particular race or gender. Although "imprisonment" is certainly listed in Article XI, that statute would violate Article I's guarantees of equal protection. Article XI does not override these fundamental safeguards. The same logic applies here: Section 27 acts as a substantive limit on the punishments authorized by Article XI, ensuring they comply with constitutional standards of reasonableness and proportionality. *Cf. In re Watson*, 157 N.C. 340, 350–51 (1911) (reasoning that a statute allowing civil detention for an offense far longer than the possible range of criminal sanctions "would be violative of section 14 of the Bill of Rights, which prohibits 'cruel or unusual punishment' ").

The majority, however, flattens these distinctions. Rather than harmonize Section 27 with Article XI, it reads the latter to swallow the former. If a statute allows a punishment listed in Article XI, the majority says, Section 27 vanishes from the analysis. In the majority's hands, Section 27 becomes a redundancy—a hollow phrase offering no protection beyond the mechanical enumeration in Article XI. The majority thus retreats from the basic principle that constitutional provisions have independent significance. *See Blankenship*, 363 N.C. at 525; *Stephenson*, 355 N.C. at 378.

Compounding that error, the majority ignores the broader constitutional framework governing punishments and juveniles. The punishments listed in Article XI, Section 1 do not stand alone; they are constrained by other provisions and broader constitutional values. For that reason, the "best way" to understand constitutional language "is to

read it contextually and to compare it with other words and sentences with which it stands connected." *See State ex rel. Martin*, 325 N.C. at 449 (quoting *State v. Emery*, 224 N.C. 581, 583 (1944)). Viewing Article XI, Section 1 in context confirms that the legislature's authority is bounded and that age matters to a punishment's permissibility.

Take Section 2 of the same Article, which explains that the "object of punishments" in North Carolina is "not only to satisfy justice, but also to reform the offender and thus prevent crime." N.C. Const. art. XI, § 2. This provision marks "the declared policy of the people of this State." *State v. Matthews*, 191 N.C. 378, 380 (1926). And that policy rejects retribution as the lone star in the penal constellation—rehabilitation is an equally weighty constitutional value. *Pharr v. Garibaldi*, 252 N.C. 803, 810 (1960) (explaining that Article XI "expressly recognize[s] that rehabilitation of a prisoner as well as punishment for past criminal conduct is a proper function" of the justice system). Section 2 is not just a lofty aspiration, but a substantive limit on the types of punishment the state can impose. By its own terms, for instance, the provision cites the principle of rehabilitation as a limit on death-eligible crimes. But Section 2 applies to all "punishments," and this Court has read its prescriptive terms to require sentencers to ensure "not only that the punishment may fit the crime, but also that it may be adapted to the purposes of the State, in dealing with those who have violated its laws." *Matthews*, 191 N.C. at 380.

This focus on rehabilitation carries special significance for juvenile offenders. By their nature, children are uniquely vulnerable and capable of change. *See, e.g.*, *Burnett*, 179 N.C. at 741–42. Article XI, Section 4 contemplates this reality, instructing the State to care for vulnerable groups, including orphans, not only as a moral obligation but as a hallmark of a civilized society. N.C. Const. art. XI, § 4; *see In re Watson*, 157 N.C. at 350. In line with that truth, decades-worth of cases have recognized the unique considerations involved in juvenile punishments—including their heightened vulnerability and capacity for reform. *See id.*; *Burnett*, 179 N.C. at 741; *State v. Frazier*, 254 N.C. 226, 229 (1961); *In re Vinson*, 298 N.C. 640, 666 (1979).

The same principles prompted this Court's more recent recognition that "life without parole sentences for juveniles should be exceedingly rare and reserved for specifically described individuals." *State v. James*, 371 N.C. 77, 96–97 (2018). That is so, we have explained, because juveniles are "inherently malleable" and have a "heightened capacity for change." *Kelliher*, 381 N.C. at 585–86. And because age matters to the "object of punishments" guiding our penal philosophy, age matters to whether a punishment is "cruel or unusual" under Section 27. *Id.* at 585;

see also In re Watson, 157 N.C. at 350 ("[A] system which does no more than measure the days and years, which must be paid by him who has violated law, 'to satisfy justice,' is a survival of the days when the only object of punishment was vengeance."). For the "vast majority of juvenile offenders," then, JLWOP is cruel because it is misaligned with the "penological functions enumerated in North Carolina's Constitution":

> Given juveniles' diminished moral culpability, it is unjustifiably retributive; given juveniles' heightened capacity for change, it unjustifiably disavows the goal of reform.

Kelliher, 381 N.C. at 585–86; *see also Miller v. Alabama*, 567 U.S. 460, 473 (2012) ("Life without parole forswears altogether the rehabilitative ideal. It reflects an irrevocable judgment about an offender's value and place in society, at odds with a child's capacity for change." (cleaned up)).

Other provisions emphasize the salience of youth to our constitutional system. Consider Article I, Section 15, which guarantees the right to education, or Article IX, Section 1, which underscores the essential role of education in fostering good government and happiness. N.C. Const. art. I, § 15; N.C. Const. art. IX, § 1. These provisions reflect North Carolina's "constitutionally expressed commitment to nurturing the potential of all our state's children." *Kelliher*, 381 N.C. at 586; *see also id.* ("Our constitution's recognition that the promotion of education generally, and educational opportunity in particular, is of paramount public importance to our state reflects the understanding that our collective citizenry benefits when all children are given the chance to realize their potential." (cleaned up)). They also dismantle the majority's argument in two ways. First, they highlight our state's distinctive duty to its youth—a commitment that goes beyond anything found in the Federal Constitution. Second, they show that a constitutional provision need not explicitly mention age to account for it. Neither Article I, Section 15 nor Article IX, Section 1 mentions "children" by name, but this Court has long recognized that their focus is on school-aged youth. *See, e.g.*, *State v. Williams*, 253 N.C. 337 (1960); *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 639–40 (2004). These provisions show juveniles' special place in North Carolina's legal framework. By ignoring this context, the majority reduces the Constitution to a patchwork of disconnected clauses, rather than the cohesive framework it was meant to be.

Aside from its methodological flaws, the majority's interpretation also raises separation of powers concerns. In practice, the majority reduces section 27 to a rubber stamp of any punishment authorized by

the legislature, so long as it is enumerated in Article XI. By doing so, the majority effectively kneecaps the judiciary's role as the guardian of constitutional rights, instead granting lawmakers carte blanche to define the scope of constitutional limits on punishments. This is an inversion of constitutional design.

It is true that penal policy is primarily entrusted to the General Assembly. This Court has therefore tread cautiously in that domain, cognizant of the legislature's policymaking authority "to define crimes and fix their punishment." *Griffin*, 190 N.C. at 137 (cleaned up). But that discretion, though broad, is not limitless—it must yield if it "encounters in its exercise a constitutional prohibition." *Id.* (cleaned up). When penal policy collides with fundamental rights, we have explained, the "legislative power is brought to the judgment of a power superior to it for the instant." *Id.* (cleaned up). In those cases, the "judiciary must judge" those constitutional limits as part of its "legal duty, strictly defined and imperative in its direction." *Id.* (cleaned up). For that reason, this Court has never relinquished its duty to enforce Section 27 and shield citizens from cruel or unusual punishment. *See Woodlief*, 172 N.C. at 891. In some cases, we have vindicated that constitutional guarantee by deeming sentences as excessive or unreasonable. *Driver*, 78 N.C. at 430; *State v. Smith*, 174 N.C. 804, 805 (1917); *State v. Tyson*, 223 N.C. 492 (1943); *State v. Blackmon*, 260 N.C. 352 (1963). And even when affirming the legislature's choice of punishment, this Court has recognized the "frequently enunciated" constitutional "principle that a criminal sentence fixed by the legislature must be proportionate to the crime committed." *Green*, 348 N.C. at 609.

The majority suggests that judicial enforcement of Section 27 sidelines the people and subverts our constitutional order. It warns of judges deciding, "without direction from the people, when the General Assembly's prescribed punishments have become cruel or unusual." But Section 27 *is* the people's direction—it reflects an abiding limit on the state's power to punish.

What this Court has made clear—and what the majority ignores—is the very purpose of North Carolina's Declaration of Rights: to secure fundamental rights "against state officials and shifting political majorities" by "limit[ing] our actions as the body politic." *Corum*, 330 N.C. at 787–88. Constitutional provisions like Section 27 thus inscribe the people's profound, enduring judgments—their commitment to core principles and the lines they refuse to let the government cross. *See id.* It "is the judiciary's responsibility to guard and protect those rights," *id.* at 785, in line with the "function and traditional role of the courts in North Carolina's

constitutional democracy," *id.* at 787; *accord State v. Jackson*, 348 N.C. 644, 648 (1998); *Stanmire v. Taylor*, 48 N.C. 207, 211 (1855). Indeed, the availability of judicial review "lies at the heart of what it means to have a constitution"; rights "are nothing more than aspirational value statements" if there is nothing to vindicate them. *See McKinney v. Goins*, No. 109PA22-2 (N.C. Jan. 31, 2025) (Earls, J., concurring in result only). So enforcing Section 27 does not discard the people's will—it affirms it, by upholding the protections they deliberately placed beyond the reach of transient political majorities.

This principle guides the analysis of Section 27, which, by its plain language, ties its protections to the world in which it is applied. A punishment is "unusual" if it deviates from the penalties imposed on similar offenders for similar crimes. *See Driver*, 78 N.C. at 426; *id.* at 430. A punishment is "cruel" if it inflicts gratuitous suffering that exceeds what is necessary to serve the Constitution's enumerated goals of punishment: "satisfy[ing] justice" and "reform[ing] the offender." N.C. Const. Art. XI, § 2; *Kelliher*, 381 N.C. at 586 ("Punishment which does not correspond to the penological functions enumerated in North Carolina's Constitution is cruel."). When judges evaluate whether a punishment meets these constitutional aims, they do not rewrite Section 27. They apply it as written, extending its principles to the present day and as the people directed. That is not overreach, but faithful execution of the judiciary's duty.

The majority today retreats from that obligation. By reducing Section 27 to a mere restatement of Article XI, the majority allows the legislature to define the constitutional limits of its penal authority. In practice, that decision surrenders the judiciary's "responsibility to protect the state constitutional rights of the citizens," *Corum*, 330 N.C. at 783, and cedes Section 27's limits to the very body it was meant to restrain.

B. History

After dismissing Section 27's text, the majority turns to the "historical context in which the People of North Carolina enacted it." This exercise, we are told, seeks to "isolate" the provision's meaning at the time of ratification. The majority seems to fix its gaze on the 1776 Constitution, though it does not explain why that moment should control. I address the deep flaws in this approach elsewhere. *See McKinney*, No. 109PA22-2, slip op. at 37-38, 78-80 (Earls, J., concurring in result only). The same critiques hold here.

To start, the majority's historical anchor is telling. It focuses on the 1776 Constitution, the only version never directly voted on and approved

by the electorate. That document, crafted by the Fifth Provincial Congress, was adopted into law "in December, 1776, without submission to the people." John L. Sanders, *The Constitutional Development of North Carolina: A Brief History of the Constitutions of North Carolina*, *in* North Carolina Government 1585–1974: A Narrative and Statistical History 795 (John L. Cheney Jr. ed., 1981). In many ways, this charter reflected the worldview of its makers, creating "a republic of free males with full participation reserved for property owners." Orth & Newby, at 3. Soon after its ratification, the "undemocratic features" of the 1776 Constitution—"especially its property and religious qualifications for officeholding"—stoked "sectional controversies" and "disillusioned the masses." Hugh Talmage Lefler & Albert Ray Newsome, *The History of a Southern State: North Carolina* 229 (3d ed. 1973).

Compare that with the state's later constitutions. In 1868, North Carolina rewrote its charter with input from a diverse delegation. *See* Orth & Newby, at 19. This new constitution abolished property qualifications for voting, expanded women's property rights, and charted a more inclusive path. *Id.* And for the first time, it was ratified by the people. The same is true of the 1971 Constitution, the version that governs us today. These later constitutions bear the mark of broader participation and more equitable values.

So why is Section 27 frozen in 1776? Why does the majority look to the most exclusive, least democratic version of our Constitution as its guiding star? These are not idle questions. If, as the majority suggests, constitutional meaning is located by "trac[ing] a constitutional provision back in time to its earliest appearance in our constitutions," then the past will always define our present. *See McKinney*, No. 109PA22-2, slip op. at 38 (Earls, J., concurring in result only). This is a recipe for stagnation and injustice. History is not, as the majority frames it, a neutral arbiter. It is a mirror of the values of those who shaped it, reflecting their priorities and exclusions. To rely on history uncritically is itself a choice—a deliberate selection about which values and assumptions we carry forward into modern law.

The majority's reliance on *State v. Manuel*, 20 N.C. (3 & 4 Dev. & Bat.) 144 (1838), underscores the perils of this approach. In *Manuel*, this Court upheld a law allowing county sheriffs to "hire out" poor, non-white defendants who could not pay criminal fines. *Id.* at 148. The law targeted free people of color, using their race and poverty as the "aggravating circumstances of [the] crime." *Id.* at 161. Yet the Court deemed this punishment a valid legislative choice within "the great powers confided to the Legislature for the suppression and punishment of crime." *Id.* at 163.

Later cases, like the majority today, cite *Manuel* to argue that, considering the legislature's policymaking authority, punishments that are statutorily allowed and listed in Article XI cannot be "cruel or unusual."

Manuel is indeed instructive—but not in the way the majority suggests. It shows, in essence, the dangers of using history as the yardstick for modern constitutional rights. *Manuel*'s deference to legislative discretion was not neutral—it reflected a discriminatory view of who deserved constitutional protections and who did not. According to *Manuel*, the legislature had the authority to "apportion punishments" based on an offender's "condition, temptations to crime, and ability to suffer." *Id.* That discretion allowed the legislature to vary criminal penalties based on race, gender, and wealth. A punishment's cruelty, in other words, was a sliding scale based on a defendant's place in the social hierarchy:

> What would be cruelty if inflicted on a woman or a child[ ] may be moderate punishment to a man. What might not be felt by a man of fortune would be oppression to a poor man. What would be a slight inconvenience to a free negro might fall upon a white man as intolerable degradation.

Id. at 163–64.

Applying that framework, this Court found nothing "cruel or unusual" about a statute subjecting poor, non-white defendants to quasi-enslavement. For that punishment, as *Manuel* saw it, was simply a permissible exercise of legislative discretion that the judiciary should not second-guess. *See id.* at 162–63. The rule extracted from *Manuel*—that punishments authorized by the legislature are policy judgments beyond constitutional reach—rests on this discriminatory logic. There is no reason why a two-centuries-old case, infected with antebellum prejudice and interpreting a since-eclipsed version of the Constitution, should dictate the meaning of Section 27 today.[6] In a democracy, especially,

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6. The majority dismisses the significance of North Carolina's more recent constitutions, claiming that because Section 27's "modern text" mirrors earlier versions, its analysis must begin—and seemingly end—with the 1776 Constitution. But even if the language of Section 27 resembles its predecessors', it does not mean its meaning and scope are fixed in the 18th century. When the people of North Carolina chose to preserve Section 27 through the constitutional milestones of 1868 and 1971, they deliberately reaffirmed its enduring principles and the limits it set on state power. The historical trajectory of Section 27 thus reflects its abiding relevance, not its fossilization in an 18th-century mold.

the law should not "freeze[ ] the meaning of our Constitution in amber according to narrow circumstances in centuries past." *McKinney*, No. 109PA22-2, slip op. at 38 (Earls, J., concurring in result only).

C. Precedent

The majority closes with a selective and incomplete account of our Section 27 jurisprudence. It declares, in sweeping terms, that "in recognition of the supremacy of the Federal Constitution," this Court has "routinely" interpreted Section 27 in lockstep with the Eighth Amendment. The majority frames this as an unbroken historical tradition. But this recitation of our caselaw is conspicuously incomplete. The majority relies on outdated precedent (its most recent opinion of the Court is from 1998), while ignoring key inflection points in our jurisprudence. More recent decisions—including *James*, 371 N.C. 77; *Kelliher*, 381 N.C. 558; and *Conner*, 381 N.C. 643—repudiated the flawed reasoning of earlier cases and rejected the lockstep approach the majority now resurrects.

Consider *Green*—a repeat player in the majority's analysis. 348 N.C. 588. When this Court decided that case in 1998, we did indeed take a lockstep approach, treating Section 27 as a carbon copy of the Eighth Amendment. *Id.* at 603. *Green* involved a thirteen-year-old defendant sentenced to life imprisonment for a first-degree sexual offense. *Id.* at 592–94. This Court acknowledged the textual differences between Section 27 and the Eighth Amendment but declined to give those differences meaning. *Id.* Instead, we relied on the supposed "historical [ ]" practice of treating the two provisions the same. *Id.* Justice Martin, writing in another case, urged this Court to take seriously the disjunctive phrasing of "cruel or unusual punishments" in Section 27. *See Medley v. N.C. Dep't of Correction*, 330 N.C. 837, 846 (1992) (Martin, J., concurring). But *Green* declined that request, sensing no "subsequent movement" towards that position by this Court or a "compelling reason" to adopt that view. *Green*, 348 N.C. at 603 n.1.

The majority avoids this reality by reducing the 1971 Constitution to a mere clerical exercise, dismissing it as nothing more than an editorial pruning of prior provisions. That view is historically inaccurate, as I explain elsewhere. *See McKinney*, No. 109PA22-2, slip op. at 80-84 (Earls, J., concurring in result only). As well, the majority's brand of "extreme originalism" rests on a deeper normative flaw. *See id.* The majority warns against "pretend[ing] that constitutional history began in 1971." But its approach suggests that constitutional history *stopped* in 1776. By centering its analysis of Section 27 in that provision's earliest form, the majority "bring[s] the law and constitutional protections back to that point in this state's history when slavery was legal and women could not own property or vote." *See McKinney*, No. 109PA22-2, slip op. at 38 (Earls, J., concurring in result only). I cannot subscribe to that mode of constitutional interpretation.

But even *Green* understood that it was a product of its time. The opinion itself acknowledged the then-prevailing belief that "serious youthful offenders must be dealt with more severely" but predicted that "[t]hese tides of thought may ebb in the future." *Id.* at 608. And ebb they did. In the years since *Green*, this Court has retreated from *Green*'s rigid framework, recognizing its failure to account for evolving understandings of adolescence and punishment.

In 2018, for instance, our decision in *James* acknowledged that "children are different" from adults in ways that profoundly matter to criminal sentencing. 371 N.C. at 96 (quoting *Miller*, 567 U.S. at 480). Though *Green* downplayed juveniles' unique traits, *James* recognized that a child's "chronological age and its hallmark features" undermine the penological justifications for imposing extreme sentences. *Id.* The Court upheld North Carolina's *Miller*-fix statute by interpreting it to align with modern principles—that life without parole should be an exceedingly rare sentence for juveniles. *See id.* at 92–93. This marked a shift away from *Green*'s rationale, focusing on the unique developmental characteristics of juveniles as informed by modern science and legal developments.

Kelliher built on this evolution, decisively breaking from the lockstep approach embraced by past cases. *See* 381 N.C. at 579–81. That case addressed *Green*'s outdated logic directly, explaining that its depiction of children as "predators" fundamentally misunderstood the nature of childhood and, in some cases, reflected racialized stereotypes. *Id.* at 582–83; *see also The Superpredator Myth, 25 Years Later*, Equal Just. Initiative (Apr. 7, 2014), https://eji.org/news/superpredator-myth-20-years-later); *State v. Null*, 836 N.W.2d 41, 56 (Iowa 2013) (noting that the propagators of the juvenile "predator" theory ultimately acknowledged that "the[ir] predictions did not come to pass, that juvenile crime rates had in fact decreased over the recent decades, that state legislative actions in the 1990s were taken during an environment of hysteria featuring highly publicized heinous crimes committed by juvenile offenders, and that recent scientific evidence and empirical data invalidated the juvenile superpredator myth." (cleaned up)). Relying on "the science of adolescent brain development that this Court has previously recognized," *Kelliher* underscored that juveniles are categorically less culpable than adults and possess a heightened capacity for reform. *See* 381 N.C. at 587. It also emphasized that Article I, Section 27's use of the phrase "cruel or unusual punishments" is meaningfully distinct from the Eighth Amendment's "cruel and unusual punishments." *Id.* at 580–81. That disjunctive phrasing—alongside the "constitutional commitments to rehabilitating criminal offenders and nurturing the potential of all of

North Carolina's children"—demanded an independent analysis, not the mechanical adoption of federal precedent. *Id.* at 587.

Conner—issued the same day as *Kelliher*—reaffirmed the unique constitutional protections afforded by Section 27. 381 N.C. at 667–68. Like *Kelliher*, *Conner* emphasized how the language of the "state constitutional provision abrogates a range of sentences which is inherently more extensive in number by virtue of the provision's disjunctive term 'or' than the lesser amount of sentences prohibited by the federal constitutional amendment due to its conjunctive term 'and.' " *Id.* at 667; *see also id.* at 667–68 ("On its face, the Constitution of North Carolina appears to offer criminal defendants—such as juvenile offenders—more protection against extreme punishments than the Federal Constitution's Eighth Amendment, because the Federal Constitution requires two elements of the punishment to be present for the punishment to be declared unconstitutional ('cruel and unusual'), while the state constitution only requires one of the two elements ('cruel or unusual')."). Also like *Kelliher*, *Conner* explained why past cases—*Green* in particular—no longer controlled. *See id.* at 668 n.14. Issued in 1998, that decision "preceded the United States Supreme Court decisions in *Roper*, *Graham*, *Miller*, and *Montgomery*," and reflected a "view of juvenile offenders" that "is in direct conflict with subsequent research and with our nation's evolution in its understanding of the culpability of juvenile offenders." *Id.* Thus, as these cases show, the reasons that once justified lockstepping—a lack of legal "movement toward" and "compelling reasons" for reading Section 27 differently—no longer hold. *Cf. Green*, 348 N.C. at 603 n.1.

Rather than meaningfully grapple with this precedent, the majority distorts it. It glosses over the substance of *Kelliher* before reducing that decision to a single fragment: that "Article I, Section 27 requires a trial court to expressly find that a juvenile homicide offender is one of those exceedingly rare juveniles who cannot be rehabilitated before sentencing him to life without parole." That portion of *Kelliher*, says the majority, was "unnecessary in determining the outcome of the case" and therefore nonbinding dicta.

The irony, of course, is that the same critique dooms most of the majority's own opinion. At any rate, the majority mischaracterizes what parts of *Kelliher* are "arguably applicable" here. For *Kelliher* expressly rejected a lockstep approach to Section 27 and held that this provision "offers protections distinct from, and in this context broader than, those provided under the Eighth Amendment." *Kelliher*, 381 N.C. at 579. That conclusion was not an aside—it was central to this Court's "ultimate holding." *Cf. Amos*, 331 N.C. at 359. *Kelliher* held that the Eighth

Amendment and Section 27 prohibit a sentence of JLWOP if a juvenile, like Mr. Kelliher, is "neither incorrigible nor irredeemable." *Kelliher*, 381 N.C. at 585. It also held that consecutive life-with-parole sentences can amount to *de facto* JLWOP under Section 27. *See id.* at 560; *see also id.* at 587–90. That second holding, rooted entirely in the state Constitution, was key to the first, since the U.S. Supreme Court has never read the Eighth Amendment to cover *de facto* JLWOP. *See id.* at 577; *see also id.* at 597 ("For the foregoing reasons, and based specifically on our analysis of the independent protections afforded by article I, section 27 of the North Carolina Constitution, the judgment of the Court of Appeals is modified and affirmed."). To put it mildly, *Kelliher* is far more than "arguably applicable"—it rejected the majority's truncated reading of Section 27 and refused to lockstep with the Eighth Amendment.

