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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AUGUST 3, 2016

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

THE SUPREME COURT
OF
NORTH CAROLINA

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[1] Retired 31 May 2016.
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SUPREME COURT OF NORTH CAROLINA

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APPEAL AND ERROR

Preservation of issues—failure to raise constitutional issue at trial— Although plaintiff deputy sheriff presented additional constitutional arguments on appeal in a wrongful termination case, they were not preserved based on plaintiff's failure to raise them at trial. **Young v. Bailey, 665.**

Redistricting plan—three-judge panel—appellate review—standard—The North Carolina Supreme Court's review of a three-judge panel trial court decision in a challenge to a redistricting plan was limited. Unchallenged findings were binding, as were findings supported by competent evidence. Conclusions of law were reviewed de novo to determine whether they were supported by the findings. **Dickson v. Rucho, 481**.

CONSTITUTIONAL LAW

Freedom of speech—wrongful termination based on political considerations—sheriff's deputy—The trial court did not err in a wrongful termination case by concluding plaintiff deputy sheriff's First Amendment free speech rights were not violated when she was fired allegedly based on her failure to support the sheriff's reelection. By standing in the elected sheriff's shoes, a deputy sheriff fills a role in which loyalty to the elected sheriff is necessary to ensure that the sheriff's policies are carried out. Mutual confidence and loyalty between a sheriff and a deputy are crucial in accomplishing the sheriff's policies and duties, and thus the dismissal of plaintiff based on political considerations was permissible. **Young v. Bailey, 665.**

Review of state constitutional issues—de novo—presumed constitutionality—The North Carolina Supreme Court reviews constitutional questions de novo. In exercising de novo review, it is presumed that laws enacted by the General Assembly are constitutional, and a law will not be declared invalid unless it is determined that the law is unconstitutional beyond reasonable doubt. To determine whether the violation is plain and clear, the Supreme Court looks to the text of the state Constitution, the historical context in which the people of North Carolina adopted the applicable constitutional provision, and the Court's precedents. **State ex rel. McCrory v. Berger, 633.**

CONSTITUTIONAL LAW—Continued

State constitution—appointments clause—authority of governor and legislature—Considering whether the appointments clause in Article III, Section 5(8) of the North Carolina Constitution prohibits the General Assembly from appointing statutory officers, the North Carolina Supreme Court concluded that this clause gives the Governor the exclusive authority to appoint constitutional officers whose appointments are not otherwise provided for by the constitution. The appointments clause does not prohibit the General Assembly from appointing statutory officers to administrative commissions. **State ex rel. McCrory v. Berger, 633.**

State constitution—separation of powers—legislative appointments to administrative commissions—Challenged statutory provisions involving legislative appointments to administrative commissions violated the separation of powers clause in the North Carolina Constitution by preventing the Governor from performing his constitutional duty. When the General Assembly appoints executive officers that the Governor has little power to remove, it can appoint them essentially without the Governor's influence. That leaves the Governor with little control over the views and priorities of the officers that the General Assembly appoints. When those officers form a majority on a commission that has the final say on how to execute the laws, the General Assembly, not the Governor, can exert most of the control over the executive policy that is implemented in any area of the law that the commission regulates. As a result, the Governor cannot take care that the laws are faithfully executed in that area. The separation of powers clause plainly and clearly does not allow the General Assembly to take this much control over the execution of the laws from the Governor and lodge it with itself. **State ex rel. McCrory v. Berger, 633.**

DRUGS

Conspiracy to traffic in opium—motion to dismiss—circumstantial evidence—There was sufficient evidence to support defendant's conviction for conspiracy to traffic in more than four but less that fourteen grams of opium in violation of N.C.G.S. § 90-95(h)(4)(a). In the light most favorable to the State, the record showed that defendant mailed sixty Oxycodone pills in an unmarked pill bottle to a person whom he knew to have a history of using and selling controlled substances. The State may rely on circumstantial evidence to survive a motion to dismiss. **State v. Winkler, 572.**

ELECTIONS

Redistricting—federal and state constitutional requirements—on remand—Where a previous decision of the North Carolina Supreme Court in a redistricting case was remanded by the U.S. Supreme Court for further consideration in light of its decision in *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. ____ (2015) (*Alabama*), the North Carolina Supreme Court held that the three-judge panel trial court decision fully complied with *Alabama*. In North Carolina, the General Assembly's priorities can only be implemented in accordance with the federal and state constitutional requirements as specified by the N.C. Supreme Court, whereas in *Alabama* the redistricting plan was drawn according to guidelines adopted by legislative committee; in *Alabama* the state was considered as a whole rather than district by district, as in N.C.; there was a standing issue as to one plaintiff which was not relevant here; the Alabama legislature placed great emphasis on ensuring that no district deviated by more than a theoretical equal population ideal, while in North Carolina equal population criteria are a component of and intertwined with

the state constitution's Whole County Provision and equal population is a part of the redistricting background but is not a factor to be weighed against the use of race to determine whether race predominates; and, lastly, in *Alabama* the U.S. Supreme Court held that the district court misinterpreted the requirements of section 5 of the Voting Rights Act in finding that the challenged districts were "narrowly tailored" to satisfy strict scrutiny, while the North Carolina three-judge panel's conclusion here that the twenty-six challenged VRA districts survive strict scrutiny was consistent with the U.S. Supreme Court's clarification of the section 5 narrow tailoring analysis. **Dickson v. Rucho, 481.**

Redistricting—federal requirements—primary concern—federal law rather than race—When making redistricting decisions, federal and state law must be read in harmony, although a redistricting plan that does not satisfy federal requirements fails even if it is consistent with the law of North Carolina. The Fourteenth Amendment, by guaranteeing equal protection for all citizens regardless of race, essentially prohibits consideration of race during redistricting; however, at the same time, the General Assembly must ensure that, to the greatest extent allowed under federal law, the state legislature's redistricting plans comply with the Whole County Provision of the North Carolina Constitution. Despite a cat's cradle of factors facing the General Assembly, the three-judge trial court panel in this case found that no factual inquiry was required regarding the General Assembly's predominant motivation in forming twenty-six Voting Rights Act districts beyond the General Assembly's concession that the districts were drafted to be VRA-compliant. In light of the many other considerations potentially in play, the Court did not believe that this concession established that race ipso facto was the predominant motive driving the General Assembly. It appeared from the three-judge panel's findings that the General Assembly was concerned with compliance with federal law more than addressing race per se. **Dickson v. Rucho, 481.**

Redistricting—gerrymandering—In a redistricting case which challenged four districts as being the result of racial gerrymandering, the General Assembly's actions in creating these districts were rationally related to all its expressed goals. The U.S. Supreme Court has recognized that compliance with federal law, incumbency protection, and partisan advantage are all legitimate governmental interests. **Dickson v. Rucho, 481.**

Redistricting—process—Considering redistricting issues under the Whole County Provision of the North Carolina Constitution, the General Assembly first must create all necessary Voting Rights Act districts, single-county districts, and single counties containing multiple districts. Thereafter, the General Assembly should make every effort to ensure that the maximum number of groupings containing two whole, contiguous counties are established before resorting to groupings containing three whole, contiguous counties, and so on. **Dickson v. Rucho, 481.**

Redistricting—splitting districts—lack of compactness—A purported lack of compactness of legislative districts created by the General Assembly and the harm resulting from splitting precincts may be valid considerations, but neither constitutes an independent legal basis for finding a constitutional violation, and there is no justiciable standard by which to measure these local factors. **Dickson v. Rucho, 481**.

Redistricting—state constitution—Good of the Whole Clause—Enacted redistricting plans did not violate the "Good of the Whole" clause found in Article I, Section 2 of the Constitution of North Carolina. Plaintiffs proffered maps

representing their good faith understanding of a plan they believed to be best for the State as a whole; however, the maps enacted by the duly elected General Assembly also represent an equally legitimate understanding of legislative districts that will function for the good of the whole. Because plaintiffs' argument is not based upon a justiciable standard, and because acts of the General Assembly enjoy "a strong presumption of constitutionality," plaintiffs' claims failed. **Dickson v. Rucho, 481.**

INDICTMENT AND INFORMATION

Registered sex offender change of address—"three business days" statutory language—The indictment charging defendant, a registered sex offender, with failure to provide timely written notice of his change of address in violation of N.C.G.S. § 14-208.11 was valid and conferred jurisdiction upon the trial court. Omission of the word "business" from the phrase "third business day" as set forth in § 14-208.9(a) did not deprive defendant of notice of the charge against him. The indictment included the critical language of § 14-208.11, alleging that defendant failed to report "as a person required by Article 27A of Chapter 14." **State v. Williams, 620.**

LOANS

Appraisal—alleged wrongful omissions—failure to plead justifiable reliance—The trial court did not err by dismissing plaintiff's claim based on its conclusion that all claims against BB&T were premised upon wrongful omissions by BB&T regarding the loan and appraisal process. Because no legal duty exists at law between a debtor and creditor, or between a bank's appraisers and a purchaser, plaintiffs' claims, as pled, failed. Moreover, because plaintiffs failed to sufficiently allege justifiable reliance upon the faulty appraisal information, or lack thereof, or that plaintiffs' injuries were proximately caused by either the bank or the appraisers, dismissal was proper. **Arnesen v. Rivers Edge Golf Club & Plantation, Inc., 440.**

PARENT AND CHILD

Parent-child doctrine—unemancipated minors—not a bar to gross negligence, intentional infliction of emotional distress, or punitive damages—bars ordinary negligence—The Court of Appeals erred in a negligence, premises liability, negligent infliction of emotional distress, intentional infliction of emotional distress, gross negligence, and punitive damages case by reversing in part the trial court's order granting summary judgment in favor of defendant. The parent-child immunity doctrine neither bars unemancipated minors' claims based on gross negligence and intentional infliction of emotional distress nor defeats their claims for punitive damages. The parent-child immunity doctrine 'bars actions between unemancipated children and their parents based on ordinary negligence. **Needham v. Price, 563.**

POLICE OFFICERS

Dismissal of highway trooper—failure to exercise discretion—misapprehension of law—The commanding officer of the North Carolina State Highway Patrol acted under a misapprehension of law when he dismissed a State Trooper (petitioner) from employment for an alleged violation of the Patrol's truthfulness policy. The commanding officer erroneously believed that he was required to

dismiss petitioner and thus failed to exercise his discretion based on the circumstances of the case. The Supreme Court remanded the matter to the employing agency for determination of whether petitioner's conduct constituted just cause for dismissal. **Wetherington v. N.C. Dep't of Pub. Safety, 583.**

PUBLIC OFFICERS AND EMPLOYEES

Wrongful termination—firing of sheriff's deputy—not a county employee—no public policy violation—The trial court did not err in a wrongful termination case, arising from the firing of a deputy by defendant sheriff for reasons allegedly attributable to her failure to support the sheriff's reelection, by granting summary judgment in favor of defendant sheriff. North Carolina is an employment-at-will state. Further, a deputy sheriff or employee of a sheriff's office is not a county employee. As a result, plaintiff was not covered by the public policy violation under N.C.G.S. § 153A-99 and her suit brought under that statute failed. **Young v. Bailey, 665.**

TORT CLAIMS ACT

Jurisdiction—school activity bus accident—not covered by waiver of governmental immunity—The Industrial Commission did not have jurisdiction over plaintiff's action brought under the Torts Claims Act to recover for alleged negligence by an employee of a local board of education in the operation of an activity bus transporting students and school staff to an extracurricular event. The waiver of governmental immunity provided in N.C.G.S. § 143-300.1 of the Tort Claims Act did not apply to this set of facts. Public school buses, school transportation service vehicles, and school activity buses are distinct categories of vehicles, and school activity buses were not incorporated into the waiver of immunity contemplated by the Tort Claims Act. **Irving v. Charlotte-Mecklenburg Bd. of Educ., 609.**

SCHEDULE FOR HEARING APPEALS DURING 2016

NORTH CAROLINA SUPREME COURT

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

February 15, 16, 17
March 21, 22
May 17, 18
August 29, 30, 31
September 1
October 10, 11, 12, 13
November 15 ,16, 17, 18
December 12, 13, 14, 15

MARIA ALVAREZ, MOLLY BAILEY-GOGA, JOHN BARTON, PAMELA BARTON, BONNIE BARY, THOMAS BARY, CAROL BIDDINGTON, WILLIAM BIDDINGTON, MARTIN BOCOCK, JR., NATHANIEL BOCOCK, CRAIG BRIGHAM, NANCY BRIGHAM, JOANN BUZEK, JOHN BUZEK, ROGER CARNIE, DIANE COUSINS, JOHN COUSINS, DANIEL D'ALESSANDRO, KELLY D'ALESSANDRO, PATRICIA DEMATTIA, DIANA FAICCHIO, NICHOLAS FAICCHIO, MARK FAIRNEY, JAMES GANDY, LOIS GANDY, EMMANUEL GEROLAMO, JOANNE GEROLAMO, THOMAS GILMARTIN, THOMAS GOGA, DORIS GUAY, JAMES HENNESSY, FREDERICK HORAK, JOANNE HORAK, JAY JONES, RUTH PAISKER JOSKO, WILLIAM JOSKO, DANIELLE KARNS, JASON KARNS, BRAD KIEL, MARK KIEL, ROBERT KIEL, MEREDITH KISNER, WILLIAM KISNER, MICHAEL KOWALSKI, BRUCE LEWIS, KIRA LEWIS, JAMES LOUY, JR., KATHLEEN MARTIN-WEIS, CHRISTOPHER MENIER, JAYME MENIER, MIDLANTIC COASTAL PROPERTIES, LLC, MRB STOCKTON PARTNERSHIP, CATHARYN NOSEK, JOHN NOSEK, ERIC OLSEN, KRISTEN OLSEN, DESIREE PATNO, DAVID POWERS, VICKIE POWERS, RBW PROPERTIES, SANDRA REYNOLDS, JANICE RIMER, JOHN RIMER, AMARANTHA RUOCCO, FREDDIE SHIVDAT, SANDRA SHIVDAT, JOHN SPICER, KATHLEEN SPICER, LARRY STAHL, MARIE STAHL, ELI TATE, PATRICIA SUE WAGNER, DEANNA SUE WATTERS, JOHN WEIS, MICHAEL WHITLOCK, AND ROBERT WHITLOCK, II

v.

COASTAL COMMUNITIES AT OCEAN RIDGE PLANTATION, INC., COASTAL COMMUNITIES AT SEAWATCH PLANTATION, LLC, SEAWATCH AT SUNSET HARBOR, INC., SEAWATCH AT SUNSET HARBOR, LLC, COASTAL COMMUNITIES AT SEAWATCH, LLC, COASTAL COMMUNITIES, INC., MARK A. SAUNDERS, DEBORAH BOODRO, ALAN KARG, MAS PROPERTIES, LLC, OLD DOCK LAND AND TIMBER, LLC, THE MORTGAGE COMPANY OF BRUNSWICK, INC., BRENDAN GORDON, JAMES POWELL, JAMES POWELL APPRAISALS, LLC, LYNN RABELLO, BRANCH BANKING AND TRUST COMPANY, BB&T COLLATERAL SERVICE CORPORATION, BAXLEYSMITHWICK PLLC, AND DOUGLAS BAXLEY[1]

No. 377A14

Filed 18 December 2015

Appeal pursuant to N.C.G.S. § 7A-27(b)(1) from opinions and orders granting motions to dismiss entered on 27 June 2011 and 13 June 2012 by Judge John R. Jolly, Jr. in Superior Court, Brunswick County. On 10 October 2014, pursuant to N.C.G.S. § 7A-31(a) and (b)(2), and Rule 15(e)(2) of the North Carolina Rules of Appellate Procedure, the Supreme Court on its own initiative certified the case for review prior to determination in the Court of Appeals. Heard in the Supreme Court on 18 March 2015.

Hodges & Coxe, P.C., by C. Wes Hodges, II and Sarah R. Buzzard, for plaintiff-appellants.

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1. The trial court referred to this case as "*Barton*" in the orders on appeal to this Court. Plaintiffs' amended complaint filed on 28 April 2010 added Alvarez and Bailey-Goga as plaintiffs in the instant action.

Teague, Campbell, Dennis & Gorham, LLP, by Jacob H. Wellman and Natalia K. Isenberg, for defendant-appellees James Powell, James Powell Appraisals, LLC, and Lynn Rabello.

Poyner Spruill LLP, by J. Nicholas Ellis and Caroline P. Mackie, for defendant-appellees Branch Banking and Trust Company and BB&T Collateral Service Corporation.

PER CURIAM.

For the reasons stated in *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, ___ N.C. ___, ___ S.E.2d ___ (2015) (375A14), the decision of the trial court is affirmed.

AFFIRMED.

Justice EDMUNDS concurs in part and dissents in part for the reasons stated in his opinion in *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, ___ N.C. ___, ___ S.E.2d ___ (2015) (375A14).

Justice HUDSON and Justice BEASLEY concur in part and dissent in part for the reasons stated in Justice Hudson's opinion in *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, ___ N.C. ___, ___ S.E.2d ___ (2015) (375A14).

BERRY ANDERSON, JONATHAN BREAREY, JUDITH BURNETTE, STEPHEN BURNETTE, YVONNE BURNETTE, EARLIE JAMES BUTLER, LINDA BUTLER, SARA COURTNEY, MICHAEL DONOVAN, SUE DEE DUNCAN, EAG PROPERTIES, LLC, JOANNE ESSLING, WILLIAM ESSLING, WILLIAM ESSLING, JR., EILEEN FAGAN, GARY FAGAN, EDMOND GIROUX, MICHAEL GRANDINETTI, ROBIN GRANDINETTI, SETH JOHNSON, LINDA KASS, ROBERT KASS, JESSICA KEENAN, SHANE KEENAN, DAVID KUKURZA, DEBORAH KUKURZA, LUCKY 7 HOLDING CORPORATION, FRANCES MACCALLUM, JOHN MACCALLUM, JOHN MALAN, MARIAN MALAN, MICHAEL MCCABE, SHEILA MCCABE, BARBARA NARDELLA, MICHAEL NARDELLA, JOAN PARKIN, ROBERT PARKIN, BRENDA PICKERING, PHILIP PICKERING, JOHN PRICE, VIRGINIA PRICE, CHRISTINE RIGNEY, PATRICK RIGNEY, CHRISTOPHER ROCCO, JYOTI CHATLANI ROCCO, ELAINE ROWINSKI, STEVEN ROWINSKI, ALLISON SEN, ROHAN SEN, DAVID SHERMAN, SANDRA SHERMAN, DANNY WALKER, JEAN WALKER, JEFF WEBB, LAURIE WEBB, CAROLE WERKING, NOEL WERKING, CLARENCE WHICHARD, III, LINDA WHICHARD, GERALD WOLF, AND MARY WOLF

v.

COASTAL COMMUNITIES AT OCEAN RIDGE PLANTATION, INC., COASTAL COMMUNITIES AT OCEAN RIDGE PLANTATION, LLC, COASTAL COMMUNITIES, INC., MARK A. SAUNDERS, DEBORAH BOODRO, MAS PROPERTIES, LLC, THE MORTGAGE COMPANY OF BRUNSWICK, INC., BRENDAN GORDON, JAMES POWELL, JAMES POWELL APPRAISALS, LLC, LYNN RABELLO, BRANCH BANKING AND TRUST COMPANY, BB&T COLLATERAL SERVICE CORPORATION, FOUR OAKS BANK AND TRUST COMPANY, CLIFTON L. PAINTER, BAXLEYSMITHWICK PLLC, AND DOUGLAS BAXLEY

No. 376A14

Filed 18 December 2015

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Hodges & Coxe, P.C., by C. Wes Hodges, II and Sarah R. Buzzard, for plaintiff-appellants.

Teague, Campbell, Dennis & Gorham, LLP, by Jacob H. Wellman and Natalia K. Isenberg, for defendant-appellees James Powell, James Powell Appraisals, LLC, and Lynn Rabello.

Poyner Spruill LLP, by J. Nicholas Ellis and Caroline P. Mackie, for defendant-appellees Branch Banking and Trust Company and BB&T Collateral Service Corporation.

PER CURIAM.

For the reasons stated in *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, ___ N.C. ___, ___ S.E.2d ___ (2015) (375A14), the decision of the trial court is affirmed.

AFFIRMED.

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KENNETH ARNESEN, KRISTEN CHANEY, STEVE CHANEY, DEBORAH CHARUK, WILLIAM CHARUK, MARIA CURATOLO, KATHLEEN JORDAN, THOMAS JORDAN, TANNER MARKLEY, JOHN MERRITT, BARRY McGOFF, JOEL SCHENKEL, JOHN SWAN, LINDA SWAN, AUDREY VARNUM, RICHARD VARNUM, ALAN WALBAUM, CAMILLE WALBAUM, AND LUCAS WILSON

v.

RIVERS EDGE GOLF CLUB & PLANTATION, INC., RIVERS EDGE GOLF CLUB & PLANTATION, LLC, COASTAL COMMUNITIES, INC., MARK A. SAUNDERS, DONALD HOWARTH, MAS PROPERTIES, LLC, THE MORTGAGE COMPANY OF BRUNSWICK, INC., BRENDAN GORDON, JAMES POWELL, JAMES POWELL APPRAISALS, LLC, LYNN RABELLO, BRANCH BANKING AND TRUST COMPANY, BB&T COLLATERAL SERVICE CORPORATION, BAXLEYSMITHWICK PLLC, AND DOUGLAS BAXLEY

No. 375A14

Filed 18 December 2015

Loans—appraisal—alleged wrongful omissions—failure to plead justifiable reliance

The trial court did not err by dismissing plaintiff's claim based on its conclusion that all claims against BB&T were premised upon wrongful omissions by BB&T regarding the loan and appraisal process. Because no legal duty exists at law between a debtor and creditor, or between a bank's appraisers and a purchaser, plaintiffs' claims, as pled, failed. Moreover, because plaintiffs failed to sufficiently allege justifiable reliance upon the faulty appraisal information, or lack thereof, or that plaintiffs' injuries were proximately caused by either the bank or the appraisers, dismissal was proper.

Justice HUDSON concurring in part and dissenting in part.

Justice BEASLEY joins in this concurring in part, dissenting in part opinion.

Justice EDMUNDS concurring in part and dissenting in part.