Like the other facets of the majority's analysis, its discussion of precedent ignores the broader arc of our jurisprudence, choosing a one-sided historical narrative that cherry-picks precedent to suit its conclusion. Our cases, our Constitution, and our understanding of juvenile justice have evolved. *Compare Green*, 348 N.C. at 610 (deeming irrelevant the "special considerations due children under the criminal justice system" because a thirteen-year-old defendant's traits—including his "difficulty controlling his temper, his previous record and his unsupportive family situation"—were "not the type attributable to or characteristic of a 'child' "), *with James*, 371 N.C. at 209 (emphasizing the "necessity for requiring sentencing authorities" to give mitigating weight to "chronological age and its hallmark features," including "immaturity," "impetuosity," "failure to appreciate risks and consequences," and "the family and home environment that surrounds the juvenile" (quoting *Miller*, 567 U.S. at 477–80) (cleaned up)). By pretending otherwise, the majority does a disservice to the law and North Carolina's unique constitutional values.

III. Conclusion

The disposition of this case does not turn on whether Section 27 of the North Carolina Constitution provides more or less protection to juvenile defendants than the Eighth Amendment. But the majority's sweeping conclusions from isolated fragments of constitutional text are dangerous not only for what they mean about the proper way to interpret the freedoms enshrined in the North Carolina Constitution but also for how we understand the role of the judiciary. Because none of the majority's pronouncements about Section 27 are required to decide the issues before us, they are nonbinding dicta, and I concur in the result only.

Justice RIGGS joins in this concurring in the result only opinion.

LEGAL SPECIALIZATION

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR

RULES GOVERNING THE SPECIALIZATION PROGRAM

The following 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 November 1, 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 .2600, *Rules Governing the Specialization Program*, be amended as shown in the following attachments:

ATTACHMENT #1: 27 N.C.A.C. 01D, Section .2600, Rule .2605, *Standards for Certification as a Specialist in Immigration Law*

ATTACHMENT #2: 27 N.C.A.C. 01D, Section .2600, Rule .2606, *Standards for Continued Certification as a Specialist*

NORTH CAROLINA
WAKE COUNTY

I, Peter Bolac, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on November 1, 2024.

Given over my hand and the Seal of the North Carolina State Bar, this the 13th day of November, 2024.

s/Peter Bolac
Peter Bolac, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 11th day of December, 2024.

s/Paul Newby
Paul Newby, Chief Justice

LEGAL SPECIALIZATION

On this date, the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were entered upon the minutes of the Supreme Court. The 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 11th day of December, 2024.

s/Riggs, J.
For the Court

27 NCAC 01D .2605 STANDARDS FOR CERTIFICATION AS A SPECIALIST IN IMMIGRATION LAW

Each applicant for certification as a specialist in immigration law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification in immigration law:

(a) Licensure and Practice - An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

(b) Substantial Involvement - An applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of immigration law.

(1) An applicant shall affirm that during the five years immediately preceding the application, the applicant devoted an average of at least 700 hours a year to the practice of immigration law, but not less than 400 hours in any one year. Service as a law professor concentrating in the teaching of immigration law for two semesters may be substituted for one year of experience to meet the five-year requirement.

(2) An applicant shall show substantial involvement in immigration law for the required period by providing such information as may be required by the board regarding the applicant's participation in at least four of the seven categories of activities listed below during the five years immediately preceding the date of application. For the purposes of this section, "representation" means the entry as the attorney of record and/or having primary responsibility of preparation of the case for presentation before the appropriate adjudicatory agency or tribunal.

(A) Family Immigration. Representation of clients before the United States Citizenship and Immigration Services (USCIS) or the State Department in family-based applications, including the Violence Against Women Act (VAWA).

(B) Employment- Related Immigration. Representation of employers or aliens before the U.S. Department of Labor (DOL), USCIS, Immigration and Customs Enforcement (ICE)(including I-9 reviews in anticipation of ICE audits), or the Department of State in employment-related immigration matters and filings.

(C) Naturalization and Citizenship. Representation of clients before USCIS in naturalization and citizenship matters.

(D) Administrative Hearings and Appeals. Representation of clients before immigration judges in removal, bond redetermination, and other administrative matters; and the representation of clients in appeals taken before the Board of Immigration Appeals and the Attorney General, the Administrative Appeals Office, the Board of Alien Labor Certification Appeals and DOL Commissioners, or the Office of Special Counsel for Immigration Related Unfair Employment Practices (OCAHO).

(E) Federal Litigation. Representation of clients before Article III courts in habeas corpus petitions, mandamus or Administrative Procedures Act complaints, criminal prosecution of violations of immigration law, district court naturalization and denaturalization proceedings, or petitions for review or certiorari.

(F) Asylum and Refugee Status. Representation of clients before USCIS or immigration judges in applications for asylum, withholding of removal, protection under the Convention Against Torture, or adjustment of status for refugees or asylees.

(G) Applications for Temporary or Humanitarian Protection. Representation of clients before USCIS, ICE, immigration judges, or the Department of State in applications for Temporary Protected Status, Deferred Action for Childhood Arrivals (DACA), Nicaraguan Adjustment and Central American Relief Act (NACARA), parole in place, humanitarian parole, deferred action, orders of supervision, U and T visas, or other similar protections and benefits.

(c) Continuing Legal Education - An applicant must earn no less than ~~48~~ 44 hours of accredited continuing legal education (CLE) credits in topics relating to immigration law during the four years preceding application. ~~At least 20 of the 48 CLE credit hours must be earned during the first and second year preceding application and at least 20 of the CLE hours must be earned during the third and fourth years preceding application. Of the 48 hours, at least 42 must be in immigration law; the balance may be in the related areas of federal administrative procedure, trial advocacy, evidence, taxation, family law, employment law, and criminal law and procedure.~~

(d) Peer Review - An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice in North Carolina. At least four of the completed peer reference forms received by the board must be from lawyers or judges who have substantial practice or judicial experience in immigration law. An applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant, nor may the reference be a partner or associate of the applicant at the time of the application.

(2) The references shall be given on standardized forms provided by the board with the application for certification in the specialty field. These forms shall be returned directly to the specialty committee.

(e) Examination - The applicant must pass a written examination designed to test the applicant's knowledge, skills, and proficiency in immigration law. The examination shall be in written form and shall be given annually. The examination shall be administered and graded uniformly by the specialty committee.

History Note: *Authority G.S. 84-23;*
Eff. March 6, 1997;
Amended approved by the Supreme Court: October 2, 2014; September 25, 2020, December 11, 2024.

27 NCAC 01D .2606 STANDARDS FOR CONTINUED CERTIFICATION AS A SPECIALIST

The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2606(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - The specialist must demonstrate that, for each of the five years preceding application, he or she has had substantial involvement in the specialty as defined in Rule .2605(b) of this subchapter.

(b) Continuing Legal Education - The specialist must have earned no less than ~~60~~ 55 hours of accredited continuing legal education credits in topics relating to immigration law as accredited by the board. ~~At least 30 of the 60 CLE credit hours must be earned during the first three years after certification or recertification, as applicable. Of the 60 hours, at least 52 must be in immigration law; the balance may be in the related areas of federal administrative procedure, trial advocacy, evidence, taxation, family law, employment law, and criminal law and procedure.~~

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in this state and familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in Rule .2605(d) of this subchapter apply to this standard.

(d) Time for Application - Application for continued certification shall be made not more than one hundred eighty (180) days nor less than ninety days prior to the expiration of the prior period of certification.

(e) Lapse of Certification - Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Rule .2605 of this subchapter, including the examination.

(f) Suspension or Revocation of Certification - If an applicant's certification has been suspended or revoked during the period of certification,

then the application shall be treated as if it were for initial certification under Rule .2605 of this subchapter.

History Note: *Authority G.S. 84-23;*
Adopted by the Supreme Court March 6, 1997;
Amendments Approved by the Supreme Court:
October 2, 2014; March 27, 2019, December 11, 2024.

RECODIFICATION OF THE NORTH CAROLINA BOARD OF LAW EXAMINERS RULES GOVERNING THE ADMISSION TO THE PRACTICE OF LAW

The following recodification of the Rules of the North Carolina Board of Law Examiners was duly adopted by the North Carolina Board of Law Examiners at its quarterly meeting on November 1, 2024.

BE IT RESOLVED by the North Carolina Board of Law Examiners that the North Carolina Board of Law Examiners Rules Governing the Admission to the Practice of Law be repealed in their entirety and that the attached recodification of the Rules and Regulations of the North Carolina Board of Law Examiners be substituted in lieu thereof.

BOARD OF LAW EXAMINERS

TITLE 27 – THE NORTH CAROLINA STATE BAR

CHAPTER 3: RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW IN THE STATE OF NORTH CAROLINA

Section .0100: Organization

Section .0101: Definitions

Section .0102: Website

Section .0103: Purpose

Section .0104: Membership

Section .0200: General Provisions

Section .0201: Compliance

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Section .0400: Applications of General Applicants

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Section .0404: Fees for General Applicants

Section .0405: Refund of Fees

Section .0500: Requirements for Applicants

Section .0501: Requirements for General Applicants

Section .0502: Requirements for Comity Applicants

Section .0503: Requirements for Military Spouse Comity Applicants

Section .0504: Requirements for Transfer Applicants

Section .0600: Moral Character and General Fitness

Section .0601: Burden of Proof

Section .0602: Permanent Record

Section .0603: Failure to Disclose
Section .0604: Bar Candidate Committee
Section .0605: Denial; Re-application
Section .0700: Educational Requirements
Section .0701: General Education
Section .0702: Legal Education
Section .0800: Protest
Section .0801: Nature of Protest
Section .0802: Format
Section .0803: Notification; Right to Withdraw
Section .0804: Hearing
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Section .0900: Examinations
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Section .0902: Dates
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Section .0904: Grading and Scoring
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Section .1000: Review of Written Bar Examination
Section .1001: Review
Section .1002: Multistate Bar Examination
Section .1003: Release of Scores
Section .1004: Board Representative
Section .1005: Re-grading
Section .1200: Board Hearings
Section .1201: Nature of Hearings
Section .1202: Notice of Hearing
Section .1203: Conduct of Hearings
Section .1204: Continuances
Section .1205: Subpoenas
Section .1206: Evidence that May Be Received by the Board
Section .1207: Reopening of a Case

Section .1300: Licenses
Section .1301: Issuance
Section .1400: Judicial Review
Section .1401: Appeals
Section .1402: Notice of Appeal
Section .1403: Record to Be Filed
Section .1404: Proceedings on Review in Wake County Superior Court
Section .1405: Further Appeal

BOARD OF LAW EXAMINERS

RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW IN THE STATE OF NORTH CAROLINA:

The following Rules Governing Admission to the Practice of Law in the State of North Carolina, submitted by the North Carolina Board of Law Examiners, was duly approved for inclusion in Title 27 of the North Carolina Administrative Code by the Council of the North Carolina State Bar at its quarterly meeting on November 1, 2024.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules Governing Admission to the Practice of Law in the State of North Carolina are approved for submission to the Codifier of Rules for inclusion in Title 27 of the North Carolina Administrative Code as shown in the following attachment:

Attachment 1: Rules Governing the Admission to the Practice of Law in the State of North Carolina

NORTH CAROLINA
WAKE COUNTY

I, Peter Bolac, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the Rules Governing Admission to the Practice of the State of North Carolina, submitted by the North Carolina Board of Law Examiners were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on November 1, 2024.

Given over my hand and the Seal of the North Carolina State Bar, this the 13th day of November, 2024.

s/Peter Bolac
Peter Bolac, Secretary

After examining the foregoing Rules Governing Admission to the Practice of Law in the State of North Carolina as readopted 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 11th day of December, 2024.

s/Paul Newby
Paul Newby, Chief Justice

BOARD OF LAW EXAMINERS

On this date, the foregoing Rules Governing Admission to the Practice of Law in the State of North Carolina were entered upon the minutes of the Supreme Court. The rules 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 11th day of December, 2024.

s/Riggs, J.
For the Court

27 NCAC 03 .0101 through and including .1405 is adopted without notice pursuant to G.S. 84-21 and G.S. 84-24 as follows:

TITLE 27 – THE NORTH CAROLINA STATE BAR

CHAPTER 3 – RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW IN THE STATE OF NORTH CAROLINA

SECTION .0100 – ORGANIZATION

27 NCAC 03 .0101 DEFINITIONS

For purposes of this Chapter, the following shall apply:

(1) "Chapter" or "Rules" refers to the "Rules Governing Admission to the Practice of Law in the State of North Carolina."

(2) "Board" refers to the "Board of Law Examiners of the State of North Carolina." A majority of the members of the Board shall constitute a quorum, and the action of a majority of a quorum, present and voting, shall constitute the action of the Board.

(3) "Executive Director" refers to the "Executive Director of the Board of Law Examiners of the State of North Carolina."

(4) "Filing" or "filed" shall mean received in the office of the Board of Law Examiners. Except that applications placed in the United States mail properly addressed to the Board of Law Examiners and bearing sufficient first-class postage and postmarked by the United States Postal Service or date-stamped by any recognized delivery service on or before a deadline date will be considered as having been timely filed if all required fees are included in the mailing. Mailings which are postmarked after a deadline or which, if postmarked on or before a deadline, do not include required fees or which include a check in payment of required fees which is dishonored because of insufficient funds will not be considered as filed. Applications which are not properly signed and notarized; or which do not include the properly executed Authorization and Release forms; or which are illegible; or with incomplete answers to questions will not be considered filed and will be returned.

(5) Any reference to a "state" shall mean one of the United States, and any reference to a "territory" shall mean a United States territory.

(6) "Panel" means one or more members of the Board specially designated to conduct hearings provided for in these Rules.

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

27 NCAC 03 .0102 WEBSITE

The Board shall maintain a public website that shall publish the location of its offices, its mailing address, office hours, telephone number, fax number, e-mail address and such other information as the Board may direct.

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

27 NCAC 03 .0103 PURPOSE

The Board was created for the purpose of examining applicants and providing rules and regulations for admission to the bar, including the issuance of licenses therefor.

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

27 NCAC 03 .0104 MEMBERSHIP

The Board consists of 11 members of the North Carolina State Bar elected by the council of the North Carolina State Bar. One member of the Board is elected by the Board to serve as its Chair for such period as the Board may determine. The Board also employs an Executive Director to enable the Board to perform its duties promptly and properly. The Executive Director, in addition to performing the administrative functions of the position, may act as the Board's attorney.

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

SECTION .0200 - GENERAL PROVISIONS

27 NCAC 03 .0201 COMPLIANCE

No person shall be admitted to the practice of law in North Carolina unless that person has complied with these Rules.

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

27 NCAC 03 .0202 APPLICANTS

For purposes of this Chapter, applicants are classified as "general applicants," "comity applicants, "military spouse comity applicants," or "transfer applicants." To be classified as a "general applicant" and certified as such for admission to practice law, an applicant must satisfy the requirements of Rule .0501 of this Chapter. To be classified as a "comity applicant" and certified as such for admission to practice law, an applicant must satisfy the requirements of Rule .0502 of this Chapter. To be classified as a "military spouse comity applicant" and certified as such for admission to practice law, an applicant must satisfy the requirements of Rule .0503 of this Chapter. To be classified as a "transfer applicant" and certified as such for admission to practice law, an applicant must satisfy the requirements of Rule .0504 of this Chapter.

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

27 NCAC 03 .0203 LIST

As soon as possible after each late-filing deadline for general applications, the Executive Director shall prepare a list of general applicants for the ensuing examination, and all comity, military spouse comity, and transfer applicants whose applications are then pending, for publication in the North Carolina State Bar Journal.

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

27 NCAC 03 .0204 HEARINGS

Every applicant may be required to appear before the Board to be examined about any matters pertaining to the applicant's moral character and general fitness, educational background or any other matters set out in Section .0500 of this Chapter.

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

27 NCAC 03 .0205 NONPAYMENT OF FEES

No application will be deemed to have been filed until the applicant has paid the fees required by these rules. If the check payable for the application fee is not honored upon presentment for any reason other than error of the bank, the application will be deemed not to have been filed and will have to be refiled. All such checks shall be returned to the applicant, who shall pay to the Board in cash, cashier's check, certified check, or money order any fees payable to the Board including a fee for processing that check.

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

SECTION .0300 – EFFECTIVE DATE

27 NCAC 03 .0301 EFFECTIVE DATE

These Revised Rules shall apply to all applications for admission to practice law in North Carolina submitted on or after June 30, 2018.

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

SECTION .0400 - APPLICATIONS OF GENERAL APPLICANTS

27 NCAC 03 .0401 HOW TO APPLY

Applications for admission must be made on forms supplied by the Board and must be complete in every detail. Every supporting document required by the application form must be submitted with each application. The application form may be obtained by submitting a written request to the Board or by accessing the application via the Board's website: www.ncble.org.

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

27 NCAC 03 .0402 APPLICATION FORM

(a) The Application for Admission to Take the North Carolina Bar Examination requires an applicant to supply full and complete information relating to the applicant's background, including family history, past and current residences, education, military service, past and present employment, credit status, involvement in disciplinary, civil, or criminal proceedings, substance abuse, current mental and emotional impairment, and bar admission and discipline history. Applicants must list references and submit as part of the application:

(1) Certificates of Moral Character from four individuals who know the applicant;

(2) A recent photograph;

(3) Two sets of clear fingerprints;

(4) Two executed informational Authorization and Release forms;

(5) A birth certificate;

(6) Transcripts from the applicant's undergraduate and graduate schools;

(7) A copy of all applications for admission to the practice of law that the applicant has filed with any state, territory, or the District of Columbia;

(8) A certificate from the proper court or agency of every jurisdiction in which the applicant is or has been licensed, that the applicant is in good standing, or the applicant must otherwise satisfy the Board that the applicant falls within the exception provided in Rule .0501(7)(b), and is not under pending charge of misconduct;

(9) Copies of any legal proceedings in which the applicant has been a party.

(10) The application must be filed in duplicate. The duplicate may be a photocopy of the original.

(b) An applicant who aptly filed a complete Application for the North Carolina Bar Examination for the February or July bar examination may, after failing or withdrawing from that particular examination, file a Supplemental Application, with the applicable fee, for the next subsequent bar examination, on forms supplied by the Board, and may continue to file a Supplemental Application, with the applicable fee, for each subsequent examination until successful. Each Supplemental Application must update any information previously submitted to the Board by the applicant. Each Supplemental Application must be filed by the deadline set out in Rule .0403 of this Chapter. An applicant who withdraws from or fails any particular administration of the bar examination and does not file a Supplemental Application for the next bar examination will be required to file a new general application before taking the written examination again.

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

27 NCAC 03 .0403 FILING DEADLINES

(a) Applications shall be filed with the Executive Director at the offices of the Board on or before the first Tuesday in January immediately preceding the date of the July written bar examination and on or before the first Tuesday in October immediately preceding the date of the February written bar examination.

(b) Upon payment of a late filing fee of two hundred and fifty dollars ($250.00) (in addition to all other fees required by these rules), an applicant may file a late application with the Board on or before the first Tuesday in March immediately preceding the July written bar examination and on or before the first Tuesday in November immediately preceding the February written bar examination.

(c) Applicants who fail to timely file their application will not be allowed to take the Bar Examination designated on the application.

(d) General Applicants may file a Supplemental Application with the Executive Director at the offices of the Board on or before the following dates:

(1) If the applicant aptly filed a General Application, or a previous Supplemental Application, for the February bar examination, the Supplemental Application for the following July bar examination must be filed on or before the first Tuesday in May immediately preceding the July examination; and

(2) If the applicant aptly filed a General Application, or a previous Supplemental Application, for the July bar examination, the Supplemental Application for the following February bar examination must be filed on or before the first Tuesday in October immediately preceding the February examination.

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

27 NCAC 03 .0404 FEES FOR GENERAL APPLICANTS

(a) The application specified in .0402 (a) shall be accompanied by a fee of eight hundred and fifty dollars ($850.00), if the applicant is not, and has not been, a licensed attorney in any other jurisdiction, or by a fee of one thousand six hundred fifty dollars ($1,650), if the applicant is or has been a licensed attorney in any other jurisdiction; provided that if the applicant is filing after the deadline set out in Rule .0403(a), but before the deadline set forth in Rule .0403(b), the application shall also be accompanied by a late fee of two hundred and fifty dollars ($250.00).

(b) A Supplemental Application shall be accompanied by a fee of four hundred dollars ($400.00).

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

27 NCAC 03 .0405 REFUND OF FEES

Except as herein provided, no part of the fee required by Rule .0404(a) or (b) of this Chapter shall be refunded to the applicant unless the applicant shall file with the Executive Director a written request to withdraw as an applicant, not later than the 15th day of June preceding the July written bar examination and not later than the 15th day of January preceding the February written bar examination, in which event not more than one-half of the applicable fee may be refunded to the applicant at the discretion of the Board. No portion of any late fee will be refunded. However, when an application for admission by examination is received from an applicant who, in the opinion of the Executive Director after consultation with the Board Chair, is not eligible for consideration under the Rules, the applicant shall be so advised by written notice. Upon receipt of such notice, the applicant may elect in writing to withdraw the application; and provided the written election is received by the Board within 20 days from the date of the Board's written notice to the applicant, receive a refund of all fees paid.

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

SECTION .0500 - REQUIREMENTS FOR APPLICANTS

27 NCAC 03 .0501 REQUIREMENTS FOR GENERAL APPLICANTS

As a prerequisite to being licensed by the Board to practice law in the State of North Carolina, a general applicant shall:

(1) possess the qualifications of character and general fitness requisite for an attorney and counselor-at- law, and be of good moral character and entitled to the high regard and confidence of the public and have satisfied the requirements of Section .0600 of this Chapter at the time the license is issued;

(2) possess the legal educational qualifications as prescribed in Section .0700 of this Chapter;

(3) be at least 18 years of age;

(4) have filed formal application as a general applicant in accordance with Section .0400 of this Chapter;

(5) pass the written bar examination prescribed in Section .0900 of this Chapter, provided that an applicant who has failed to achieve licensure for any reason within three years after the date of the written bar examination in which the applicant received a passing score will be required to take and pass the examination again before being admitted as a general applicant;

(6) have taken and passed the Multistate Professional Responsibility Examination within the 24 month period next preceding the beginning day of the written bar examination which applicant passes as prescribed above, or shall take and pass the Multistate Professional Responsibility Examination within the 12 month period thereafter; the time limits are tolled for a period not exceeding four years for any applicant who is a service member as defined in the Service Members Civil Relief Act, 50 U.S.C. Appx. § 511, while engaged in active service as defined in 10 U.S.C. § 101, and who provides a letter or other communication from the service member's commanding officer stating that the service member's current military duty prevents attendance for the examination, stating that military leave is not authorized for the service member at the time of the letter, and stating when the service member would be authorized military leave to take the examination.

(7) if the applicant is or has been a licensed attorney, be in good standing in each state, territory of the United States, or the District of Columbia, in which the applicant is or has been licensed to practice law and not under any charges of misconduct while the application is pending before the Board.

(a) For purposes of this rule, an applicant is "in good standing" in a jurisdiction if:

(i) the applicant is an active member of the bar of the jurisdiction and the jurisdiction issues a certificate attesting to the applicant's good standing therein; or

(ii) the applicant was formerly a member of the jurisdiction, and the jurisdiction certifies the applicant was in good standing at the time that the applicant ceased to be a member; and

(b) if the jurisdiction in which the applicant is inactive or was formerly a member will not certify the applicant's good standing solely because of the non-payment of dues, the Board, in its discretion, may waive such certification from that jurisdiction.

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

27 NCAC 03 .0502 REQUIREMENTS FOR COMITY APPLICANTS

The Board in its discretion shall determine whether an attorney duly licensed to practice law in any state, or territory of the United States, or the District of Columbia, may be licensed to practice law in the State of North Carolina without written examination, other than the Multistate Professional Responsibility Examination; provided that such attorney's jurisdiction of licensure qualifies as a jurisdiction in comity with North Carolina, in that the conditions required by such state, or territory of the United States or the District of Columbia, for North Carolina attorneys to be licensed to practice law in that jurisdiction without written examination are not considered by the Board to be unduly or materially greater than the conditions required by the State of North Carolina for licensure to practice law without written examination in this State. A list of "approved jurisdictions", as determined by the Board pursuant to this rule, shall be available upon request. Any attorney at law duly admitted to practice in another state, or territory of the United States, or the District of Columbia, upon written application may, in the discretion of the Board, be licensed to practice law in the State of North Carolina without written examination provided each such applicant shall:

(1) File with the Executive Director, upon such forms as may be supplied by the Board, a typed application. Such application shall require:

(a) That an applicant supplies full and complete information in regard to his background, including family, past residences, education, military, employment, credit status, whether he has been a party to any disciplinary or legal proceedings, whether currently mentally or emotionally impaired, references, and the nature of the applicant's practice of law.

(b) That the applicant furnishes the following documentation:

(i) Certificates of Moral Character from four individuals who know the applicant;

(ii) A recent photograph;

(iii) Two sets of clear fingerprints;

(iv) A certification of the Court of Last Resort from the jurisdiction from which the applicant is applying that: the applicant is currently licensed in the jurisdiction; the date of the applicant's licensure in the jurisdiction; the applicant was of good moral character when licensed by the jurisdiction; and the jurisdiction allows North Carolina attorneys to be admitted without examination;

(v) Transcripts from the applicant's undergraduate and graduate schools;

(vi) A copy of all applications for admission to the practice of law that the applicant has filed with any state, territory, or the District of Columbia;

(vii) A certificate of admission to the bar of any state, territory, or the District of Columbia;

(viii) A certificate from the proper court or body of every jurisdiction in which the applicant is licensed that he is in good standing, or that the applicant otherwise satisfies the Board that the applicant falls within the exception provided in Rule .0501(7)(b), and not under pending charges of misconduct;

(2) Pay to the Board with each application, a fee of two thousand dollars ($2,000), no part of which may be refunded to (a) an applicant whose application is denied; or (b) an applicant who withdraws, unless the applicant has filed with the Board a written request to withdraw, in which event, the Board in its discretion may refund no more than one-half of the fee to the withdrawing applicant. However, when an application for admission by comity is received from an applicant who, in the opinion of the Executive Director after consideration with the Board Chair, is not eligible for consideration under the Rules, the applicant shall be so advised by written notice. Upon receipt of such notice, the applicant may elect in writing to withdraw the application, and provided the written election is received by the Board within 20 days from the date of the

Board's written notice to the applicant, receive a refund of all fees paid.

(3) Prove to the satisfaction of the Board that the applicant is duly licensed to practice law in one or more jurisdictions which are on the list of "approved jurisdictions," or should be on such list, as a comity jurisdiction within the language of the first paragraph of this Rule .0502; that the applicant has been, for at least four out of the six years immediately preceding the filing of this application with the Executive Director, actively and substantially engaged in the practice of law pursuant to the license to practice law from one or more jurisdictions relied upon by the applicant; and that the applicant has read the Rules of Professional Conduct promulgated by the North Carolina State Bar. Practice of law for the purposes of this rule when conducted pursuant to a license granted by another jurisdiction shall include the following activities, if performed in a jurisdiction in which the applicant is admitted to practice law, or if performed in a jurisdiction that permits such activity by a licensed attorney not admitted to practice in that jurisdiction:

(a) The practice of law as defined by G.S. 84-2.1; or

(b) Activities which would constitute the practice of law if done for the general public; or

(c) Legal service as house counsel for a person or other entity engaged in business; or

(d) Judicial service, service as a judicial law clerk, or other legal service in a court of record or other legal service with any local or state government or with the federal government; or

(e) Legal service with the United States, a state or federal territory, or any local governmental bodies or agencies, including military service; or

(f) A full-time faculty member in a law school approved by the Council of the North Carolina State Bar.

(g) For purposes of this rule, the active practice of law shall not include (a) work that, as undertaken, constituted the unauthorized practice of law in the jurisdiction in which it was performed or in the jurisdiction in which any person receiving the unauthorized service was located, or (b) the practice of law in any additional jurisdiction, pursuant to a license to practice law in that additional jurisdiction, and that additional jurisdiction is not an

"approved jurisdiction" as determined by the Board pursuant to this rule.

(4) Be in good standing in each State, territory of the United States, or the District of Columbia in which the applicant is or has been licensed to practice law and not under any charges of misconduct while the application is pending before the Board.

(a) For purposes of this rule, an applicant is "in good standing" in a jurisdiction if:

(i) the applicant is an active member of the bar of the jurisdiction and the jurisdiction issues a certificate attesting to the applicant's good standing therein; or

(ii) the applicant was formerly a member of the bar of the jurisdiction and the jurisdiction certifies the applicant was in good standing at the time that the applicant ceased to be a member; and

(b) if the jurisdiction in which the applicant is inactive or was formerly a member will not certify the applicant's good standing solely because of the non-payment of dues, the Board, in its discretion, may waive such certification from that jurisdiction; however, the applicant must not only be in good standing, but also must be an active member of each jurisdiction upon which the applicant relies for admission by comity.

(5) Be of good moral character and have satisfied the requirements of Section .0600 of this Chapter;

(6) Meet the educational requirements of Section .0700 of this Chapter as hereinafter set out if first licensed to practice law after August 1971;

(7) Not have taken and failed the written North Carolina Bar Examination within five years prior to the date of filing the applicant's comity application;

(8) Have passed the Multistate Professional Responsibility Examination.

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

27 NCAC 03 .0503 REQUIREMENTS FOR MILITARY SPOUSE COMITY APPLICANTS

A Military Spouse Comity Applicant, upon written application may, in the discretion of the Board, be granted a license to practice law in the State of North Carolina without written examination provided that:

(1) The Applicant fulfills all of the requirements of Rule .0502, except that:

(a) in lieu of the requirements of paragraph (3) of Rule .0502, a Military Spouse Comity Applicant shall certify that said applicant has read the Rules of Professional Conduct promulgated by the North Carolina State Bar and shall prove to the satisfaction of the Board that the Military Spouse Comity Applicant is duly licensed to practice law in a state, or territory of the United States, or the District of Columbia, and that the Military Spouse Comity Applicant has been for at least four out of the last eight years immediately preceding the filing of this application with the Executive Director, actively and substantially engaged in the practice of law. Practice of law for the purposes of this rule shall be defined as it would be defined for any other comity applicant; and

(b) Paragraph (4) of Rule .0502 shall not apply to a Military Spouse Comity Applicant.

(2) Military Spouse Comity Applicant Defined. A Military Spouse Comity Applicant is any person who is

(a) An attorney at law duly admitted to practice in another state or territory of the United States, or the District of Columbia; and

(b) Identified by the Department of Defense (or, for the Coast Guard when it is not operating as a service in the Navy, by the Department of Homeland Security) as the spouse of a service member of the United States Uniformed Services; and

(c) Is residing or intends within the next six months to be residing, in North Carolina due to the service member's military orders for a permanent change of station to the State of North Carolina.

(3) Procedure. In addition to the documentation required by paragraph (1) of Rule .0502, a Military Spouse Comity Applicant must file with the Board the following:

(a) A copy of the service member's military orders reflecting a permanent change of station to a military installation in North Carolina; and

(b) A military identification card which lists the Military Spouse Applicant as the spouse of the service member.

(4) Fee. No application fee will be required for Military Spouse Comity Applicants.

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

27 NCAC 03 .0504 REQUIREMENTS FOR TRANSFER APPLICANTS

As a prerequisite to being licensed by the Board to practice law in the State of North Carolina, a transfer applicant shall:

(1) possess the qualifications of character and general fitness requisite for an attorney and counselor-at- law, and be of good moral character and entitled to the high regard and confidence of the public and have satisfied the requirements of Section .0600 of this Chapter;

(2) possess the legal educational qualifications as prescribed in Section .0700 of this Chapter;

(3) be at least 18 years of age;

(4) have filed with the Executive Director, upon such forms as may be supplied by the Board, a typed application in duplicate, containing the same information and documentation required of general applicants under Rule .0402(a);

(5) have paid with the application an application fee of one thousand five hundred dollars ($1,500), if the applicant is licensed in any other jurisdiction, or one thousand two hundred seventy-five dollars ($1,275) if the applicant is not licensed in any other jurisdiction, no part of which may be refunded to an applicant whose application is denied or to an applicant who withdraws, unless the withdrawing applicant filed with the Board a written request to withdraw, in which event, the Board in its discretion may refund no more than one-half of the fee to the withdrawing applicant. However, when an application

for admission by transfer is received from an applicant who, in the opinion of the Executive Director, after consultation with the Board Chair, is not eligible for consideration under the Rules, the applicant shall be so advised by written notice. Upon receipt of such notice, the applicant may elect in writing to withdraw the application, and provided the written election is received by the Board within 20 days from the date of the Board's written notice to the applicant, receive a refund of all fees paid.

(6) have, within the three-year period preceding the filing date of the application, taken the Uniform Bar Examination and achieved a scaled score on such exam that is equal to or greater than the passing score established by the Board for the UBE as of the administration of the exam immediately preceding the filing date;

(7) have passed the Multistate Professional Responsibility Examination.

(8) if the applicant is or has been a licensed attorney, be in good standing in each state, territory of the United Sates, or the District of Columbia, in which the applicant is or has been licensed to practice law and not under any charges of misconduct while the application is pending before the Board.

(a) For purposes of this rule, an applicant is "in good standing" in a jurisdiction if:

(i) the applicant is an active member of the bar of the jurisdiction and the jurisdiction issues a certificate attesting to the applicant's good standing therein; or

(ii) the applicant was formerly a member of the jurisdiction, and the jurisdiction certifies the applicant was in good standing at the time that the applicant ceased to be a member; and

(b) if the jurisdiction in which the applicant is inactive or was formerly a member will not certify the applicant's good standing solely because of the non-payment of dues, the Board, in its discretion, may waive such certification from that jurisdiction.

History Note: *Authority G.S. 84-21; 84-24;*

Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

SECTION .0600 - MORAL CHARACTER AND GENERAL FITNESS

27 NCAC 03 .0601 BURDEN OF PROOF

Every applicant shall have the burden of proving that the applicant possesses the qualifications of character and general fitness requisite for an attorney and counselor-at-law and is possessed of good moral character and is entitled to the high regard and confidence of the public.

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

27 NCAC 03 .0602 PERMANENT RECORD

All information furnished to the Board by an applicant shall be deemed material, and all such information shall be and become a permanent record of the Board.

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

27 NCAC 03 .0603 FAILURE TO DISCLOSE

No one shall be licensed to practice law in this state:

(1) who fails to disclose fully to the Board, whether requested to do so or not, the facts relating to any disciplinary proceedings or charges as to the applicant's professional conduct, whether same have been terminated or not, in this or any other state, or any federal court or other jurisdiction, or

(2) who fails to disclose fully to the Board, whether requested to do so or not, any and all facts relating to any civil or criminal proceedings, charges or investigations involving the applicant (unless expunged under applicable state law), whether the same have been terminated or not in this or any other state or in any of the federal courts or other jurisdictions.

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

27 NCAC 03 .0604 BAR CANDIDATE COMMITTEE

Every General Applicant and UBE Transfer Applicant not licensed in another jurisdiction shall appear before a bar candidate committee, appointed by the Board Chair, in the judicial district in which the applicant resides, or in such other judicial districts as the Board in its sole discretion may designate to the applicant, to be examined about any matter pertaining to the applicant's moral character and general fitness to practice law. An applicant who has appeared before a hearing Panel may, in the Board's discretion, be excused from making a subsequent appearance before a bar candidate committee. The Board Chair may delegate to the Executive Director the authority to exercise such discretion. The applicant shall give such information as may be required on such forms provided by the Board. A bar candidate committee may require the applicant to make more than one appearance before the committee and to furnish to the committee such information and documents as it may reasonably require pertaining to the moral character and general fitness of the applicant to be licensed to practice law in North Carolina. Each applicant will be advised when to appear before the bar candidate committee. There can be no changes once the initial assignment is made.

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

27 NCAC 03 .0605 DENIAL; RE-APPLICATION

No new application or petition for reconsideration of a previous application from an applicant who has either been denied permission to take the bar examination or has been denied a license to practice law on the grounds set forth in Section .0600 shall be considered by the Board within a period of three years next after the date of such denial unless, for good cause shown, permission for re-application or petition for a reconsideration is granted by the Board.

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

SECTION .0700 - EDUCATIONAL REQUIREMENTS

27 NCAC 03 .0701 GENERAL EDUCATION

Each applicant must have satisfactorily completed the academic work required for admission to a law school approved by the Council of the North Carolina State Bar.

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

27 NCAC 03 .0702 LEGAL EDUCATION

Every applicant applying for admission to practice law in the State of North Carolina, before being granted a license to practice law, shall prove to the satisfaction of the Board that said applicant has graduated from a law school approved by the Council of The North Carolina State Bar or that said applicant will graduate within 30 days after the date of the written bar examination from a law school approved by the Council of the North Carolina State Bar. There shall be filed with the Executive Director a certificate of the dean, or other proper official of said law school, certifying the date of the applicant's graduation. A list of the approved law schools is available in the office of the Executive Director.

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

SECTION .0800 - PROTEST

27 NCAC 03 .0801 NATURE OF PROTEST

Any person may protest the application of any applicant to be admitted to the practice of law.

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

27 NCAC 03 .0802 FORMAT

A protest shall be made in writing, signed by the person making the protest and bearing the person's home and business address, and shall be filed with the Executive Director

(1) if a general applicant, before the date the applicant is scheduled to be examined; or

(2) if a comity, military spouse comity, or transfer applicant, before the date of the applicant's final appearance before a Panel.

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

27 NCAC 03 .0803 NOTIFICATION; RIGHT TO WITHDRAW

The Executive Director shall notify immediately the applicant of the protest and of the charges therein made; and the applicant thereupon may file with the Executive Director a written withdrawal as a candidate for admission.

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

27 NCAC 03 .0804 HEARING

In case the applicant does not withdraw as a candidate for admission to the practice of law, the person or persons making the protest and the applicant in question shall appear before a Panel or the Board at a time and place designated by the Board Chair. If the applicant is an applicant for admission by examination and a hearing on the protest is not held before the written examination, the applicant may take the written examination.

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

27 NCAC 03 .0805 REFUSAL TO LICENSE

Nothing herein contained shall prevent the Board on its own motion from refusing to issue a license to practice law until the Board has been fully satisfied as to the moral character and general fitness of the applicant as provided by Section .0600 of this Chapter.

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

SECTION .0900 - EXAMINATIONS

27 NCAC 03 .0901 WRITTEN EXAMINATION

Two written bar examinations shall be held each year for general applicants.

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

27 NCAC 03 .0902 DATES

The written bar examinations shall be held in North Carolina in the months of February and July on the dates prescribed by the National Conference of Bar Examiners.

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

27 NCAC 03 .0903 SUBJECT MATTER

The examination shall be the Uniform Bar Examination (UBE) prepared by the National Conference of Bar Examiners and comprising six Multistate Essay Examination (MEE) questions, two Multistate Performance Test (MPT) items, and the Multistate Bar Examination (MBE). Applicants may be tested on any subject matter listed by the National Conference of Bar Examiners as areas of law to be tested on the UBE. Questions will be unlabeled and not necessarily limited to one subject matter.

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

27 NCAC 03 .0904 GRADING AND SCORING

Grading of the MEE and MPT answers shall be strictly anonymous. The MEE and MPT raw scores shall be combined and converted to the MBE scale to calculate written scaled scores according to the method used by the National Conference of Bar Examiners for jurisdictions that administer the UBE.

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

27 NCAC 03 .0905 PASSING SCORE

The Board shall determine the passing UBE score for admission in North Carolina. The UBE passing score shall only be increased on one year's public notice.

History Note: Authority G.S. 84-21; 84-24;
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

SECTION .1000 – REVIEW OF WRITTEN BAR EXAMINATION

27 NCAC 03 .1001 REVIEW

After release of the results of the written bar examination, a general applicant who has failed the written examination may, in the Board's offices, review the MEE questions and MPT items on the written examination and the applicant's answers thereto, along with selected answers by other applicants which the Board determines may be useful to unsuccessful applicants. The Board will also furnish an unsuccessful applicant hard copies of any or all of these materials, upon payment of the reasonable cost of such copies, as determined by the Board. No copies of the MEE or MPT grading materials prepared by the National Conference of Bar Examiners will be shown or provided to the applicant unless authorized by the National Conference of Bar Examiners.

History Note: Authority G.S. 84-21; 84-24;
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

27 NCAC 03 .1002 MULTISTATE BAR EXAMINATION

There is no provision for review of the Multistate Bar Examination. Applicants may, however, request the National Conference of Bar Examiners to hand score their MBE answers.

History Note: Authority G.S. 84-21; 84-24;
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

27 NCAC 03 .1003 RELEASE OF SCORES

(a) The Board will not release UBE scores to the public.

(b) The Board will inform each applicant in writing of the applicant's scaled score on the UBE. Scores will be shared with the applicant's law school only with the applicant's consent.

(c) Upon written request of an unsuccessful applicant, the Board will furnish the following information about the applicant's score to the applicant: the applicant's raw scores on the MEE questions and MPT items; the applicant's scaled combined MEE and MPT score; the applicant's scaled MBE score; and the applicant's scaled UBE score.

(d) Upon written request of an applicant, the Board will furnish the Multistate Bar Examination score of said applicant to another jurisdiction's board of bar examiners or like organization that administers the admission of attorneys for that jurisdiction.

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

27 NCAC 03 .1004 BOARD REPRESENTATIVE

The Executive Director serves as the Board's representative for purposes of any review of the written bar examination by an unsuccessful applicant. The Executive Director is not authorized to discuss any specific questions and answers on the bar examination.

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

27 NCAC 03 .1005 RE-GRADING

Examination answers cannot be re-graded once UBE scores have been released.

History Note: Authority G.S. 84-21; 84-24;
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

SECTION .1200 - BOARD HEARINGS

27 NCAC 03 .1201 NATURE OF HEARINGS

Any applicant may be required to appear before the Board or a hearing Panel at a hearing to answer inquiry about any matter under these rules. In the event a hearing for an applicant for admission by examination is not held before the written examination, the applicant shall be permitted to take the written examination.

History Note: Authority G.S. 84-21; 84-24;
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

27 NCAC 03 .1202 NOTICE OF HEARING

The Board Chair will schedule the hearings before the Board or Panel, and such hearings will be scheduled by the issuance of a notice of hearing mailed to the applicant or the applicant's attorney within a reasonable time before the date of the hearing.

History Note: Authority G.S. 84-21; 84-24;
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

27 NCAC 03 .1203 CONDUCT OF HEARINGS

(a) All hearings shall be heard by the Board except that the Board Chair may designate two or more members or Emeritus Members (as recommended by the Board and approved by the State Bar Council) to serve as a Panel to conduct the hearings.

(b) The Panel will make a determination as to the applicant's eligibility for admission to practice law in North Carolina. The Panel may grant the

application, deny the application, or refer it to the Board for a de novo hearing. The applicant will be notified in writing of the Panel's determination. In the event of an adverse determination by the Panel, the applicant may request a hearing de novo before the Board by giving written notice to the Executive Director at the offices of the Board within 10 days following receipt of the hearing Panel's determination. Failure to file such notice in the manner and within the time stated shall operate as a waiver of the right of the applicant to request a hearing de novo before the Board.

(c) The Board or a Panel may require an applicant to make more than one appearance before the Board or a hearing Panel, to furnish information and documents as it may reasonably require, and to submit to reasonable physical or mental examinations, pertaining to the moral character or general fitness of the applicant to be licensed to practice law in North Carolina.

(d) The Board or a Panel of the Board may allow an applicant to take the bar examination while the Board or a Panel makes a final determination that the applicant possesses the qualifications and general fitness requisite for an attorney and counselor at law, is possessed of good moral character, and is entitled to the confidence of the public.

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

27 NCAC 03 .1204 CONTINUANCES

Continuances will be granted to a party only in compelling circumstances, especially when one such disposition has been previously requested by and granted to that party. Motions for continuances should be made to the Executive Director and will be granted or denied by the Board Chair or by a Panel designated for the applicant's hearing.

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

27 NCAC 03 .1205 SUBPOENAS

(a) The Board Chair, or the Board Chair's designee, shall have the power to subpoena and to summon and examine witnesses under oath and to compel their attendance and the production of books, papers and other documents and writings deemed by it to be necessary or material to the hearing as set forth in G.S. 84-24.

(b) The Executive Director is delegated the power to issue subpoenas in the Board's name.

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

27 NCAC 03 .1206 EVIDENCE THAT MAY BE RECEIVED BY THE BOARD

(a) In addition to live testimony, a deposition may be used in evidence when taken in compliance with the N. C. Rules of Civil Procedure, G.S. lA-1.

(b) A Panel or the Board may consider sworn affidavits as evidence in a hearing. The Board will take into consideration sworn affidavits presented to the Board by persons desiring to protest an applicant's admission to the North Carolina Bar.

(c) The Board may receive other evidence in its discretion.

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

27 NCAC 03 .1207 REOPENING OF A CASE

After a final decision has been reached by the Board on any matter, a party may petition the Board to reopen or reconsider a case. Petitions will not be granted except when petitioner can show that the reasons for reopening or reconsidering the case are to introduce newly discovered evidence which was not presented at the initial hearing because of some

justifiable, excusable, or unavoidable circumstances and that fairness and justice require reopening or reconsidering the case. The Petition must be made within a reasonable time and not more than 90 days after the decision of the Board has been entered.

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

SECTION .1300 – LICENSES

27 NCAC 03 .1301 ISSUANCE

Upon compliance with the rules of the Board, and all orders of the Board, the Executive Director, upon order of the Board, shall issue a license to practice law in North Carolina to each applicant as may be designated by the Board in the form and manner as may be prescribed by the Board, and at such times as prescribed by the Board.

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

SECTION .1400 - JUDICIAL REVIEW

27 NCAC 03 .1401 APPEALS

An applicant may appeal from an adverse ruling or determination by the Board as to the applicant's eligibility for admission to practice law in North Carolina. Such appeal shall lie to the Superior Court of Wake County.

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

27 NCAC 03 .1402 NOTICE OF APPEAL

Notice of Appeal shall be provided, in writing, within 20 days after notice of such ruling or determination. This Notice shall contain written exceptions to the ruling or determination and shall be filed with the Superior Court for Wake County, North Carolina. A filed copy of said Notice shall be given to the Executive Director. Failure to file such notice of appeal in the manner and within the time stated shall operate as a waiver of the right to appeal and shall result in the decision of the Board becoming final.

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

27 NCAC 03 .1403 RECORD TO BE FILED

Within 60 days after receipt of the notice of appeal, and after the applicant has paid the cost of preparing the record, the Executive Director shall prepare, certify, and file with the Clerk of the Superior Court of Wake County the record of the case, containing:

(1) the application and supporting documents or papers filed by the applicant with the Board;

(2) a complete transcription of the testimony taken at any hearing;

(3) copies of all pertinent documents and other written evidence introduced at the hearing;

(4) a copy of the decision of the Board; and

(5) a copy of the notice of appeal containing the exceptions filed to the decision.

With the permission of the court, the record may be shortened by stipulation of all parties to the review proceedings. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for such additional costs as may be occasioned by the refusal. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

27 NCAC 03 .1404 PROCEEDINGS ON REVIEW IN WAKE COUNTY SUPERIOR COURT

The appeal shall be heard by the presiding judge or resident judge, without a jury, who may hear oral arguments and receive written briefs, but no evidence not offered at the hearing shall be taken, except that in cases of alleged omissions or errors in the record, testimony thereon may be taken by the court. The findings of fact by the Board, when supported by competent evidence, shall be conclusive and binding upon the court. The court may affirm, reverse, or remand the case for further proceedings. If the court reverses or remands for further proceedings the decision of the Board, the judge shall set out in writing, which writing shall become a part of the record, the reasons for such reversal or remand.