Appeal pursuant to N.C.G.S. § 7A-27(b)(1) from opinions and orders granting motions to dismiss entered on 27 June 2011 and 13 June 2012 by Judge John R. Jolly, Jr. in Superior Court, Brunswick County. On 10 October 2014, pursuant to N.C.G.S. § 7A-31(a) and (b)(2), and Rule 15(e)(2) of the North Carolina Rules of Appellate Procedure, the Supreme Court on its own initiative certified the case for review prior to determination in the Court of Appeals. Heard in the Supreme Court on 18 March 2015.

Hodges & Coxe, P.C., by C. Wes Hodges, II and Sarah R. Buzzard, for plaintiff-appellants.

Teague, Campbell, Dennis & Gorham, LLP, by Jacob H. Wellman and Natalia K. Isenberg, for defendant-appellees James Powell, James Powell Appraisals, LLC, and Lynn Rabello.

Poyner Spruill LLP, by J. Nicholas Ellis and Caroline P. Mackie, for defendant-appellees Branch Banking and Trust Company and BB&T Collateral Service Corporation.

NEWBY, Justice.

In this case we consider whether plaintiffs, individual investors in undeveloped real estate, may recover against a bank and its appraisers for their alleged participation in a scheme to defraud investors by artificially inflating property values in the years preceding the national real estate crisis. Plaintiffs allege, essentially, that they would not have purchased certain real property but for faulty appraisal information and that, in any event, the bank should have discovered and disclosed the inflated appraised property values to them. The complaint reveals that plaintiffs did not view, receive, order, or even inquire about an appraisal before purchasing the property, nor that their purchases were contingent upon an appraisal, faulty or not. Because no legal duty exists at law between a debtor and creditor, or between a bank's appraisers and a purchaser, plaintiffs' claims, as pled, fail. Moreover, because plaintiffs fail to sufficiently allege justifiable reliance upon the faulty appraisal information, or lack thereof, or that plaintiffs' injuries were proximately caused by either the bank or the appraisers, dismissal is proper.

Plaintiffs are purchasers of undeveloped real property located in one of several planned residential communities in Brunswick County, North Carolina, developed and marketed by defendant Mark A. Saunders (collectively, Coastal Communities).[1] Like many others throughout the nation, plaintiffs invested in real property shortly before the collapse of the real estate market. Taking the well-pled allegations in plaintiffs' complaint as true, the record reveals the following:

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1. The communities include the following residential subdivisions located in Brunswick County, North Carolina: Ocean Isle Palms, Ocean Ridge Plantation, Rivers Edge, and SeaWatch at Sunset Harbor. Plaintiffs allege Saunders acted individually and through his various corporate entities.

In 2004 Saunders, a real estate developer, began marketing lots in the Coastal Communities. Saunders purchased unimproved real property through his company, MAS Properties, LLC, subdivided the property into lots, and then deeded the parcels to various corporate entities for sale to investors. During the "pre-development stage" of the proposed subdivisions, Saunders marketed the undeveloped lots with plans to improve them within two years after purchase.

On 8 August 2005, Saunders, acting through MAS Properties, purchased approximately one hundred acres of land in Shallotte Township, Brunswick County, North Carolina. Eleven days later, MAS Properties transferred the property to Rivers Edge Golf Club & Plantation, Inc. (Rivers Edge),[2] which became the basis for the investments at issue here. Rivers Edge recorded various subdivision plats thereafter, continuing through 2006.

Saunders marketed the Rivers Edge property to potential investors through various promotional materials and sales events, including invitation packages, brochures, community maps, and artistic representations. These artistic renditions included maps and sketches of planned community amenities, like "a southern style clubhouse," "pool, outdoor hot tub, [and] fitness center," "walking/nature trails and sidewalks," and "other recreational amenities." Saunders invited investors to special pre-development marketing events designed to drive sales. For example, he hosted a "big tent" event with food and music to kick off the Rivers Edge development and implemented a lottery system to give interested investors priority selection over lots. "[P]rospective purchasers were urged to execute a 'Homesite Reservation' and submit a 'Reservation Deposit' amounting to up to 10% of the purchase price of the property selected in order to have their names placed in the Priority Selection drawings." According to the Homesite Reservation document, the ten-percent deposit would be applied toward an earnest-money down payment for the purchase of the underlying property.

Saunders offered various financial incentives to promote business, including "pre-development pricing," payment by the developer of two years of interest on lot financing, "and $400 to $500 toward closing costs." Saunders furnished prospective investors a detailed "HUD Property Report" and additional materials that disclosed a variety of details including the development plans, construction guidelines, and

2. Rivers Edge Golf Club & Plantation, LLC and Rivers Edge Golf Club & Plantation, Inc. are referred to interchangeably as "Rivers Edge" throughout the complaint.

estimated timelines. All of these documents were provided in a large binder containing several hundred pages. A series of property reports included the current status of construction and amenities and many of these documents disclosed significant delays. Investors were asked to sign a document acknowledging "that they had received a copy of the Property Report and [had been] given an opportunity to read the Property Report before signing any contract or agreement." Plaintiffs state that they purchased the vacant properties from Saunders, marketed for their "good investment potential," and relied on his representations that the undeveloped properties were "a financially sound investment that offered little risk."

Plaintiffs characterize Saunders's marketing strategies as creating a "false sense of urgency for potential buyers to purchase the undeveloped property with seemingly little risk." Plaintiffs assert that Saunders's agents and employees "encouraged the Plaintiffs and other prospective buyers to purchase more than one lot" and that Saunders marketed the invitation events as "exclusive," when in reality "hundreds, if not thousands," were invited. Plaintiffs allege Saunders "pushed" his sales assistants "to go out in teams and pretend to be sales agents and interested buyers during sales events and property showings" and that Saunders "required [his sales assistants] to drive Range Rovers or other expensive Sports Utility Vehicles."

From 2004 to 2007, defendant Branch Banking and Trust Company (BB&T)[3] served as primary lender for the majority of Saunders's real estate investors who sought bank financing, including plaintiffs. As Saunders's business grew, he established The Mortgage Company of Brunswick, Inc. (TMC), a private mortgage brokerage, to help facilitate the lending process. TMC thereafter assisted Saunders's investors through the loan application process and referred them to BB&T, which then paid TMC a fee for each referral. Internally, BB&T engaged a local firm, James Powell Appraisals, LLC (the Appraisers),[4] to prepare appraisals on some of the properties. The bank did not require full appraisals on the early lot sales with transaction values less than $250,000. Of the limited number of appraisals that BB&T did obtain, the bank used them for its own internal underwriting purposes.

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3. BB&T Collateral Service Corporation served as trustee on the deeds of trust securing the loans issued by Branch Banking and Trust Company and also is a named defendant. Both defendants are collectively referred to as "BB&T" throughout this opinion.

4. James Powell Appraisals, LLC was formed in 2007. Prior to that time James Powell Appraisals operated as a sole proprietorship. James Powell employed defendant Lynn Rabello. Collectively these parties are referred to as "the Appraisers."

From May 2005 through the summer of 2006, each plaintiff reserved one or more properties during a sales event at Rivers Edge and executed a sales contract. After executing the sales contract and obligating themselves to purchase the property, each plaintiff financed his or her investment with a loan through BB&T. Plaintiffs received a full Property Report sometime during the transaction but deny having the opportunity to read it before signing a sales contract. Rivers Edge provided plaintiffs financial incentives consisting of payments for two years of interest and $400 to $500 credits at closing.

On 26 March 2010, two years after the collapse of the national real estate market and four to five years after their initial investment, plaintiffs commenced this action asserting eighteen claims against Saunders, his various companies, BB&T, and the Appraisers.[5] Each of plaintiffs' claims as stated incorporates by reference and is based in part upon the following allegations:

> 40. The Defendant Saunders, through the corporate identity of the Defendant MAS Properties, purchased undeveloped and unimproved parcels of real property throughout Brunswick County, North Carolina and thereafter partitioned the property into lots of proposed subdivisions. The Defendants Saunders and MAS Properties then deeded the property to one of the Defendant Saunders' various corporate entities, including the Defendant Rivers Edge. Under the control and direction of the Defendant Saunders, the agents and employees of the various corporate entities, including the Defendants Rivers Edge and/or Coastal Communities, thereafter marketed the subdivisions and immediately resold the lots to purchasers at grossly inflated prices.
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> 84. Upon information and belief, the Defendant Saunders and/or the agents and employees of the various corporate entities under the control and direction of the Defendant Saunders, including the Defendants Coastal Communities and Rivers Edge, made an arrangement with a local appraiser, James Powell of James Powell Appraisals, LLC, to ensure that appraisals would

5. Plaintiffs' amended complaint includes eighteen causes of action. The Chief Justice designated the action as a mandatory complex business case on 7 April 2010.

> be generated as described above, using comparable sales of other properties marketed and sold by the Defendant Coastal Communities, including property in Rivers Edge, at the inflated prices.
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> 90. Upon information and belief, the Defendants Powell and Rabello thereby engaged in the fabrication and use of fraudulently overstated appraisals to justify the financing of Coastal Communities properties.
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> 98. The Plaintiffs and other property owners relied upon the Defendants' misrepresentations when purchasing property, and paying inflated prices for the property, within one or more of the undeveloped subdivisions. Absent the Defendants' misrepresentations, Plaintiffs and other property owners would not have purchased the property from the Defendants.
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> . . . .
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> 99. Upon information and belief, the Defendant Saunders and/or the agents and employees of the various corporate entities under the control and direction of the Defendant Saunders, including the Defendants Coastal Communities and/or Rivers Edge, made an arrangement with local lenders, including the Brunswick County, North Carolina, regional office of BB&T, to ensure that the lenders would rely upon the previously described appraisals which manipulated property values.

Plaintiffs assert the following claims against BB&T: (1) fraud, (2) unjust enrichment, (3) violation of North Carolina's RICO statute, (4) breach of duty of good faith and fair dealing/negligent supervision, (5) unfair and deceptive trade practices, (6) civil conspiracy, and (7) violation of North Carolina's Mortgage Lending Act. Plaintiffs assert the following claims against the Appraisers: (1) negligence, (2) negligent misrepresentation, (3) fraud, (4) unjust enrichment, (5) violation of North Carolina's RICO statute, (6) civil conspiracy, and (7) unfair and deceptive trade practices. In addition to compensatory damages, plaintiffs seek a preliminary injunction to prevent foreclosure on the subject properties, rescission of the underlying sales contracts, treble damages

for unfair and deceptive trade practices, and punitive damages against both parties.

Plaintiffs premise each of their claims against BB&T on allegations that the bank wrongfully omitted information about the loan and appraisal process, most specifically, that faulty appraisals significantly overstated the value of the investment properties and that the bank had a duty to discover and disclose this information.[6] Plaintiffs do not allege that BB&T or the Appraisers made any direct representations to them. Plaintiffs do not allege that they received, requested, or inquired about an appraisal at any time before purchasing the investment properties or that they were prevented from so doing. Plaintiffs do not allege that the sales were contingent on financing or an appraisal. In fact, of the

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6. The complaint reveals, *inter alia*, that each of plaintiffs' stated claims is "premised upon wrongful omissions by BB&T regarding the loan and appraisal process" and relies upon faulty appraisal information therein as follows:

(1) Plaintiffs' Mortgage Lending Act violation claim relies on allegations of BB&T's "misrepresenting or concealing material facts for the purpose of influencing, persuading, or inducing the Plaintiffs to take a loan" and that BB&T "improperly influenc[ed] the . . . reporting, result, and/or review of real estate appraisals."

(2) Plaintiffs' duty of good faith and fair dealing claim relies on allegations that "BB&T was aware, or should have been aware, of the fact that the Plaintiffs were being misled and/or induced to enter into the contracts in ignorance of facts materially increasing the risks," and that BB&T was aware of "fraudulent and inflated appraisals," but "failed to inform the Plaintiffs of such facts as required by its duty of good faith and fair dealing."

(3) Plaintiffs' RICO claim relies on allegations that BB&T's "misrepresentations, acts of concealment and failures to disclose were knowing and intentional, and made for the purpose of deceiving the Plaintiffs and obtaining their money for . . . pecuniary gain," and that BB&T "rel[ied] upon fraudulent . . . appraisals of the property."

(4) Plaintiffs' conspiracy claim relies on allegations that BB&T entered into an agreement "to commit . . . unlawful acts, practices, plans, schemes, and transactions to defraud and mislead Plaintiffs," that the agreement ensured that BB&T "would rely upon the [fraudulent] appraisals," and that defendants would "control the appraisal and lending process."

(5) Plaintiffs' fraud claim relies on allegations that BB&T was "under a duty to disclose the truth regarding all defendants' misrepresentations and concealed material facts of which only they knew or could have known, and to make a full and open disclosure of all such information," and that BB&T approved and disbursed money at closing "notwithstanding their knowledge of and dependence upon the fraudulently overstated appraisals."

(6) Plaintiffs' unfair and deceptive trade practices claim relies on allegations that BB&T's "conduct, as alleged [in the aforementioned claims by reference], constitutes unfair and/or deceptive acts or practices."

(7) Plaintiffs' unjust enrichment claim relies on allegations that "inequitable enrichment, benefits, and ill-gotten gains [were] acquired as a result of the" omissions alleged in the aforementioned claims, and that plaintiffs' purchases were at "inflated prices."

remaining properties at issue in this action, the complaint reveals that BB&T ordered only two appraisals for their own internal purposes.

On 28 June 2010, BB&T and the Appraisers moved to dismiss the complaint for failure to state a claim under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. On 1 June 2011, the trial court denied plaintiffs' motion for a preliminary injunction to prevent foreclosure proceedings, concluding, *inter alia*, that plaintiffs failed to demonstrate a likelihood of success on the merits of their claims because a lender does not generally owe its borrower a duty beyond the lender's contractual obligations. *Anderson v. Coastal Cmtys. at Ocean Ridge Plantation, Inc.*, No. 09 CVS 1042, ¶¶ 14-24 (N.C. Super. Ct. Brunswick County June 1, 2011).

On 27 June 2011, the trial court entered an opinion and order concluding that all claims against BB&T were "premised upon wrongful omissions by BB&T regarding the loan and appraisal process," but that "BB&T did not owe Plaintiffs a duty to disclose the details of the loan process not required to be disclosed under state or federal law or under the terms of the loan agreements." The trial court granted BB&T's motion to dismiss. *Anderson*, 2011 WL 2381781, ¶¶ 16-20 (N.C. Super. Ct. June 3, 2011). On 13 June 2012, the trial court entered an opinion and order concluding, *inter alia*, that plaintiffs could not have relied upon appraisals they did not receive, or that did not in fact exist, at the time of their decisions to purchase and thus granted the Appraisers' motion to dismiss on all claims. *Anderson*, 2012 WL 1948767, ¶¶ 59-61, 124 (N.C. Super. Ct. May 30, 2012).[7] On 16 May 2014, plaintiffs appealed, and on 10 October 2014, this Court certified the case for review prior to determination in the Court of Appeals. N.C.G.S. § 7A-31(a), (b)(2) (2013); N.C. R. App. P. 15(e)(2).

In essence, plaintiffs argue that they would not have purchased the properties but for faulty appraisal information. Plaintiffs claim that the underlying appraisals were the key to Saunders's complex scheme to sell undeveloped real estate to investors at "grossly inflated prices"

7. The record indicates the following plaintiffs were voluntarily dismissed from this action without prejudice: John Merritt on 10 July 2012; John Swann and Lisa Swann (referred to in the amended complaint as plaintiffs "Swan"); Audrey Varnum, Richard Varnum, and Lucas Wilson on 15 February 2013; and Steve Chaney and Barry McGoff on 21 March 2014. Deborah Charuk, William Charuk, Maria Curatolo, Kathleen Jordan, Thomas Jordan, Tanner Markley, and Joel Schenkel voluntarily dismissed without prejudice their claims against Saunders, TMC, and his corporate entities in April 2014. We take notice of plaintiffs' attorneys' motion to withdraw as counsel for Kenneth Arnesen, Alan Walbaum, and Camille Walbaum dated 3 May 2013, which appears to remain pending at the trial court. N.C. R. App. P. 14(c)(1).

and that, using this faulty information, Saunders controlled the entire loan process from application to appraisal to closing. Plaintiffs argue, essentially, that BB&T owed them a legal duty, resembling a fiduciary duty, created either by the general relationship between a bank and its borrower, the duty of good faith and fair dealing, or by the Mortgage Lending Act (MLA). Plaintiffs argue BB&T breached this duty by, *inter alia*, "concealing material facts for the purpose of influencing, persuading, or inducing the Plaintiffs to take a loan." Similarly, plaintiffs assert that the Appraisers breached a duty of care owed to them when they prepared faulty appraisals for the bank.

It is undisputed, however, that plaintiffs decided to purchase the investment properties without consulting an appraisal. Moreover, plaintiffs obligated themselves to purchase the properties independent of the loan process. Plaintiffs have not alleged that they ordered, viewed, or requested appraisal information at any time, or that they were prevented from doing so. Furthermore, of the properties remaining at issue in this action, the complaint reveals that BB&T obtained only two appraisals for its own internal underwriting purposes. As alleged, all misrepresentations during the sales process, if any, were made by Saunders, not by BB&T or the Appraisers.

As such, BB&T is entitled to dismissal of all claims because plaintiffs' complaint reveals an absence of both law and facts necessary to establish that the bank owed a duty to disclose the information that plaintiffs contend was wrongfully omitted. Moreover, plaintiffs have failed to sufficiently allege justifiable reliance on any omission by the bank before they purchased the investment properties and have failed to sufficiently establish that any action by BB&T was the proximate cause of their harm.

Dismissal of an action under Rule 12(b)(6) is appropriate when the complaint "fail[s] to state a claim upon which relief can be granted." N.C.G.S. § 1A-1, Rule 12(b)(6) (2013). "[T]he well-pleaded material allegations of the complaint are taken as true; but conclusions of law or unwarranted deductions of fact are not admitted." *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970) (quoting 2A James Wm. Moore et al., *Moore's Federal Practice* ¶ 12.08 (2d ed. 1968)). When the complaint on its face reveals that no law supports the claim, reveals an absence of facts sufficient to make a valid claim, or discloses facts that necessarily defeat the claim, dismissal is proper. *Wood v. Guilford County*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citation omitted). We review appeals from dismissals under Rule 12(b)(6) de novo. *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013).

In an ordinary debtor-creditor transaction, the lender's duties are defined by the loan agreement and do not extend beyond its terms. *Dallaire v. Bank of Am., N.A.*, 367 N.C. 363, 368, 760 S.E.2d 263, 266-67 (2014) (citations omitted). This Court has held on many occasions that "[o]ne who executes a written instrument is ordinarily charged with knowledge of its contents." *Ussery v. Branch Banking & Trust Co.*, ___ N.C. ___, ___, 777 S.E.2d 272, 279 (2015) (citation omitted). A fiduciary duty generally arises when one reposes a special confidence in another, and the other "in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Dallaire*, 367 N.C. at 367, 760 S.E.2d at 266 (quoting, *inter alia*, *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001)). "[T]he law does not typically impose on lenders a duty to put borrowers' interests ahead of their own," *id.* at 368, 760 S.E.2d at 267, though "it is possible, at least theoretically, for a particular bank-customer transaction to 'give rise to a fiduciary [relationship] given the proper circumstances,' " *id.* at 368, 760 S.E.2d at 267 (quoting *Branch Banking & Trust Co. v. Thompson*, 107 N.C. App. 53, 61, 418 S.E.2d 694, 699, *disc. rev. denied*, 332 N.C. 482, 421 S.E.2d 350 (1992)). Here plaintiffs fail to allege any special circumstances that could establish a fiduciary relationship. Plaintiffs' allegations establish nothing more than a typical debtor-creditor relationship, wherein any duty would be created by contract through the loan agreement.

Even if a plaintiff can show circumstances giving rise to a duty beyond the four corners of the loan agreement, absent a sufficient allegation and showing of justifiable reliance, a plaintiff's negligence claims fail. *See id.* at 369, 760 S.E.2d at 267. "Reliance is not reasonable if a plaintiff fails to make any independent investigation," *id.* at 369, 760 S.E.2d at 268 (quoting *State Props., LLC v. Ray*, 155 N.C. App. 65, 73, 574 S.E.2d 180, 186 (2002), *disc. rev. denied*, 356 N.C. 694, 577 S.E.2d 889 (2003)), or fails to demonstrate he was "prevented from doing so," *id.* at 370, 760 S.E.2d at 268. Further, a plaintiff must establish that the lender proximately caused his injury. *See, e.g.*, *Bumpers v. Cmty. Bank of N. Va.*, 367 N.C. 81, 88-90, 747 S.E.2d 220, 226-27 (2013).

The MLA, which was enacted by the General Assembly in 2001,[8] applied solely to loans "primarily for personal, family, or household use,

8. Act of Aug. 23, 2001, ch. 393, sec. 2, 2001 N.C. Sess. Laws 1425, 1425-40, *repealed and recodified by* Act of July 22, 2009, ch. 374, 2009 N.C. Sess. Laws 681 (titled "North Carolina Secure and Fair Enforcement (S.A.F.E.) Mortgage Licensing Act") (codified as amended at N.C.G.S. §§ 53-244.010 to 53-244.121).

primarily secured by either a mortgage or a deed of trust on residential real property located in North Carolina." N.C.G.S. § 53-243.01(15) (2005) (repealed 2009); *see also Fazzari v. Infinity Partners, LLC*, ___ N.C. App. ___, ___, 762 S.E.2d 237, 243 (2014) ("The MLA applied to residential loans and was intended to protect residential borrowers." (citation omitted)). The operative provisions of the MLA during the relevant period here are:

> § 53-243.11. Prohibited activities.
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> In addition to the activities prohibited under other provisions of this Article, it shall be unlawful for any person in the course of any mortgage loan transaction:
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> (1) To misrepresent or conceal the material facts or make false promises likely to influence, persuade, or induce an applicant for a mortgage loan or a mortgagor to take a mortgage loan, or to pursue a course of misrepresentation through agents or otherwise.
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> . . . .
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> (8) To engage in any transaction, practice, or course of business that is not in good faith or fair dealing or that constitutes a fraud upon any person, in connection with the brokering or making of, or purchase or sale of, any mortgage loan.
>
> . . . .
>
> (11) To influence or attempt to influence . . . the development, reporting, result, or review of a real estate appraisal sought in connection with a mortgage loan.

N.C.G.S. § 53-243.11 (2005) (repealed 2009).