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

27 NCAC 03 .1405 FURTHER APPEAL

Any party to the review proceeding, including the Board, may appeal to the Supreme Court from the decision of the Superior Court. No appeal bond shall be required of the Board.

History Note: *Authority G.S. 84-21; 84-24;*
Approved by the Supreme Court and re-entered into the Supreme Court's minutes December 11, 2024.

ORDER AMENDING THE RULES OF MEDIATION FOR MATTERS BEFORE THE CLERK OF SUPERIOR COURT

Pursuant to subsection 7A-38.3B(b) of the General Statutes of North Carolina, the Court hereby amends the Rules of Mediation for Matters Before the Clerk of Superior Court. This order affects Rules 2 and 4.

* * *

Rule 2. Designation of the Mediator

(a) **Designation of a Mediator by Agreement of the Parties.** By agreement, the parties may designate a mediator certified by the Commission ~~within the time period set out in the clerk's order~~by filing a Designation of Mediator by Agreement of Parties in Matter Before Clerk of Superior Court and Order of Appointment, Form AOC-G-302 (Designation Form), requesting that the clerk approve the designation. ~~However, i~~In estate and guardianship matters, the parties may designate only those mediators who are certified under these rules for estate and guardianship matters.

~~A Designation of Mediator in Matter Before Clerk of Superior Court, Form AOC-G-302 (Designation Form),~~The Designation Form must be filed within the time period set out in the clerk's order. The petitioner or petitioner's attorney should file the Designation Form; however, any party may file the Designation Form. The party filing the Designation Form shall serve a copy on all parties and the mediator designated to conduct the mediation. The Designation Form shall state: (i) the name, e-mail address, address, and telephone number of the mediator designated; (ii) the rate of compensation of the mediator; (iii) that the mediator and the persons ordered to attend the mediation have agreed on the designation and the rate of compensation; and (iv) under which rules the mediator is certified.

(b) **Appointment of a Mediator by the Clerk.** ~~In the event that a Designation Form is not filed with the clerk within the time period for filing stated in the clerk's order, the clerk shall appoint a mediator certified by the Commission. The clerk shall appoint only those mediators certified under these rules for estate and guardianship matters to those matters. The clerk may appoint any certified mediator who has expressed a desire to be appointed to mediate all other matters within the jurisdiction of the clerk.~~If the parties cannot agree on the designation of a mediator, then the parties shall notify the court by filing an Appointment of Mediator by Court Order in Matter Before Clerk of Superior Court, Form AOC-G-314 (Mediator Appointment Form), requesting that the

clerk appoint a certified mediator. The Mediator Appointment Form shall be filed within the time period set out in the clerk's order and shall state that the parties have discussed the designation of a mediator and have been unable to agree. Upon receipt of a Mediator Appointment Form, or in the event that the parties fail to file a Designation Form or a Mediator Appointment Form with the clerk within the time period set out in the clerk's order, the clerk shall appoint a mediator certified by the Commission who has expressed a willingness to mediate matters within the clerk's jurisdiction. In estate and guardianship matters, the clerk shall appoint a mediator who is certified under these rules for estate and guardianship matters.

Except for good cause, mediators shall be appointed by the clerk by rotation from a list of those certified mediators who wish to be appointed for matters within the clerk's jurisdiction, without regard to occupation, race, gender, religion, national origin, disability, or whether the mediator is an attorney.

As part of the application or annual certification renewal process, all mediators shall designate those counties for which they are willing to accept court appointments. Each designation shall be deemed to be a representation that the designating mediator has read and will abide by the local rules for, and will accept appointments from, the designated county and will not charge for travel time and expenses incurred in carrying out his or her duties associated with those appointments. A mediator's refusal to accept an appointment in a county designated by the mediator may be grounds for removal from that county's court-appointment list by the Commission or by the clerk of that county.

The Commission shall provide to the clerk of each county a list of superior court mediators requesting appointments in that county who are certified in estate and guardianship proceedings, and those certified in other matters before the clerk. The list shall contain each mediator's name, address, and telephone number. The list shall be provided to the clerks electronically on the Commission's website at https://www.ncdrc.gov. The Commission shall promptly notify the clerk of any disciplinary action taken with respect to a mediator on the list of certified mediators for the county.

(c) **Mediator Information Directory.** For the consideration of the clerks and those designating mediators for matters within the clerk's jurisdiction, the Commission shall post a list of certified mediators who request appointments in those matters and are certified under these rules on its website at https://www.ncdrc.gov. If a mediator has supplied it to the Commission, the list shall also provide the mediator's

designated attendance method and the mediator's biographical information, including information about the mediator's education, professional experience, and mediation training and experience.

(d) **Withdrawal or Disqualification of the Mediator.**

(1) Any person ordered to attend a mediation under these rules may move the clerk of the county in which the matter is pending for an order disqualifying the mediator using a Notice of Withdrawal/Disqualification of Mediator and Order for Substitution of Mediator, Form AOC-DRC-20. For good cause, an order disqualifying the mediator shall be entered.

(2) A mediator who wishes to withdraw from a case may file a Notice of Withdrawal/Disqualification of Mediator and Order for Substitution of Mediator, Form AOC-DRC-20, with the clerk.

(3) If a mediator withdraws or is disqualified, then a substitute mediator shall be designated or appointed under this rule. A mediator who has withdrawn or been disqualified shall not be entitled to receive an administrative fee, unless the mediation has been commenced.

* * *

Rule 4. Duties of Parties, Attorneys, and Other Participants in Mediations

(a) **Attendance.**

(1) **Persons Required to Attend.** The following persons shall attend a mediation:

a. Any person ordered by the clerk to attend.

b. Any nongovernmental entity ordered to attend a mediation conducted under these rules shall be represented at the mediation by an officer, employee, or agent who is not the entity's outside counsel and who has authority to decide on behalf of the entity whether, and on what terms, to settle the matter.

c. Any governmental entity ordered to attend a mediation conducted under these rules shall be represented at the mediation by an employee or agent who is not the entity's outside counsel and who has authority to decide on behalf of the entity whether,

and on what terms, to settle the matter; provided, however, that if proposed settlement terms can be approved only by a governing board, the employee or agent shall have authority to negotiate on behalf of the governing board.

d. An attorney ordered to attend a mediation under these rules has satisfied the attendance requirement when at least one counsel of record for any person ordered to attend has attended the mediation.

e. Other persons may participate in a mediation at the discretion of the mediator.

(2) **Attendance Method.**

a. **Determination.**

1. All parties and persons required to attend a mediation may agree to conduct the mediation in person, using remote technology, or using a hybrid of in-person attendance and remote technology.

2. If all parties and persons required to attend the mediation do not agree on an attendance method and the mediator has designated in the Mediator Information Directory that he or she will conduct mediations only using remote technology, then the mediation shall be conducted using remote technology.

3. If all parties and persons required to attend the mediation do not agree on an attendance method and the mediator has not selected remote technology as his or her designated attendance method in the Mediator Information Directory, then the mediation shall be conducted in person.

b. **Order by Clerk; Mediator Withdrawal.** The clerk, upon motion of a party and notice to the mediator and to all other parties and persons required to attend the mediation, may order that the mediation be conducted in person, using remote technology, or using a hybrid of in-person attendance and remote technology.

If the method of attendance ordered by the clerk is contrary to the attendance method the mediator has designated in the Mediator Information Directory, then the mediator may withdraw from the case under Rule 2(d).

(3) **Scheduling.** Persons ordered to attend a mediation shall promptly notify the mediator, after selection or appointment, of any significant problems that they may have with the dates for mediation sessions before the completion deadline, and shall inform the mediator of any problems that arise before an anticipated mediation session is scheduled by the mediator.

(4) **Excusing the Attendance Requirement.** Any person may be excused from the requirement to attend a mediation with the consent of all persons required to attend the mediation and the mediator.

(5) **Safety Compliance.** The mediator and all parties and persons required to attend a mediation shall comply with all federal, state, and local safety guidelines that are in place for trial court proceedings at the time of the mediation.

(b) **Finalizing Agreement.**

(1) If an agreement is reached at the mediation, in matters that, as a matter of law, may be resolved by the parties by agreement, then the parties to the agreement shall reduce the terms of the agreement to writing and sign the writing ~~along with their counsel~~. The parties shall designate a person who will file a consent judgment or a voluntary dismissal with the clerk, and that person shall sign the mediator's report. If an agreement is reached prior to or during a recess of the mediation, then the parties shall inform the mediator and the clerk that the matter has been settled and, within ten calendar days of the agreement, file a consent judgment or voluntary dismissal with the court.

A designee may sign the agreement on behalf of a party only if the party does not attend the mediation in person and the party provides the mediator with a written verification that the designee is authorized to sign the agreement on the party's behalf.

(2) In all other matters, including guardianship and estate matters, if an agreement is reached upon some or all of the issues at the mediation, then the persons ordered to attend the mediation shall reduce the terms of the agreement to writing and sign the writing~~ along with their counsel, if any~~. Such agreements are not binding upon the clerk, but may be offered into evidence at the hearing of the matter and may be considered by the clerk for a just and fair resolution of the matter. Evidence of statements made and conduct occurring in a mediation where an agreement is reached is admissible under N.C.G.S. § 7A-38.3B(g)(3).

All written agreements reached in such matters shall include the following language in a prominent location in the document: "This agreement is not binding on the clerk but will be presented to the clerk as an aid to reaching a just resolution of the matter."

(c) **Payment of the Mediator's Fee**. The persons ordered to attend the mediation shall pay the mediator's fee as provided by Rule 7.

(d) **No Recording**. There shall be no stenographic, audio, or video recording of the mediation process by any participant. This prohibition includes recording either surreptitiously or with the agreement of the parties.

Comment

Comment to Rule 4(a)(2). The rule describes the attendance methods used for mediations. If a mediation is conducted using remote technology, then the mediator should ensure that the parties are able to fully communicate with all other participants and videoconferencing is encouraged.

* * *

These amendments to the Rules of Mediation for Matters Before the Clerk of Superior Court become effective on 6 January 2025.

This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 11th day of December 2024.

For the Court

RULES OF MEDIATION FOR MATTERS
BEFORE THE CLERK OF THE SUPERIOR COURT

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 11th day of December 2024.

GRANT E. BUCKNER
Clerk of the Supreme Court

ORDER AMENDING THE STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS

Pursuant to subsection 7A-38.2(a) of the General Statutes of North Carolina, the Court hereby amends the Standards of Professional Conduct for Mediators. This order affects Standards 3, 4, and 5.

*   *   *

Standard 3. Confidentiality

A mediator shall, subject to exceptions set forth below, maintain the confidentiality of all information obtained within the mediation process.

(a) A mediator shall not disclose to any nonparticipant, directly or indirectly, any information communicated to the mediator by a participant within the mediation process, whether the information is obtained before, during, or after the mediated settlement conference. A mediator's filing of a copy of an agreement reached in mediation with the appropriate court, under a statute that mandates such filing, shall not be considered to be a violation of this subsection.

(b) A mediator shall not disclose to any participant, directly or indirectly, any information communicated to the mediator in confidence by any other participant in the mediation process, whether the information is obtained before, during, or after the mediated settlement conference, unless the other participant gives the mediator permission to do so. A mediator may encourage a participant to permit disclosure but, absent permission, the mediator shall not disclose the information.

(c) A mediator shall not disclose to court officials or staff any information communicated to the mediator by a participant within the mediation process, whether before, during, or after the mediated settlement conference, including correspondence or communications regarding scheduling or attendance, except as required to complete a report of mediator form; provided, however, that when seeking to collect a fee for services, the mediator may share correspondence or communications from a participant relating to the fees of the mediator. Report of mediator forms are available on the North Carolina Administrative Office of the Court's website at https://www.nccourts.gov.

(d) Notwithstanding the confidentiality provisions set forth in subsections (a), (b), and (c) of this standard, a mediator may report otherwise confidential conduct or statements made before, during, or after mediation in the following circumstances:

(1) If a mediator believes that communicating certain procedural matters to court officials or staff will aid the mediation, then, with the consent of the parties to the mediation, the mediator may do so. In making a permitted disclosure, a mediator shall refrain from expressing his or her personal opinion about a participant or any aspect of the case to court officials or staff.

(2) If a statute or a mediation rule promulgated by a state or federal agency requires or permits a mediator to testify, give an affidavit, or tender a copy of an agreement reached in mediation to the official designated by the statute or rule, then the mediator may do so.

If, under the Rules for Settlement Procedures in District Court Family Financial Cases or the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions, a hearing is held on a motion for sanctions for failure to attend a mediated settlement conference, or for failure to pay the mediator's fee, and the mediator who mediated the dispute testifies, either as the movant or under a subpoena, then the mediator shall limit his or her testimony to facts relevant to a decision about the sanction sought and shall not testify about statements made by a participant that are not relevant to that decision.

(3) If a mediator is subpoenaed and ordered to testify or produce evidence in a criminal action or proceeding as provided in N.C.G.S. § 7A-38.1(1), N.C.G.S. § 7A-38.4A(j), and N.C.G.S. § 7A 38.3B(g), then the mediator may do so.

(4) If public safety is at issue, then a mediator may disclose otherwise confidential information to participants, nonparticipants, law enforcement personnel, or other persons potentially affected by the harm, if:

a. a party to, or a participant in, the mediation has communicated to the mediator a threat of serious bodily harm or death to any person, and the mediator has reason to believe the party has the intent and ability to act on the threat;

b. a party to, or a participant in, the mediation has communicated to the mediator a threat of significant damage to real or personal property, and the

mediator has reason to believe the party has the intent and ability to act on the threat; or

c. a party or other participant's conduct during the mediation results in direct bodily injury or death to a person.

(5) If a party to, or a participant in, a mediation has filed a complaint with the Commission, the North Carolina State Bar, or another professional licensing board established by the North Carolina General Assembly regarding a mediator's professional conduct, moral character, or fitness to practice as a mediator, then the mediator may reveal otherwise confidential information for the purpose of defending himself or herself against the complaint.

(6) If a party to, or a participant in, a mediation has filed a lawsuit against a mediator for damages or other relief regarding the mediator's professional conduct, moral character, or fitness to practice as a mediator, then the mediator may reveal otherwise confidential information for the purpose of defending himself or herself in the action.

(7) With the permission of all parties, a mediator may disclose otherwise confidential information to an attorney who now represents a party in a case previously mediated by the mediator and in which no settlement was reached. The disclosure shall be intended to help the newly involved attorney understand any offers extended during the mediation process and any impediments to settlement. A mediator who discloses otherwise confidential information under this subsection shall take great care, especially if some time has passed, to ensure that their recall of the discussion is clear, that the information is presented in an unbiased manner, and that no confidential information is revealed.

(8) If a mediator is a lawyer licensed by the North Carolina State Bar and another lawyer makes statements or engages in conduct that is reportable under subsection (d)(4) of this standard, then the mediator shall report the statements or conduct to either the North Carolina State Bar or the court having jurisdiction over the matter, in accordance with Rule 8.3(e) of the North Carolina Rules of Professional Conduct.

(9) If a mediator concludes that, as a matter of safety, the mediated settlement conference should be held in a secure location, such as the courthouse, then the mediator may seek the assistance of court officials or staff in securing a location, so long as the specific circumstances of the parties' dispute are not identifiable.

(10) If a mediator or mediator-observer witnesses concerning behavior of an attorney during a mediation, then that behavior may be reported to the North Carolina Lawyer Assistance Program for the purpose of providing assistance to the attorney for alcohol or substance abuse.

In making a permitted disclosure under this standard, a mediator should make every effort to protect the confidentiality of noncomplaining parties or participants in the mediation, refrain from expressing his or her personal opinion about a participant, and avoid disclosing the identities of the participants or the specific circumstances of the parties' dispute.

(e) "Court officials or staff," as used in this standard, includes court officials or staff of North Carolina state and federal courts, state and federal administrative agencies, and community mediation centers.

(f) The duty of confidentiality as set forth in this standard encompasses information received by the mediator and then disseminated to a nonmediator employee or nonmediator associate who is acting as an agent of the mediator.

(1) A mediator who individually or together with other professionals employs and/or utilizes a nonmediator in the practice, firm, or organization shall make reasonable efforts to ensure that the practice, firm, or organization has provided reasonable assurance that the nonmediator's conduct is compatible with the professional obligations of the mediator.

a. A mediator having direct, or indirect, supervisory authority over the nonmediator shall make reasonable efforts to ensure that the nonmediator's conduct is compatible with the ethical obligations of the mediator.

b. A mediator may share confidential files with the nonmediator provided the mediator properly supervises the nonmediator to ensure the preservation of party confidences.

c. A mediator shall be responsible for the nonmediator's actions, or inactions, that would be a violation of these standards if:

1. the mediator orders or, with the knowledge of the specific conduct, ratifies the conduct; or

2. the mediator has managerial or direct supervisory authority over the nonmediator and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action to avoid the consequences.

(2) A mediator who individually or together with other professionals employs and/or utilizes a nonmediator in the practice, firm, or organization shall make reasonable efforts to ensure that the nonmediator's conduct is compatible with the provisions set forth in subsections (c) and (d) of this standard.

(g) Nothing in this standard prohibits the use of information obtained in a mediation for instructional purposes or for the purpose of evaluating or monitoring the performance of a mediator, mediation organization, or dispute resolution program, so long as the parties or the specific circumstances of the parties' controversy are not identifiable.

Comment

Comment to Standard 3(f). Mediators may employ associates and/or assistants in their practice, including secretaries, law student interns, and paraprofessionals. The associates and assistants, whether employees or independent contractors, act for the mediator in rendition of the mediator's professional services. A mediator must give the associates and assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to a mediation case. The measures employed in supervising nonmediators should take account of the fact that nonmediators do not have mediation training and are not subject to professional discipline by the Commission.

* * *

Standard 4. Consent

A mediator shall make reasonable efforts to ensure that each party understands the mediation process, the role of the mediator, and the party's options within the mediation process.

(a) A mediator shall discuss with the participants the rules and procedures pertaining to the mediation process and shall inform the parties of such matters as applicable rules require.

(b) A mediator shall not exert undue pressure on a participant, whether to participate in mediation or to accept a settlement; nevertheless, a mediator shall encourage the parties to consider both the benefits of participation and settlement and the costs of withdrawal and impasse.

(c) If a party appears to have difficulty comprehending the mediation process, issue, or settlement options, or appears to have difficulty participating in a mediation, then a mediator shall explore the circumstances and potential accommodations, modifications, or adjustments that would facilitate the party's ability to comprehend, participate, and exercise self-determination. If the mediator determines that the party cannot meaningfully participate in the mediation, then the mediator shall recess or ~~discontinue~~terminate the mediation. Before ~~discontinuing~~ terminating the mediation, the mediator shall consider the context and circumstances of the mediation, including the subject matter of the dispute, availability of support persons for the party, and whether the party is represented by counsel.

(d) In appropriate circumstances, a mediator shall inform the parties about the importance of seeking legal, financial, tax, or other professional advice before, during, or after the mediation process.

* * *

Standard 5. Self-Determination

A mediator shall respect and encourage self-determination by the parties in their decision whether, and on what terms, to resolve their dispute, and shall refrain from being directive or judgmental regarding the issue in dispute and the options for settlement.

(a) A mediator is obligated to leave to the parties the full responsibility for deciding whether, and on what terms, to resolve their dispute. The mediator may assist a party in making an informed and thoughtful decision, but shall not impose his or her judgment or opinion concerning any aspect of the mediation on the party.

(b) A mediator may raise questions for the participants to consider regarding their perception of the dispute, as well as the acceptability of proposed options for settlement and their impact on third parties.

Furthermore, a mediator may suggest options for settlement in addition to those conceived of by the parties.

(c) A mediator shall not impose his or her opinion about the merits of the dispute or about the acceptability of any proposed option for settlement. A mediator should refrain from giving his or her opinion about the dispute and options for settlement, even when the mediator is requested to do so by a party or attorney. Instead, a mediator should help that party utilize the party's own resources to evaluate the dispute and the options for settlement.

This subsection prohibits a mediator from imposing his or her opinion, advice, or counsel upon a party or attorney. This subsection does not prohibit a mediator from expressing his or her opinion as a last resort to a party or attorney who requests it, as long as the mediator has already helped that party utilize the party's own resources to evaluate the dispute and the options for settlement.

(d) Subject to Standard 4(d), if a party to a mediation declines to consult with independent counsel or an expert after a mediator has raised the consultation as an option, then the mediator shall permit the mediation to go forward according to the parties' wishes.

(e) If, in a mediator's judgment, the integrity of the mediation process has been compromised by, for example, the inability or unwillingness of a party to participate meaningfully, the inequality of bargaining power or ability, the unfairness resulting from nondisclosure or fraud by a participant, or other circumstances likely to lead to a grossly unjust result, then the mediator shall inform the parties of his or her concern. Consistent with the confidentiality provisions in Standard 3, the mediator may discuss with the parties the source of his or her concern. The mediator may choose to ~~discontinue~~terminate the mediation in such circumstances but shall not violate his or her obligation of confidentiality.

* * *

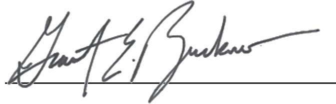
These amendments to the Standards of Professional Conduct for Mediators become effective on 6 January 2025.

This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 11th day of December 2024.

For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 11th day of December 2024.



GRANT E. BUCKNER
Clerk of the Supreme Court

ORDER AMENDING THE RULES FOR SETTLEMENT PROCEDURES IN DISTRICT COURT FAMILY FINANCIAL CASES

Pursuant to subsection 7A-38.4A(k) and subsection 7A-38.4A(*o*) of the General Statutes of North Carolina, the Court hereby amends the Rules for Settlement Procedures in District Court Family Financial Cases. This order affects Rules 2, 7, and 8.

* * *

Rule 2. Designation of the Mediator

(a) **Designation of a Mediator by Agreement of the Parties**. By agreement, the parties may designate a family financial mediator certified under these rules by filing a ~~Designation of Mediator in Family Financial Case~~Designation of Mediator by Agreement of Parties in Family Financial Case and Order of Appointment, Form AOC CV-825 (Designation Form), ~~with the court at the scheduling and discovery conference~~requesting that the chief district court judge approve the designation. The Designation Form shall be filed at the scheduling and discovery conference. The plaintiff or plaintiff's attorney should file the Designation Form; however, any party may file the Designation Form. The party filing the Designation Form shall serve a copy on all parties and the mediator designated to conduct the mediation. The Designation Form shall state: (i) the name, e-mail address, address, and telephone number of the designated mediator; (ii) the rate of compensation of the mediator; (iii) that the mediator and opposing counsel have agreed upon the designation and rate of compensation; and (iv) that the mediator is certified under these rules.

~~A copy of each form submitted to the court and the court's order requiring a mediated settlement conference shall be delivered to the mediator by the parties.~~

(b) **Appointment of a Mediator by the Court**. If the parties cannot agree on the designation of a ~~certified~~ mediator, then the parties shall notify the court by filing an ~~Designation Form~~Appointment of Mediator by Court Order in Family Financial Case, Form AOC-CV-841 (Mediator Appointment Form), requesting that the court appoint a certified mediator. The ~~Designation~~Mediator Appointment Form shall be filed at the scheduling and discovery conference and shall state that ~~the attorneys for~~ the parties have discussed the designation of a mediator and have been unable to agree~~ on a mediator~~. Upon receipt of a ~~Designation~~Mediator Appointment Form ~~requesting the appointment~~

~~of a mediator~~r, or ~~upon~~in the event that the parties' fail~~ure~~ to file a Designation Form or a Mediator Appointment Form with the court at the scheduling and discovery conference, the court shall appoint a family financial mediator certified under these rules who has expressed a willingness to mediate disputes within the judicial district.

In appointing a mediator, the court shall rotate through a list of available certified mediators. Appointments shall be made without regard to race, gender, religious affiliation, or whether the mediator is a licensed attorney. The court shall retain discretion to depart from a strict rotation of mediators when, in the court's discretion, there is good cause in a case to do so.

As part of the application or certification renewal process, all mediators shall designate the judicial districts in which they are willing to accept court appointments. Each designation is a representation that the designating mediator has read and will abide by the local rules for, and will accept appointments from, the designated district and will not charge for travel time and expenses incurred in carrying out his or her duties associated with those appointments. A mediator's refusal to accept an appointment in a judicial district designated by the mediator may be grounds for the mediator's removal from the district's appointment list by the Dispute Resolution Commission (Commission) or the chief district court judge.

The Commission shall provide the district court judges in each judicial district a list of certified family financial mediators requesting appointments in that district. The list shall contain each mediator's name, address, and telephone number. The list shall be provided to the judges electronically through the Commission's website at https://www.ncdrc.gov.

The Commission shall promptly notify the district court of any disciplinary action taken with respect to a mediator on the list of certified mediators for the judicial district.

(c) **Mediator Information Directory.** To assist the parties in designating a mediator, the Commission shall assemble, maintain, and post a list of certified family financial mediators on its website at https://www.ncdrc.gov, accompanied by each mediator's contact information and the judicial districts in which each mediator is available to serve. If a mediator has supplied it to the Commission, the list shall also provide the mediator's designated attendance method and the mediator's biographical information, including information about the mediator's education, professional experience, and mediation training and experience.

(d) **Withdrawal or Disqualification of the Mediator.**

(1) Any party may move the chief district court judge of the judicial district where the case is pending for an order disqualifying the mediator using a Notice of Withdrawal/ Disqualification of Mediator and Order for Substitution of Mediator, Form AOC DRC-20. For good cause, an order disqualifying the mediator shall be entered.

(2) A mediator who wishes to withdraw from a case may file a Notice of Withdrawal/Disqualification of Mediator and Order for Substitution of Mediator, Form AOC-DRC-20, with the chief district court judge of the judicial district where the case is pending.

(3) If a mediator withdraws or is disqualified, then a substitute mediator shall be designated or appointed under this rule. A mediator who has withdrawn or been disqualified shall not be entitled to receive an administrative fee, unless the mediation has been commenced.

* * *

Rule 7. Compensation of the Mediator and Sanctions

(a) **By Agreement**. When a mediator is selected by agreement of the parties, compensation shall be as agreed upon between the parties and the mediator. Notwithstanding the terms of the parties' agreement with the mediator, subsection (e) of this rule shall apply to an issue involving compensation of the mediator. Subsections (d) and (f) of this rule shall apply unless the parties' agreement provides otherwise.

(b) **By Court Order**. When the mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate of $150 per hour. The parties shall also pay the mediator a one-time, per-case administrative fee of $175, which accrues upon appointment.

(c) **Change of Appointed Mediator**. Parties who fail to select a mediator and then desire a substitution after the court has appointed a mediator shall obtain court approval for the substitution<u> by filing a Consent Order for Substitution of Mediator, Form AOC-CV-836</u>. The court may approve the substitution only upon proof of payment to the court's original appointee of the $175 one-time, per-case administrative fee, any other amount due for mediation services under subsection (b) of this rule, and any postponement fee owed under subsection (f) of this rule.

(d) **Payment of Compensation by the Parties**. Unless otherwise agreed to by the parties or ordered by the court, the mediator's fee shall be paid in equal shares by the parties. Payment shall be due upon the completion of the mediated settlement conference.

(e) **Inability to Pay**. Any party found by the court to be unable to pay its full share of the mediator's fee shall not be required to do so. Any party required to pay a share of a mediator's fee under subsections (b) and (c) of this rule may move the court for relief using a Petition and Order for Relief from Obligation to Pay All or Part of Mediator's Fee in Family Financial Case, Form AOC-CV-828.

In ruling upon the motion, the court may consider the income and assets of the movant and the outcome of the dispute. The court shall enter an order granting or denying the party's motion. The court may require that one or more shares be paid out of the marital estate.

Any mediator conducting a mediated settlement conference under these rules shall accept as payment in full of a party's share of the mediator's fee that portion paid by, or on behalf of, the party pursuant to a court order issued under this rule.

(f) **Postponements and Fees**.

(1) As used in subsection (f) of this rule, "postponement" means to reschedule or not proceed with a mediated settlement conference once a date for the conference has been scheduled by the mediator. After a conference has been scheduled for a specific date, a party may not unilaterally postpone the conference.

(2) A mediated settlement conference may be postponed by a mediator for good cause only after notice by the movant to all parties of the reason for the postponement and a finding of good cause by the mediator. Good cause exists when the reason for the postponement involves a situation over which the party seeking the postponement has no control, including, but not limited to: (i) the illness of a party or attorney, (ii) a death in the family of a party or attorney, (iii) a sudden and unexpected demand by the court that a party or attorney for a party appear in court for a purpose not inconsistent with the guidelines established by Rule 3.1(d) of the General Rules of Practice for the Superior and District Courts, or (iv) inclement weather exists, such that travel is prohibitive. Where good cause is found, the mediator shall not assess a postponement fee.

(3) The settlement of a case prior to the scheduled date for mediation shall be good cause for postponement; provided, however, that the mediator was notified of the settlement immediately after it was reached and at least fourteen calendar days prior to the date scheduled for the mediation.

(4) Without a finding of good cause, a mediator may also postpone a scheduled mediated settlement conference session with the consent of all parties. A fee of $150 shall be paid to the mediator if the postponement is allowed. However, if the request for a postponement is made within seven calendar days of the scheduled date for mediation, then the postponement fee shall be $300. The postponement fee shall be paid by the party requesting the postponement, unless otherwise agreed to by the parties. Postponement fees are in addition to the one-time, per-case administrative fee provided for in subsection (b) of this rule.

(5) If the parties select a certified mediator and contract with the mediator as to compensation, then the parties and the mediator may specify in their contract alternatives to the postponement fees otherwise required under subsection (f) of this rule.

Comment

Comment to Rule 7(b). Court-appointed mediators may not be compensated for travel time, mileage, or any other out-of-pocket expenses associated with a court-ordered mediation.

Comment to Rule 7(d). If a party is found by the court to have failed to attend a mediated settlement conference without good cause, then the court may require that party to pay the mediator's fee and related expenses.

Comment to Rule 7(f). Non-essential requests for postponements work a hardship on parties and mediators and serve only to inject delay into a process and program designed to expedite litigation. It is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to a postponement in instances where, in the mediator's judgment, the mediation could be held as scheduled.

* * *

Rule 8. Mediator Certification and Decertification

(a) The Commission may receive and approve applications for certification of persons to be appointed as mediators for family financial

matters in district court. In order to be certified, an applicant must satisfy the requirements of this subsection.

(1) The applicant for certification must have a basic understanding of North Carolina family law and have completed the requirements of this subsection prior to taking the forty hours of Commission-certified family and divorce mediation training or the sixteen hours of Commission-certified supplemental family and divorce mediation training under subsection (a)(2)(b) of this rule. Applicants ~~should be able to~~shall demonstrate that they have completed at least twelve hours of basic family law education by:

a. attending workshops or programs on topics such as separation and divorce, alimony and postseparation support, equitable distribution, child custody and support, and domestic violence;

b. completing an independent study on these topics, such as viewing or listening to video or audio programs on family law topics; or

c. having equivalent North Carolina family law experience, including work experience that satisfies one of the categories set forth in the Commission's policy on interpreting Rule 8(a)(1) (e.g., the applicant is an experienced family law judge or a North Carolina State Bar board certified family law specialist).

(2) The applicant for certification must:

a. have been designated a Family Mediator Advanced Practitioner by the Association for Conflict Resolution (ACR) and have earned an undergraduate degree from an accredited four-year college or university; or

b. have completed either (i) forty hours of Commission certified family and divorce mediation training; or (ii) forty hours of Commission-certified trial court mediation training and sixteen hours of Commission certified supplemental family and divorce mediation training; and be

1. a member in good standing of the North Carolina State Bar or a member similarly in good standing of the bar of another state and eligible to

apply for admission to the North Carolina State Bar under Chapter 1, Subchapter C, of the North Carolina State Bar Rules and the Rules Governing the Board of Law Examiners and the Training of Law Students, 27 N.C. Admin. Code 1C.0105, with at least five years of experience after the date of licensure as a judge, practicing attorney, law professor, or mediator, or must possess equivalent experience;

2. a licensed psychiatrist under N.C.G.S. § 90-9.1, with at least five years of experience in the field after the date of licensure;

3. a licensed psychologist under N.C.G.S. §§ 90-270.1 to -270.22, with at least five years of experience in the field after the date of licensure;

4. a licensed marriage and family therapist under N.C.G.S. §§ 90-270.45 to -270.63, with at least five years of experience in the field after the date of licensure;

5. a licensed clinical social worker under N.C.G.S. § 90B-7, with at least five years of experience in the field after the date of licensure;

6. a licensed professional counselor under N.C.G.S. §§ 90-329 to -345, with at least five years of experience in the field after the date of licensure; or

7. an accountant certified in North Carolina, with at least five years of experience in the field after the date of certification.

(3) If the applicant is not licensed to practice law in one of the United States, then the applicant must have, as a prerequisite for the forty hours of Commission-certified family and divorce mediation training under subsection (a)(2)(b) of this rule, completed six hours of training on North Carolina legal terminology, court structure, and civil procedure, provided by a Commission-certified trainer. An attorney licensed to practice law in a state other than North Carolina shall satisfy this requirement by completing a self-study course, as directed by Commission staff.

(4) If the applicant is not licensed to practice law in North Carolina, then the applicant must provide three letters of reference to the Commission about the applicant's good character, including at least one letter from a person with knowledge of the applicant's professional practice and experience qualifying the applicant under subsection (a) of this rule.

(5) The applicant must have observed, as a neutral observer and with the permission of the parties, two mediations involving a custody or family financial issue conducted by a mediator who (i) is certified under these rules, (ii) has a~~n~~ Family Mediator Advanced Practitioner Designation from the ACR, or (iii) is a mediator certified by the NCAOC for custody matters. ~~Mediations eligible for observation shall also include mediations conducted in matters prior to litigation of family financial disputes that are mediated by agreement of the parties and incorporate these rules.~~

If the applicant is not an attorney licensed to practice law in one of the United States, then the applicant must observe three additional mediations involving ~~civil or~~ family~~-related disputes~~ financial issues conducted by a Commission-certified family financial mediator~~, or disputes prior to litigation that are conducted by a Commission-certified mediator and are conducted pursuant to a court order or an agreement of the parties incorporating the mediation rules of a North Carolina state or federal court~~.

Mediations eligible for observation under this subsection may include mediations conducted in matters prior to litigation of family financial cases that are mediated pursuant to an agreement of the parties incorporating these rules. All mediations shall be observed from their beginning until settlement, or until the point that an impasse has been declared, and shall be reported by the applicant on a Certificate of Observation - Family Financial Settlement Conference Program, Form AOC-DRC-08. All observers shall conform their conduct to the Commission's policy on *Guidelines for Observer Conduct*.

(6) The applicant must demonstrate familiarity with the statutes, rules, standards of practice, and standards of

conduct governing mediated settlement conferences conducted in North Carolina.

(7) The applicant must be of good moral character and adhere to the Standards of Professional Conduct for Mediators when acting under these rules. On his or her application(s) for certification or application(s) for certification renewal, an applicant shall disclose any:

a. pending criminal charges;

b. criminal convictions;

c. restraining orders issued against him or her;

d. failures to appear;

e. closed grievances or complaints filed with a professional licensing, certifying, or regulatory body, whether in North Carolina, another state, or another country;

f. disciplinary action taken against him or her by a professional licensing, certifying, or regulatory body, whether in North Carolina, another state, or another country, including, but not limited to, disbarment, revocation, decertification, or suspension of any professional license or certification, including the suspension or revocation of any license, certification, registration, or qualification to serve as a mediator in another state or country, even if stayed;

g. judicial sanctions imposed against him or her in any jurisdiction;

h. civil judgments, tax liens, or bankruptcy filings that occurred within the ten years preceding the date that the initial or renewal application was filed with the Commission; or

i. pending grievances or complaints filed with a professional licensing, certifying, or regulatory body, whether in North Carolina, another state, or another country.

If a matter listed in subsections (a)(7)(a) through (a)(7)(h) of this rule arises after a mediator submits his or her initial or renewal application for certification, then the mediator shall report the matter to the Commission no later than thirty days after receiving notice of the matter.

If a pending grievance or complaint described in subsection (a)(7)(i) of this rule is filed after a mediator submits his or her initial or renewal application for certification, then the mediator shall report the matter to the Commission no later than thirty days after receiving notice of the matter or, if a response to the grievance or complaint is permitted by the professional licensing, certifying, or regulatory body, no later than thirty days after the due date for the response.

As referenced in this subsection, criminal charges or convictions (excluding infractions) shall include felonies, misdemeanors, or misdemeanor traffic violations (including driving while impaired) under the law of North Carolina or another state, or under the law of a federal, military, or foreign jurisdiction, regardless of whether adjudication was withheld (prayer for judgment continued) or the imposition of a sentence was suspended.

(8) The applicant must submit proof of the qualifications set out in this rule on a form provided by the Commission.

(9) The applicant must pay all administrative fees established by the NCAOC upon the recommendation of the Commission.

(10) The applicant must agree to accept the fee ordered by the court under Rule 7 as payment in full of a party's share of the mediator's fee.

(11) The applicant must comply with the requirements of the Commission for completing and reporting continuing mediator education or training.

(12) The applicant must agree, once certified, to make reasonable efforts to assist applicants for mediator certification in completing their observation requirements.

(b) No mediator who held a professional license and relied upon that license to qualify for certification under subsection (a)(2)(b) of this rule shall be decertified or denied recertification because the mediator's license lapses, is relinquished, or becomes inactive; provided, however, that this subsection shall not apply to a mediator whose professional license is revoked, suspended, lapsed, or relinquished, or whose professional license becomes inactive due to disciplinary action, or the threat of disciplinary action, from the mediator's licensing authority. Any mediator whose professional license is revoked, suspended, lapsed,

relinquished, or whose professional license becomes inactive shall report the matter to the Commission.

(c) A mediator's certification may be revoked or not renewed at any time if it is shown to the satisfaction of the Commission that a mediator no longer meets the qualifications set out in this rule or has not faithfully observed these rules or those of any judicial district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible for certification under this rule. No application for certification renewal shall be denied on the ground that the mediator's training and experience does not satisfy a training and experience requirement promulgated after the date of the mediator's original certification.

Comment

Comment to Rule 8(a)(3). Commission staff has discretion to waive the requirements set out in Rule 8(a)(3) if an applicant can demonstrate sufficient familiarity with North Carolina legal terminology, court structure, and civil procedure.

* * *

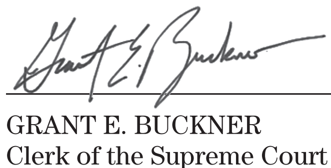
These amendments to the Rules for Settlement Procedures in District Court Family Financial Cases become effective on 6 January 2025.

This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 11th day of December 2024.

For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 11th day of December 2024.



GRANT E. BUCKNER
Clerk of the Supreme Court

RULES FOR MEDIATED SETTLEMENT
CONFERENCES AND OTHER SETTLEMENT
PROCEDURES IN SUPERIOR COURT CIVIL ACTIONS

ORDER AMENDING THE RULES FOR MEDIATED SETTLEMENT CONFERENCES AND OTHER SETTLEMENT PROCEDURES IN SUPERIOR COURT CIVIL ACTIONS

Pursuant to subsection 7A-38.1(c) of the General Statutes of North Carolina, the Court hereby amends the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions. This order affects Rules 2, 4, 7, 8, and 10.

* * *

Rule 2. Designation of the Mediator

(a) **Designation of a Mediator by Agreement of the Parties**. ~~Within twenty-one days of the court's order, the parties may, by~~By agreement, the parties may designate a mediator ~~who is~~ certified under these rules. ~~A Designation of Mediator in Superior Court Civil Action~~ by filing a Designation of Mediator by Agreement of Parties in Superior Court Civil Action and Order of Appointment, Form AOC-CV-812 (Designation Form), ~~must be filed with the court within twenty-one days of the court's order~~requesting that the senior resident superior court judge approve the designation. The Designation Form shall be filed within twenty-one days of the court's order. The plaintiff or plaintiff's attorney should file the Designation Form; however, any party may file the Designation Form. The party filing the Designation Form shall serve a copy on all parties and the mediator designated to conduct the mediated settlement conference. The Designation Form shall state: (i) the name, e-mail address, address, and telephone number of the mediator; (ii) the rate of compensation of the mediator; (iii) that the mediator and opposing counsel have agreed upon the designation and rate of compensation; and (iv) that the mediator is certified under these rules.

(b) **Appointment of a Mediator by the Court.** If the parties cannot agree on the designation of a mediator, then the plaintiff or the plaintiff's attorney shall notify the court by filing an ~~Designation Form~~Appointment of Mediator by Court Order in Superior Court Civil Action, Form AOC-CV-840 (Mediator Appointment Form), requesting, ~~on behalf of the parties,~~ that the senior resident superior court judge appoint a mediator. The ~~Designation~~Mediator Appointment Form ~~must~~ shall be filed within twenty-one days of the court's order and shall state that ~~the attorneys for~~ the parties have discussed the designation of a mediator and have been unable to agree.

Upon receipt of a ~~Designation~~Mediator Appointment Form ~~requesting the appointment of a mediator~~, or in the event that the parties fail to

file a Designation Form or a Mediator Appointment Form with the court within twenty-one days of the court's order, the senior resident superior court judge shall appoint a mediator certified under these rules who has expressed a willingness to mediate actions within the senior resident superior court judge's district.

In appointing a mediator, the senior resident superior court judge shall rotate through a list of available certified mediators. Appointments shall be made without regard to race, gender, religious affiliation, or whether the mediator is a licensed attorney. The senior resident superior court judge shall retain discretion to depart from a strict rotation of mediators when, in the judge's discretion, there is good cause in a case to do so.

As part of the application or annual certification renewal process, all mediators shall designate the judicial districts in which they are willing to accept court appointments. Each designation is a representation that the designating mediator has read and will abide by the local rules for, and will accept appointments from, the designated district and will not charge for travel time and expenses incurred in carrying out his or her duties associated with those appointments. A mediator's refusal to accept an appointment in a judicial district designated by the mediator may be grounds for removal from the district's appointment list by the Dispute Resolution Commission (Commission) or the senior resident superior court judge.

The Commission shall provide the senior resident superior court judge of each judicial district a list of certified superior court mediators requesting appointments in that district. The list shall contain each mediator's name, address, and telephone number. The list shall be available on the Commission's website at https://www.ncdrc.gov.

The Commission shall promptly notify the senior resident superior court judge of any disciplinary action taken with respect to a mediator on the list of certified mediators for the judicial district.

(c) **Mediator Information Directory**. To assist the parties in designating a mediator, the Commission shall post a list of certified superior court mediators on its website at https://www.ncdrc.gov, accompanied by each mediator's contact information and the judicial districts in which each mediator is available to serve. If a mediator has supplied it to the Commission, the list shall also provide the mediator's designated attendance method and the mediator's biographical information, including information about the mediator's education, professional experience, and mediation training and experience.

(d) **Withdrawal or Disqualification of the Mediator.**

(1) Any party may move the senior resident superior court judge of the judicial district where the action is pending for an order disqualifying the mediator using a Notice of Withdrawal/Disqualification of Mediator and Order for Substitution of Mediator, Form AOC-DRC-20. For good cause, an order disqualifying the mediator shall be entered.

(2) A mediator who wishes to withdraw from a case may file a Notice of Withdrawal/Disqualification of Mediator and Order for Substitution of Mediator, Form AOC-DRC-20, with the senior resident superior court judge of the judicial district where the action is pending.

(3) If a mediator withdraws or is disqualified, then a substitute mediator shall be designated or appointed under this rule. A mediator who has withdrawn or been disqualified shall not be entitled to receive an administrative fee, unless the mediation has been commenced.

* * *

Rule 4. Duties of Parties, Attorneys, and Other Participants in Mediated Settlement Conferences

(a) **Attendance**.

(1) **Persons Required to Attend**. The following persons shall attend a mediated settlement conference:

a. Parties to the action, to include the following:

1. All individual parties.

2. Any party that is a nongovernmental entity shall be represented at the mediated settlement conference by an officer, employee, or agent who is not the entity's outside counsel and who has been authorized to decide whether, and on what terms, to settle the action on behalf of the entity, or who has been authorized to negotiate on behalf of the entity and can promptly communicate during the conference with persons who have

decision-making authority to settle the action; provided, however, that if a specific procedure is required by law (e.g., a statutory pre-audit certificate) or the entity's governing documents (e.g., articles of incorporation, bylaws, partnership agreement, articles of organization, or operating agreement) to approve the terms of the settlement, then the representative shall have the authority to negotiate and make recommendations to the applicable approval authority in accordance with that procedure.

3. Any party that is a governmental entity shall be represented at the mediated settlement conference by an employee or agent who is not the entity's outside counsel and who: (i) has authority to decide on behalf of the entity whether and on what terms to settle the action; (ii) has been authorized to negotiate on behalf of the entity and can promptly communicate during the conference with persons who have decision-making authority to settle the action; or (iii) has authority to negotiate on behalf of the entity and to make a recommendation to the entity's governing board, if under applicable law the proposed settlement terms can be approved only by the entity's governing board.

   Notwithstanding anything in these rules to the contrary, any agreement reached which involves a governmental entity may be subject to the provisions of N.C.G.S. § 159-28(a).

b. A representative of each liability insurance carrier, uninsured motorist insurance carrier, and underinsured motorist insurance carrier, which may be obligated to pay all or part of any claim presented in the action. Each carrier shall be represented at the mediated settlement

conference by an officer, employee, or agent, other than the carrier's outside counsel, who has the authority to make a decision on behalf of the carrier, or who has been authorized to negotiate on behalf of the carrier, and can promptly communicate during the conference with persons who have decision-making authority.

c. At least one counsel of record for each party or other participant whose counsel has appeared in the action.

(2) **Attendance Method**.

a. **Determination**.

1. All parties and persons required to attend a mediated settlement conference may agree to conduct the conference in person, using remote technology, or using a hybrid of in-person attendance and remote technology.

2. If all parties and persons required to attend the conference do not agree on an attendance method and the mediator has designated in the Mediator Information Directory that he or she will conduct conferences only using remote technology, then the conference shall be conducted using remote technology.

3. If all parties and persons required to attend the conference do not agree on an attendance method and the mediator has not selected remote technology as his or her designated attendance method in the Mediator Information Directory, then the conference shall be conducted in person.

b. **Order by Court; Mediator Withdrawal.** The senior resident superior court judge, upon motion of a party and notice to the mediator and to all other parties and persons required to attend the mediated settlement

conference, may order that the conference be conducted in person, using remote technology, or using a hybrid of in-person attendance and remote technology.

If the method of attendance ordered by the judge is contrary to the attendance method the mediator has designated in the Mediator Information Directory, then the mediator may withdraw from the case under Rule 2(d).

(3) **Scheduling.** Participants required to attend the mediated settlement conference shall promptly notify the mediator after designation or appointment of any significant problems that they may have with the dates for conference sessions before the completion deadline, and shall inform the mediator of any problems that arise before an anticipated mediated settlement conference session is scheduled by the mediator. If a scheduling conflict in another court proceeding arises after a conference session has been scheduled by the mediator, then the participants shall promptly attempt to resolve the conflict under Rule 3.1 of the General Rules of Practice for the Superior and District Courts, or, if applicable, the Guidelines for Resolving Scheduling Conflicts adopted by the State-Federal Judicial Council of North Carolina on 20 June 1985.

(4) **Excusing the Attendance Requirement**. Any party or person may be excused from the requirement to attend a mediated settlement conference with the consent of all parties and persons required to attend the conference and the mediator.