The MLA does not apply here because plaintiffs fail to allege that they purchased the properties for "personal, family, or household use," and the complaint indicates they purchased nothing more than undeveloped real estate, characterized as an "investment." *See Fazzari*, ___ N.C. App. at ___, 762 S.E.2d at 243 (finding the MLA inapplicable when the "Plaintiffs' own complaint describes the sale of the founders' lots as an 'Investment Scheme' and consistently refers to the investment purchasers as 'investors' "). Plaintiffs purchased the undeveloped lots from Saunders, marketed as an "investment" and for its "good investment potential." In fact, some individual plaintiffs purchased multiple,

noncontiguous lots. Further, plaintiffs could not have used the property for residential purposes at the time of purchase, or for some time thereafter, because infrastructure and amenities had yet to be built and were delayed well into the future. Saunders informed plaintiffs of these delays before plaintiffs closed on their loans with BB&T, as expressly acknowledged in their signed receipts of the Property Reports. Plaintiffs' assertions that they did not read the Property Reports, or that the Reports were buried in hundreds of pages of disclosure material, are insufficient to bring their investment purchases within the ambit of the MLA. *See Ussery*, ___ N.C. at ___, 777 S.E.2d at 279.

BB&T could not have violated the MLA by acting in bad faith when it did not disclose information it did not have, was not asked to provide, or was not contractually obligated to produce. *See Suntrust Bank v. Bryant/Sutphin Props., LLC*, 222 N.C. App. 821, 833, 732 S.E.2d 594, 603 (concluding that the bank did not breach the covenant of good faith and fair dealing when the claimant failed to establish breach of the contract), *disc. rev. denied*, 366 N.C. 417, 735 S.E.2d 180 (2012); *see also Bicycle Transit Auth. v. Bell*, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985) ("There is implied in every contract a covenant by each party not to do anything which will deprive the other parties thereto of *the benefits of the contract*." (emphasis added) (quoting *Harm v. Frasher*, 5 Cal. Rptr. 367, 374, 181 Cal. App. 2d 405, 417 (1960))). Accordingly, plaintiffs' attempts to establish a breach of duty under the MLA or the duty of good faith and fair dealing fail.

In sum, plaintiffs' allegations are insufficient to establish that BB&T owed or breached any duty. Plaintiffs have not alleged that their investment purchases were contingent on an appraisal nor have they alleged breach of contract by the bank. The complaint reveals that plaintiffs obligated themselves to purchase the properties without consulting an appraisal. Because plaintiffs' claims depend upon BB&T's alleged omission of appraisal information, which BB&T had no duty to provide, plaintiffs' claims, as pled, fail.

Even if we were to find here, for the first time, that debtor-creditor relationships give rise to some heightened duty, plaintiffs have not alleged that they inquired, or were prevented from inquiring, about the appraisal information, and thus they have not established justifiable reliance. *Dallaire*, 367 N.C. at 370, 760 S.E.2d at 268 (concluding that when the borrowers "put forth no evidence that they made inquiry or were prevented from doing so, they have failed to demonstrate [ ] justified reliance"); *see also Calloway v. Wyatt*, 246 N.C. 129, 135, 97 S.E.2d 881, 886 (1957) ("A sale of land will not be vitiated by false representations

of the seller . . . where the purchaser had sufficient opportunity to examine the subject of the representations but made no examination or investigation, and was not prevented from so doing by any artifice of the seller . . . ." (quoting *Hays v. McGinness*, 208 Ga. 547, 547, 67 S.E.2d 720, 720 (1951) (syllabus by the court))).

Moreover, plaintiffs fail to allege actual reliance upon an appraisal at all and therefore, fail to establish proximate cause. *Fazzari*, ___ N.C. App. at ___, 762 S.E.2d at 243-45 (finding it well established that "the plaintiff must show actual reliance on the alleged misrepresentation in order to establish [proximate cause]" and denying relief when "the purchase contracts were not subject to any appraisal contingencies"). Accordingly, without establishing justifiable reliance or proximate cause, plaintiffs' claims fail. *See Bumpers*, 367 N.C. at 88-90, 747 S.E.2d at 226-27 (requiring actual reliance to establish proximate cause element of an unfair and deceptive trade practices claim); *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 568-71, 374 S.E.2d 385, 391-93 (1988) (noting that reasonable reliance must be shown to make a case for actionable fraud); *Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 555-56 (1988) (requiring a "measurable" benefit conferred upon and accepted by the defendant for an unjust enrichment claim); *Reid v. Holden*, 242 N.C. 408, 414-15, 88 S.E.2d 125, 130 (1955) (implying that proximate cause is required for civil conspiracy claim seeking damages caused by acts done by one or more conspirators); *Hoke v. E.F. Hutton & Co.*, 91 N.C. App. 159, 162-63, 370 S.E.2d 857, 859-60 (1988) (requiring actual reliance on the "predicate act" alleged in a complaint to establish proximate cause for federal RICO claim). Accordingly, BB&T is entitled to dismissal on all claims.

Similar to the allegations against BB&T, each of plaintiffs' claims against the Appraisers, as pled, depends on an alleged duty of care owed by the Appraisers, coupled with assertions that plaintiffs justifiably relied on their faulty appraisals and that the Appraisers proximately caused plaintiffs' injury.[9] Because plaintiffs' complaint reveals an absence of both law and facts necessary to sufficiently allege that the Appraisers owed them a duty of care or to establish the substantive elements of a legally recognized claim, dismissal for the Appraisers on all claims is proper.

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9. The complaint reveals, *inter alia*, that each of plaintiffs' stated claims against the Appraisers seeks to impose a duty, assert justifiable reliance, or establish proximate cause as follows:

(1) Plaintiffs' negligence claim relies on allegations that the Appraisers "owed a duty to the Plaintiffs to exercise due care in the performance of the appraisals," that the

In *Raritan River Steel Co. v. Cherry, Bekaert & Holland* we reviewed in depth the duty an accountant owes to nonclients who make use of an accountant's prepared financial reports, and we find that case instructive here. 322 N.C. 200, 207-16, 367 S.E.2d 609, 613-18 (1988); *see also Ballance v. Rinehart*, 105 N.C. App. 203, 206-08, 412 S.E.2d 106, 108-09 (1992) (applying the tenets of *Raritan* to liability in the real estate appraisal context). An accountant who prepares financial reports for his client clearly owes a duty of care to his client, *Raritan*, 322 N.C. at 210, 214, 367 S.E.2d at 614, 617; however, the duty may extend to "persons . . . whom [the accountant] knows and intends will rely on his opinion, or whom [the accountant] knows his client intends will so rely," *id.* at 214, 367 S.E.2d at 617. In the latter circumstance, "the accountant must know of his client's intent at the time the accountant audits or prepares the information." *Id.* at 210, 367 S.E.2d at 614. The duty does not extend "liability to all persons whom the accountant should reasonably foresee might obtain and rely on the accountant's work." *Id.* at 210, 367 S.E.2d at 615; *see id.* at 214, 367 S.E.2d at 617.

Further, liability will only extend if there is justifiable reliance. *Id.* at 209-10, 214, 367 S.E.2d at 614, 617. "[A] party cannot show justifiable

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Appraisers "communicat[ed] a misleading or fraudulent report," and that plaintiffs' "damages were reasonably foreseeable to the [Appraisers] and were proximately cause [sic] by the[ir] negligence."

(2) Plaintiffs' negligent misrepresentation claim relies on allegations that their "interest in their . . . transaction places them within a limited class to whom the [A]ppraisers . . . owe a duty of due care," that plaintiffs "relied on the false and misleading information supplied by the [Appraisers]," and that their "reliance was justifiable."

(3) Plaintiffs' fraud claim relies on allegations that the Appraisers were "under a duty to disclose the truth regarding their misrepresentations" and that they delivered "false and misleading [appraisals]."

(4) Plaintiffs' RICO claim relies on allegations that, "[a]s a direct and proximate result [of the Appraisers' participation in the RICO scheme], the Plaintiffs have been injured in their business or property" and that the Appraisers "conduct[ed] . . . misleading and inflated appraisals of the property."

(5) Plaintiffs' unfair and deceptive trade practices claim relies on allegations that plaintiffs suffered damages "[a]s a proximate and direct result of the [Appraisers'] unfair and/or deceptive acts or practices" as alleged in the aforementioned claims.

(6) Plaintiffs' unjust enrichment claim relies on allegations that "inequitable enrichment, benefits, and ill-gotten gains [were] acquired as a result of the wrongful conduct" alleged in the aforementioned claims and that plaintiffs' purchases were "at inflated prices."

(7) Plaintiffs' conspiracy claim relies on allegations that the damages they sustained were "a direct and proximate result of the acts committed" by the Appraisers and that the Appraisers "artificially manipulat[ed] the values of the properties."

reliance on information contained in audited financial statements without showing that he relied upon the *actual financial statements* themselves . . . ." *Id.* at 206, 367 S.E.2d at 612 (emphasis added). As discussed previously, to establish justifiable reliance a plaintiff must sufficiently allege that he made a reasonable inquiry into the misrepresentation and allege that he "was denied the opportunity to investigate or that he could not have learned [. . . the true facts] by exercise of reasonable diligence." *Dallaire*, 367 N.C. at 369, 760 S.E.2d at 267 (quoting *Pinney v. State Farm Mut. Ins. Co.*, 146 N.C. App. 248, 256, 552 S.E.2d 186, 192 (2001), *disc. rev. denied*, 356 N.C. 438, 572 S.E.2d 788 (2002)). Similarly, proximate cause in the appraisal context requires that "plaintiffs *actually relied* on defendant's appraisal report." *Alva v. Cloninger*, 51 N.C. App. 602, 611, 277 S.E.2d 535, 541 (1981). These limitations "hold accountants to a standard that accounts for their contemporary role in the financial world . . . [while balancing] the need to protect them from liability that unreasonably exceeds the bounds of their real undertaking." *Raritan*, 322 N.C. at 215, 367 S.E.2d at 617.

Plaintiffs here fail to establish that the Appraisers owed them a duty of care. The complaint reveals that BB&T, not plaintiffs, hired the Appraisers to evaluate properties for the bank's own internal underwriting purposes; thus, BB&T, not plaintiffs, was the Appraisers' client. *See Fazzari*, ___ N.C. App. at ___, 762 S.E.2d at 242 ("[A]ppraisals and underwriting are for the benefit of the lenders, not for the borrowers."). At no time did plaintiffs engage, communicate with, or deal with the Appraisers directly, nor did plaintiffs receive, review, or request any information from the Appraisers. Likewise, plaintiffs have not sufficiently alleged that the Appraisers knew that BB&T intended to use the appraisals to benefit or influence plaintiffs in any way when they prepared them. *See Raritan*, 322 N.C. at 213, 367 S.E.2d at 616 ("[A]ccountants should not be liable in circumstances where they are unaware of the use to which their opinions will be put."). Because plaintiffs fail to establish a legal duty, their negligence claims against the Appraisers fail.

Moreover, even if we were to find that the Appraisers did owe plaintiffs a duty of care, plaintiffs fail to sufficiently allege that they justifiably relied upon any representation by the Appraisers, or lack thereof, or that the Appraisers proximately caused injury to plaintiffs. Plaintiffs assert, essentially, that they indirectly relied upon the Appraisers' faulty information because BB&T chose to close on their loans. Plaintiffs' complaint fails to establish that they relied on *actual appraisals*; thus, plaintiffs fail to establish justifiable reliance and their negligence claims must fail. *See id.* at 205-07, 367 S.E.2d at 612-13. Further, because the

complaint reveals that plaintiffs chose to purchase the properties independent of an appraisal and independent of their decision on whether and how to finance their purchases, plaintiffs' allegations are insufficient to establish that the Appraisers proximately caused injury to plaintiffs. Accordingly, plaintiffs' remaining claims fail. *See Alva*, 51 N.C. App. at 611, 277 S.E.2d at 541; *see also Bumpers*, 367 N.C. at 88-90, 747 S.E.2d at 226-27; *Myers & Chapman*, 323 N.C. at 568, 374 S.E.2d at 391; *Booe*, 322 N.C. at 570, 369 S.E.2d at 555-56; *Reid*, 242 N.C. at 414-15, 88 S.E.2d at 130; *Hoke*, 91 N.C. App. at 162-63, 370 S.E.2d at 859-60. In sum, dismissal of plaintiffs' claims against the Appraisers, as pled, was proper.

In conclusion, the complaint reveals that plaintiffs chose to invest in undeveloped real property without consulting an appraisal. For the properties at issue here, the bank ordered only a limited number of appraisals, which were for its own internal use. It is undisputed that plaintiffs did not view, request, or inquire about an appraisal before deciding to purchase the properties. Any representations regarding property development, investment potential, or the like were made by developer Saunders, not the bank or the Appraisers. Taking the well-pled material allegations of the complaint as true, BB&T and the Appraisers are entitled to dismissal on all claims set forth in plaintiffs' complaint. Accordingly, we affirm the decision of the trial court.

AFFIRMED.

Justice HUDSON, concurring in part and dissenting in part.

I agree with the majority that these cases arose out of plaintiffs' purchase of certain real estate and that many of plaintiffs' claims were properly dismissed under Rule 12(b)(6). However, with respect to plaintiffs' claims against the appraiser defendants (James Powell, James Powell Appraisals, LLC, and Lynn Rabello) and the BB&T defendants (Branch Banking and Trust Company, and BB&T Collateral Service Corporation), I conclude that the claims for negligent misrepresentation (against appraiser defendants only), for unfair and deceptive acts and practices (UDAP) under Article 1 of N.C.G.S. Chapter 75 (against BB&T defendants only), and for fraud (against both groups) were sufficiently pleaded to survive dismissal. Finally, the trial court dismissed plaintiffs' claims for civil conspiracy against both sets of defendants because no underlying claims remained. Because I would hold that several claims do survive, I would allow the civil conspiracy claims against these defendants to go forward as well. Accordingly, I respectfully dissent as to these claims only.

Plaintiffs' Claims against Appraisers

Among other claims against the appraiser defendants, plaintiffs alleged negligent misrepresentation and fraud, both of which include reliance as an element.[1] The majority repeatedly states that plaintiffs have failed to allege reliance; however, review of the complaint shows otherwise. "The tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206, 367 S.E.2d 609, 612 (1988) (citations omitted). In asserting fraud claims plaintiffs must allege that the actions were "made with intent to deceive," *Rowan Cty. Bd. of Educ. v. U.S. Gypsum Co.*, 332 N.C. 1, 17, 418 S.E.2d 648, 658-59 (1992) (citations omitted). Defendants here argue that without reliance, there can be no actionable deception.

First, we must look at the critical allegations in the complaint related to plaintiffs' claims for negligent misrepresentation and fraud against the appraiser defendants. For purposes of our Rule 12(b)(6) analysis, we take these allegations as true:

SEVENTH CLAIM FOR RELIEF

(Negligent Misrepresentation— Alternative Claim

- Defendants Powell, James Powell Appraisals and Rabello)

> 366. Plaintiffs reallege and incorporate by reference all prior allegations of this Amended Complaint.
>
> 367. Alternatively, in the course of their business and profession, and in a transaction in which they had a financial interest, the Defendants James Powell Appraisals, Powell and Rabello supplied information to the Plaintiffs' lender for the benefit of the Plaintiffs, and the Defendants James Powell Appraisals, Powell and Rabello intended for the Plaintiffs and the Plaintiffs' lender to rely on that information for guidance or benefit in the business transaction.
>
> 368. The Plaintiffs' interest in their overall purchase transaction places them within a limited class to whom

1. Plaintiffs also alleged claims against the BB&T defendants for fraud and unfair acts and practices under N.C.G.S. Chapter 75. These claims are discussed more extensively below, but any reliance elements contained in them should survive based on the following discussion.

the appraisers, the Defendants James Powell Appraisals, Powell and Rabello, owe a duty of due care.

369. The information supplied by the Defendants James Powell Appraisals, Powell and Rabello, in the form of appraisals conducted, was false and misleading.

370. The Defendants James Powell Appraisals, Powell and Rabello failed to exercise reasonable care or competence in obtaining or communicating this false and misleading information.

371. Injury to the Plaintiffs and the other property purchasers in the Coastal Communities subdivisions, as a result of the appraisals conducted, was foreseeable to the Defendants James Powell Appraisals, Powell and Rabello.

372. Through the acceptance of the appraisals by their lender, the Defendant BB&T, the Plaintiffs relied on the false and misleading information supplied by the Defendants James Powell Appraisals, Powell and Rabello, and the Plaintiffs' reliance was justifiable.

373. The Defendants James Powell Appraisals, Powell and Rabello were aware and/or should have been aware of the importance of the appraisals to the Plaintiffs and the other property purchasers/borrowers in the Coastal Communities subdivisions and the reliance that the Plaintiffs and the other property purchasers/borrowers in the Coastal Communities subdivisions would place thereon.

374. The Plaintiffs' reliance caused the Plaintiffs to incur financial damage. Had the Defendants James Powell Appraisals, Powell and Rabello disclosed the true facts, including the actual market value of the properties, the Plaintiffs would not have purchased the properties.

375. As a direct and proximate result of the negligent misrepresentation of the Defendants James Powell Appraisals, Powell and Rabello, the Plaintiffs have been damaged in an amount in excess of Ten Thousand Dollars ($10,000.00), with the precise amount to be determined at the trial of this matter.

EIGHTH CLAIM FOR RELIEF

(Fraud — All Defendants)

376. The Plaintiffs reallege and incorporate by reference all prior allegations of this Amended Complaint.

377. Under the control and direction of the Defendant Saunders, the agents and employees of various planned residential subdivisions in Brunswick County, North Carolina, including, but not limited to, Rivers Edge sections 9-11, 13-15, 17-19, promised and promoted seemingly legitimate investments in real estate while in actuality operating a highly successful scheme designed for the benefit of the Defendants Saunders, Gordon, Powell, Rabello, certain employees and/or executives of the Defendant BB&T and the various corporate entities of the Defendant Saunders, including the Defendants Rivers Edge, Coastal Communities, MAS Properties, and TMC, to the damage of the Plaintiffs and countless other property owners.

378. The Plaintiffs were individually approached and specifically targeted by the Defendants Coastal Communities and/or Rivers Edge by direct mail solicitation and special events as promotional techniques to induce likely and prospective purchasers or lessees to visit the subdivision or to purchase or lease a lot in the subdivision.

. . . .

381. In order to accomplish this scheme, under the control and direction of the Defendant Saunders, the agents and employees of the various corporate entities, including the Defendants Rivers Edge, Coastal Communities, TMC, James Powell Appraisals and BB&T, mislead [sic] potential purchasers throughout one or more of the various facets of purchasing the property, arranged for and/or procured the financing for the fraudulent transactions.

382. Each Defendant is joined in this action as a co-conspirator. Liability arises from the fact that each Defendant entered into an agreement with the other Defendants to commit or to participate in the commission of all or part of the unlawful acts, practices, plans, schemes, and transactions to defraud and mislead Plaintiffs and other Coastal Communities property purchasers by: (i)

artificially manipulating the values of the properties; (ii) entering into an arrangement with a local appraiser and lender in order to control the appraisal and lending process; (iii) using a fraudulent marketing strategy to create the false appearance of high demand and a false sense of urgency to purchase unimproved and undeveloped property with seemingly little risk; (iv) controlling the loan application and settlement process; and (v) misrepresenting the infrastructure and amenities to be developed.

383. Upon information and belief, the agents and employees of the various corporate entities under the control and direction of the Defendant Saunders, including the Defendants Coastal Communities and/or Rivers Edge, employed a marketing strategy to fraudulently lure buyers through the *misrepresentation* of: (i) the infrastructure and amenities to be developed, (ii) the availability of the property, and (iii) the degree of interest in the property.

384. Upon the Coastal Communities property owners' visits to the subdivision of Rivers Edge prior to their execution of the Sales Contracts, the Defendants Coastal Communities and/or Rivers Edge presented the Plaintiffs with various marketing materials, community maps, plats and other artistic representations outlining the Master Plan of the development. The information and representations provided by the Defendants Coastal Communities and/or Rivers Edge or their authorized agents, including, but not limited to, the marketing materials exhibited by the Defendants Coastal Communities and/or Rivers Edge at the location and presented to the Plaintiffs, upon which the Plaintiffs relied, indicated *inter alia* that the subdivision of Rivers Edge offered various amenities, including a southern style clubhouse, property owners clubhouse with outdoor Jr. Olympic sized pool and heated indoor pool, outdoor hot tub, fitness center with steam room and sauna, tennis courts, 27 acre fresh water Palmer Lake with canoeing and kayaking, walking/nature trails and sidewalks through the community, private beach club, and other recreational amenities. Specifically, the new sections of Rivers Edge to be referred to as "Fairway Crossing" would contain an entrance gate, Palmer Lake and surrounding ponds, walking/nature trails and

sidewalks surrounding the 11th, 12th, 13th and 14th holes of the Arnold Palmer golf course at Rivers Edge.

. . . .

386. Upon information and belief, the Defendant Saunders and/or the agents and employees of the various corporate entities under the control and direction of the Defendant Saunders, including the Defendants Coastal Communities and/or Rivers Edge, made an arrangement with a local appraiser, the Defendant Powell of the Defendant James Powell Appraisals, to ensure that appraisals would be generated using comparable sales of other properties marketed and sold by the Defendants Coastal Communities and/or Rivers Edge, at inflated prices.

387. Upon information and belief, in order to justify these sales prices for the Coastal Communities properties, the Defendants Powell, Rabello and James Powell Appraisals purposefully failed to consider sales prices for comparable lots outside of the Coastal Communities developments when establishing the appraised value of the lots and appraisals were performed on the property as-is, rather than subject to the extraordinary assumption that the developments would be completed as planned and promised, with infrastructure and amenities.

388. Upon information and belief, the Defendants Powell, Rabello and James Powell Appraisals thereby engaged in the fabrication and use of fraudulently overstated appraisals to justify the financing of Coastal Communities properties.

389. Upon information and belief, the Defendant Saunders conducted and controlled the appraisal process with the Defendants Powell, Rabello and James Powell Appraisals, through the Defendant TMC, a private mortgage brokerage and corporate entity under the control and direction of the Defendant Saunders and the Defendant Gordon, Vice President and managing principal of the Defendant TMC.