(5) **Safety Compliance**. The mediator and all parties and persons required to attend a mediated settlement conference shall comply with all federal, state, and local safety guidelines that are in place for trial court proceedings at the time of the conference.

(b) **Notifying Lienholders**. Any party or attorney who has received notice of a lien, or other claim upon proceeds recovered in the action, shall notify the lienholder or claimant of the date, time, and location of the mediated settlement conference, and shall request that the

lienholder or claimant attend the conference or make a representative available with whom to communicate during the conference.

(c) **Finalizing Agreement**.

(1) If an agreement is reached at the mediated settlement conference, then the parties shall reduce the terms of the agreement to writing and sign the writing~~, along with their counsel~~. By stipulation of the parties and at the parties' expense, the agreement may be electronically recorded. If the agreement resolves all issues in the dispute, then a consent judgment or one or more voluntary dismissals shall be filed with the court by such persons as the parties shall designate.

(2) If the agreement resolves all issues at the mediated settlement conference, then the parties shall give a copy of the signed agreement, consent judgment, or voluntary dismissal to the mediator and to all parties at the conference, and shall file the consent judgment or voluntary dismissal with the court within thirty days of the conference, or within ninety days if the State or a political subdivision of the State is a party to the action, or before expiration of the mediation deadline, whichever is later. In all cases, a consent judgment or voluntary dismissal shall be filed prior to the scheduled trial.

(3) If an agreement that resolves all issues in the dispute is reached prior to the mediated settlement conference, or is finalized while the conference is in recess, then the parties shall reduce the terms of the agreement to writing and sign the writing~~, along with their counsel~~, and shall file a consent judgment or voluntary dismissal disposing of all issues with the court within thirty days of the conference, or within ninety days if the State or a political subdivision of the State is a party to the action, or before expiration of the mediation deadline, whichever is later.

(4) A designee may sign the agreement on behalf of a party only if the party does not attend the mediated settlement conference in person and the party provides the mediator with a written verification that the designee is authorized to sign the agreement on the party's behalf.

(5) When an agreement is reached upon all issues, all attorneys of record must notify the senior resident superior

court judge within four business days of the settlement and advise who will file the consent judgment or voluntary dismissal.

(d) **Payment of the Mediator's Fee**. The parties shall pay the mediator's fee as provided by Rule 7.

(e) **Related Cases**. Upon application of any party or person, the senior resident superior court judge may order that an attorney of record or a party in a pending superior court civil action, or a representative of an insurance carrier that may be liable for all or any part of a claim pending in superior court, shall, upon reasonable notice, attend a mediation conference that may be convened in another pending case, regardless of the forum in which the other case may be pending, provided that all parties in the other pending case consent to the attendance ordered under this rule. Any attorney, party, or representative of an insurance carrier that properly attends a mediation conference under this rule shall not be required to pay any of the mediation fees or costs related to that mediation conference. Any disputed issue concerning an order entered under this rule shall be determined by the senior resident superior court judge who entered the order.

(f) **No Recording**. There shall be no stenographic, audio, or video recording of the mediation process by any participant. This prohibition includes recording either surreptitiously or with the agreement of the parties.

Comment

Comment to Rule 4(a). Parties subject to Chapter 159 of the General Statutes of North Carolina—which provides, among other things, that if an obligation is evidenced by a contract or agreement requiring the payment of money or by a purchase order for supplies and materials, then the contract, agreement, or purchase order shall include on its face a certificate stating that the instrument has been pre-audited to assure compliance with N.C.G.S. § 159-28(a) and that an obligation incurred in violation of N.C.G.S. § 159 28(a) or (a1) is invalid and may not be enforced—should, as appropriate, inform all participants at the beginning of the mediation of the preaudit requirement and the consequences for failing to preaudit under N.C.G.S. § 159-28.

Rule 4(a)(2)(a) describes the attendance methods used for mediated settlement conferences. If a conference is conducted using remote technology, then the mediator should ensure that the parties are able to fully communicate with all other participants and videoconferencing is encouraged.

Comment to Rule 4(c). Consistent with N.C.G.S. § 7A-38.1(*l*), if a settlement is reached during a mediated settlement conference, then the mediator shall ensure that the terms of the settlement are reduced to

writing and signed by the parties, or by the parties' designees, and by the parties' attorneys before ending the conference. No settlement shall be enforceable unless it has been reduced to writing and signed by the parties or by the parties' designees.

Cases in which an agreement upon all issues has been reached should be disposed of as expeditiously as possible. This assures that the mediator and the parties move the case toward disposition while honoring the private nature of the mediation process and the mediator's duty of confidentiality. If the parties wish to keep the terms of the settlement confidential, then they may timely file with the court closing documents that do not contain confidential terms (e.g., voluntary dismissal or a consent judgment resolving all claims). Mediators will not be required by local rules to submit agreements to the court.

Comment to Rule 4(e). Rule 4(e) clarifies a senior resident superior court judge's authority to order a party, attorney of record, or representative of an insurance carrier to attend proceedings in another forum that are related to the superior court civil action. For example, when there are workers' compensation claims being asserted in a case before North Carolina Industrial Commission, there are typically additional claims asserted in superior court against a third-party tortfeasor. Because of the related nature of the claims, it may be beneficial for a party, attorney of record, or representative of an insurance carrier in the superior court civil action to attend the North Carolina Industrial Commission mediation conference in order to resolve the pending claims. Rule 4(e) specifically authorizes a senior resident superior court judge to order a party, attorney of record, or representative of an insurance carrier to attend a proceeding in another forum, provided that all parties in the related matter consent and the persons ordered to attend receive reasonable notice of the proceeding. *The North Carolina Industrial Commission Rules for Mediated Settlement and Neutral Evaluation Conferences* contain a similar provision, which provides that persons involved in a North Carolina Industrial Commission case may be ordered to attend a mediated settlement conference in a related matter.

* * *

Rule 7. Compensation of the Mediator and Sanctions

(a) **By Agreement**. When a mediator is stipulated to by the parties, compensation shall be as agreed upon between the parties and the mediator. Notwithstanding the terms of the parties' agreement with the mediator, subsection (d) of this rule shall apply to an issue involving compensation of the mediator. Subsections (e) and (f) of this rule shall apply unless the parties' agreement provides otherwise.

(b) **By Court Order**. When a mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the

rate of $150 per hour. The parties shall also pay the mediator a one-time, per-case administrative fee of $175, due upon appointment.

(c) **Change of Appointed Mediator.** Under Rule 2(a), the parties may select a certified mediator to conduct the mediated settlement conference. Parties who fail to select a certified mediator and then desire a substitution after the court has appointed a mediator shall obtain court approval for the substitution by filing a Consent Order for Substitution of Mediator, Form AOC-CV-836. The court may approve the substitution only upon proof of payment to the court's original appointee of the $175 one-time, per-case administrative fee, any other amount owed for mediation services under subsection (b) of this rule, and any postponement fee owed under subsection (e) of this rule.

(d) **Indigent Cases**. Any party found to be indigent by the court for the purposes of these rules shall not be required to pay a mediator's fee. A mediator conducting a mediated settlement conference under these rules shall waive the payment of fees from parties found by the court to be indigent. Any party may move the senior resident superior court judge for a finding of indigency and ask to be relieved of that party's obligation to pay a share of the mediator's fee using a Petition and Order for Relief from Obligation to Pay Mediator's Fee, Form AOC-CV-814.

The motion shall be heard subsequent to the completion of the conference or, if the parties do not settle their dispute, subsequent to trial. In ruling upon the motion, the judge shall apply the criteria enumerated in N.C.G.S. § 1-110(a), but shall consider the outcome of the action and whether a judgment was rendered in the movant's favor. The court shall enter an order granting or denying the party's motion.

(e) **Postponements and Fees**.

(1) As used in subsection (e) of this rule, "postponement" means to reschedule or not proceed with a mediated settlement conference once a date for a session of the conference has been scheduled by the mediator. After a conference has been scheduled for a specific date, a party may not unilaterally postpone the conference.

(2) A mediated settlement conference session may be postponed by the mediator for good cause only after notice by the movant to all parties of the reason for the postponement and a finding of good cause by the mediator. Good cause exists when the reason for the postponement involves a situation over which the party seeking

the postponement has no control, including, but not limited to: (i) the illness of a party or attorney, (ii) a death in the family of a party or attorney, (iii) a sudden and unexpected demand by a judge that a party or attorney for a party appear in court for a purpose not inconsistent with the guidelines established by Rule 3.1(d) of the General Rules of Practice for the Superior and District Courts, or (iv) inclement weather exists, such that travel is prohibitive. Where good cause is found, the mediator shall not assess a postponement fee against a party.

(3) The settlement of a case prior to the scheduled date for mediation shall be good cause for postponement; provided, however, that the mediator was notified of the settlement immediately after it was reached and at least fourteen calendar days prior to the date scheduled for the mediation.

(4) Without a finding of good cause, a mediator may also postpone a scheduled mediated settlement conference session with the consent of all parties. A fee of $150 shall be paid to the mediator if the postponement is allowed. However, if the request for a postponement is made within seven calendar days of the scheduled date for mediation, then the postponement fee shall be $300. The postponement fee shall be paid by the party requesting the postponement, unless otherwise agreed to by the parties. Postponement fees are in addition to the one-time, per-case administrative fee provided for in subsection (b) of this rule.

(5) If the parties select a certified mediator and contract with the mediator as to compensation, then the parties and the mediator may specify in their contract alternatives to the postponement fees otherwise required under subsection (e) of this rule.

(f) **Payment of Compensation by Parties**. Unless otherwise agreed to by the parties or ordered by the court, the mediator's fee shall be paid in equal shares by the parties. For purposes of this rule, multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the fees shall pay them equally. Payment shall be due upon completion of the mediated settlement conference.

Comment

Comment to Rule 7(b). Court-appointed mediators may not be compensated for travel time, mileage, or any other out-of-pocket expenses associated with a court-ordered mediation.

It is not unusual for two or more related cases to be mediated collectively. A mediator shall use his or her business judgment in assessing the one-time, per-case administrative fee when two or more cases are mediated together, and set his or her fee according to the amount of time that he or she spent in an effort to schedule the matters for mediation. The mediator may charge a flat fee of $175 if scheduling was relatively easy, or multiples of that amount if more effort was required.

Comment to Rule 7(e). Non-essential requests for postponements work a hardship on parties and mediators and serve only to inject delay into a process and program designed to expedite litigation. It is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to a postponement in instances where, in the mediator's judgment, the mediation could be held as scheduled.

Comment to Rule 7(f). If a party is found by a senior resident superior court judge to have failed to attend a mediated settlement conference without good cause, then the court may require that party to pay the mediator's fee and related expenses.

* * *

Rule 8. Mediator Certification and Decertification

(a) The Commission may receive and approve applications for certification of persons to be appointed as superior court mediators. In order to be certified, an applicant must satisfy the requirements of this subsection.

(1) The applicant must complete: (i) at least forty hours of Commission-certified trial court mediation training, or (ii) at least forty hours of Commission-certified family and divorce mediation training and a sixteen-hour Commission-certified supplemental trial court mediation training.

(2) The applicant must have the following training, experience, and qualifications:

a. An attorney-applicant may be certified if he or she:

1. is a member in good standing of the North Carolina State Bar; or

2. is a member similarly in good standing of the bar of another state and eligible to apply for admission to the North Carolina State Bar under Chapter 1, Subchapter C, of the North Carolina State Bar Rules and the Rules Governing the Board of Law Examiners and the Training of Law Students, 27 N.C. Admin. Code 1C.0105; demonstrates familiarity with North Carolina court structure, legal terminology, and civil procedure; provides to the Commission three letters of reference about the applicant's good character, including at least one letter from a person with knowledge of the applicant's professional practice; and possesses the experience required by this subsection; and

3. has at least five years of experience after date of licensure as a judge, practicing attorney, law professor, or mediator, or has equivalent experience.

b. A nonattorney-applicant may be certified if he or she:

1. has, as a prerequisite for the forty hours of Commission-certified trial court mediation training, completed a six-hour training provided by a Commission-certified trainer on North Carolina court organization, legal terminology, civil court procedure, the attorney–client privilege, the unauthorized practice of law, and the common legal issues arising in superior court civil actions;

2. has provided to the Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's experience qualifying the applicant under subsection (a)(2)(b)(3) of this rule; and

3. has completed one of the following:

i. a minimum of twenty hours of basic mediation training provided by a trainer acceptable to the Commission and, after completing the twenty-hour training, has

mediated at least thirty disputes over the course of at least three years, or has equivalent experience, and possesses a four year college degree from an accredited institution, and has four years of a high or relatively high level of professional or management experience of an executive nature in a professional, business, or governmental entity;

ii. ten years of a high or relatively high level of professional or management experience of an executive nature in a professional, business, or governmental entity, and possesses a four year college degree from an accredited institution; or

iii. a master's degree or doctoral degree in alternative dispute resolution studies from an accredited institution and possesses five years of a high or relatively high level of professional or management experience of an executive nature in a professional, business, or governmental entity.

Any current or former attorney who is disqualified by the attorney licensing authority of any state shall be ineligible for certification under subsections (a)(2)(a) and (a)(2)(b) of this rule.

(3) The applicant must complete the following observations:

a. **All Applicants**. All applicants for certification shall observe two ~~mediated settlement~~mediation conferences~~;~~. ~~at~~At least one of ~~which~~the mediation conferences shall be ~~of~~ a mediated settlement conference in a superior court civil action, and the other may be any mediation conference described under subsection (a)(3)(c) of this rule.

b. **Nonattorney-Applicants**. Nonattorney-applicants for certification shall observe three ~~mediated settlement~~mediation conferences, in addition to those required under subsection (a)(3)(a) of this rule, that are conducted by at least two different mediators. At least one of the additional ~~observations~~mediation

conferences shall be ~~of~~ a mediated settlement conference in a superior court civil action, and the others may be any mediation conferences described under subsection (a)(3)(c) of this rule.

c. **Conferences Eligible for Observation.** ~~Conferences~~Mediation conferences eligible for observation ~~under subsection (a)(3) of this rule~~ shall be either: (i) those conducted in cases pending before the North Carolina superior courts, the North Carolina Court of Appeals, the North Carolina Industrial Commission, the North Carolina Office of Administrative Hearings, the North Carolina Department of Labor, or the federal district courts in North Carolina ~~that are ordered to mediation~~; or (ii) those conducted ~~by~~pursuant to an agreement of the parties ~~which incorporates the rules of mediation of one of those entities~~in disputes prior to litigation.

~~Conferences eligible for observation shall also include those conducted in disputes prior to litigation that are mediated by an agreement of the parties and incorporate the rules for mediation of one of the entities named above.~~

All mediation conferences shall be conducted by a certified superior court mediator, ~~under~~shall be conducted pursuant to mediation rules adopted by one of the above entities, and shall be observed from their beginning ~~to~~until settlement, or ~~when an impasse is declared~~until the point that an impasse has been declared. Observations shall be reported on a Certificate of Observation – Mediated Settlement Conference Program, Form AOC-DRC-07. All observers shall conform their conduct to the Commission's policy on *Guidelines for Observer Conduct*.

(4) The applicant must demonstrate familiarity with the statutes, rules, and practices governing mediated settlement conferences in North Carolina.

(5) The applicant must be of good moral character and adhere to the Standards of Professional Conduct for Mediators when acting under these rules. On his or her

application(s) for certification or application(s) for certification renewal, an applicant shall disclose any:

a. pending criminal charges;

b. criminal convictions;

c. restraining orders issued against him or her;

d. failures to appear;

e. closed grievances or complaints filed with a professional licensing, certifying, or regulatory body, whether in North Carolina, another state, or another country;

f. disciplinary action taken against him or her by a professional licensing, certifying, or regulatory body, whether in North Carolina, another state, or another country, including, but not limited to, disbarment, revocation, decertification, or suspension of any professional license or certification, including the suspension or revocation of any license, certification, registration, or qualification to serve as a mediator in another state or country, even if stayed;

g. judicial sanctions imposed against him or her in any jurisdiction;

h. civil judgments, tax liens, or bankruptcy filings that occurred within the ten years preceding the date that the initial or renewal application was filed with the Commission; or

i. pending grievances or complaints filed with a professional licensing, certifying, or regulatory body, whether in North Carolina, another state, or another country.

If a matter listed in subsections (a)(5)(a) through (a)(5)(h) of this rule arises after a mediator submits his or her initial or renewal application for certification, then the mediator shall report the matter to the Commission no later than thirty days after receiving notice of the matter.

If a pending grievance or complaint described in subsection (a)(5)(i) of this rule is filed after a mediator submits his or her initial or renewal application for certification, then the mediator shall report the matter to

the Commission no later than thirty days after receiving notice of the matter or, if a response to the grievance or complaint is permitted by the professional licensing, certifying, or regulatory body, no later than thirty days after the due date for the response.

As referenced in this subsection, criminal charges or convictions (excluding infractions) shall include felonies, misdemeanors, or misdemeanor traffic violations (including driving while impaired) under the law of North Carolina or another state, or under the law of a federal, military, or foreign jurisdiction, regardless of whether the adjudication was withheld (prayer for judgment continued) or the imposition of a sentence was suspended.

(6) The applicant must submit proof of qualifications set out in this rule on a form provided by the Commission.

(7) The applicant must pay all administrative fees established by the NCAOC upon the recommendation of the Commission.

(8) The applicant must agree to accept the fee ordered by the court under Rule 7 as payment in full of a party's share of the mediator's fee.

(9) The applicant must comply with the requirements of the Commission for completing and reporting continuing mediator education or training.

(10) The applicant must agree, once certified, to make reasonable efforts to assist applicants for mediator certification in completing their observation requirements.

(b) No mediator who held a professional license and relied upon that license to qualify for certification under subsections (a)(2)(a) or (a)(2)(b) of this rule shall be decertified or denied recertification because that mediator's license lapses, is relinquished, or becomes inactive; provided, however, that this subsection shall not apply to any mediator whose professional license is revoked, suspended, lapsed, relinquished, or whose professional license becomes inactive due to disciplinary action or the threat of disciplinary action from his or her licensing authority. Any mediator whose professional license is revoked, suspended, lapsed, or relinquished, or whose professional license becomes inactive, shall report the matter to the Commission.

(c) A mediator's certification may be revoked or not renewed at any time it is shown to the satisfaction of the Commission that a mediator no longer meets the qualifications set out in this rule or has not faithfully observed these rules or those of any district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible for certification under this rule. No application for certification renewal shall be denied on the grounds that the mediator's training and experience does not meet the training and experience required under rules which were promulgated after the date of the applicant's original certification.

Comment

Comment to Rule 8(a)(2). Commission staff has discretion to waive the requirements set out in Rule 8(a)(2)(a)(2) and Rule 8(a)(2)(b)(1), if the applicant can demonstrate sufficient familiarity with North Carolina legal terminology, court structure, and procedure.

Comment to Rule 8(a)(2)(b)(3). Administrative, secretarial, and paraprofessional experience will not generally qualify as "a high or relatively high level of professional or management experience of an executive nature."

* * *

Rule 10. Other Settlement Procedures

(a) **Order Authorizing Other Settlement Procedures**. Upon receipt of a motion by the parties seeking authorization to utilize a settlement procedure in lieu of a mediated settlement conference, the senior resident superior court judge may order the use of the procedure requested under these rules or under local rules, unless the court finds that the parties did not agree on all of the relevant details of the procedure, including the items in Rule 1(c)(2), or that, for good cause, the selected procedure is not appropriate for the case or the parties.

(b) **Other Settlement Procedures Authorized by These Rules**. In addition to a mediated settlement conference, the following settlement procedures are authorized by these rules:

(1) Neutral evaluation under Rule 11 (a settlement procedure in which a neutral offers an advisory evaluation of the case following summary presentations by each party).

(2) Nonbinding arbitration under Rule 12 (a settlement procedure in which a neutral renders an advisory decision

following summary presentations of the case by the parties).

(3) Binding arbitration under Rule 12 (a settlement procedure in which a neutral renders a binding decision following presentations by the parties).

(4) A summary trial (jury or non-jury) under Rule 13 (a settlement procedure that is either: (i) a nonbinding trial in which a privately procured jury or presiding officer renders an advisory verdict following summary presentations by the parties and, in the case of a summary jury trial, a summary of the law presented by a presiding officer; or (ii) a binding trial in which a privately procured jury or presiding officer renders a binding verdict following summary presentations by the parties and, in the case of a summary jury trial, a summary of the law presented by a presiding officer).

(c) **General Rules Applicable to Other Settlement Procedures.**

(1) **When Proceeding Is Conducted**. Other settlement procedures ordered by the court under these rules shall be conducted no later than the date for completion set out in the court's original mediated settlement conference order, unless extended by the senior resident superior court judge.

(2) **Authority and Duties of the Neutral**.

a. **Authority of the Neutral**.

1. **Control of the Proceeding**. The neutral, arbitrator, or presiding officer shall at all times be in control of the proceeding and the procedures to be followed.

2. **Scheduling the Proceeding**. The neutral, arbitrator, or presiding officer shall attempt to schedule the proceeding at a time that is convenient to the participants, attorneys, and the neutral. In the absence of agreement, the neutral shall select the date for the proceeding.

b. **Duties of the Neutral**.

1. **Informing the Parties**. At the beginning of the proceeding, the neutral, arbitrator, or

presiding officer shall define and describe for the parties:

i. the process of the proceeding;

ii. the differences between the proceeding and other forms of conflict resolution;

iii. the costs of the proceeding;

iv. the inadmissibility of conduct and statements as provided by N.C.G.S. § 7A 38.1(*l*) and subsection (c)(6) of this rule; and

v. the duties and responsibilities of the neutral and the participants.

2. **Disclosure**. The neutral has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice, or partiality.

3. **Reporting Results of the Proceeding**. The neutral, arbitrator, or presiding officer shall report the results of the proceeding to the court using a Report of Neutral Conducting Settlement Procedure Other Than Mediated Settlement Conference or Arbitration in Superior Court Civil Action, Form AOC-CV-817. The NCAOC may require the neutral to provide statistical data for evaluation of other settlement procedures.

4. **Scheduling and Holding the Proceeding**. It is the duty of the neutral, arbitrator, or presiding officer to schedule and conduct the proceeding prior to the completion deadline set out in the court's order. The deadline for completion of the proceeding shall be strictly observed by the neutral, arbitrator, or presiding officer, unless the deadline is changed by a written order of the senior resident superior court judge.

(3) **Extensions of Time**. A party or a neutral may request that the senior resident superior court judge extend the deadline for completion of the settlement procedure.

The request for an extension shall state the reasons the extension is sought and shall be served by the movant on the other parties and the neutral. If the court grants the motion for an extension, then the order shall set a new deadline for the completion of the settlement procedure. A copy of the order shall be delivered to all parties and the neutral by the person who sought the extension.

(4) **Where the Proceeding Is Conducted**. The neutral, arbitrator, or presiding officer shall be responsible for reserving a place agreed to by the parties, setting a time for and making other arrangements for the proceeding, and for giving timely notice to all attorneys and unrepresented parties in writing of the time and location of the proceeding.

(5) **No Delay of Other Proceedings**. Settlement proceedings shall not be the cause for a delay of other proceedings in the case, including, but not limited to, the conduct or completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the senior resident superior court judge.

(6) **Inadmissibility of Settlement Proceedings**. Evidence of statements made and conduct that occurs in a mediated settlement conference or other settlement proceeding conducted under this rule, whether attributable to a party, mediator, neutral, or neutral-observer present at the settlement proceeding, shall not be subject to discovery and shall be inadmissible in any proceeding in the action or another civil action involving the same claim, except:

a. in proceedings for sanctions under subsection (c) of this rule;

b. in proceedings to enforce or rescind a settlement of the action;

c. in disciplinary proceedings before the North Carolina State Bar or any agency established to enforce the Standards of Professional Conduct for Mediators or standards of conduct for other neutrals; or

d. in proceedings to enforce laws concerning juvenile or elder abuse.

As used in this subsection, "neutral observer" includes persons seeking mediator certification, persons studying dispute resolution processes, and persons acting as interpreters.

No settlement agreement to resolve any or all issues reached at a proceeding conducted under this rule, or during its recesses, shall be enforceable, unless the agreement has been reduced to writing and signed by the parties or by the parties' designees. No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a conference or other settlement proceeding.

No mediator, neutral, or neutral-observer present at a settlement proceeding shall be compelled to testify or produce evidence in any civil proceeding concerning statements made and conduct that occurs in anticipation of, during, or as a follow-up to a conference or other settlement proceeding under subsection (c) of this rule. This includes proceedings to enforce or rescind a settlement of the action, except to attest to the signing of any agreements, and during proceedings for sanctions under this section, proceedings to enforce laws concerning juvenile or elder abuse, and disciplinary hearings before the North Carolina State Bar or any agency established to enforce the Standards of Professional Conduct for Mediators or standards of conduct for other neutrals.

(7) **No Record Made**. There shall be no record made of any proceedings under these rules, unless the parties have stipulated to binding arbitration or a binding summary trial, in which case any party, after giving adequate notice to opposing parties, may make a record of the proceeding.

(8) **Ex Parte Communications Prohibited**. Unless all parties agree otherwise, there shall be no ex parte communication prior to the conclusion of the proceeding between the neutral and a party or a party's attorney on any matter related to the proceeding, except about administrative matters.

(9) **Duties of the Parties**.

a. **Attendance**. All persons required to attend a mediated settlement conference under Rule 4 shall attend

any other nonbinding settlement procedure authorized by these rules and ordered by the court, except those persons to whom the parties agree and the senior resident superior court judge excuses. Those persons required to attend other settlement procedures which are binding in nature, authorized by these rules, and ordered by the court, shall be those persons to whom the parties agree. Notice of the agreement shall be given to the court and the neutral by filing a Motion to Use Settlement Procedure Other Than Mediated Settlement Conference in Superior Court Civil Action and Order, Form AOC-CV-818.

b. **Finalizing Agreement**.

1. If an agreement that resolves all issues in the dispute is reached at the neutral evaluation, arbitration, or summary trial, then the parties to the agreement shall reduce the terms of the agreement to writing and sign it~~ along with their counsel~~. A consent judgment or voluntary dismissal shall be filed with the court by such persons as the parties shall designate within fourteen days of the conclusion of the proceeding or before the expiration of the deadline for its completion, whichever is later. The person responsible for filing closing documents with the court shall also sign the report to the court. The parties shall give a copy of their signed agreement, consent judgment, or voluntary dismissal to the neutral, arbitrator, or presiding officer, and all parties at the proceeding.

2. If an agreement that resolves all issues in the dispute is reached prior to the evaluation, arbitration, or summary trial, or while the proceeding is in recess, then the parties shall reduce the terms of the agreement to writing and sign the writing ~~along with their counsel~~ and shall file a consent judgment or voluntary dismissal disposing of all issues with the court within fourteen days of the agreement or before the expiration of the deadline for completion of the proceeding, whichever is later.

3. A designee may sign the agreement on behalf of a party only if the party does not attend the evaluation, arbitration, or summary trial in person and the party provides the neutral with a written verification that the designee is authorized to sign the agreement on the party's behalf.

4. When an agreement is reached upon all issues in the dispute, all attorneys of record must notify the senior resident superior court judge within four business days of the settlement and advise the judge of the persons who will sign the consent judgment or voluntary dismissal.

c. **Payment of the Neutral's Fee**. The parties shall pay the neutral's fee as provided by subsection (c)(12) of this rule.

(10) **Selection of Neutrals in Other Settlement Procedures**. The parties may select any person to serve as a neutral in a settlement procedure authorized under these rules. For arbitration, the parties may either select a single arbitrator or a panel of arbitrators. Notice of the parties' selection shall be given to the court and to the neutral by filing a Motion to Use Settlement Procedure Other Than Mediated Settlement Conference in Superior Court Civil Action and Order, Form AOC CV-818, within twenty-one days after the entry of the order requiring a mediated settlement conference.

The motion shall state: (i) the name, address, and telephone number of the neutral; (ii) the rate of compensation of the neutral; and (iii) that the neutral and opposing counsel have agreed upon the selection and compensation.

(11) **Disqualification**. Any party may move the resident or presiding superior court judge of the district in which an action is pending for an order disqualifying the neutral and, for good cause, an order disqualifying the neutral shall be entered. Good cause exists if the selected neutral has violated any standards of conduct of the North Carolina State Bar or any standards of conduct for neutrals adopted by the Supreme Court.

(12) **Compensation of the Neutral**. A neutral's compensation shall be paid in an amount agreed to by the parties and the neutral. Time spent reviewing materials in preparation for the neutral evaluation, conducting the proceeding, and making and reporting the award shall be compensable time.

Unless otherwise agreed by the parties or ordered by the court, the neutral's fee shall be paid in equal shares by the parties. For purposes of this section, multiple parties shall be considered one party when they are represented by the same counsel. The presiding officer and jurors in a summary jury trial are neutrals within the meaning of these rules and shall be compensated by the parties.

(13) **Sanctions for Failure to Attend Other Settlement Procedure or Pay the Neutral's Fee**. Any person required to attend a settlement proceeding or to pay a neutral's fee in compliance with N.C.G.S. § 7A-38.1 and these rules who fails to attend the proceeding or pay the neutral's fee without good cause shall be subject to the contempt power of the court and any monetary sanctions imposed by a resident or presiding superior court judge. The monetary sanctions may include, but are not limited to, the payment of fines, attorneys' fees, the neutral's fee, expenses, and loss of earnings incurred by persons attending the proceeding. A party seeking sanctions against a person or a judge, upon his or her own motion, shall do so in a written motion stating the grounds for the motion and the relief sought. The motion shall be served on all parties and any person against whom sanctions are being sought. If the court imposes sanctions, it shall do so after giving notice to the person, holding a hearing, and issuing a written order that contains both findings of fact that are supported by substantial evidence and conclusions of law.

* * *

These amendments to the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions become effective on 6 January 2025.

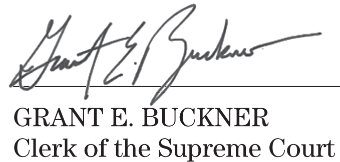
This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

RULES FOR MEDIATED SETTLEMENT
CONFERENCES AND OTHER SETTLEMENT
PROCEDURES IN SUPERIOR COURT CIVIL ACTIONS

Ordered by the Court in Conference, this the 11th day of December 2024.

For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 11th day of December 2024.



GRANT E. BUCKNER
Clerk of the Supreme Court

ORDER AMENDING THE RULES OF THE DISPUTE RESOLUTION COMMISSION

Pursuant to subsection 7A-38.2(b) of the General Statutes of North Carolina, the Court hereby amends Rule 9 of the Rules of the Dispute Resolution Commission.

* * *

Rule 9. The Grievance and Disciplinary Committee

(a) **Appointment of the Grievance and Disciplinary Committee**. The Commission's chair shall appoint a standing committee entitled the Grievance and Disciplinary Committee to address the matters listed in subsection (b) of this rule.

(b) **Matters to Be Considered by the Grievance and Disciplinary Committee**. The Grievance and Disciplinary Committee shall review and consider, consistent with subsection (d)(2) of this rule, the following:

(1) Matters that relate to the moral character, conduct, or fitness to practice of those seeking a provisional pre-training approval, including a request to review a Commission staff determination not to issue a provisional pre-training approval on the basis of a requesting party's moral character, conduct, or fitness to practice.

(2) Matters that relate to the moral character, conduct, or fitness to practice of an applicant for mediator certification or certification renewal, including a request for review of a Commission staff decision to deny an application for mediator certification or certification renewal on the basis of the applicant's moral character, conduct, or fitness to practice.

(3) Matters otherwise self-reported by a certified mediator or personnel affiliated with a certified mediator training program, or otherwise coming to the attention of the Commission that relate to the moral character, conduct, or fitness to practice of a mediator under the Commission's jurisdiction or a person affiliated with a certified mediator training program.

(4) Matters that relate to the moral character, conduct, or fitness to practice of a trainer or other person affiliated with a certified mediator training program or a mediator training program that is an applicant for certification or

certification renewal, including a request for review of a Commission staff decision to deny an application for mediator training program certification or certification renewal on the basis of the moral character, conduct, or fitness to practice of any trainer or other person affiliated with the program.

(5) Complaints by a Commission member, Commission staff, a judge, an attorney, court staff, or any member of the public that relate to the moral character, conduct, or fitness to practice of a mediator under the Commission's jurisdiction or a trainer or other person affiliated with a certified mediator training program.

(c) **Initial Commission Staff Review and Determination**.

(1) **Review of Requests for Provisional Pre-training Approvals**. Commission staff shall review requests for the issuance of provisional pre-training approvals regarding matters that relate to the moral character, conduct, or fitness to practice of a requesting party, and shall seek guidance from the chair of the Grievance and Disciplinary Committee, as necessary. Staff may contact the requesting party, conduct background checks, and contact third parties or entities who may possess relevant information that relates to the moral character, conduct, or fitness to practice of the requesting party. Based on its review, staff shall determine whether to issue or refrain from issuing a provisional pre-training approval. The requesting party may seek review of the staff decision from the chair of the committee. If, after review, the chair determines that the requesting party does not possess the requisite criteria for certification related to moral character, conduct, or fitness to practice established by program rules and Commission policies and guidelines, then the chair shall instruct staff not to issue a provisional pre-training approval. The staff decision, or that of the chair after review, to deny a request for a provisional pre-training approval shall be final and is not subject to appeal.

(2) **Review and Referral of Matters Relating to the Moral Character, Conduct, or Fitness to Practice of Applicants**. Commission staff shall review information relating to the moral character, conduct, or fitness to practice of an applicant seeking mediator certification or

certification renewal, including matters which an applicant is required to report under program rules and information relating to the moral character, conduct, or fitness to practice of personnel affiliated with mediator training programs seeking certification or certification renewal.

Staff may contact an applicant to discuss matters reported and may conduct a background check on an applicant. Any third party with knowledge of any information relating to the moral character, conduct, or fitness to practice of an applicant may notify the Commission. Staff shall seek to verify any such third party report and may disregard a report that cannot be verified. Staff may contact an agency where a complaint about an applicant has been filed or that has imposed discipline on an applicant and may contact a judge who has imposed discipline on an applicant.

All reported matters or other information gathered by staff that bears on the moral character, conduct, or fitness to practice of an applicant shall be forwarded directly to the Grievance and Disciplinary Committee for its review, except matters expressly exempted from review by the Commission's *Policy for Reviewing Matters Relevant to Good Moral Character*, *Conduct*, *and Fitness to Practice*. Matters that are exempted by the policy may be processed by staff, but will not act as a bar to certification or certification renewal.

The committee shall review any matter that relates to an applicant and is referred by staff under this policy, while not a complaint, in accordance with the procedures set forth in subsection (d) of this rule.

(3) **Commission Staff Review of Concerns Raised That Are Not Deemed to Constitute Complaints**. Commission staff shall review information received or concerns raised that relates to a mediator's failure to meet his or her case management duties under applicable program rules, or relates to matters that are not deemed to constitute a complaint under this subsection or subsection (c)(4) of this rule.

a. If the information received or the concern raised does not state a violation of rules or standards promulgated by the Supreme Court or local district

rules, then the reporting party will be advised that the Commission will take no action in response to the report.

b. If it appears that the information received or the concern raised constitutes a violation of a rule, statute, or standard, but either is not serious enough to be treated as a complaint or the complaining party does not wish to file a complaint, Commission staff shall prepare a summary of the concern raised and submit the matter to the chair of the Grievance and Disciplinary Committee and to the chair of the Commission.

c. Commission staff shall report the concerns to the mediator by letter or other manner of communication as approved by the chair of the Grievance and Disciplinary Committee and chair of the Commission. Any written correspondence shall be copied to the chair of the committee and to the chair of the Commission.

Commission staff shall not disclose the identity of a reporting party who wishes to remain anonymous. If a reporting party wishes to remain anonymous, then staff shall not proceed under this section unless evidence of the mediator's failure to fulfill his or her case management duties has been provided or otherwise exists.

(4) **Commission Staff Review of Oral or Written Complaints.** Commission staff shall review oral and written complaints received by the Commission regarding the moral character, conduct, or fitness to practice of a mediator under the jurisdiction of the Commission or any personnel affiliated with a certified mediator training program (respondents), except that staff shall not act on anonymous complaints unless staff can independently verify the allegations made.

a. **Oral Complaints**. If, after reviewing an oral complaint, Commission staff determines it is necessary to contact a third party about the matter, including a witness identified by the complaining party or other third party identified by Commission staff during its review of the complaint, or to refer the matter to the Grievance and Disciplinary Committee,

then Commission staff shall first make a summary of the complaint and forward it to the complaining party who shall be asked to sign the summary and a release and to return both to the Commission's office. A member of the Commission, a committee of the Commission, Commission staff, judges, other court officials, or court staff may initiate an oral, anonymous complaint. Commission staff shall not proceed under this subsection unless corroborative evidence of the allegation relating to the mediator's conduct has been provided to the Commission.

b. **Written Complaints**. Commission staff shall acknowledge all written complaints within thirty days from receipt. A written complaint may be made by letter, e-mail, or filed on the Commission's approved complaint form. If a written complaint is not made on the approved form, then staff shall require the complaining party to have his or her signature on the complaint notarized and execute a release authorizing staff to contact third parties in the course of staff's review of the complaint.

c. **Pursuit of Complaint by Commission Staff or by Grievance and Disciplinary Committee Member**. If a complaining party refuses to sign a complaint summary prepared by Commission staff, refuses to sign a release, or otherwise seeks to withdraw a complaint after filing it with the Commission, staff or a Grievance and Disciplinary Committee member may pursue the complaint. In determining whether to pursue a complaint independently, staff or a committee member may consider why the complaining party is unwilling to pursue the matter further, whether the complaining party is willing to testify if a hearing becomes necessary, whether the complaining party has specifically asked to withdraw the complaint, whether the circumstances complained of may be independently verified without the complaining party's participation, whether there have been previous complaints filed regarding the respondent's conduct, and the seriousness of the allegations made in the complaint.

d. **Response to Complaint**. If Commission staff asks a respondent to respond in writing to an oral or written complaint, then the respondent shall be sent a summary or a copy of the complaint and any supporting evidence provided by the complaining party by Certified Mail, return receipt requested. The respondent shall respond no later than thirty days from the date of the actual delivery to the respondent or the date of the last attempted delivery by the U.S. Postal Service. A copy of the summary or complaint shall also be sent to respondent through the U.S. Postal Service by First-Class Mail directed to the respondent at the last mailing address provided to the Commission by the respondent. Upon written request, the respondent may be afforded ten additional days to respond to the complaint.

e. **Materials Not Forwarded to Complaining Party**. The respondent's response to the complaint and the summaries of comments of any witnesses or others contacted during the investigation shall not be forwarded to the complaining party, except as may be required by N.C.G.S. § 7A-38.2(h).

(5) **Initial Determination on Oral and Written Complaints.** In reviewing a complaint under subsection (c)(4) of this rule and any additional information gathered, including information supplied by the respondent or a witness or other third party contacted, Commission staff shall consider the conduct complained of by reference to subsection (d)(2) of this rule. Staff shall determine whether to:

a. **Recommend Dismissal.** After review and upon concluding that the complaint does not allege facts sufficient to constitute a violation of a statute, rule, standard, or policy enforceable under the jurisdiction of the Commission, Commission staff shall make a recommendation to the chair of the Grievance and Disciplinary Committee to dismiss the complaint. If the chair agrees with the recommendation, then the complaint shall be dismissed with notification to the complaining party, the respondent, and any witnesses or others contacted during the review

process. The complaining party and the respondent shall be notified of the dismissal by Certified Mail, return receipt requested, and such service shall be deemed sufficient for purposes of these rules. A copy of the notice of dismissal shall also be sent to the complaining party and the respondent through the U.S. Postal Service by First-Class Mail directed to the respondent and complaining party at the last mailing address provided to the Commission.

Staff shall note for the file why a determination was made to dismiss a complaint and shall report on such dismissals to the committee. Dismissed complaints shall remain on file with the Commission. The committee may take dismissed complaints into consideration if additional complaints are later made against the same respondent.

A complaining party may file a written appeal of the dismissal of the complaint to the committee no later than thirty days from the date of the actual delivery of the notice of dismissal to the complaining party or of the date of the last attempted delivery by the U.S. Postal Service of the notice of dismissal.

b. **Refer to the Grievance and Disciplinary Committee**. Following an initial Commission staff review of the complaint and any response submitted by the respondent, including contacting the respondent, witnesses, or other third parties as necessary, and upon a determination that the complaint (i) raises a concern about a possible violation of a statute, a program rule, the Standards of Professional Conduct for Mediators, or a Commission policy; or (ii) raises a significant question about a respondent's moral character, conduct, or fitness to practice, or if, after giving the complaint due consideration, the chair of the Grievance and Disciplinary Committee disagrees with staff's recommendation to dismiss the complaint, staff shall refer the matter to the full committee for review.

No matter shall be referred to the committee until the respondent has been forwarded a copy or summary of the complaint and a copy of these

rules. The respondent shall respond no later than thirty days from the date of the actual delivery of the letter transmitting the complaint or summary to the respondent or the last attempted delivery to the respondent by the U.S. Postal Service. A copy of the complaint or summary shall also be sent to the respondent through the U.S. Postal Service by First-Class Mail directed to the respondent at the last mailing address provided to the Commission by the respondent. Upon written request, the respondent may be afforded ten additional days to respond to the complaint.

The respondent's response shall be included in the materials forwarded to the committee. If a witness or other person was contacted, any written response or summary of a response shall also be included in the materials forwarded to the committee.

(6) **Filing Deadlines for Complaints**. A complaint made under subsection (b) of this rule that relates to the conduct of a certified mediator during a mediation, from appointment or selection of the mediator through the conclusion of the mediation by settlement or impasse, shall be filed no later than one year from the conclusion of the mediation by settlement or impasse, except that a complaint that relates to the conduct of a certified district criminal court mediator during a mediation, from the beginning of the mediation through the conclusion of the last session of mediation, shall be filed no later than ninety days from the conclusion of the last mediation session. A complaint made under subsection (b) of this rule that relates to the conduct of a person affiliated with a certified mediator training program during a training program shall be filed no later than one year from the conclusion of the training program.

(7) **Confidentiality**. Commission staff will create and maintain files for all matters considered under subsection (b) of this rule. All information in the files pertaining to applicants for certification, certification of a mediator training program, or certification renewal shall remain confidential in accordance with N.C.G.S. § 7A-38.2(h). Information pertaining to complaints regarding the moral character, conduct, or fitness to practice of mediators

or trainers or personnel affiliated with certified mediator training programs shall remain confidential until such time as the Grievance and Disciplinary Committee completes its preliminary investigation, finds probable cause under subsection (d)(2) of this rule and N.C.G.S. § 7A-38.2(h), and the time within which the respondent may appeal the determination of probable cause has expired, or if the respondent files a timely appeal under subsection (e) of this rule, the information shall remain confidential until a hearing is held and a decision is reached by the Commission.

Staff shall reveal the names of applicants and respondents to the committee and the committee shall keep the names of applicants and respondents and other identifying information confidential, except as provided for in N.C.G.S. § 7A-38.2(h) and subsection (d)(3) of this rule.

Notwithstanding the above, staff shall notify the executive director of the Mediation Network of North Carolina, and the executive director of the community mediation center that is sponsoring the application of an applicant seeking certification as a district criminal court mediator, of any matter regarding the moral character, conduct, or fitness to practice of the applicant.

Staff shall notify any mediation program or agency populating a list of mediators certified by the Commission, including, but not limited to, the Mediation Network of North Carolina, community mediation centers, the North Carolina Industrial Commission, and the federal trial courts in North Carolina, of any finding of probable cause under this subsection against a mediator arising out of a mediated settlement conference conducted under the auspices of such agency or program. When practicable, staff shall notify the agency or program of any public sanction imposed by the Commission under these rules against a certified mediator who also serves as a mediator for that agency or program.

Staff and members of the Grievance and Disciplinary Committee may share information with other committee chairs or committees if needed and relevant to a review of any matter before such other committee.

The Commission may publish names, contact information, and biographical information for mediators, neutrals, and mediator training programs that have been certified or qualified.

(d) **Grievance and Disciplinary Committee Review and Determination on Matters Referred by Commission Staff**.

(1) **Grievance and Disciplinary Committee Review of Moral Character Issues and Complaints**. The Grievance and Disciplinary Committee shall review matters brought before it by Commission staff under the provisions of subsection (c) of this rule and may contact any other persons or entities with knowledge of the matter for additional information. The chair may, in his or her discretion, appoint members of the committee to serve on a subcommittee to investigate a particular matter brought to the committee by staff. The chair of the committee, or his or her designee, may issue subpoenas for the attendance of witnesses and for the production of books, papers, materials, or other documentary evidence deemed necessary to the committee's investigation and review of the matter.

(2) **Grievance and Disciplinary Committee Deliberation**. The Grievance and Disciplinary Committee shall deliberate to determine whether probable cause exists to believe that an applicant or respondent's conduct:

a. is a violation of the enabling legislation for a mediated settlement conference program under the jurisdiction of the Commission or a violation of N.C.G.S. § 7A-38.2;

b. is a violation of the Standards of Professional Conduct for Mediators or any other standards of professional conduct that are not inconsistent with the Standards of Professional Conduct for Mediators and to which the respondent is subject;

c. is a violation of Supreme Court rules or any other rules for mediated settlement conferences or mediation programs;

d. is inconsistent with good moral character (*See* Rule 8(a)(~~4~~5) of the Rules for Mediated Settlement Conferences and Other Settlement Procedures in

Superior Court Civil Actions, Rule 8(a)(7) of the Rules for Settlement Procedures in District Court Family Financial Cases, Rule 7(a)(4) of the Rules of Mediation for Matters in District Criminal Court, and Rule 7 of these rules);

e. reflects a lack of fitness to conduct mediated settlement conferences or mediations, or to serve in affiliation with a certified mediator training program (*See* Rule 7);

f. serves to discredit the Commission, the courts, or the mediation process (*See* Rule 7); or

g. is a violation of a Commission policy.

(3) **Grievance and Disciplinary Committee Determination**. Following deliberation, the Grievance and Disciplinary Committee shall determine whether to dismiss the matter, make a referral, or impose sanctions, as follows:

a. **To Dismiss**. If a majority of the Grievance and Disciplinary Committee members review an issue of, or a complaint about, moral character, conduct, or fitness to practice and find no probable cause to believe that the applicant or respondent's conduct is a violation of subsection (d)(2) of this rule, then the committee shall dismiss the matter and instruct Commission staff to:

1. certify or recertify the applicant, if an application is pending, or notify the respondent by Certified Mail, return receipt requested, with a copy sent by First Class Mail through the U.S. Postal Service, that no further action will be taken in the matter; or

2. notify the complaining party and the respondent by Certified Mail, return receipt requested, that no further action will be taken and that the matter is dismissed. A copy of the notice of dismissal shall also be sent to the respondent and the complaining party through the U.S. Postal Service by First-Class Mail.

b. **To Refer**. If, after reviewing an application for certification or certification renewal or a complaint, a majority of the Grievance and Disciplinary Committee members eligible to vote determine that:

1. any violation of a statute, a program rule, the Standards of Professional Conduct for Mediators, or a Commission policy was technical or relatively minor in nature, caused minimal harm to the complaining party, and did not discredit the program, courts, or Commission, then the committee may:

    i. dismiss the complaint with a letter to the complaining party and respondent by Certified Mail, return receipt requested, and a copy of the letter through the U.S. Postal Service by First-Class Mail directed to the complaining party and the respondent at the last mailing address provided to the Commission by the complaining party and the respondent, notifying them of the dismissal, citing the violation, and advising the respondent to avoid such conduct in the future; or

    ii. refer the respondent to one or more members of the committee to discuss the matter and explore ways that the respondent may avoid similar complaints in the future.