390. Upon information and belief, the Defendants concealed their practice of manipulating appraised values from the Plaintiffs and other Coastal Communities

property purchasers and utilized this practice at each one of their developments. Therefore, the Plaintiffs and other Coastal Communities property purchasers did not know and had no reason to know that the Defendants had manipulated the appraised value of the property.

. . . .

393. Because the Defendant Saunders and/or the agents and employees of the various corporate entities under the control and direction of the Defendant Saunders, including the Defendants Coastal Communities and/or Rivers Edge, only offered the advertised financial incentives to Plaintiffs who used the services of the Defendants TMC and Gordon and thereafter controlled the lending process through the Defendants TMC and Gordon, it was certain that the Defendant BB&T, the lender participating in the agreement to generate the inflated and manipulated appraisals, would be used.

394. Upon information and belief, the Defendant BB&T approved, funded and handled the loans for the Plaintiffs and the vast majority of Coastal Communities property purchasers from 2004 until 2007 and distributed over 400 million dollars in lot loans to Coastal Communities property purchasers in Brunswick County, North Carolina during this time.

395. Upon information and belief, the Defendant BB&T did not follow either industry standards or their own internal guidelines governing loan origination and underwriting when handling the loan applications of the Plaintiffs or other Coastal Communities property purchasers. The Defendant BB&T approved the majority of the loans without any contact to the applicants to justify the information received and paid the Defendant TMC for the referrals for each loan application, upon information and belief.

396. For several years, from on or about 2004 until on or about 2007, BB&T regional bankers continued issuing loans for Coastal Communities property owners in the lot loan program in order to meet their own BB&T expanding growth goals regardless of whether the loans should have been approved and/or the properties were being developed

by the Defendant Saunders and his various corporate entities as represented to property owners.

397. The Defendant BB&T ensured that the vast majority of lot loans were approved and money disbursed at the closing of the Coastal Communities lot sales, notwithstanding their knowledge of and dependence upon the fraudulently overstated appraisals performed by the Defendant Rabello of the Defendant James Powell Appraisals to justify the inflated amounts of the lot loans, upon information and belief.

398. Upon information and belief, the Defendant BB&T's regional branch managers and/or loan officers then continued in bad faith to issue loans to the Plaintiffs and other Coastal Communities property purchasers in the lot loan program, relying on fraudulent appraisals, knowing that the loans were under-collateralized and knowing that the infrastructure and amenities of the developments were not being completed as promised, in order to meet their own BB&T expanding growth goals regardless of whether the loans should have been approved and/or whether the properties were being developed by the Defendant Saunders and his various corporate entities as represented to property owners.

399. All of the Defendants were under a duty to disclose the truth regarding their misrepresentations and concealed material facts of which only they knew or could have known, and to make a full and open disclosure of all such information.

400. The silence and/or omission of the Defendants related to material matters known by the Defendants which they had a legal duty to disclose to the Plaintiffs and other Coastal Communities property purchasers.

401. In addition, the Defendants have taken affirmative steps to conceal material facts regarding the property purchase, appraisal process, and loan process from the Plaintiffs and other Coastal Communities property purchasers, who were unaware and unable to discover these material facts through their reasonable diligence.

402. With regard to the Defendant BB&T, the regional executives mentioned above (Glen Heintz, the regional retail banking manager and Jeff Etheridge, the regional president for BB&T) and local Brunswick County branch managers and/or loan officers (specifically, Brian Walker, Vi Jones, Connie Norton, and others) were under a duty to make such disclosures to the Plaintiffs and other Coastal Communities property purchasers. Instead, the executives, branch managers, and/or loan officers forced through the loan applications and benefited from the increased production from the "lot loan program," and received higher salaries and/or large yearly bonuses (anywhere from 30% to 100% of their salaries) through the Defendant BB&T's bonus system.

403. By concealing their conduct designed to artificially inflate the market for the sale of lots in the subdivision, including but not limited to the high-pressure and misleading sales tactics, appraisals that reached a pre-determined result and were otherwise deficient and designed to support an inflated purchase price, irregular and deceptive brokerage and lending practices, and affixing of excess revenue stamps to recorded deeds, as alleged herein, all Defendants, in essence, together and by their own acts and omissions, perpetrated a fraud on the market, including the Plaintiffs, which in fact inflated the market.

404. All of the Defendants' misrepresentations and/or concealments were reasonably calculated to deceive the Plaintiffs and other Coastal Communities property purchasers, in that all of the Defendants knew their representations and/or concealments were false or were made recklessly, without any knowledge of truth or falsity, as a positive assertion, and where all of the Defendants knew there was a duty to disclose all material facts, or where all of the Defendants were recklessly indifferent to their duty to disclose.

405. The Defendants' misrepresentations and/or concealments were done with the intent to deceive the Plaintiffs, and the Plaintiffs were in fact deceived by these misrepresentations and/or concealments. The Plaintiffs' reliance on the Defendants' false representations was reasonable.

> 406. The Plaintiffs have suffered actual damages as a result of their reliance on all of the Defendants' false representations and/or concealments. Had any of the Defendants disclosed the true facts, the Plaintiffs would not have purchased the property.
>
> 407. As a direct and proximate result of the Defendants' fraudulent conduct, the Plaintiffs have been damaged in an amount in excess of Ten Thousand Dollars ($10,000.00), with the precise amount to be determined at the trial of this matter.

In my view, these allegations are sufficient to withstand dismissal under existing North Carolina law.

The trial court found as follows:

> [52] Plaintiffs in this case allege in substance that they indirectly relied on the appraisal reports. However, the North Carolina Supreme Court, in *Raritan*, held that indirect reliance will not support a claim for negligent misrepresentation. . . . (Footnote call number omitted.)
>
> . . . .
>
> [Trial Court summarizes our opinion in *Raritan*.]
>
> [54] In sum, the court in *Raritan* affirmed dismissal of the plaintiff's negligent misrepresentation claim because the plaintiff did not *directly* rely upon the audit report in [sic] which it asserted was defective. Applying *Raritan* to the present case, Plaintiffs must allege that they relied directly on the appraisal reports themselves in order to plead sufficiently a claim for negligent misrepresentation. 322 N.C. at 205-06. Post-*Raritan*, claims for negligent misrepresentation that have failed to allege direct reliance have been susceptible to dismissal. (Internal citations omitted.)
>
> . . . .
>
> [Trial Court summarizes the precedent of the Court of Appeals on this issue.]
>
> [59] Similar to the purchasers in *Williams* [*v. United Community. Bank*, 218 N.C. App. 361, 724 S.E.2d 543 (2012)], Plaintiffs in the instant case purchased lots in

undeveloped, proposed residential communities. Further, Plaintiffs allege that Coastal Defendants and the banks controlled the loan and appraisal process. Indeed, the banks procured the appraisals and subsequently approved Plaintiffs' loan applications. Plaintiffs do not allege that they ever viewed or read the appraisal reports prior to signing their purchase contracts or closing on their loans. Instead, Plaintiffs' [sic] argue, in conclusory fashion, that they relied on the appraisals "regardless of whether they viewed the appraisal report" because "if the appraisal reports reflected fair market values below the purchase price, none of the Plaintiffs would have moved forward and closed the loan." More specifically, Plaintiffs allege that "[t]hrough the acceptance of the appraisals by their lender [BB&T], the Plaintiffs relied on the false and misleading information supplied by [Appraiser Defendants], and the Plaintiffs' reliance was justifiable." In other words, Plaintiffs contend that they indirectly relied on the appraisal reports because BB&T presumably reviewed the reports and decided to close on their loans, implying that the lots appraised for the value of the loans. Thus, because BB&T decided to close on their loans, Plaintiffs assumed that the appraisal reports supported the loans and were not defective. (Footnote call numbers omitted.)

[60] Plaintiffs also allege, like the purchasers in *Williams*, that if Appraiser Defendants had disclosed any of the flaws in their appraisal reports or if Plaintiffs knew that the lots were overvalued, they would not have closed on their loans, and that they subsequently lost money as a result of the purchases. However, Plaintiffs' Complaint makes it clear that they were not involved in the appraisal process, which was instead controlled by Coastal Defendants and BB&T. Further, Plaintiffs do not allege that they viewed any of the appraisals prior to signing the purchase contracts, which in any event were not contingent upon the appraised values for the lots. Consequently, Plaintiffs do not, and cannot, allege that they ever relied upon any appraisal of the property before they agreed to purchase said property. Moreover, Plaintiffs do not allege that they viewed the appraisals before closing on their loans with BB&T. Actual reliance is particularly lacking as to certain Plaintiffs who allege that their appraisal was

> performed after they closed on the loans. (Footnote call numbers omitted.)

I do not agree with the trial court's interpretation of *Raritan River Steel*, although I recognize that it is the interpretation adopted by the Court of Appeals. However, we are not bound by that precedent, and I conclude that common sense and the plain language of our precedent lead to a contrary result. Consequently, I would hold that the allegations of reliance here are adequate to support these claims.

In 1981 the Court of Appeals decided *Alva v. Cloninger*, 51 N.C. App. 602, 277 S.E.2d 535 (1981). The plaintiffs there bought a house that turned out to have serious structural defects. *Id.* at 603-05, 277 S.E.2d at 536-37. They filed suit against the appraiser, seeking damages. *Id.* at 603, 277 S.E.2d at 536. The defendant argued that he could not be liable for negligence because the plaintiffs were not in privity of contract with him. *Id.* at 604, 277 S.E.2d at 537. The Court of Appeals disagreed, noting that

> [t]he evidence established prima facie that plaintiffs' reliance upon the appraisal was, or should reasonably have been, expected by defendant. The evidence also warrants an inference that plaintiffs actually relied on defendant's appraisal report to NCNB and that defendant's failure to discover and disclose the alleged defects in the house was a proximate cause of plaintiffs' injury. Dr. Alva testified that the contract to purchase the house was conditioned upon his obtaining financing. . . . Dr. Alva also testified that he understood the loan was conditioned upon the appraisal and "assumed everything was all right when the loan was approved." Dr. Alva's assumption as to the import of the appraisal was substantiated by the testimony of witness McGhee, the lending officer, who said "[e]ither the repair work had to be done or we would have had to decline the loan application."

Id. at 611, 277 S.E.2d at 541 (alteration in original). Under the reasoning in *Alva*, plaintiffs here would have a claim against the appraiser defendants.

The question then becomes whether this Court's decision in *Raritan River Steel* overturned *Alva*. In my view, the answer is no. First, the facts of each case are distinguishable: *Alva* dealt with a situation similar to the one we have here—real estate appraisals—whereas *Raritan* involved auditors and financial reports. In *Raritan*, the plaintiff alleged that it obtained the information it used to value a company not from

an actual audit of that company, but from information contained in a report prepared by a third party. *Raritan*, 322 N.C. at 205, 367 S.E.2d at 612. Given those facts, this Court "conclude[d] that a party cannot show justifiable reliance on information contained in audited financial statements without showing that he relied upon the actual financial statements themselves to obtain this information." *Id.* at 206, 367 S.E.2d at 612. Second, that conclusion was based

> in part from an understanding of the audit report. . . . Isolated statements in the report, particularly the net worth figure, do not meaningfully stand alone; rather, they are interdependent and can be fully understood and justifiably relied on only when considered in the context of the entire report, including any qualifications of the auditor's opinion and any explanatory footnotes included in the statements.

Id. at 207, 367 S.E.2d at 613.

While the Court of Appeals has subsequently interpreted this precedent as requiring direct reliance in all negligent misrepresentation claims, *see, e.g.*, *Fazzari v. Infinity Partners, LLC*, ___ N.C. App. ___, 762 S.E.2d 237 (2014), I am not convinced our holding in *Raritan* should be read so narrowly. Instead, I am more inclined to follow the reasoning in *Alva*. Nothing in *Raritan* mandates direct reliance—*Raritan* only mandates actual reliance. There the auditor relied on a summary of the information contained in the report. Here the complaint alleges that the appraiser defendants fabricated and overstated appraisals, and concealed from plaintiffs this conduct, all of which became the basis for the approval of financing for plaintiffs' purchases. In this way, plaintiffs allege they relied on the appraisals, regardless of whether they personally viewed them. Additionally, unlike the summary report relied upon by the plaintiff in *Raritan*, the appraisals here are more like the audit of the original company that we concluded the plaintiff must have actually relied upon there in order to establish a claim. Plaintiffs here did not rely on "[i]solated statements" from a summary but rather on "the entire report." *See Raritan*, 322 N.C. at 207, 367 S.E.2d at 613.

Additionally, in *Raritan*, *id.* at 203, 209-10, 214-16, 367 S.E.2d at 611, 614-15, 617-18, this Court referenced the Restatement (Second) of Torts, a comment to which is pertinent here and states:

> g. *Information supplied directly and indirectly.* The person for whose guidance the information is supplied is often the person who has employed the supplier to

> furnish it, in which case, if it is supplied for a consideration paid by that person, he has at his election either a right of action under the rule stated in this Section or a right of action upon the contract under which the information is supplied. In many cases, however, the information is supplied directly to the person who is to act upon it although it is paid for by the other party to the transaction. Thus, when a vendor of beans employs a public weigher to weigh beans, the weigher, who gives to the vendee a certificate which through his carelessness overstates the weight of the beans, is subject to liability to the vendee for the amount that he overpays in reliance upon the certificate. *However, direct communication of the information to the person acting in reliance upon it is not necessary.* In the situation above the liability of the weigher would not be affected by his giving the certificate to the vendor for communication to the vendee.

Restatement (Second) of Torts § 552 (titled "Information Negligently Supplied for the Guidance of Others") (cmt. g (Am. Law Inst. 1977)) (emphasis added). Here the appraisers are comparable to the "weigher" and their liability is "not . . . affected by [their] giving the certificate [appraisal] to the vendor [BB&T] for communication to the vendee [plaintiffs]."

Further, this conclusion is bolstered by common sense and everyday experience. When buying a house, parties commonly understand that unless the house appraises for the contract price (at least), the lender will not approve a loan to finance the purchase. Therefore, even though the appraisers here were hired by the lender, to which it supplied the appraisals, plaintiffs allege that the appraisals were essential to the transaction and were relied upon by the parties to the purchase. In my view, the better reasoned approach allows such reliance to be either direct, if the buyer actually sees the appraisal, or indirect, as here. And when, as here, the plaintiffs have specifically and repeatedly alleged such reliance, I would hold that the claims can proceed.

Applying these principles here, I would allow plaintiffs' claims for negligent misrepresentation and fraud to go forward because plaintiffs have sufficiently pleaded all necessary elements, including reliance.[2] In

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2. This reasoning does not apply to plaintiffs who closed on their loans before the appraisal was completed. In that case, I do not include these plaintiffs as those who can show reliance (even indirectly).

my opinion, these allegations are sufficient to survive a Rule 12(b)(6) motion to dismiss.

Plaintiffs' Claims against BB&T

Because it appears that under the Mortgage Lending Act (MLA), N.C.G.S. 53-243.11, the lender here owed a duty to these plaintiffs, I would allow several of plaintiffs' claims which allege this duty as a basis for liability on the part of BB&T to go forward. N.C.G.S. § 53-243.11 (2005) (repealed 2009 and recodified as amended at N.C.G.S. §§ 53-244.010 to 53-244.121).

Initially, I disagree with the majority's assertions that plaintiffs' purchases of these properties in residential communities fall outside the scope of the MLA. As amended and recodified in N.C.G.S. § 53-244.020, the purpose of the MLA is as follows:

> (a) Purpose. – A primary purpose of this Article is to protect consumers seeking mortgage loans and to ensure that the mortgage lending industry operates without unfair, deceptive, and fraudulent practices on the part of mortgage loan originators. Therefore, the General Assembly establishes within this Article an effective system of supervision and enforcement of the mortgage lending industry by giving the Commissioner of Banks broad administrative authority to administer, interpret, and enforce this Article and adopt rules implementing this Article in order to carry out the intentions of the General Assembly.
>
> (b) Construction. – It is the intent of the General Assembly that provisions of this Article be liberally construed to effect the purposes stated or clearly encompassed by the Article.

Id. § 53-244.020 (2013).[3] Plaintiffs allege in their complaint that they sought mortgage loans for these purchases and that "BB&T at all times relevant herein was acting as a mortgage lender pursuant to [the MLA]."

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3. Although this language was not included in the version of the MLA in effect at the times pertinent to these events, most of the remaining language is identical or similar, tending to indicate a similar remedial purpose. *See, e.g.*, *O & M Indus. v. Smith Eng'g Co.*, 360 N.C. 263, 268, 624 S.E.2d 345, 348 (2006) ("A remedial statute must be construed broadly 'in the light of the evils sought to be eliminated, the remedies intended to be applied, and the objective to be attained.' *Puckett v. Sellars*, 235 N.C. 264, 267, 69 S.E.2d 497, 499 (1952).").

The statute in effect during the events at issue here defined "[r]esidential real property" as "[r]eal property located in the State of North Carolina upon which there is located or is to be located one or more single-family dwellings or dwelling units." *Id.* § 53-243.01(19) (2005). The majority opinion, as well as the complaint and the trial court, repeatedly refer to plaintiffs' purchases of real property in planned residential developments. The majority's assertion that the MLA does not apply because plaintiffs "could not have used the property for residential purposes at the time of purchase" cannot be accurate; people frequently buy lots upon which to build residences, and the MLA surely applies to them. Additionally, despite the majority's repeated characterization of plaintiffs as "investors," the complaint alleges no such thing. None of the plaintiffs are described as an "investor" in the complaint; instead each of the plaintiffs is described as an individual "citizen and resident" who purchased property in a Brunswick County "subdivision" at issue here. The only instances in which "investments" are mentioned are in plaintiffs' allegations that defendants marketed the lots as a "good investment." That the lots, if properly developed, could have been a sound investment does not deprive these purchases of their residential nature, nor does it remove them from within the scope of the MLA. In fact, for most people, their residence is their largest "investment," and the MLA is designed to protect that. Any duty arising out of the MLA should apply to the facts alleged here.

On this issue the trial court concluded:

> [16] The gravamen of Plaintiffs' Claims against BB&T is that the Bank had a duty under the MLA to appraise the collateral for the loans and inform Plaintiffs of the details of the loan process including Saunders' alleged involvement and selection of JPA as the appraiser. All of the Claims against BB&T are premised upon wrongful omissions by BB&T regarding the loan and appraisal processes, including Saunders' alleged involvement and control over both.
>
> [17] In the Preliminary Injunction Order, the court concluded that Plaintiffs failed to allege facts sufficient to show that BB&T acted improperly in issuing loans to purchasers of Coastal Communities Properties. The court noted that in an ordinary debtor-creditor relationship, a lender does not owe any duty to its borrower beyond the terms of the loan agreement. "[P]arties to a contract do not thereby become each others' fiduciaries; they

> generally owe no special duty to one another beyond the terms of the contract . . . ." *Branch Banking & Trust Co. v. Thompson*, 107 N.C. App. 53, 61 (1992). "A lender is only obligated to perform those duties expressly provided for in the loan agreement to which it is a party." *Lassiter v. Bank of North Carolina*, 146 N.C. App. 264, 268 (2001). (Footnote call numbers omitted.)
>
> [18] BB&T did not owe Plaintiffs a duty to disclose the details of the loan process not required to be disclosed under state or federal law or under the terms of the loan agreements. BB&T acted properly in issuing loans to Plaintiffs and did not violate any duties owed to Plaintiffs under the terms of the loan agreements. The court CONCLUDES that when measured under the standards of Rule 12(b)(6), the allegations in Plaintiffs' Amended Complaints can not support their Claims against BB&T.

I disagree. Under N.C.G.S. § 53-243.11, it was prohibited for a lender

> (1) To misrepresent or conceal the material facts or make false promises likely to influence, persuade, or induce an applicant for a mortgage loan or a mortgagor to take a mortgage loan, or to pursue a course of misrepresentation through agents or otherwise.
>
> . . . .
>
> (8) To engage in any transaction, practice, or course of business that is not in good faith or fair dealing or that constitutes a fraud upon any person, in connection with the brokering or making of, or purchase or sale of, any mortgage loan.
>
> . . . .
>
> (11) To influence or attempt to influence through coercion, extortion, or bribery, the development, reporting, result, or review of a real estate appraisal sought in connection with a mortgage loan.

N.C.G.S. § 53-241.11 (2005). The Court of Appeals has held that this statute created a legal duty owed to buyers. *Guyton v. FM Lending Servs., Inc.*, 199 N.C. App. 30, 681 S.E.2d 465 (2009). There the conduct alleged was that the lender had withheld information that the property purchased by the plaintiffs lay in a flood plain. The plaintiffs sued for

fraud, negligent misrepresentation, and unfair and deceptive trade practices. *Id.* at 33, 681 S.E.2d at 469. The Court of Appeals reasoned that, "[a]lthough N.C. Gen. Stat. § 53-243.11 does not directly address the specific set of factual circumstances present in this case, we conclude that this statutory provision was intended to protect buyers against the sort of activity that is alleged to have occurred here." *Id.* at 43, 681 S.E.2d at 475. The court concluded:

> Assuming that Defendant did, in fact, engage in the conduct described in Plaintiffs' complaint, Defendant would have clearly violated N.C. Gen. Stat. § 53-243.11. As a result, there is ample basis in North Carolina law . . . for concluding that Defendant would have violated a legal duty owed to Plaintiffs if it acted as described in Plaintiffs' complaint.

Id. at 44, 681 S.E.2d at 476. This reasoning equally applies here.

Plaintiffs assert claims for fraud and unfair and deceptive trade practices against BB&T, alleging that:

> 99. Upon information and belief, the Defendant Saunders and/or the agents and employees of the various corporate entities under the control and direction of the Defendant Saunders, including the Defendants Coastal Communities and/or Rivers Edge, made an arrangement with local lenders, including the Brunswick County, North Carolina, regional office of BB&T, to ensure that the lenders would rely upon the previously described appraisals which manipulated property values.
>
> 100. In addition, the Defendant BB&T financed early lot sales in the various undeveloped subdivisions with transactional values under $250,000.00, waiving the requirement of a full appraisal in most cases.
>
> 101. Upon information and belief, the Defendant BB&T's waiver of a full appraisal for the lots with transactional values of under $250,000.00 did not comply with the requirements of the North Carolina Administrative Code and/or the Defendant BB&T's own internal underwriting guidelines.
>
> . . . .

112. Upon information and belief, the Defendant BB&T approved, funded and handled the loans for the vast majority of Coastal Communities property purchasers from 2004 until 2007 and distributed over 400 million dollars in lot loans to Coastal Communities property purchasers in Brunswick County, North Carolina during this time.

113. Upon information and belief, the Defendant BB&T did not follow either industry standards or their own internal guidelines governing loan origination and underwriting when handling the loan applications of the Coastal Communities property purchasers.

114. The Defendant BB&T employs a standard practice whereby all loan applications submitted must be approved through their Central Underwriting department in Winston[-]Salem, North Carolina, upon information and belief. Nevertheless, upon information and belief, the decisions of the Defendant BB&T's Central Underwriting department may be overridden by the regional branches if deemed necessary on a case-by-case basis.

115. In the instant case, upon information and belief, many of the loan applications of the Coastal Communities property purchasers were turned down at BB&T's Central Underwriting department as a result of gaps in information, debt to income ratio and/or credit history in the loan applications of the Coastal Communities property purchasers submitted by TMC.

116. However, upon information and belief, Glen Heintz, the regional retail banking manager for the Defendant BB&T (for the region encompassing Brunswick County, North Carolina) and/or Jeff Etheridge, the regional president for the Defendant BB&T (for the region encompassing Brunswick County, North Carolina), chose to override the majority of the declines and approve the loan applications regardless of any issues or concerns noted in the applications by the Defendant BB&T's Central Underwriting department.

117. As a result, in or about 2005, the Defendant BB&T's Central Underwriting department declined to

review the loan applications of the Coastal Communities property purchasers from the Brunswick County region altogether because they determined that the Brunswick County region would override the majority of the declines and approve the loan applications regardless of their decisions, upon information and belief.

118. Upon information and belief, following this change in policy, BB&T Branch Managers throughout Brunswick County, specifically, Brian Walker, Vi Jones and Connie Norton, employed a "no phone call" policy in order to handle the numerous faxed applications being submitted by the Defendants TMC and Gordon (referred to hereinafter as "the lot loan program").

119. Upon information and belief, the loan applications were thereafter "forced through" and approved by the Defendant BB&T without any contact to the applicants to justify the information received.

120. The Defendant BB&T thereafter paid the Defendant TMC for the referrals for each loan application, upon information and belief. At the height of the program, the Defendant BB&T paid the Defendant TMC as much as $15,000.00 to $20,000.00 per month for the referrals, upon information and belief.

121. The above mentioned BB&T executives purposefully shifted the work with the "lot loan program" to younger retail lenders that were less inclined to question the internal adjustments made specifically for the program, upon information and belief.

. . . .

125. Thereafter, upon information and belief, the Defendant BB&T's regional branch managers/loan officers continued issuing loans for Coastal Communities property owners in the lot loan program in order to meet their own BB&T expanding growth goals regardless of whether the loans should have been approved and/or the properties were being developed by the Defendant Saunders and his various corporate entities as represented to property owners

> . . . .
>
> 127. Upon information and belief, the Defendant BB&T continued in bad faith to provide loans to the Plaintiffs and other Coastal Communities property owners in the lot loan program, relying on fraudulent appraisals and knowing that the infrastructure and amenities in all of the developments were not being completed as promised.
>
> . . . .
>
> 135. Instead, the Defendant BB&T failed to maintain adequate and appropriate compliance reviews of the appraisals which would have easily alerted the Defendant BB&T that the appraisals were flawed and the lot prices were inflated, upon information and belief. If, in fact, compliance reviews were performed, the Defendant BB&T knew or should have known that the reviews were performed in an inadequate and inappropriate manner, upon information and belief.

Like in *Guyton*, if we take these allegations as true, they certainly suffice to support a conclusion that BB&T breached a duty to plaintiffs here and therefore, any claims requiring such a duty as an element, as well as claims under Chapter 75, should be allowed to go forward.[4]

In sum, for the above reasons, I would allow plaintiffs' claims against the appraiser defendants for negligent misrepresentation and fraud to proceed, as well as plaintiffs' claims for fraud and for unfair and deceptive acts or practices under Chapter 75 to go forward against the BB&T defendants. Moreover, based on reviving these claims, I would allow the claims of civil conspiracy to proceed as to both sets of defendants.

Accordingly, I respectfully dissent from the majority opinion as to these claims only. I concur with the majority's decision regarding the remaining claims asserted by plaintiffs and addressed in the majority opinion.

Justice BEASLEY joins in this concurring in part, dissenting in part opinion.

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4. I am not inclined to go so far as to hold that the Mortgage Lending Act creates its own cause of action, however. Thus, I would hold that plaintiffs' claims on that cause were properly dismissed.

Justice EDMUNDS concurring in part; and dissenting in part.

I join with that portion of the dissent that addresses plaintiffs' claims against defendants James Powell, James Powell Appraisers, LLC, and Lynn Rabello.

I also join that portion of the dissent that would find that the MLA applies to plaintiffs' purchase of real property, even if made primarily for investment purposes. However, because I do not believe that issue is dispositive of plaintiffs' claims against the BB&T defendants, I concur in the remainder of the majority opinion.

JOHN BARRY, III, KEVIN BESTICK, SUSAN BESTICK, GEORGE BRADY, PAMELA BRADY, BOBBY BROWN, CATHY BROWN, JOHN CARUSO, LAURA CARUSO, BARBARA KARINA CASSELL, JEFF CASSELL, FRANK CATANIA, LUDWIKA CERF, WILLIAM CERF, CHRISTINA CHAPPELL, DELANE CHAPPELL, JOE CHRISTENSEN, LAURA CLARK, SUZANNE DILLMAN, SUSAN EYERMANN, TIMOTHY EYERMANN, BRIAN FARRELL, MEGAN FARRELL, TIMOTHY FOLEY, KAY GREEN, ROBIN GREEN, TANNER GREEN, DANA JONES, KRISTI JONES, MEREDITH KISNER, WILLIAM KISNER, CHRISTOPHER LEE, MICHAEL LEWIS, TINA LEWIS, MICHAEL LUVUOLO, CLEVE THOMAS MASSON, PAULINE MARIE MASSON, FRAN METKIFF, WILLIAM METKIFF, DONNA NEELY, KEVIN NEELY, PAMELA O'BRYAN, WILLIAM O'BRYAN, CHARLES OTIS, ELAINE OTIS, DENNIS POWERS, ERIKA POWERS, GEORGE POWERS, LILLIAN POWERS, KATHLEEN ROBERTS, WILLIAM ROBERTS, JULIE ROOKSTOOL, DAVID CRAIG SALMON, NANCY SALMON, LINDA SCHUELLER, DONALD SLOVER, ELIZABETH SLOVER, SPECTRUMAX, LLC, MICHAEL STOPCZYNSKI, MICHELLE STOPCZYNSKI, SCOTT SWANN, ANDREY VARNUM, RICHARD VARNUM, JILL VOSS, JANE WALTER, AND RUSSELL WALTER

v.

OCEAN ISLE PALMS, INC., OCEAN ISLE PALMS, LLC, COASTAL COMMUNITIES, INC., MARK A. SAUNDERS, DEBORAH BOODRO, DONALD HOWARTH, MAS PROPERTIES, LLC, THE MORTGAGE COMPANY OF BRUNSWICK, INC., BRENDAN GORDON, JAMES POWELL, JAMES POWELL APPRAISALS, LLC, LYNN RABELLO, BRANCH BANKING AND TRUST COMPANY, FOUR OAKS BANK AND TRUST COMPANY, BB&T COLLATERAL SERVICE CORPORATION, CLIFTON L. PAINTER, BAXLEYSMITHWICK PLLC, AND DOUGLAS BAXLEY

No. 378A14

Filed 18 December 2015

Appeal pursuant to N.C.G.S. § 7A-27(b)(1) from opinions and orders granting motions to dismiss entered on 27 June 2011 and 13 June 2012 by Judge John R. Jolly, Jr. in Superior Court, Brunswick County. On 10 October 2014, pursuant to N.C.G.S. § 7A-31(a) and (b)(2), and

Rule 15(e)(2) of the North Carolina Rules of Appellate Procedure, the Supreme Court on its own initiative certified the case for review prior to determination in the Court of Appeals. Heard in the Supreme Court on 18 March 2015.

Hodges & Coxe, P.C., by C. Wes Hodges, II and Sarah R. Buzzard, for plaintiff-appellants.

Teague, Campbell, Dennis & Gorham, LLP, by Jacob H. Wellman and Natalie K. Isenberg, for defendant-appellees James Powell, James Powell Appraisals, LLC, and Lynn Rabello.

Poyner Spruill LLP, by J. Nicholas Ellis and Caroline P. Mackie, for defendant-appellees Branch Banking and Trust Company and BB&T Collateral Service Corporation.

PER CURIAM.

For the reasons stated in *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, ___ N.C. ___, ___ S.E.2d ___ (2015) (375A14), the decision of the trial court is affirmed.

AFFIRMED.

Justice EDMUNDS concurs in part and dissents in part for the reasons stated in his opinion in *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, ___ N.C. ___, ___ S.E.2d ___ (2015) (375A14).

Justice HUDSON and Justice BEASLEY concur in part and dissent in part for the reasons stated in Justice Hudson's opinion in *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, ___ N.C. ___, ___ S.E.2d ___ (2015) (375A14).

BRANCH BANKING AND TRUST COMPANY
v.
PEACOCK FARM, INC., RODOLPHE T. LYNCH, AND WILLARD A. RHODES

No. 230A15

Filed 18 December 2015

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 772 S.E.2d 495 (2015), dismissing an interlocutory appeal from an order entered on 5 June 2012, as certified under Rule of Civil Procedure 54(b) by an order entered on 16 April 2014, both by Judge Anderson D. Cromer in Superior Court, Moore County. Heard in the Supreme Court on 17 November 2015.

Howard, Stallings, From, Hutson, Atkins, Angell & Davis, P.A., by John N. Hutson, Jr. and Matthew M. Lawless, for plaintiff-appellee.

Van Camp, Meacham & Newman, PLLC, by William M. Van O'Linda, Jr., for defendant-appellant Rodolphe T. Lynch.

PER CURIAM.

For the reasons stated in the majority opinion, the decision of the Court of Appeals is affirmed. We remand this case to the Court of Appeals for further remand to the trial court so that additional proceedings may be held not inconsistent with the opinion.

AFFIRMED AND REMANDED.

KATHLEEN BEADNELL, RAYMOND BEADNELL, RICHARD BEMIS, DAWN BENNETT, MICHAEL BENNETT, DONNA BERRY, WILLIAM BERRY, JUDY BLOODWORTH, DARLENE BROYLES, WILLIAM BROYLES, PATRICIA CALDERONE, READ CALDERONE, JANET CAMERON, PAUL CAMERON, WAYNE CAMERON, MICHELE CARDNO, THOMAS CARDNO, JAMES CARY, JR., LISA CARY, JOSEPH CIPRIANI, KAREN CIPRIANI, CATHERINE COLELLA, CHARLES COLELLA, FITZGERALD FAMILY TRUST, CHARLES FITZGERALD, MARY FITZGERALD, NANCY FLAHERTY, THOMAS FLAHERTY, DEBRA FREEDMAN, RICHARD FREEDMAN, BLAIR HANSON, JEFF HANSON, BLANEY HARPER, SHARON HARPER, ARLENE JUROW, LESTER JUROW, PATRICIA KARL, CHRISTINE KENT, JAY KENT, STEPHEN LUNN, DANIEL LOWNES, SHARON LOWNES, DOROTHY MANCUSO, RICHARD MANCUSO, WILLIAM MCENROE, MICHAEL MCGARRY, MILLIKEN FAMILY TRUST, JOHN MILLIKEN, LINDA MILLIKEN, PETER MITCHELL, SUSAN MITCHELL, JACQUE MUNROE, SCOTT MUNROE, DIANE NEALE, PETER NEALE, BONNIE PASSARELLA, DAVID PATTERSON, DEBORAH PATTERSON, TAMARA PETRILLO, MICHAEL RATCHFORD, VALERIE RATCHFORD, MARGARET RIDGE, ANGELINA SANDOLO, MARIO SANDOLO, PAUL SANDOLO, DAVID SHERMAN, SANDRA SHERMAN, JOELENE SLOCUM, DOLORES SMITH, MARY SMITH, ROBERT SMITH, KAREN SPINELLI, MICHAEL SPINELLI, JANET STEWART, PETER STEWART, GLEN TALLEY, VIRGINIA TALLEY, ROBERT TUGYA, SUZANNE TUGYA, ERIC VAN SLYKE, KARIN VAN SLYKE, GORDON C. WICKE, JR., GORDON C. WICKE, JR. TRUST, KATHLEEN WICKE, JERRY WICKERSHAM, KATHLEEN WICKERSHAM, EMILY WILSON, LUCAS WILSON, AND JOANNA ZUMALT-MCGARRY

v.

COASTAL COMMUNITIES AT OCEAN RIDGE PLANTATION, INC., COASTAL COMMUNITIES AT OCEAN RIDGE PLANTATION, LLC, COASTAL COMMUNITIES, INC., MARK A. SAUNDERS, DEBORAH BOODRO, MAS PROPERTIES, LLC, THE MORTGAGE COMPANY OF BRUNSWICK, INC., BRENDAN GORDON, JAMES POWELL, JAMES POWELL APPRAISALS, LLC, LYNN RABELLO, BRANCH BANKING AND TRUST COMPANY, BB&T COLLATERAL SERVICE CORPORATION, BAXLEYSMITHWICK PLLC, AND DOUGLAS BAXLEY

No. 379A14

Filed 18 December 2015

Appeal pursuant to N.C.G.S. § 7A-27(b)(1) from opinions and orders granting motions to dismiss entered on 27 June 2011 and 13 June 2012 by Judge John R. Jolly, Jr. in Superior Court, Brunswick County. On 10 October 2014, pursuant to N.C.G.S. § 7A-31(a) and (b)(2), and Rule 15(e)(2) of the North Carolina Rules of Appellate Procedure, the Supreme Court on its own initiative certified the case for review prior to determination in the Court of Appeals. Heard in the Supreme Court on 18 March 2015.

Hodges & Coxe, P.C., by C. Wes Hodges, II and Sarah R. Buzzard, for plaintiff-appellants.

Teague, Campbell, Dennis & Gorham, LLP, by Jacob H. Wellman and Natalia K. Isenberg, for defendant-appellees James Powell, James Powell Appraisals, LLC, and Lynn Rabello.

Poyner Spruill LLP, by J. Nicholas Ellis and Caroline P. Mackie, for defendant-appellees Branch Banking and Trust Company and BB&T Collateral Service Corporation.

PER CURIAM.

For the reasons stated in *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, ___ N.C. ___, ___ S.E.2d ___ (2015) (375A14), the decision of the trial court is affirmed.

AFFIRMED.

Justice EDMUNDS concurs in part and dissents in part for the reasons stated in his opinion in *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, ___ N.C. ___, ___ S.E.2d ___ (2015) (375A14).

Justice HUDSON and Justice BEASLEY concur in part and dissent in part for the reasons stated in Justice Hudson's opinion in *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, ___ N.C. ___, ___ S.E.2d ___ (2015) (375A14).

DICKSON v. RUCHO

[368 N.C. 481 (2015)]

MARGARET DICKSON, ALICIA CHISOLM, ETHEL CLARK, MATTHEW A. McLEAN, MELISSA LEE ROLLIZO, C. DAVID GANTT, VALERIA TRUITT, ALICE GRAHAM UNDERHILL, ARMIN JANCIS, REBECCA JUDGE, ZETTIE WILLIAMS, TRACEY BURNS-VANN, LAWRENCE CAMPBELL, ROBINSON O. EVERETT, JR., LINDA GARROU, HAYES McNEILL, JIM SHAW, SIDNEY E. DUNSTON, ALMA ADAMS, R. STEVE BOWDEN, JASON EDWARD COLEY, KARL BERTRAND FIELDS, PAMLYN STUBBS, DON VAUGHAN, BOB ETHERIDGE, GEORGE GRAHAM, JR., THOMAS M. CHUMLEY, AISHA DEW, GENEAL GREGORY, VILMA LEAKE, RODNEY W. MOORE, BRENDA MARTIN STEVENSON, JANE WHITLEY, I.T. ("TIM") VALENTINE, LOIS WATKINS, RICHARD JOYNER, MELVIN C. McLAWHORN, RANDALL S. JONES, BOBBY CHARLES TOWNSEND, ALBERT KIRBY, TERRENCE WILLIAMS, NORMAN C. CAMP, MARY F. POOLE, STEPHEN T. SMITH, PHILIP A. BADDOUR, and DOUGLAS A. WILSON

v.

ROBERT RUCHO, in his official capacity only as the Chairman of the North Carolina Senate Redistricting Committee; DAVID LEWIS, in his official capacity only as the Chairman of the North Carolina House of Representatives Redistricting Committee; NELSON DOLLAR, in his official capacity only as the Co-Chairman of the North Carolina House of Representatives Redistricting Committee; JERRY DOCKHAM, in his official capacity only as the Co-Chairman of the North Carolina House of Representatives Redistricting Committee; PHILIP E. BERGER, in his official capacity only as the President Pro Tempore of the North Carolina Senate; THOM TILLIS, in his official capacity only as the Speaker of the North Carolina House of Representatives; THE STATE BOARD OF ELECTIONS; and THE STATE OF NORTH CAROLINA

NORTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NAACP, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, DEMOCRACY NORTH CAROLINA, NORTH CAROLINA A. PHILIP RANDOLPH INSTITUTE, REVA McNAIR, MATTHEW DAVIS, TRESSIE STANTON, ANNE WILSON, SHARON HIGHTOWER, KAY BRANDON, GOLDIE WELLS, GRAY NEWMAN, YVONNE STAFFORD, ROBERT DAWKINS, SARA STOHLER, HUGH STOHLER, OCTAVIA RAINEY, CHARLES HODGE, MARSHALL HARDY, MARTHA GARDENHIGHT, BEN TAYLOR, KEITH RIVERS, ROMALLUS O. MURPHY, CARL WHITE, ROSA BRODIE, HERMAN LEWIS, CLARENCE ALBERT, JR., EVESTER BAILEY, ALBERT BROWN, BENJAMIN LANIER, GILBERT VAUGHN, AVIE LESTER, THEODORE MUCHITENI, WILLIAM HOBBS, JIMMIE RAY HAWKINS, HORACE P. BULLOCK, ROBERTA WADDLE, CHRISTINA DAVIS-McCOY, JAMES OLIVER WILLIAMS, MARGARET SPEED, LARRY LAVERNE BROOKS, CAROLYN S. ALLEN, WALTER ROGERS, SR., SHAWN MEACHEM, MARY GREEN BONAPARTE, SAMUEL LOVE, COURTNEY PATTERSON, WILLIE O. SINCLAIR, CARDES HENRY BROWN, JR., and JANE STEPHENS

v.

THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; THOM TILLIS, in his official capacity as Speaker of the North Carolina House of Representatives; and PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate

No. 201PA12-3

Filed 18 December 2015

1. Appeal and Error—redistricting plan—three-judge panel—appellate review—standard

The North Carolina Supreme Court's review of a three-judge panel trial court decision in a challenge to a redistricting plan was limited. Unchallenged findings were binding, as were findings supported by competent evidence. Conclusions of law were reviewed de novo to determine whether they were supported by the findings.

2. Elections—redistricting—federal and state constitutional requirements—on remand

Where a previous decision of the North Carolina Supreme Court in a redistricting case was remanded by the U.S. Supreme Court for further consideration in light of its decision in *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. ____ (2015) (*Alabama*), the North Carolina Supreme Court held that the three-judge panel trial court decision fully complied with *Alabama*. In North Carolina, the General Assembly's priorities can only be implemented in accordance with the federal and state constitutional requirements as specified by the N.C. Supreme Court, whereas in *Alabama* the redistricting plan was drawn according to guidelines adopted by legislative committee; in *Alabama* the state was considered as a whole rather than district by district, as in N.C.; there was a standing issue as to one plaintiff which was not relevant here; the Alabama legislature placed great emphasis on ensuring that no district deviated by more than a theoretical equal population ideal, while in North Carolina equal population criteria are a component of and intertwined with the state constitution's Whole County Provision and equal population is a part of the redistricting background but is not a factor to be weighed against the use of race to determine whether race predominates; and, lastly, in *Alabama* the U.S. Supreme Court held that the district court misinterpreted the requirements of section 5 of the Voting Rights Act in finding that the challenged districts were "narrowly tailored" to satisfy strict scrutiny, while the North Carolina three-judge panel's conclusion here that the twenty-six challenged VRA districts survive strict scrutiny was consistent with the U.S. Supreme Court's clarification of the section 5 narrow tailoring analysis.

3. Elections—redistricting—federal requirements—primary concern—federal law rather than race

When making redistricting decisions, federal and state law must be read in harmony, although a redistricting plan that does

not satisfy federal requirements fails even if it is consistent with the law of North Carolina. The Fourteenth Amendment, by guaranteeing equal protection for all citizens regardless of race, essentially prohibits consideration of race during redistricting; however, at the same time, the General Assembly must ensure that, to the greatest extent allowed under federal law, the state legislature's redistricting plans comply with the Whole County Provision of the North Carolina Constitution. Despite a cat's cradle of factors facing the General Assembly, the three-judge trial court panel in this case found that no factual inquiry was required regarding the General Assembly's predominant motivation in forming twenty-six Voting Rights Act districts beyond the General Assembly's concession that the districts were drafted to be VRA-compliant. In light of the many other considerations potentially in play, the Court did not believe that this concession established that race ipso facto was the predominant motive driving the General Assembly. It appeared from the three-judge panel's findings that the General Assembly was concerned with compliance with federal law more than addressing race per se.

4. Elections—redistricting—gerrymandering

In a redistricting case which challenged four districts as being the result of racial gerrymandering, the General Assembly's actions in creating these districts were rationally related to all its expressed goals. The U.S. Supreme Court has recognized that compliance with federal law, incumbency protection, and partisan advantage are all legitimate governmental interests.

5. Elections—redistricting—process

Considering redistricting issues under the Whole County Provision of the North Carolina Constitution, the General Assembly first must create all necessary Voting Rights Act districts, single-county districts, and single counties containing multiple districts. Thereafter, the General Assembly should make every effort to ensure that the maximum number of groupings containing two whole, contiguous counties are established before resorting to groupings containing three whole, contiguous counties, and so on.