2. the respondent's conduct involves no violation, but raises best practices or professionalism concerns, then the committee may:

    i. direct Commission staff to dismiss the complaint with a letter sent by Certified Mail, return receipt requested, and a copy through the U.S. Postal Service by First Class Mail to the complaining party and the respondent directed to the complaining party or respondent at the last mailing address provided to the Commission by the complaining party or the respondent advising him or her of the committee's concerns and providing guidance;

    ii. direct the respondent to meet with one or more members of the committee, who will informally discuss the committee's concerns and provide counsel; or

iii. refer the respondent to the Chief Justice's Commission on Professionalism for counseling and guidance.

3. the applicant or respondent's conduct raises significant concerns about his or her fitness to practice, including concerns about mental instability, mental health, lack of mental acuity, possible dementia, or possible alcohol or substance abuse, then the committee may, in lieu of or in addition to imposing sanctions, refer the applicant or respondent to the North Carolina Lawyer Assistance Program for evaluation or, if the applicant or respondent is not an attorney, to a physician, other licensed mental health professional, or substance abuse counselor or organization.

In the event that an applicant or respondent is referred to one or more members of the committee for counsel, to the Lawyer Assistance Program, or to some other professional entity, and fails to cooperate regarding the referral or refuses to sign releases or provide any resulting evaluations to the committee, or should any resulting discussion or evaluation suggest that the applicant or respondent is not currently capable of serving as a mediator, trainer, or manager, the committee may make further determinations in the matter. Pending further review, the committee may also recommend summary suspension under subsection (d)(4) of this rule until such time as the committee has authorized the applicant or respondent to return to active mediation practice. The committee may condition a certification or certification renewal on the applicant or respondent's successful completion of the referral process. Any costs associated with a referral, e.g., costs of evaluation or treatment, shall be borne entirely by the applicant or respondent.

c. **To Impose Sanctions**. Except as provided for in subsection (d)(3)(b)(1) of this rule, if a majority of

the Grievance and Disciplinary Committee members find probable cause under subsection (d)(2) of this rule, then the committee shall impose sanctions on the applicant or respondent under subsection (e)(13) of this rule.

Notification of any dismissal, referral, or sanction imposed under subsection (d)(3) of this rule shall be sent to respondent by Certified Mail, return receipt requested, and a copy sent through the U.S. Postal Service by First-Class Mail directed to the last mailing address provided to the Commission by the respondent, and such service shall be deemed sufficient for the purposes of these rules. All witnesses and any others contacted by Commission staff or a committee member shall be notified, if feasible, of a dismissal of the complaint.

A complaining party shall have no right of appeal from a committee determination to dismiss a complaint under subsection (d)(3)(a) of this rule or from a committee determination to refer a mediator under subsection (d)(3)(b) of this rule.

A letter issued under subsection (d)(3)(a) or subsection (d)(3)(b) of this rule regarding conduct or referral shall not be considered sanctions under subsection (e)(13) of this rule. Rather, the letters are intended to be opportunities to address concerns and to help applicants and respondents perform more effectively as mediators. However, there may be instances that are more serious in nature where the committee may both make a referral under subsection (d)(3)(b) of this rule and impose sanctions under subsection (e)(13) of this rule.

(4) **Summary Suspension**. If, after initiation of a complaint against a respondent certified by the Commission and during review by the Grievance and Disciplinary Committee, the committee determines and the chair of the Commission concurs that the conduct of the respondent raises a serious issue regarding the health, safety, or welfare of the mediator or the public, or may adversely affect the integrity of the courts, and that there is a necessity for prompt action, then the Commission, through its chair, may petition the court to restrain or enjoin the respondent's conduct, including suspending the mediator from active service as a mediator in North Carolina. The

petition for injunctive relief shall be filed in the Superior Court, Wake County.

(5) **Right to Object and Negotiate**. Within the thirty-day period set forth in subsection (d)(6) of this rule, an applicant or respondent may contact the Grievance and Disciplinary Committee and object to any referral made or sanction imposed on the applicant or respondent, including objecting to any public posting of a sanction, and seek to negotiate some other outcome with the committee. The committee shall have the authority and discretion to engage or decline to engage in negotiations with the applicant or respondent. During the negotiation period, the applicant or respondent may request an extension of the time in which to request an appeal in writing under this subsection and subsection (d)(6) of this rule. Commission staff, in consultation with the committee chair, may extend the appeal period up to an additional thirty days in order to allow more time to complete negotiations.

(6) **Right of Appeal**. If a referral is made or sanctions are imposed, then the applicant or respondent may file an appeal with the Commission in writing no later than thirty days from the date of the actual delivery of the notice to the applicant or respondent, or within thirty days from the last attempted delivery by the U.S. Postal Service. Subject to the provisions of subsection (d)(5) of this rule, if no appeal is received within thirty days as set out herein, then the applicant or respondent shall be deemed to have accepted the Grievance and Disciplinary Committee's findings and the imposition of sanctions. The complaining party does not have a right to appeal from a decision of the committee to dismiss the complaining party's complaint against the respondent.

(7) **Notification**. At such time as the matter becomes public under subsection (c)(7) of this rule and N.C.G.S. § 7A-38.2(h), Commission staff shall, if feasible, notify the complaining party and any witnesses or others contacted during the investigation of the complaint by staff or the Grievance and Disciplinary Committee of the sanctions imposed and the fact of the respondent's appeal, if filed.

(e) **Appeal to the Commission**.

(1) **Stay Pending Appeal**. The imposition of a private or public sanction by the Grievance and Disciplinary Committee shall be stayed, pending the final disposition of an appeal properly filed by the respondent with the Commission.

(2) **The Commission Shall Meet to Consider Appeals**. In the discretion of the Commission's chair, an appeal by the respondent to the Commission of the Grievance and Disciplinary Committee's determination under subsection (d)(6) of this rule shall be heard either by (i) a five-member panel of Commission members chosen by the chair or the chair's designee, or (ii) the members of the full Commission. Any members of the committee who participated in issuing the committee's determination shall be recused and shall not participate in the hearing. Under Rule 3(c), members of the Commission shall recuse themselves from hearing the matter when they cannot act impartially. No matter shall be heard and decided by less than three Commission members.

(3) **Conduct of the Hearing**.

a. At least thirty days prior to the hearing before the Commission or panel, Commission staff shall forward to all parties, special counsel to the Commission, and members of the Commission or panel who will hear the matter, a copy of all documents considered by the Grievance and Disciplinary Committee and the names of the members of the Commission or panel who will hear the matter. Any written challenge questioning the neutrality of a member of the Commission or panel shall be directed to and decided by the Commission's chair or the chair's designee. A written challenge shall be filed with the Commission no later than seven days from the date the person filing the challenge received notice of the members who will hear the appeal.

b. Hearings conducted by the Commission or a panel under this rule shall be de novo.

c. Applicants, complainants, respondents, and any witnesses or others identified as having relevant information about the matter may appear at the hearing with or without counsel.

d. An appeal from a denial of an initial application for certification or qualification of a mediator, neutral, or mediator training program that relates to moral character, conduct, or fitness to practice shall be held in private unless the applicant requests a public hearing. An appeal from a denial of an application for certification renewal or reinstatement that relate to ethics or conduct shall be open to the public except that, for good cause shown, the presiding officer may exclude from the hearing room all persons except the parties, counsel, and those engaged in the hearing.

e. In the event that the applicant, complaining party, or respondent fails to appear without good cause, the Commission or panel shall proceed to hear from the parties and witnesses who are present and make a determination based on the evidence presented at the proceeding.

f. Proceedings before the Commission or panel shall be conducted informally, but with decorum.

g. The Commission or panel, through its counsel, and the applicant or respondent, may present evidence in the form of sworn testimony and/or written documents and may cross-examine any witness called to testify by the other. Commission or panel members may question any witness called to testify at the hearing. The Rules of Evidence shall not apply, except as to privilege, but shall be considered as a guide toward a full and fair development of the facts. The Commission or panel shall consider all evidence presented and give the evidence appropriate weight and effect.

h. If, in the discretion of the Commission's chair, a panel is empaneled to hear the appeal, then the Commission's chair or designee shall appoint one of the members of the panel to serve as the presiding officer at the hearing before the panel. The Commission's chair or designee shall serve as the presiding officer at a hearing before the full Commission. The presiding officer shall have such jurisdiction and powers as are necessary to conduct

a proper and efficient hearing and disposition of the matter on appeal. The presiding officer may administer oaths and may issue subpoenas for the attendance of witnesses and the production of books, papers, or other documentary evidence.

i. Nothing herein shall restrict the chair of the Commission from serving on a panel or serving as its presiding officer at any hearing held under the provisions of subsection (e) of this rule.

(4) **Date of the Hearing**. An appeal of any sanction imposed by the Grievance and Disciplinary Committee shall be heard by the Commission no later than 180 days from the date the notice of appeal is filed with the Commission, unless waived in writing by the respondent.

(5) **Notice of the Hearing**. The Commission's office shall serve on all parties by Certified Mail, return receipt requested, notice of the date, time, and place of the hearing no later than sixty days prior to the hearing, and such service shall be deemed sufficient for the purposes of these rules. A copy of the hearing notice shall also be sent through the U.S. Postal Service by First-Class Mail directed to the respondent at the last mailing address provided to the Commission by the respondent.

(6) **Ex Parte Communications**. With the exception of Commission staff, no person shall have any ex parte communication with a member of the Commission concerning the subject matter of the appeal. Communications regarding scheduling matters shall be directed to staff.

(7) **Attendance**. The presiding officer may, in his or her discretion, permit an attorney to represent a party by telephone or through video conference or allow witnesses to testify by telephone or through video conference, with such limitations and conditions as are just and reasonable. If an attorney or witness wishes to appear by telephone or video conference, then the requesting party shall notify Commission staff at least twenty days prior to the proceeding. At least five days prior to the proceeding, staff must be provided with the contact information of those who will participate by telephone or video conference.

(8) **Witnesses**. The presiding officer shall exercise discretion with respect to the attendance and number of witnesses

who appear voluntarily or involuntarily, for the purpose of ensuring the orderly conduct of the proceeding. Each party shall forward to the Commission's office and to all other parties at least ten days prior to the hearing the names of all witnesses who will be called to testify.

(9) **Rights of the Applicant or Respondent at the Hearing**. At the hearing, the applicant or respondent may:

a. appear personally and be heard;

b. be represented by counsel;

c. call and examine witnesses;

d. offer exhibits; and

e. cross-examine witnesses.

(10) **Transcript**. The Commission shall retain a court reporter to keep a record of the proceeding. Any respondent who wishes to obtain a transcript of the record may do so at his or her own expense by contacting the court reporter directly. The only official record of the proceeding shall be the one made by the court reporter retained by the Commission. Copies of a tape, noncertified transcript, or record made by a court reporter retained by a respondent are not part of the official record.

(11) **Commission Deliberation**. The members of the Commission or panel shall deliberate to determine whether clear, cogent, and convincing evidence exists to believe that an applicant or respondent's conduct is a violation of any of the provisions set out in subsection (d)(2) of this rule.

(12) **Commission Decision.** After the hearing, a majority of the Commission members hearing the appeal or the panel may find that:

a. there is not clear, cogent, and convincing evidence to support a referral or the imposition of sanctions and, therefore, dismiss the complaint or direct Commission staff to certify the applicant or recertify the mediator or mediator training program; or

b. there is clear and convincing evidence that grounds exist to refer or to impose sanctions. The Commission or panel may impose the same or different sanctions than those imposed by the Grievance

and Disciplinary Committee or make the same or a different referral.

The Commission or panel shall set forth its findings of fact, conclusions of law, order of referral and/or imposition of sanctions, or other action in writing and serve its decision on the respondent within sixty days from the date the hearing is concluded. A copy of the decision shall be sent by Certified Mail, return receipt requested, and such service shall be deemed sufficient for purposes of these rules. A copy of the decision shall also be sent through the U.S. Postal Service by First-Class Mail directed to the respondent at the last mailing address provided to the Commission by the respondent.

A decision of the Commission or panel shall be, subject to subsection (e)(15) of this rule, the final decision of the Commission.

(13) **Private and Public Sanctions**.

a. **Private Sanctions.** The Grievance and Disciplinary Committee, or the Commission members or panel who heard the respondent's appeal, may impose private sanctions against an applicant or respondent, which include the following:

1. Letter of warning (a written communication to the respondent stating that the respondent's conduct, while not a basis for public sanctions, was an unintentional, minor, or technical violation of a statute, rule, policy, or the Standards of Professional Conduct for Mediators, or was unprofessional or not in accord with accepted professional practice, and if continued, may be a basis for public sanctions).

2. Reprimand (a written communication to the respondent stating that the respondent's conduct, although a violation of a statute, rule, policy, or the Standards of Professional Conduct for Mediators, was minor and, if continued, may result in public sanctions).

3. Denial of certification of an initial application.

4. Approval of certification or certification renewal upon enumerated condition(s).

5. Any other private sanction deemed appropriate by the Commission members who heard the appeal or the panel, including referrals as authorized by subsection (d)(3)(b) of this rule.

b. **Public Sanctions**. The Grievance and Disciplinary Committee, the Commission members who heard the appeal, or the panel may impose public sanctions against the respondent which include, but are not limited to, the following:

1. Censure (a written communication to the respondent stating that the violation of a statute, rule, Commission policy, or the Standards of Professional Conduct for Mediators is serious, has caused or could cause significant or potential harm, and if continued, may result in the imposition of more serious sanctions).

2. Reinstatement upon condition(s).

3. Suspension of certification for a specified term, with or without condition(s).

4. Denial of certification renewal.

5. Denial of reinstatement.

6. Decertification.

7. Any other sanction deemed appropriate by the Commission members who heard the appeal or the panel.

c. **Imposition of Conditions.** The Grievance and Disciplinary Committee or the panel may impose any sanction set forth in subsections (e)(13)(a) and (e)(13)(b) of this rule subject to reasonable conditions, which may include, but are not limited to, the following:

1. Completion of additional training.

2. Restriction on the types of cases to be mediated in the future.

3. Reimbursement of the fees paid to the mediator or mediator training program.

4. Prohibition on participation as a trainer or person associated with a certified mediator

training program, either indefinitely or for a specific period of time.

5. Completion of additional observations.

6. Any other condition deemed appropriate by the Commission members who heard the appeal or the panel.

d. **Factors that May Be Considered in Imposing Sanctions and/or Conditions**.

1. The intent of the respondent to commit acts resulting in harm or the circumstances under which the potential of causing harm was foreseeable.

2. The circumstances reflecting the respondent's lack of honesty, trustworthiness, or integrity.

3. A dishonest or selfish motive, or the absence thereof.

4. Any negative impact of the respondent's conduct on third parties, the public's perception of the mediation process, or the administration of justice.

5. A conviction of a felony.

6. Any prior disciplinary offenses, or the absence thereof.

7. The remoteness of prior disciplinary offenses.

8. Any timely good faith efforts to rectify the consequences of misconduct.

9. A pattern of misconduct.

10. The effect of any physical or mental disability or impairment, or personal or emotional problems, on the conduct in question.

11. A full disclosure and cooperative attitude toward the disciplinary process.

12. Any bad faith obstruction of the disciplinary process by intentionally failing to comply with rules or orders of the Commission or by submitting false evidence or making false statements to the Commission.

13. The respondent's failure to acknowledge the wrongful nature of his or her conduct or to express remorse.
14. An expression of remorse and acknowledgement of the wrongful nature of the respondent's conduct.
15. The character or reputation of the respondent.
16. The respondent's mediation experience and the number of years that the respondent has been certified.
17. Any other factor found to be pertinent to the consideration of the sanctions to be imposed.

(14) **Publication of Grievance and Disciplinary Committee or Commission Decisions**.

a. The names of respondents who have been issued a private sanction as set forth in subsection (e)(13)(a) of this rule or applicants who have never been certified but have been denied certification shall not be published by the Commission.

b. The names of respondents or applicants for certification renewal who are sanctioned under any provision of subsection (e)(13)(b) of this rule or who have been denied reinstatement under this rule shall be published by the Commission, along with a short summary of the facts involved and the discipline imposed. For good cause shown, the Grievance and Disciplinary Committee or the Commission may waive this requirement.

c. Chief district court judges, senior resident superior court judges, and clerks in judicial districts and counties in which a respondent is available to serve, the North Carolina State Bar and any other professional licensing or certification bodies to which a respondent is subject, and other trial forums or agencies having mandatory programs and using mediators certified by the Commission shall be notified of any public sanction and/or condition imposed upon a respondent.

(15) **Appeal**. The Superior Court, Wake County, shall have jurisdiction over appeals of Commission or panel decisions imposing sanctions or denying applications for mediator or mediator training program certification or certification renewal. An order imposing sanctions or denying an application for mediator or mediator training program certification or certification renewal shall be reviewable upon appeal, and the entire record, as submitted, shall be reviewed to determine whether the order is supported by substantial evidence. Notice of appeal by a respondent shall be filed in the Superior Court, Wake County, no later than thirty days from the date of the actual delivery of the order imposing sanctions or denying certification or certification renewal to the applicant or respondent, or no later than thirty days from the date of the last attempted delivery to the applicant or respondent by the U.S. Postal Service. A copy of the notice of appeal shall also be sent to the applicant or respondent through the U.S. Postal Service by First-Class Mail directed to respondent or applicant at the last mailing address provided to the Commission by the applicant or respondent.

(16) **Effective Date of Sanction Imposed.** A sanction imposed against a respondent becomes effective either upon the expiration of the period within which an applicant or respondent may appeal the determination of the Grievance and Disciplinary Committee, or upon a final decision by the Commission or a panel after hearing a timely appeal of the committee's imposition of sanctions.

(17) **Petition for Reinstatement or New Application Following a Denial of Initial or Subsequent Application**. An applicant whose application for certification has been denied under the provisions of subsection (e)(13)(a) of this rule may be certified, or a respondent who has been decertified may be reinstated, under subsection (e)(17)(h) of this rule. Except as otherwise provided by the Grievance and Disciplinary Committee, the Commission, or a panel of the Commission, no petition for reinstatement or new application for certification following a denial may be tendered within two years of the date of the order of decertification or the date of denial of the application for certification.

a. A petition for reinstatement or a new application for certification after a denial shall be made in writing, verified by the applicant or petitioner, and filed with the Commission's office.

b. The petition for reinstatement or the new application for certification following a denial shall contain:

   1. the name and address of the applicant or petitioner;

   2. the reasons why certification was denied or the moral character, conduct, or fitness concerns upon which the suspension, decertification, or bar to serving as a trainer or training program manager was based;

   3. a concise statement of facts alleged to meet the applicant or petitioner's burden of proof as set forth in subsection (e)(17)(g) of this rule and alleged to justify certification or reinstatement as a certified mediator or certified mediator training program; and

   4. a statement consenting to a criminal background check, signed by the applicant or petitioner; or, if the applicant or petitioner is a mediator training program, by the trainers or instructors affiliated with the program.

c. The petition for reinstatement or the application for certification following a previous denial may also contain a request for a hearing on the matter to consider any additional evidence which the applicant or petitioner wishes to submit, including any third-party testimony regarding his or her moral character, competency, or fitness to practice as a mediator. A petition or application for certification from a mediator training program may contain a request for a hearing on the matter to consider any additional evidence regarding the effectiveness of the program and/or the qualifications of its trainer(s).

d. Commission staff shall refer the petition for reinstatement or the application for certification following a denial to the Commission for review. In the discretion of the Commission's chair, the chair

or designee may (i) appoint a five-member panel of Commission members to review the matter, or (ii) put the matter before the Commission for review. The panel shall not include any members of the Commission who were involved in any prior determination involving the applicant or petitioner. Members of the Commission shall recuse themselves from reviewing any matter if they cannot act impartially. Any challenges questioning the neutrality of a member reviewing the matter shall be decided by the Commission's chair or designee. No matter shall be heard and decided by less than three Commission members.

e. If the applicant or petitioner does not request a hearing under subsection (e)(17)(c) of this rule, then the Commission or panel members shall review the application or petition and shall decide whether to grant or deny the applicant's application for certification or the petitioner's petition for reinstatement after denial within sixty days from the filing of the application or petition. That decision shall be final.

   If the applicant or petitioner requests a hearing, it shall be held within 180 days from the filing of the application or petition, unless the time limit is waived by the applicant or petitioner in writing. In the discretion of the chair of the Commission, the hearing shall be conducted before the Commission or a panel appointed by the chair. At the hearing, the applicant or petitioner may:

   1. appear personally and be heard;
   2. be represented by counsel;
   3. call and examine witnesses;
   4. offer exhibits; and
   5. cross-examine witnesses.

f. At the hearing, the Commission may call witnesses, offer exhibits, and examine the applicant or petitioner and witnesses.

g. The burden of proof shall be upon the applicant or petitioner to establish by clear, cogent, and convincing evidence that:

1. the applicant or petitioner has (i) rehabilitated his or her character; (ii) addressed and resolved any conditions that led to his or her denial of certification or decertification; (iii) completed additional training in mediation theory and practice, studied program rules, the Standards of Professional Conduct for Mediators, and ethics to ensure his or her competency as a mediator; and/or (iv) taken steps to address and resolve any other matter which led to the applicant or petitioner's denial of certification or decertification;

2. the applicant or petitioner, if a mediator training program, has corrected any deficiencies as required by enabling legislation, program rules, or Commission policies, and has addressed and resolved any issues related to the qualifications or character issues of any persons affiliated with the program;

3. the petitioner's reinstatement or applicant's certification will not be detrimental to the Mediated Settlement Conference, Family Financial Settlement, Clerk Mediation, District Criminal Court Mediation programs, or to other programs, the Commission, the courts, or the public; and

4. the applicant or petitioner has completed any paperwork required for certification or reinstatement, including, but not limited to, the completion of a new application and execution of a release to conduct a background check, and has paid any required reinstatement and/or certification fees.

h. If the applicant or petitioner has established that the conditions set forth in subsection (e)(17)(g) of this rule have been met by clear, cogent, and convincing evidence, then the Commission shall certify or reinstate the applicant or petitioner as a certified mediator or mediator training program. Certification or reinstatement may be conditioned upon the completion of any reasonable condition set forth in subsection (e)(13)(c) of this rule.

i. The Commission or panel shall set forth its decision to certify or reinstate an applicant or petitioner or to deny certification or reinstatement in writing, making findings of fact and conclusions of law. A copy of the decision shall be sent by Certified Mail, return receipt requested, within sixty days from the date of the hearing, and such service shall be deemed sufficient for purposes of these rules. A copy of the decision shall also be sent to the applicant or petitioner through the U.S. Postal Service by First-Class Mail.

j. If a new application for certification or petition seeking reinstatement is denied, then the applicant or petitioner may not apply again under subsection (e)(17) of this rule until two years have elapsed from the date of the decision denying certification or reinstatement.

k. The Superior Court, Wake County, shall have jurisdiction over appeals of Commission decisions to deny certification or reinstatement under subsection (e)(17) of this rule. A decision denying certification or reinstatement under this section shall be reviewable upon appeal, and the entire record, as submitted, shall be reviewed to determine whether the decision is supported by substantial evidence. Notice of appeal shall be filed in the Superior Court, Wake County, no later than thirty days from the date of the actual delivery to the applicant or petitioner of the decision, or no later than thirty days from the last attempted delivery by the U.S. Postal Service.

* * *

This amendment to the Rules of the Dispute Resolution Commission becomes effective on 6 January 2025.

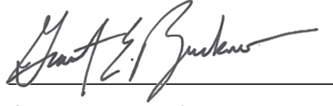
This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 11th day of December 2024.

For the Court

RULES OF THE DISPUTE
RESOLUTION COMMISSION

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 11th day of December 2024.



GRANT E. BUCKNER
Clerk of the Supreme Court

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