6. Elections—redistricting—splitting districts—lack of compactness

A purported lack of compactness of legislative districts created by the General Assembly and the harm resulting from splitting precincts may be valid considerations, but neither constitutes

an independent legal basis for finding a constitutional violation, and there is no justiciable standard by which to measure these local factors.

7. Elections—redistricting—state constitution—Good of the Whole Clause

Enacted redistricting plans did not violate the "Good of the Whole" clause found in Article I, Section 2 of the Constitution of North Carolina. Plaintiffs proffered maps representing their good faith understanding of a plan they believed to be best for the State as a whole; however, the maps enacted by the duly elected General Assembly also represent an equally legitimate understanding of legislative districts that will function for the good of the whole. Because plaintiffs' argument is not based upon a justiciable standard, and because acts of the General Assembly enjoy "a strong presumption of constitutionality," plaintiffs' claims failed.

Justice BEASLEY concurring in part and dissenting in part.

Justices HUDSON and ERVIN join in this dissenting opinion.

On order of the United States Supreme Court entered 20 April 2015 granting plaintiffs' petition for writ of certiorari to review our decision reported in 367 N.C. 542, 766 S.E.2d 238 (2014), vacating said judgment, and remanding the case to this Court for further consideration in light of *Alabama Legislative Black Caucus v. Alabama*, ___ U.S. ___, 135 S. Ct. 1257, 191 L. Ed. 2d 314 (2015). Heard in the Supreme Court on 31 August 2015.

Poyner Spruill LLP, by Edwin M. Speas, Jr., John W. O'Hale, and Caroline P. Mackie, for Dickson plaintiff-appellants; and Southern Coalition for Social Justice, by Anita S. Earls and Allison Riggs, and Tin Fulton Walker & Owen, PLLC, by Adam Stein, for NC NAACP plaintiff-appellants.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., by Thomas A. Farr and Phillip J. Strach, for legislative defendant-appellees; and Roy Cooper, Attorney General, by Alexander McC. Peters, Special Deputy Attorney General, for all defendant-appellees.

Michael E. Casterline, P.A.; Paul, Weiss, Rifkind, Wharton & Garrison LLP, by Theodore V. Wells, Jr., pro hac vice, Robert A. Atkins, pro hac vice, Jaren Janghorbani, pro hac vice, Farrah

R. Berse, pro hac vice, and Pietro Signoracci, pro hac vice; and Brazil & Burke, P.A., by Meghann K. Burke, for Congressional Black Caucus, amicus curiae.

H. Jefferson Powell for North Carolina Law Professors Michael Curtis, Walter Dellinger, William P. Marshall, and H. Jefferson Powell, amici curiae.

NEWBY, Justice.

Following the 2010 Decennial Census, the General Assembly of North Carolina enacted redistricting plans for the North Carolina Senate and House of Representatives, and for the North Carolina districts for the United States House of Representatives. Plaintiffs challenge the legality of these plans, arguing that they violate the Constitutions of the United States and of North Carolina, controlling federal statutes, and applicable decisions of the Supreme Court of the United States (the Supreme Court) and the Supreme Court of North Carolina. The three-judge panel[1] reviewing the plans unanimously concluded that the General Assembly applied traditional and permissible redistricting principles to achieve partisan advantage and that no constitutional violations resulted. On plaintiffs' direct appeal, this Court affirmed the three-judge panel's ruling. *Dickson v. Rucho*, 367 N.C. 542, 766 S.E.2d 238 (2014). Thereafter, the Supreme Court vacated this Court's opinion and remanded the case to this Court for further consideration in light of its recent decision in *Alabama Legislative Black Caucus v. Alabama*, ___ U.S. ___, 135 S. Ct. 1257, 191 L. Ed. 2d 314 (2015) (*Alabama*). *Dickson v. Rucho*, ___ U.S. ___, 135 S. Ct. 1843, 191 L. Ed. 2d 719 (2015) (mem.).

In compliance with the Supreme Court's mandate, we have reconsidered this case in light of *Alabama*. Specifically, *Alabama* requires a district-by-district analysis in which the federal equal population requirement is simply a "background" rule that does not influence the predominant motive analysis. *Alabama*, ___ U.S. at ___, 135 S. Ct. at 1271, 191 L. Ed. 2d at 332-33. After rebriefing and a careful review of the record in this case, we observe that the three-judge panel conducted the required

1. The three-judge panel, appointed by then-Chief Justice Sarah Parker of the North Carolina Supreme Court, consisted of Superior Court Judges Joseph Crosswhite, Alma Hinton, and Paul Ridgeway. In their order, the three judges describe themselves as each being "from different geographic regions and each with differing ideological and political outlooks" and state that they "independently and collectively arrived at the conclusions that are set out [in their order]."

detailed district-by-district analysis without giving improper weight to population equalization. *See id.* at ___, 135 S. Ct. at 1271, 191 L. Ed. 2d at 332-33. The panel detailed its extensive findings and conclusions in a one hundred seventy-one page Judgment and Memorandum of Decision. Our careful review of that document leads us to conclude that, as to the twenty-six districts drawn to comply with the federal Voting Rights Act of 1965 ("Voting Rights Act" or "VRA"), the three-judge panel erred when it applied strict scrutiny prematurely; however, because these districts survive this most demanding level of review, plaintiffs were not prejudiced by the three-judge panel's error. As to the remaining challenged districts, we affirm the ruling of the three-judge panel that the predominant factors in their creation were the traditional and permissible redistricting principles encompassed within the mandatory framework as established by precedents of the Supreme Court and this Court.[2]

I. Procedural Background

The Constitution of North Carolina requires decennial redistricting of the North Carolina Senate and North Carolina House of Representatives, subject to several specific requirements. The General Assembly is directed to revise the districts and apportion Representatives and Senators among those districts ("House Districts" and "Senate Districts" or, collectively, "State House and Senate Districts"). N.C. Const. art. II, §§ 3, 5. Similarly, consistent with the requirements of the Constitution of the United States, the General Assembly establishes North Carolina's districts for the United States House of Representatives (Congressional Districts) after every decennial census. U.S. Const. art. I, §§ 2, 4; 2 U.S.C. §§ 2a, 2c (2012).

Redistricting in North Carolina has been challenged in this Court on multiple occasions.[3] As a result, redistricting in this State does not proceed upon preferences or guidelines determined by the General

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2. Our opinion incorporates the parts of our prior opinion that are unaffected by or are consistent with the *Alabama* opinion.

3. For example, regarding the 2010 redistricting, in addition to the two cases consolidated here, two cases currently pending in the United States District Court for the Middle District of North Carolina involve challenges to many of the same districts that are challenged here. *See Harris v. McCrory*, No. 1:13-cv-949 (M.D.N.C. heard Oct. 13-15, 2015) (challenging Congressional Districts 1 and 12); *Covington v. North Carolina*, No. 1:15-cv-399 (M.D.N.C. filed May 19, 2015); *see also*, *e.g.*, *Dean v. Leake*, 550 F. Supp. 2d 594 (E.D.N.C.), *appeal dismissed*, 555 U.S. 801, 129 S. Ct. 94, 172 L. Ed. 2d 6 (2008); *Cromartie v. Hunt*, 133 F. Supp. 2d 407 (E.D.N.C. 2000), *rev'd sub nom. Easley v. Cromartie*, 532 U.S. 234, 121 S. Ct. 1452, 149 L. Ed. 2d 430 (2001); *Cromartie v. Hunt*, 34 F. Supp. 2d 1029 (E.D.N.C. 1998), *rev'd*, 526 U.S. 541, 119 S. Ct. 1545, 143 L. Ed. 2d 731 (1999); *Shaw v. Hunt*, 861 F. Supp. 408 (E.D.N.C. 1994), *rev'd*, 517 U.S. 899, 116 S. Ct. 1894, 135 L. Ed. 2d 207 (1996);

Assembly. Instead, the legislature's priorities in drawing new district lines must be implemented within the mandatory framework recognized by this Court as required by federal law, federal and state constitutional mandates, and prior decisions of this Court. *Pender County v. Bartlett*, 361 N.C. 491, 493, 649 S.E.2d 364, 366 (2007) (*Pender County*), *aff'd sub nom. Bartlett v. Strickland*, 556 U.S. 1, 129 S. Ct. 1231, 173 L. Ed. 2d 173 (2009) (plurality) (*Strickland*); *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) (*Stephenson I*).

The North Carolina Constitution "enumerates several limitations on the General Assembly's redistricting authority." *Pender County*, 361 N.C. at 493, 649 S.E.2d at 366. In particular, Sections 3 and 5 of Article II of the North Carolina Constitution, which address State House and Senate Districts, both include an equal population requirement and a Whole County Provision (collectively referred to as the "Whole County Provision"). Specifically, those sections of the constitution provide:

> Sec. 3. Senate districts; apportionment of Senators.
>
> The Senators shall be elected from districts. The General Assembly, at the first regular session convening after the return of every decennial census of population taken by order of Congress, shall revise the senate districts and the apportionment of Senators among those districts, subject to the following requirements:
>
> (1) Each Senator shall represent, as nearly as may be, an equal number of inhabitants, the number of inhabitants that each Senator represents being determined for this purpose by dividing the population of the district that he represents by the number of Senators apportioned to that district;
>
> (2) Each senate district shall at all times consist of contiguous territory;

Pope v. Blue, 809 F. Supp. 392 (W.D.N.C.), *aff'd mem.*, 506 U.S. 801, 113 S. Ct. 30, 121 L Ed. 2d 3 (1992); *Shaw v. Barr*, 808 F. Supp. 461 (E.D.N.C. 1992), *rev'd sub nom. Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993); *Gingles v. Edmisten*, 590 F. Supp. 345 (E.D.N.C. 1984), *aff'd in part, rev'd in part sub nom. Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986); *Pender County v. Bartlett*, 361 N.C. 491, 493, 649 S.E.2d 364, 366 (2007), *aff'd sub nom. Bartlett v. Strickland*, 556 U.S. 1, 129 S. Ct. 1231, 173 L. Ed. 2d 173 (2009); *Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247 (2003); *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002).

> (3) No county shall be divided in the formation of a senate district;
>
> (4) When established, the senate districts and the apportionment of Senators shall remain unaltered until the return of another decennial census of population taken by order of Congress.
>
> Sec. 5. Representative districts; apportionment of Representatives.
>
> The Representatives shall be elected from districts. The General Assembly, at the first regular session convening after the return of every decennial census of population taken by order of Congress, shall revise the representative districts and the apportionment of Representatives among those districts, subject to the following requirements:
>
> (1) Each Representative shall represent, as nearly as may be, an equal number of inhabitants, the number of inhabitants that each Representative represents being determined for this purpose by dividing the population of the district that he represents by the number of Representatives apportioned to that district;
>
> (2) Each representative district shall at all times consist of contiguous territory;
>
> (3) No county shall be divided in the formation of a representative district;
>
> (4) When established, the representative districts and the apportionment of Representatives shall remain unaltered until the return of another decennial census of population taken by order of Congress.

N.C. Const. art. II, §§ 3, 5.

While the federal one-person, one-vote standard addresses every district statewide, our state law instructs that the state constitution's equal population requirement must be read in the context of the geographic boundaries of counties, the state-recognized political subdivisions. In other words, the Whole County Provision, as recognized by this Court, requires that each State House and Senate District be confined to a single

county or minimum grouping of contiguous counties. *Stephenson I*, 355 N.C. at 383-84, 562 S.E.2d at 397. In effect, North Carolina's Whole County Provision, of which equal population is a component, establishes a framework to address the neutral redistricting requirement that "political subdivisions" be respected.[4] *Shaw v. Reno*, 509 U.S. 630, 646-47, 113 S. Ct. 2816, 2826-27, 125 L. Ed. 2d 511, 528-29 (1993) (*Shaw I*); *Stephenson I*, 355 N.C. at 364, 371, 562 S.E.2d at 385, 389 (recognizing "the importance of counties as political subdivisions of the State of North Carolina" and "observ[ing] that the State Constitution's limitations upon redistricting and apportionment uphold what the United States Supreme Court has termed 'traditional districting principles' . . . such as 'compactness, contiguity, and *respect for political subdivisions*' " (citation omitted) (quoting *Shaw I*, 509 U.S. at 647, 113 S. Ct. at 2827, 125 L. Ed. 2d at 528)). Our state constitution's Whole County Provision establishes requirements not just for the number of voters, but for their identity as well. Thus, the approach to redistricting used here, required by the state constitution's Whole County Provision, is fundamentally different from the federal one-person, one-vote requirement addressed in *Alabama*, which spoke only to the number of voters. *See Alabama*, ___ U.S. at ___, 135 S. Ct. at 1271, 191 L. Ed. 2d at 332 (explaining that equal population goals play a role in determining the number of persons placed in a district, but do not necessarily control "*which* persons were placed in *appropriately apportioned districts*"); *see also Stephenson I*, 355 N.C. at 371, 562 S.E.2d at 389 (distinguishing the "traditional districting principles" found in the North Carolina Constitution, including the Whole County Provision, from the federal "one-person, one-vote" standard).

In addition, the General Assembly followed the mandatory framework of our decision in *Stephenson I*, which harmonized the

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4. We note that the principles articulated in the Whole County Provision, including state equal population requirements, have been reflected in our various state constitutions since 1776. *See Stephenson I*, 355 N.C. at 364-72, 562 S.E.2d at 385-90. In our opinion in *Stephenson I*, we discussed the historical importance of counties as vital "political subdivisions" of our state. *Id.* at 364, 562 S.E.2d at 385. For example, we recognized that "[i]t is through [the counties], mainly, that the powers of government reach and operate directly upon the people" and that the counties "are indeed a necessary part and parcel of the subordinate instrumentalities employed in carrying out the general policy of the state in the administration of government." *Id.* at 365, 562 S.E.2d at 386 (quoting *White v. Comm'rs of Chowan Cty.*, 90 N.C. 437, 438 (1884)).

requirements of federal and state law and set out nine criteria that the General Assembly must follow in drawing new district lines. 355 N.C. at 383-84, 562 S.E.2d at 396-97. These nine criteria may be summarized as follows: First, "legislative districts required by the VRA shall be formed" before non-VRA districts are created. *Id.* at 383, 562 S.E.2d at 396-97. Second, "[i]n forming new legislative districts, any deviation from the ideal population for a legislative district shall be at or within plus or minus five percent" to ensure "compliance with federal 'one-person, one-vote' requirements." *Id.* at 383, 562 S.E.2d at 397. Third, "[i]n counties having a . . . population sufficient to support the formation of one non-VRA legislative district, . . . the physical boundaries" of the non-VRA district shall "not cross or traverse the exterior geographic line of [the] county." *Id.* at 383, 562 S.E.2d at 397. Fourth, "[w]hen two or more non-VRA legislative districts may be created within a single county, . . . single-member non-VRA districts shall be formed within [the] county," "shall be compact, and shall not traverse the [county's] exterior geographic boundary." *Id.* at 383, 562 S.E.2d at 397. Fifth, for non-VRA counties that "cannot support at least one legislative district," or "counties having a non-VRA population pool, which, if divided into [legislative] districts, would not comply with" one-person, one-vote requirements, the General Assembly should "combin[e] or group[ ] the minimum number of whole, contiguous counties necessary to comply with the at or within plus or minus five percent 'one-person, one-vote' standard." *Id.* at 383, 562 S.E.2d at 397. Moreover, "[w]ithin any such contiguous multi-county grouping, compact districts shall be formed, consistent with the [one-person, one-vote] standard, whose boundary lines do not cross or traverse the 'exterior' line of the multi-county grouping." *Id.* at 383-84, 562 S.E.2d at 397. "[T]he resulting interior county lines created by any such groupings may be crossed or traversed in the creation of districts within said multi-county grouping but only to the extent necessary to comply with the at or within plus or minus five percent 'one-person, one-vote' standard." *Id.* at 384, 562 S.E.2d at 397. Sixth, "only the smallest number of counties necessary to comply with the at or within plus or minus five percent 'one-person, one-vote' standard shall be combined." *Id.* at 384, 562 S.E.2d at 397. Seventh, "communities of interest should be considered in the formation of compact and contiguous [legislative] districts." *Id.* at 384, 562 S.E.2d at 397. Eighth, "multi-member districts shall not be" created "unless it is established that such districts are necessary to advance a compelling governmental interest." *Id.* at 384, 562 S.E.2d at 397. Ninth, "any new redistricting plans . . . shall depart from strict

compliance with" these criteria "only to the extent necessary to comply with federal law." *Id.* at 384, 562 S.E.2d at 397. Within this mandatory framework, the General Assembly may consider permissible and traditional redistricting principles such as compactness, contiguity, and respect for political subdivisions and communities of interest. *See Miller v. Johnson*, 515 U.S. 900, 916, 115 S. Ct. 2475, 2488, 132 L. Ed. 2d 762, 779-80 (1995).

Following the 2010 census, leaders of the North Carolina House of Representatives and the North Carolina Senate independently appointed redistricting committees. Each committee was responsible for recommending a plan applicable to its own chamber, while the two committees jointly were charged with preparing a redistricting plan for North Carolina's Congressional districts for the United States House of Representatives.

Guided by the United States Supreme Court's redistricting principles, in addition to the state constitution and the mandatory framework of this Court's prior decisions, the redistricting committees sought information and suggestions from numerous sources, including the North Carolina Legislative Black Caucus and the North Carolina delegation to the United States Congress. In addition, these committees solicited input from various constituencies; invited public comment and conducted public hearings in multiple counties, including twenty-four of the forty counties then covered by section 5 of the Voting Rights Act;[5] heard both lay and expert testimony regarding such matters as racially polarized voting; solicited and received advice from the University of North Carolina School of Government; commissioned reports from independent experts to fill gaps in the evidence; and considered written submissions, including proposed redistricting maps submitted by the Southern Coalition for Social Justice.

The General Assembly convened on 25 July 2011 to deliberate the redistricting plans drawn by the House and Senate committees. That same day, the leaders of the Democratic Party and the Legislative Black Caucus submitted other alternative maps. On 27 July, the General Assembly ratified the 2011 North Carolina Senate redistricting plan and the 2011 plan for the federal House of Representatives districts. On

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5. Effective 1 September 2014, section 5 of the VRA is codified at 52 U.S.C.S. § 10304 (LexisNexis 2014). Section 5 previously was codified at 42 U.S.C.S. § 1973c.

28 July, the General Assembly ratified the 2011 North Carolina House of Representatives redistricting plan. On 2 September 2011, the General Assembly submitted the three plans to the United States Department of Justice (USDOJ) for preclearance under section 5 of the Voting Rights Act. That same day, the General Assembly filed a suit also seeking preclearance in the United States District Court for the District of Columbia. The General Assembly dismissed this suit upon receiving preclearance from the USDOJ on 1 November 2011.[6]

On 3 November 2011, Margaret Dickson and forty-five other registered voters filed a complaint seeking to have the three redistricting plans declared invalid on both constitutional and statutory grounds. These plaintiffs filed an amended complaint on 12 December 2011. On 4 November 2011, the North Carolina State Conference of Branches of the NAACP, joined by three organizations and forty-six individuals, filed a complaint seeking similar relief. These plaintiffs filed an amended complaint on 9 December 2011. Following the filing of the original complaints, then-Chief Justice Sarah Parker of the Supreme Court of North Carolina appointed a panel of three superior court judges to hear these actions, pursuant to N.C.G.S. § 1-267.1. On 19 December 2011, the three-judge panel consolidated both cases for all purposes.

Plaintiffs argue that the redistricting violated their federal and state equal protection rights as well as the state constitution's Whole County Provision. Underlying all of plaintiffs' complaints is the implicit argument that the Supreme Court incorrectly decided *Strickland* and that the General Assembly impermissibly utilized a fifty percent plus one black voting age population in the challenged VRA districts.

On 6 February 2012, the three-judge panel allowed in part and denied in part defendants' motion to dismiss. Plaintiffs filed a motion for partial summary judgment on 5 October 2012, and defendants filed a motion for summary judgment on 10 December 2012. The three-judge panel heard arguments on these motions on 25 and 26 February 2013.

While a ruling on the motions for summary judgment was pending, the three-judge panel issued an order determining that genuine issues of material fact existed as to two issues that could not be resolved by

6. Because a computer software glitch caused the State's initial submission to the Department of Justice to be incomplete, the General Assembly enacted curative statutes on 7 November 2011. These statutes were precleared on 8 December 2011.

summary judgment.[7] The panel conducted a trial on these two issues on 4 and 5 June 2013. On 8 July 2013, the three-judge panel issued its unanimous Judgment and Memorandum of Decision denying plaintiffs' motion for partial summary judgment and entering judgment for defendants on all claims asserted by plaintiffs, including those related to the issues addressed at trial.

In rendering its ruling, the three-judge panel conducted a district-by-district review of the constitutionality of each challenged district. After considering thousands of pages of evidence and testimony from numerous witnesses, the panel produced a detailed, one hundred seventy-one page document setting out its findings of fact and conclusions of law. In upholding the General Assembly's redistricting plans, the panel recognized that:

> Redistricting in North Carolina is an inherently political and intensely partisan process that results in political winners and, of course, political losers. . . .
>
> Political losses and partisan disadvantage are not the proper subject for judicial review. . . . Rather, the role of the court in the redistricting process is to ensure that North Carolinians' constitutional rights – not their political rights or preferences – are secure.

The three-judge panel first considered plaintiffs' claims that the General Assembly's redistricting plans violated the equal protection guarantees of the United States and North Carolina Constitutions. The panel's first step was to determine which level of scrutiny to apply to each challenged district. It recognized that while generally "all racial classifications [imposed by a government] . . . must be analyzed by a reviewing court under strict scrutiny," *see Johnson v. California*, 543 U.S. 499, 505, 125 S. Ct. 1141, 1146, 160 L. Ed. 2d 949, 958 (2005)

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7. The two issues separated for trial were:

> A. Assuming application of a strict scrutiny standard and, in considering whether the Enacted Plans were narrowly tailored, was each challenged Voting Rights Act ("VRA") district drawn in a place where a remedy or potential remedy for racially polarized voting was reasonable for purposes of preclearance or protection of the State from vote dilution claims under the Constitution or under § 2 of the VRA?
>
> B. For six specific districts (Senate Districts 31 and 32, House Districts 51 and 54 and Congressional Districts 4 and 12 – none of which is identified as a VRA district), what was the predominant factor in the drawing of those districts?

(alterations in original) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227, 115 S. Ct. 2097, 2113, 132 L. Ed. 2d 158, 182 (1995)), mere "consciousness of race" is insufficient to trigger strict scrutiny in redistricting cases, *Bush v. Vera*, 517 U.S. 952, 958, 116 S. Ct. 1941, 1951, 135 L. Ed. 2d 248, 257 (1996) (plurality). Instead, the three-judge panel explained that strict scrutiny is only appropriate when plaintiffs establish that "all other legislative districting principles were subordinated to race and that race was the predominant factor motivating the legislature's redistricting decision." *See Cromartie v. Hunt*, 133 F. Supp. 2d 407, 425 (E.D.N.C. 2000) (citing, *inter alia*, *Miller*, 515 U.S. at 916, 115 S. Ct. at 2488, 132 L. Ed. 2d at 779-80), *rev'd sub nom. Easley v. Cromartie*, 532 U.S. 234, 121 S. Ct. 1452, 149 L. Ed. 2d 430 (2001) (*Cromartie II*).

The three-judge panel determined that twenty-six[8] of the thirty districts challenged by plaintiffs were created by the General Assembly to be VRA districts. The General Assembly intended to draw each of these districts so as to include at least fifty percent Total Black Voting Age Population (TBVAP). The three-judge panel concluded that, "even though legislative intent may have been remedial and the districts may have been drawn to conform with federal and state law," these VRA districts were "predominantly determined by a racial objective." Therefore, the three-judge panel determined that strict scrutiny was the appropriate level of review for these twenty-six VRA districts. The panel acknowledged, however, "that a persuasive argument can be made that compliance with the VRA is but one of several competing redistricting criteria balanced by the General Assembly and that a lesser standard of review might be appropriate." Nonetheless, the three-judge panel employed strict scrutiny because that standard provides a "convenient and systematic roadmap for judicial review," and because, if the plans survive strict scrutiny, in which the evidence is considered in a light most favorable to the non-prevailing party, then the plans would necessarily survive a lesser level of scrutiny, such as rational basis review.

The three-judge panel made specific findings of fact for each of the twenty-six VRA districts. Based on its findings, the three-judge panel concluded that the twenty-six VRA districts survive strict scrutiny because they were narrowly tailored to achieve a compelling governmental interest in "avoiding *future* liability under § 2 of the VRA and ensuring *future*

8. The twenty-six districts are: Senate Districts 4, 5, 14, 20, 21, 28, 38, and 40; House Districts 5, 7, 12, 21, 24, 29, 31, 32, 33, 38, 42, 48, 57, 99, 102, 106, and 107; and Congressional District 1.

preclearance of the redistricting plans under § 5 of the VRA." *See Shaw v. Hunt*, 517 U.S. 899, 915-16, 116 S. Ct. 1894, 1905-06, 135 L. Ed. 2d 207, 225-26 (1996) (*Shaw II)*.

The three-judge panel concluded that avoiding section 2 liability was a compelling governmental interest because, based upon the panel's exhaustive review of the entire record, "the General Assembly had a strong basis in evidence to conclude that each of the *Gingles* preconditions was present in substantial portions of North Carolina," *see Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986), "and that, based upon the totality of the circumstances, VRA districts were required to remedy against vote dilution."[9] In considering whether compliance with section 5 provided a compelling governmental interest, the three-judge panel explained that "the newly-enacted plan may not undo or defeat rights afforded by the most recent legally enforceable redistricting plan in force or effect in the covered jurisdiction (the 'benchmark' plan)." *See Riley v. Kennedy*, 553 U.S. 406, 128 S. Ct. 1970, 170 L. Ed. 2d 837 (2008) (cited by the panel in support of this statement). Because "the General Assembly had a strong basis in evidence to conclude that [its plans] must be precleared" under section 5, the three-judge panel determined that preclearance under section 5 provided "a compelling governmental interest."

The three-judge panel next concluded that each of the twenty-six VRA districts was narrowly tailored to avoid section 2 liability and to ensure section 5 preclearance. *See Shaw I*, 509 U.S. at 645, 113 S. Ct. at 2831, 125 L. Ed. 2d at 534 (quoted by the panel and providing that in responding to the compelling interests in complying with sections 2 and 5, the General Assembly is not granted "*carte blanche* to engage in racial gerrymandering"). The panel recognized "that the 'narrow tailoring' requirement of strict scrutiny allows the States a limited degree of leeway in furthering such interests." *Vera*, 517 U.S. at 977, 116 S. Ct. at 1960, 135 L. Ed. 2d at 268.

First, the unanimous panel found that the enacted plans do not contain a greater number of VRA districts than are reasonably necessary to comply with the VRA because "the General Assembly had a strong basis in evidence for concluding that 'rough proportionality' was reasonably

9. The three-judge panel noted that the Supreme Court has required state legislatures to present a strong basis in the record of the three *Gingles* preconditions, but it has never imposed the "totality of the circumstances" requirement upon a state legislature. Nonetheless, in its thorough and exhaustive review of the record, the three-judge panel considered both requirements in its analysis.

necessary to protect the State from anticipated liability under § 2 of the VRA and ensuring preclearance under § 5 of the VRA." *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 438, 126 S. Ct. 2594, 2621, 165 L. Ed. 2d 609, 643-44 (2006) (*LULAC)*; *Shaw II*, 517 U.S. at 915-16, 116 S. Ct. at 1905-06, 135 L. Ed. 2d at 225-26; *Johnson v. De Grandy*, 512 U.S. 997, 1000, 114 S. Ct. 2647, 2651, 129 L. Ed. 2d 775, 784 (1994) ("[N]o violation of § 2 can be found . . . where, in spite of continuing discrimination and racial bloc voting, minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters' respective shares in the voting-age population.").

Second, the panel found that the General Assembly did not unnecessarily "pack" VRA districts with black voters when it endeavored to create all VRA districts with at least fifty percent TBVAP in order to avoid liability under section 2. *See Strickland*, 556 U.S. at 13, 129 S. Ct. at 1242, 173 L. Ed. 2d at 183 (plurality) (opinion of Kennedy, J.) (stating that compliance with section 2 allows creating majority-minority districts that contain "a numerical, working majority of the voting age population" of a specific minority group and that it does not mandate creating or preserving crossover districts). The three-judge panel explained that under *Strickland*, "the State must be afforded the leeway to avail itself of the 'bright line rule' and create majority-minority districts, rather than cross-over districts, in those areas where there is a sufficiently large and geographically compact minority population and racial polarization exist[s]." As a result, the three-judge panel found that, "notwithstanding the racial classification inherent in the creation of >50% TBVAP VRA districts, the Enacted Plans substantially address the threat of anticipated § 2 liability and challenges to preclearance under § 5 of the VRA."

Third, the three-judge panel heard evidence on the following issue:

> Assuming application of a strict scrutiny standard and, in considering whether the Enacted Plans were narrowly tailored, was each challenged VRA district drawn in a place where a remedy or potential remedy for racially polarized voting was reasonable for purposes of preclearance or protection of the State from vote dilution claims under the Constitution or under § 2 of the VRA?

Based on this evidence the panel made numerous detailed findings of fact, including one hundred eighty-eight findings on this issue set out in Appendix A of its judgment. The three-judge panel conducted an individualized analysis of each of the VRA districts, setting out how racially polarized voting was found in the locales. For example, the court noted

that a study conducted by Thomas Brunell, Ph.D., found "statistically significant racially polarized voting" in fifty out of fifty-one counties examined.[10] The three-judge panel then determined that "the General Assembly had a strong basis in evidence for concluding that [ ] each of the VRA districts in the Enacted Plans were placed in a location that was reasonably necessary to protect the State from anticipated liability under" sections 2 and 5 of the VRA.

Finally, the three-judge panel found that the VRA districts are sufficiently compact and regular in shape to meet the requirement that they be narrowly tailored. Quoting Justice Kennedy, the panel stated: " 'Districts not drawn for impermissible reasons or according to impermissible criteria may take any shape, even a bizarre one,' provided that the bizarre shapes are not 'attributable to race-based districting unjustified by a compelling interest.' " *Vera*, 517 U.S. at 999, 116 S. Ct. at 1972, 135 L. Ed. 2d at 284 (Kennedy, J., concurring). The three-judge panel further found that plaintiffs' retained expert testified that the shape of a district is irrelevant, as are traditional notions of communities of interest.

Ultimately, the three-judge panel concluded that plaintiffs failed to produce alternative plans that (1) contain VRA districts in rough proportion to the black population in North Carolina, (2) comply with the General Assembly's decision, as supported by *Strickland*, to populate each VRA district with more than fifty percent TBVAP, or (3) comply with the state constitution's Whole County Provision.

Accordingly, the three-judge panel concluded that

> based upon the law and the undisputed facts, and allowing for the limited degree of leeway that permits the General Assembly to exercise political discretion in its reasonable efforts to address compelling governmental interests, the trial court finds that the General Assembly had a strong basis in evidence for concluding that the VRA districts in the Enacted Plans, as drawn, were reasonably necessary to protect the State from anticipated liability under § 2 of the VRA and ensuring preclearance under § 5 of the VRA.

Because it found that the twenty-six VRA districts were narrowly tailored to achieve a compelling governmental interest, the three-judge

10. There was insufficient information for Dr. Brunell to determine whether racially polarized voting occurred in Camden County.

panel concluded that these districts survive strict scrutiny. Alternatively, the panel noted "that under a lesser standard of review, such as a rational relationship test, the creation of the VRA districts as drawn was supported by a number of rational bases."

Next, the three-judge panel considered the constitutionality of the four remaining challenged districts, which were non-VRA districts.[11] The panel explained that if these non-VRA districts were "unexplainable on grounds other than race" and "the legislature neglected all traditional redistricting criteria such as compactness, contiguity, respect for political subdivisions and incumbency protection," then strict scrutiny would apply. *See id.* at 976, 116 S. Ct. at 1959-60, 135 L. Ed. 2d at 268 (plurality). Otherwise, if the legislature was not motivated predominantly by race in drawing these four districts, the three-judge panel must apply rational basis review. The panel stated that whether race was the General Assembly's predominant motive is a factual question. *See Hunt v. Cromartie*, 526 U.S. 541, 549, 119 S. Ct. 1545, 1550, 143 L. Ed. 2d 731, 740 (1999) (*Cromartie I*) (citing *Shaw II*, 517 U.S. at 905, 116 S. Ct. at 1900, 135 L. Ed. 2d at 218-19). Thus, the three-judge panel held a trial to determine the following issue: "For six specific districts (Senate Districts 31 and 32, House Districts 51 and 54 and Congressional Districts 4 and 12 – none of which is identified as a VRA district), what was the predominant factor in the drawing of those districts?" Although Senate District 31 and House District 51 were not challenged by plaintiffs as racial gerrymanders, the three-judge panel heard evidence on these two districts as well because they are neighboring districts that are part of the same contiguous-county grouping required under the North Carolina Constitution's Whole County Provision. Therefore, these two unchallenged districts are necessarily intertwined with those that were challenged, making consideration of the motivation for the creation of each unchallenged district relevant to a determination of the motivation for the creation of the counterparts, the challenged districts.

As it did for the twenty-six VRA districts, based upon the evidence received, the three-judge panel made specific findings of fact as to each non-VRA district, including Senate District 31 and House District 51. After conducting a detailed, district-by-district analysis, the panel made numerous specific findings of fact on whether race was the General Assembly's predominant motive in drawing these districts.

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11. The non-VRA districts were Senate District 32, House District 54, and Congressional Districts 4 and 12.

The three-judge panel found, in addition to complying with federal and state law and applying nonracial traditional redistricting criteria, the General Assembly desired to create districts "more competitive for Republican candidates." The panel noted the "undisputed" fact "that in North Carolina, racial identification correlates highly with political affiliation." But, the goal to create State House and Senate Districts more competitive for Republicans could only be realized while following the requirements of the state constitution's Whole County Provision. Thus, while the three-judge panel recognized the General Assembly's desire "to equalize population among the districts," for state redistricting purposes, this finding must be viewed in the context of the Whole County Provision requirement.

Based upon its findings, the three-judge panel concluded that rational basis review was the appropriate level of scrutiny for each of the non-VRA districts and that "the General Assembly has articulated a reasonably conceivable state of facts, other than a racial motivation, that provides a rational basis for creating the non-VRA districts." Moreover, the three-judge panel determined that plaintiffs failed to proffer, as required by *Cromartie II*, "any alternative redistricting plans that show that the General Assembly could have met its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles." *See Cromartie II*, 532 U.S. at 258, 121 S. Ct. at 1466, 149 L. Ed. 2d at 453. Accordingly, the three-judge panel concluded that plaintiffs' racial gerrymandering claims failed.

The three-judge panel next addressed plaintiffs' claim that the Senate and House plans violated the Whole County Provision of the North Carolina Constitution. The panel concluded that the enacted plans conform to the Whole County Provision, as interpreted and applied by this Court in *Stephenson I* and *Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247 (2003) (*Stephenson II*), and that plaintiffs' alternative proposed plans failed to comport with the Whole County Provision.

Plaintiffs entered timely notice of appeal pursuant to N.C.G.S. § 120-2.5. On 19 December 2014, this Court affirmed the three-judge panel's decision, holding "that the General Assembly's enacted plans do not violate plaintiffs' constitutional rights." *Dickson*, 367 N.C. at 575, 766 S.E.2d at 260. Plaintiffs petitioned the Supreme Court for a writ of certiorari on 16 January 2015. On 25 March 2015, while plaintiffs' petition was pending, the Supreme Court issued its decision in *Alabama*, ___ U.S. ___, 135 S. Ct. 1257, 191 L. Ed. 2d 314. The Supreme Court subsequently vacated our decision and remanded the case to this Court for reconsideration in light of *Alabama*. *Dickson*, ___ U.S. ___, 135 S. Ct.

1843, 191 L. Ed. 2d 719. The parties filed briefs, and we heard oral arguments regarding the applicability of *Alabama* to this case.

[1] Our review of the three-judge panel's unanimous decision is limited. Though "[o]ur standard of review of an appeal from summary judgment is de novo," *In Re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008), unchallenged findings of fact are binding on appeal, *see, e.g.*, K*eeter v. Town of Lake Lure*, 264 N.C. 252, 257, 141 S.E.2d 634, 638 (1965). Likewise, regarding issues tried by the panel, its findings of fact are binding on this Court if not challenged at trial or on appeal, *see e.g.*, *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991), or if supported by competent evidence found by the three-judge panel, *e.g.*, *In re Estate of Trogdon*, 330 N.C. 143, 147-48, 409 S.E.2d 897, 900 (1991). Conclusions of law are reviewed de novo to determine if they are supported by the findings of fact. *E.g.*, *N.C. Farm Bureau Mut. Ins. Co. v. Cully's Motorcross Park, Inc.*, 366 N.C. 505, 512, 742 S.E.2d 781, 786 (2013). After a careful review of the *Alabama* decision and the record in this case, we conclude that the three-judge panel's Judgment and Memorandum of Decision complied with the standards articulated in *Alabama* as well as other pertinent federal and state laws.

II. Overview of *Alabama* and Its Impact Here

[2] Like the case before us, the *Alabama* case involved a challenge to the state legislature's redistricting plans following the 2010 decennial census. *Alabama*, ___ U.S. at ___, 135 S. Ct. at 1262-63, 191 L. Ed. 2d at 323-24. The Alabama Code requires the creation of a legislative committee known as the Permanent Legislative Committee on Reapportionment "to prepare for and develop a reapportionment plan for the state." Ala. Code 1975 § 29-2-50 to -51 (2015). Unlike North Carolina, where the General Assembly's priorities can only be implemented in accordance with the federal and state constitutional requirements as specified by this Court, the Alabama legislative committee adopted "guidelines for drawing the new district lines." *Ala. Legislative Black Caucus v. Alabama*, 989 F. Supp. 2d 1227, 1245 (2013), *vacated*, ___ U.S. ___, 135 S. Ct. 1257, 191 L. Ed. 2d 314. These guidelines provided that new districts should be drawn in a manner to achieve numerous traditional redistricting objectives, including compactness, not splitting counties or precincts, minimizing change, and protecting incumbents. *Alabama*, ___ U.S. at ___, 135 S. Ct. at 1263, 191 L. Ed. 2d at 324; *Legislative Black Caucus*, 989 F. Supp. 2d at 1245. The guidelines acknowledged, however, "that not all of the redistricting goals could be accomplished," *Legislative Black Caucus*, 989 F. Supp. 2d at 1245, and the guidelines placed the greatest emphasis on two of these goals: (1) minimizing the extent to which

any district deviated by more than one percent from the theoretical precisely equal population ideal; and (2) avoiding retrogression under section 5 of the VRA by maintaining roughly the same black population percentage in existing majority-minority districts, *Alabama*, ___ U.S. at ___, 135 S. Ct. at 1263, 191 L. Ed. 2d at 324. To achieve population equalization while avoiding retrogression, the legislature adjusted existing, underpopulated, majority-minority districts by adding massive numbers of minority voters. *Id.* at ___, 135 S. Ct. at 1263, 191 L. Ed. 2d at 324. For example, to maintain a 72.75% black population in Senate District 26, the legislature added 15,785 individuals, all but 36 of whom are black. *Id.* at ___, 135 S. Ct. at 1263, 191 L. Ed. 2d at 324.

The plaintiffs in *Alabama* claimed that the legislature's new districts created "racial gerrymanders" that violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at ___, 135 S. Ct. at 1262, 191 L. Ed. 2d at 323. A federal district court panel ruled in favor of the State. *Id.* at ___, 135 S. Ct. at 1262, 191 L. Ed. 2d at 323. In vacating that decision and remanding the case for further proceedings, the Supreme Court identified four problems with the district court's ruling. *Id.* at ___, 135 S. Ct. at 1264, 191 L. Ed. 2d at 325.

First, the Supreme Court in *Alabama* held that the district court erred by considering the state "as a whole," rather than conducting a "district-by-district" analysis of the racial gerrymandering claims. *Id.* at ___, 135 S. Ct. at 1265-68, 191 L. Ed. 2d at 326-30. This ruling does not affect our case because North Carolina's three-judge panel conducted the required individualized, district-by-district analysis.

Second, the Supreme Court held that the district court erred in ruling that one of the plaintiffs lacked standing without giving that plaintiff an opportunity to prove that it had standing. *Id.* at ___, 135 S. Ct. at 1268-70, 191 L. Ed. 2d at 330-31. This is a fact-specific issue that has no relevance to or effect on our case.

Third, as previously noted, the *Alabama* legislative committee placed great emphasis on ensuring that no district deviated by more than one percent from the theoretical equal population ideal. The Supreme Court held that the district court improperly concluded that "[r]ace was not the predominant motivating factor" in the creation of any of the challenged districts because the court "placed in the balance, among other nonracial factors, legislative efforts to create districts of approximately equal population." *Id.* at ___, 135 S. Ct. at 1270, 191 L. Ed. 2d at 331. The Supreme Court observed that equal population goals might explain the number of persons placed in a district, but they do not address "*which*

persons were placed in *appropriately apportioned districts*." *Id.* at ___, 135 S. Ct. at 1271, 191 L. Ed. 2d at 332. As a result, an equal population goal is not a factor "to be weighed against the use of race to determine whether race 'predominates' "; rather, equal population "is part of the redistricting background" that should be "taken as a given, when determining whether race, or other factors, predominate" in the creation of new districts. *Id.* at ___, 135 S. Ct. at 1270, 191 L. Ed. 2d at 332. The Supreme Court concluded that "had the District Court treated equal population goals as background factors, it might have concluded that race was the predominant boundary-drawing consideration," *id.* at ___, 135 S. Ct. at 1272, 191 L. Ed. 2d at 333, given that the record contained "strong, perhaps overwhelming, evidence that race did predominate as a factor," *id.* at ___, 135 S. Ct. at 1272, 191 L. Ed. 2d at 333.

This portion of the *Alabama* decision supports our holding here. The legislative committee in Alabama adopted guidelines that included compliance with the federal one-person, one-vote standard. In contrast, North Carolina's constitutional equal population criteria are a component of and intertwined with the state constitution's Whole County Provision, as explained above. *See* N.C. Const. art. II, §§ 3(1), 5(1); *Stephenson I*, 355 N.C. at 383, 562 S.E.2d at 397 (providing, for example, that for non-VRA counties that "cannot support at least one legislative district," or counties "having a non-VRA population pool which, if divided into [legislative] districts, would not comply with" one-person, one-vote requirements, the General Assembly should "combin[e] or group[ ] the minimum number of whole, contiguous counties necessary to comply with the at or within plus or minus five percent 'one-person, one-vote' standard," and that "[w]ithin any such contiguous multi-county grouping, compact districts shall be formed, consistent with the [one-person, one-vote] standard, whose boundary lines do not cross or traverse the 'exterior' line of the multi-county grouping"). Unlike the situation in *Alabama*, the General Assembly here did not place special emphasis on compliance with federal one-person, one-vote standards; rather, equal population was a "background" criterion that entered into formulating the challenged congressional and state legislative districts in conjunction with meeting the Whole County Provision of the state constitution. Nevertheless, to ensure compliance with *Alabama*, we have carefully reviewed the record, the transcripts, and the three-judge panel's findings to ensure that federal population equalization is treated as a "background rule" in conducting the predominance test. *Alabama*, ___ U.S. at ___, 135 S. Ct. at 1271, 191 L. Ed. 2d at 332-33. The three-judge panel's finding that race was a predominant factor in forming the VRA districts

is unaffected. In its predominance analysis of the non-VRA districts, the three-judge panel properly weighed the relevant facts and made its findings, and the findings support its conclusion that race was not the predominant factor in drawing these districts.

Last, in *Alabama* the Supreme Court held that the district court misinterpreted the requirements of section 5 of the VRA in finding that the challenged districts were "narrowly tailored" to satisfy strict scrutiny.[12] *Id.* at ___, 135 S. Ct. at 1272-74, 191 L. Ed. 2d at 334-36. The Court instructed that section 5 "does not require a covered jurisdiction to maintain a particular numerical minority percentage" in order to avoid retrogression. *Id.* at ___, 135 S. Ct. at 1272, 191 L. Ed. 2d at 334 (pointing to evidence in the record reflecting Alabama's belief that section 5 "forbids, not just *substantial* reductions, but *any* reduction in the percentage of black inhabitants of a majority-minority district" (quoting *id.* at ___, 135 S. Ct. at 1289, 191 L. Ed. 2d at 337 (App. B))). Instead, "[section] 5 is satisfied if minority voters retain the ability to elect their preferred candidates." *Id.* at ___, 135 S. Ct. at 1273, 191 L. Ed. 2d at 334. As an example, the Court explained that "Congress did not mandate that a 1% reduction in a 70% black population district would be necessarily retrogressive." *Id.* at ___, 135 S. Ct. at 1273, 191 L. Ed. 2d at 335. The Court concluded that, in "rel[ying] heavily upon a mechanically numerical view as to what counts as forbidden retrogression," *id.* at ___, 135 S. Ct. at 1273, 191 L. Ed. 2d at 335, the district court failed to ask the right question with respect to narrow tailoring: "To what extent must [the legislature] preserve existing minority percentages in order to maintain the minority's present ability to elect the candidate of its choice?" *Id.* at ___, 135 S. Ct. at 1274, 191 L. Ed. 2d at 336.

The three-judge panel's conclusion here that the twenty-six challenged VRA districts survive strict scrutiny is consistent with the Supreme Court's clarification of the section 5 narrow tailoring analysis. Our conclusion that the VRA districts are constitutional is not dependent on a section 5 analysis. Each of the challenged VRA districts subject to strict scrutiny was created because the State had a compelling interest in compliance with section 2, and each was narrowly tailored to accomplish that goal; therefore, each of the VRA districts is constitutional on

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12. Because the Court expressly declined to "decide whether, given *Shelby County v. Holder* . . . , continued compliance with § 5 remains a compelling interest," *Alabama*, ___ U.S. at ___, 135 S. Ct. at 1274, 191 L. Ed. 2d at 336, it appears this portion of the *Alabama* decision impacts only the narrow tailoring prong of the strict scrutiny analysis.

the basis of a section 2 analysis alone. Regardless, as explained below, the Supreme Court and this Court have stated that the legislature's requirement that each of the challenged districts consist of a TBVAP exceeding fifty percent of the total voting age population in that district is permissible. *See Strickland*, 556 U.S. at 23, 129 S. Ct. at 1248, 173 L. Ed. 2d at 190. The TBVAP was not greater than necessary to avoid retrogression, while also avoiding liability under section 2, even considering the Supreme Court's warning against a "mechanical interpretation" of section 5. Therefore, the challenged VRA districts survive strict scrutiny under either a section 2 or section 5 analysis.

Significantly, the United States Supreme Court in *Alabama* did not modify its prior holding in *Strickland*, where it made clear that a state legislature may create majority-minority VRA districts with a fifty percent plus one TBVAP. *Id.* at 23, 129 S. Ct. at 1248, 173 L. Ed. 2d at 190. In the case *sub judice* plaintiffs persistently argue that the General Assembly must create crossover or coalition districts and that the General Assembly violated section 2 by drawing districts with a fifty percent plus one TBVAP. Essentially, plaintiffs argue that the Supreme Court wrongly decided *Strickland*, in which Justice Kennedy stated for the plurality that "[section] 2 does not require the creation of influence districts." *Id.* at 13, 129 S. Ct. at 1242, 173 L. Ed. 2d at 183 (citing *LULAC*, 548 U.S. at 445, 126 S. Ct. at 2625, 165 L. Ed. 2d at 648 (opinion of Kennedy, J.)). In fact, none of the alternative plans proposed by plaintiffs or supported by them complied with *Strickland*. Accordingly, plaintiffs' arguments implicitly premised upon revisiting the Supreme Court's decision in *Strickland* are without merit.

III. Plaintiffs' Federal Claims

[3] We now consider plaintiffs' claims brought under federal law. If a redistricting plan does not satisfy federal requirements, it fails even if it is consistent with the law of North Carolina. *See* U.S. Const. art. VI, § 2; N.C. Const. art. I, § 3. Nonetheless, as emphasized by *Stephenson I*, in making redistricting decisions, federal and state law must be read in harmony. 355 N.C. at 363, 562 S.E.2d at 384. Plaintiffs argued first to the three-judge panel, and now to us, that the redistricting plans violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States because they impermissibly classify individuals based upon their race. In other words, plaintiffs contend that the redistricting plans constitute impermissible racial gerrymandering that has denied them equal protection under the law.

A. Levels of Scrutiny

A court considering allegations of racial gerrymandering first must determine the appropriate level of scrutiny. Strict scrutiny, the highest tier of review, applies "when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." *White v. Pate*, 308 N.C. 759, 766, 304 S.E.2d 199, 204 (1983) (citations omitted). "Race is unquestionably a 'suspect class,' " *Phelps v. Phelps*, 337 N.C. 344, 353, 446 S.E.2d 17, 23 (1994), and if a court finds that race is the "predominant, overriding factor" behind the General Assembly's plans, the plans must satisfy strict scrutiny to survive, *Miller*, 515 U.S. at 920, 115 S. Ct. at 2490, 132 L. Ed. 2d at 782. "Under strict scrutiny [review], a challenged governmental action is unconstitutional if the State cannot establish that it is narrowly tailored to advance a compelling governmental interest." *Stephenson I*, 355 N.C. at 377, 562 S.E.2d at 393 (citation omitted). If, on the other hand, the plans are not predominantly motivated by improper racial considerations, the court applies the rational basis test. *See Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S. Ct. 2326, 2331, 120 L. Ed. 2d 1, 12 (1992) ("[U]nless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification" satisfy rational basis review.). Under rational basis review, "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440, 105 S. Ct. 3249, 3254, 87 L. Ed. 2d 313, 320 (1985) (citations omitted).

A party challenging a redistricting plan has the burden of establishing that race was the predominant motive behind the state legislature's action. *Miller*, 515 U.S. at 916, 115 S. Ct. at 2488, 132 L. Ed. 2d at 779-80. In *Miller* the Supreme Court stated that

> [t]he plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined

> by actual shared interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a State can "defeat a claim that a district has been gerrymandered on racial lines."

Id. at 916, 115 S. Ct. at 2488, 132 L. Ed. 2d at 779-80 (quoting *Shaw I*, 509 U.S. at 647, 113 S. Ct. at 2827, 125 L. Ed. 2d at 529). In *Alabama* the Court clarified that federal "equal population" requirements cannot serve as a "traditional race-neutral districting principle[ ]" in the predominant motive analysis. *Alabama*, ___ U.S. at ___, 135 S. Ct. at 1270-71, 191 L. Ed. 2d at 332-33.

As a court considers which level of scrutiny is appropriate, it should be mindful of the Supreme Court's observation that "courts must 'exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race.' " *Cromartie II*, 532 U.S. at 242, 121 S. Ct. at 1458, 149 L. Ed. 2d at 443 (quoting *Miller*, 515 U.S. at 916, 115 S. Ct. at 2488, 132 L. Ed. 2d at 779). At least three factors lie behind this admonition. First, in light of the interplay detailed below between the Fourteenth Amendment, which virtually forbids consideration of race, and the VRA, which requires consideration of race, the Supreme Court has acknowledged that the existence of legislative consciousness of race while redistricting does not automatically render redistricting plans unconstitutional. *Miller*, 515 U.S. at 916, 115 S. Ct. at 2488, 132 L. Ed. 2d at 779-80 ("Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process."); *see also Shaw I*, 509 U.S. at 646, 113 S. Ct. at 2826, 125 L. Ed. 2d at 528 ("[T]he legislature always is *aware* of race when it draws district lines . . . . That sort of race consciousness does not lead inevitably to impermissible race discrimination."). Second, the Supreme Court has recognized the importance of the states' own traditional districting principles, holding that states can adhere to them without being subject to strict scrutiny so long as those principles are not subordinated to race. *Vera*, 517 U.S. at 978, 116 S. Ct. at 1961, 135 L. Ed. 2d at 269. Finally, the Supreme Court has accepted that some degree of deference is due in light of the difficulties facing state legislatures when reconciling conflicting legal responsibilities. *Miller*, 515 U.S. at 915, 115 S. Ct. at 2488, 132 L. Ed. 2d at 779 ("Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests."); *Vera*, 517 U.S. at 1038, 116 S. Ct. at 1991, 135 L. Ed. 2d at 308 (Stevens, Ginsburg & Breyer,

JJ., dissenting) ("[I]n fashioning a reapportionment plan or in choosing among plans, a district court should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary." (quoting *White v. Weiser*, 412 U.S. 783, 795, 93 S. Ct. 2348, 2355, 37 L. Ed. 2d 335, 346 (1973)); *see also Page v. Va. State Bd. of Elections*, 58 F. Supp. 3d 533, 542 (E.D. Va. 2014) (recognizing that redistricting is "possibly 'the most difficult task a legislative body ever undertakes' " (quoting *Smith v. Beasley*, 946 F. Supp. 1174, 1207 (D.S.C. 1996))), *vacated and remanded*, *Cantor v. Personhuballah*, ___ U.S. ___, 135 S. Ct. 1699, 191 L. Ed. 2d 671 (2015) (mem.) (remanded for further consideration in light of *Alabama*, ___ U.S. ___, 135 S. Ct. 1257, 191 L. Ed. 2d 314 (2015)).

A court's determination of the predominant motive underlying a redistricting plan is factual in nature. *Cromartie I*, 526 U.S. at 549, 119 S. Ct. at 1550, 143 L. Ed. 2d at 740 (citations omitted). Factual findings are binding on appeal if not challenged at trial or on appeal, *e.g.*, *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731, or if supported by competent evidence found by the three-judge panel, *e.g.*, *In re Estate of Trogdon*, 330 N.C. at 147-48, 409 S.E.2d at 900. Conclusions of law are reviewed de novo. *E.g.*, *Cully's Motorcross Park*, 366 N.C. at 512, 742 S.E.2d at 786 (citation omitted). Here, before the three-judge panel, plaintiffs challenged thirty House, Senate, and Congressional Districts.[13] The three-judge panel concluded that the twenty-six VRA districts were predominantly motivated by race and thus subject to strict scrutiny review. The three-judge panel concluded that the remaining four challenged non-VRA districts were not predominantly motivated by race and thus were subject to rational basis review. We consider each group in turn.

B. The VRA Districts

We turn first to the twenty-six state legislative VRA districts that the three-judge panel subjected to strict scrutiny. As to these districts, the panel reached two significant conclusions. First, the panel unanimously found that "it is undisputed that the General Assembly intended to create 26 of the challenged districts to be 'Voting Rights Act districts' " that would include a TBVAP of at least fifty percent. This unchallenged finding of fact is binding on us. *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731. The three-judge panel then reached a second conclusion that drawing VRA districts "necessarily requires the drafters of districts to classify residents by race," that "the shape, location and racial composition of

13. It is unclear if plaintiffs continue to challenge all thirty districts. In their brief filed subsequent to the *Alabama* remand, plaintiffs only specifically question two of the non-VRA districts. Nonetheless, we proceed with our analysis as if all thirty districts are challenged.

each VRA district was predominantly determined by a racial objective," and that the process of creating such districts resulted in "a racial classification sufficient to trigger the application of strict scrutiny as a matter of law." While the three-judge panel recognized that a "persuasive argument" could be made that other non-racial factors could have predominated, it chose to apply strict scrutiny because (1) strict scrutiny provides a "convenient and systematic roadmap for judicial review," and (2) if the plans withstand strict scrutiny, when the evidence is considered in a light most favorable to plaintiffs, then they would necessarily withstand a lesser level of scrutiny, such as rational basis review. Although the three-judge panel's determination that race predominated is neither purely factual nor purely legal, we are mindful that federal precedent cited above instructs that the General Assembly's consideration of race to the degree necessary to comply with section 2 does not rise to the level of a "predominant motive" as a matter of course. Accordingly, before reviewing the three-judge panel's application of strict scrutiny, we believe it necessary to review its conclusion as to the General Assembly's predominant motive.

1. Predominant Motive

The challenges faced by the General Assembly while redistricting are easy to express but persistently difficult to resolve. The Fourteenth Amendment, by guaranteeing equal protection for all citizens regardless of race, essentially prohibits consideration of race during redistricting. U.S. Const. amend. XIV, § 1. Yet the Voting Rights Act, passed "to help effectuate the Fifteenth Amendment's guarantee that no citizen's right to vote shall 'be denied or abridged . . . on account of race, color, or previous condition of servitude,' " *Voinovich v. Quilter*, 507 U.S. 146, 152, 113 S. Ct. 1149, 1154-55, 122 L. Ed. 2d 500, 510 (1993) (alteration in original) (citations omitted), specifically requires consideration of race. For instance, section 2 "prohibits the imposition of any electoral practice or procedure that 'results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color.' " *Id.* at 152, 113 S. Ct. at 1155, 122 L. Ed. 2d at 510 (alteration in original) (quoting 42 U.S.C. § 1973(a) (effective 1 September 2014, recodified as 52 U.S.C.S. § 10301(a) (LexisNexis 2014))). At the same time, the General Assembly must ensure that, to the greatest extent allowed under federal law, the state legislature's redistricting plans comply with the Whole County Provision of the North Carolina Constitution, including the "background rule" of plus or minus five percent as required by our constitution. *Stephenson I*, 355 N.C. at 382-84, 562 S.E.2d at 395-97. Moreover, the Supreme Court has acknowledged other legitimate considerations, such as compactness,

contiguity, and respect for political subdivisions, *see Miller*, 515 U.S. at 916, 115 S. Ct. at 2488, 132 L. Ed. 2d at 780; *Shaw I*, 509 U.S. at 646, 113 S. Ct. at 2826, 125 L. Ed. 2d at 528; *Reynolds v. Sims*, 377 U.S. 533, 578, 84 S. Ct. 1362, 1390, 12 L. Ed. 2d 506, 537 (1964); political advantage, *see Cromartie I*, 526 U.S. at 551, 119 S. Ct. at 1551, 143 L. Ed. 2d at 741; and accommodation of incumbents, *see Karcher v. Daggett*, 462 U.S. 725, 740, 103 S. Ct. 2653, 2663, 77 L. Ed. 2d 133, 147 (1983). Thus, "[t]he courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus." *Miller*, 515 U.S. at 915-16, 115 S. Ct. at 2488, 132 L. Ed. 2d at 779.

Despite this cat's cradle of factors facing the General Assembly, the three-judge panel found that no factual inquiry was required regarding the General Assembly's predominant motivation in forming the twenty-six VRA districts beyond the General Assembly's concession that the districts were drafted to be VRA-compliant. In light of the many other considerations potentially in play, we do not believe that this concession established that race *ipso facto* was the predominant motive driving the General Assembly. The three-judge panel assumed that because federal law requires racial considerations, race then predominates. Yet, it appears from the three-judge panel's findings that the General Assembly was concerned with compliance with federal law more than addressing race per se. In other words, race was only a factor insomuch as required by federal law. Because of the three-judge panel's truncated findings of fact on this issue, we do not know which additional factors may have influenced the creation and shape of these twenty-six districts and the extent of any such influence. As a result, we do not know whether race fairly can be described as the predominant factor in the formation of these districts and whether, in turn, strict scrutiny was the appropriate level of scrutiny. Moreover, in future cases such an assumption—that deliberate creation of VRA-compliant districts equates to race as the predominant motive in creating the districts—may well shortcut the fact-finding process at which trial courts excel, resulting in scanty records on appeal. Accordingly, we hold that the three-judge panel erred in concluding as a matter of law that, just because the twenty-six districts were created to be VRA-compliant, the General Assembly was motivated predominantly by race.

Nonetheless, this error is not fatal and does not invalidate the three-judge panel's decision. First, the panel itself concluded that, "[t]o the extent that the most exacting level of review, strict scrutiny, is not warranted . . . [,] under a lesser standard of review, such as a

rational relationship test, the creation of the VRA districts as drawn was supported by a number of rational bases." Further, a similar scenario occurred in *Cromartie I*, in which the courts reviewed the General Assembly's creation of North Carolina's Twelfth Congressional District. 526 U.S. at 543, 119 S. Ct. at 1547, 143 L. Ed. 2d at 736. The plaintiffs filed suit in federal court, arguing that the district was the result of an unconstitutional racial gerrymander. *Id.* at 544-45, 119 S. Ct. at 1548, 143 L. Ed. 2d at 737. The three-judge panel of the United States District Court heard arguments pertaining to pending motions, but did not conduct an evidentiary hearing. *Id.* at 545, 119 S. Ct. at 1548, 143 L. Ed. 2d at 737. The panel majority, finding that the General Assembly used race-driven criteria in drawing the district and that doing so violated the Equal Protection Clause of the Fourteenth Amendment, granted the plaintiffs' motion for summary judgment and entered an injunction. *Id.* at 545, 119 S. Ct. at 1548, 143 L. Ed. 2d at 737. On appeal, the Supreme Court reversed, finding that the General Assembly's motivation in drawing district lines is a factual question that, when contested, should not be resolved by summary judgment. *Id.* at 549, 553, 119 S. Ct. at 1550, 1552, 143 L. Ed. 2d at 739, 742.

The posture of the litigants here is distinguishable because plaintiffs, unlike their counterparts in *Cromartie I*, lost at summary judgment and are the appealing party; however, even if we were to follow *Cromartie I*'s lead and reverse, plaintiffs could gain nothing on remand. The basis for our reversal would be that the three-judge panel erred in applying strict scrutiny before making adequate findings of fact. As the panel noted in its Judgment, if defendants' plans survived strict scrutiny, they would surely survive a less rigorous review. On the other hand, if the three-judge panel on remand found facts and determined once more that strict scrutiny is proper, the panel has already conducted its analysis under that standard. If these plans survive strict scrutiny, they survive rational basis review.

2. Compelling Governmental Interest

We begin this analysis by considering the factors that defendants contend constitute a "compelling governmental interest." *See Stephenson I*, 355 N.C. at 377, 562 S.E.2d at 393 (citation omitted). Defendants argue that the General Assembly drafted the twenty-six districts both to avoid liability under section 2 of the VRA and to obtain preclearance under section 5 of the VRA by avoiding retrogression, which has been defined as "a change in voting procedures which would place the members of a racial or language minority group in a less favorable position than they had occupied before the change with respect to the

opportunity to vote effectively." *Id.* at 363-64, 562 S.E.2d at 385 (citations omitted). Defendants' brief acknowledges that three principles guided the General Assembly: (1) Compliance with the Whole County Provision of the Constitution of North Carolina, as set out in *Stephenson I* and *Stephenson II*; (2) Where possible, establishment of VRA districts having a TBVAP above fifty percent, in accord with *Pender County*; and (3) Exploration of "the possibility of establishing a sufficient number of VRA legislative districts to provide [black] voters with rough proportionality in the number of VRA districts in which they have a reasonable opportunity to elect their candidates of choice."

Although the Supreme Court has never held outright that compliance with section 2 or section 5 can be a compelling state interest, that Court has issued opinions that expressly assumed as much. To be specific, the Supreme Court in *Shaw II* assumed *arguendo* that compliance with section 2 could be a compelling state interest, 517 U.S. at 915, 116 S. Ct. at 1905, 135 L. Ed. 2d at 225, and adopted a similar approach in *Miller*, where the issue was the State's desire to comply with section 5 of the Voting Rights Act, 515 U.S. at 921, 115 S. Ct. at 2490-91, 132 L. Ed. 2d at 783. In addition, the Supreme Court has observed that "deference is due to [States'] reasonable fears of, and to their reasonable efforts to avoid, § 2 liability." *Vera*, 517 U.S. at 978, 116 S. Ct. at 1961, 135 L. Ed. 2d at 269. The three-judge panel here, citing several federal cases addressing the issue, stated that "[i]n general, compliance with the Voting Rights Act can be a compelling governmental interest." Faced squarely with the issue, we agree with the three-judge panel. The Equal Protection Clause of the Fourteenth Amendment requires equal treatment regardless of race, while the Voting Rights Act requires consideration of race. Because a federal statute may not violate the Constitution of the United States, a State's efforts to comply with the Voting Rights Act create tension with the Fourteenth Amendment. An alleged violation of the Fourteenth Amendment based on race triggers strict scrutiny, mandating that the State demonstrate a compelling interest. Because the Supreme Court and the United States Congress have indicated without ambiguity that they expect states to comply with the Voting Rights Act, state laws passed for the purpose of complying with the Act must be capable of surviving strict scrutiny, indicating that such compliance is a compelling state interest.[14] This analysis applies equally to a State's efforts to comply with sections 2 and 5 of the Voting Rights Act.

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14. "If compliance with § 5 were not a compelling state interest, then a State could be placed in the impossible position of having to choose between compliance with § 5 and compliance with the Equal Protection Clause." *LULAC*, 548 U.S. at 518, 126 S. Ct. at 2667, 165 L. Ed. 2d at 694 (Scalia, J., Thomas, J., Roberts, C.J. & Alito, J., dissenting in part).

Moreover, the General Assembly's desire to comply with the Voting Rights Act is justifiable for other reasons. Holding elections is a core State function, fundamental in a democracy. Establishing voting districts is an essential component of holding elections. In doing so, a State is subject to federal mandates in addition to those found in the Voting Rights Act and the Fourteenth Amendment, such as the "one-person, one-vote" requirement. *Stephenson I*, 355 N.C. at 363-64, 383, 562 S.E.2d at 384-85, 397. A determination that the State does not have a compelling interest in complying with federal mandates would invite litigation by those claiming that the State could never satisfy the requirements of strict scrutiny, undermining the General Assembly's efforts to create stable districts between censuses and citizen expectations that existing election districts are valid. On a level no less practical, we also assume that North Carolina, and all states for that matter, would prefer to avoid the expense and delay resulting from litigation. Accordingly, we hold that compliance with sections 2 and 5 of the Voting Rights Act may be a compelling state interest.

We next consider whether compliance with either section 2 or section 5 constitutes a compelling state interest under the facts presented here. Those goals may reach the level of a compelling state interest if two conditions are satisfied. First, the General Assembly must have identified past or present discrimination with some specificity before it could turn to race-conscious relief. *Shaw II*, 517 U.S. at 909, 116 S. Ct. at 1902, 135 L. Ed. 2d at 221 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 504, 109 S. Ct. 706, 727, 102 L. Ed. 2d 854, 889 (1989)). Second, before acting, the General Assembly must also have "had 'a strong basis in evidence' " on which to premise a conclusion that the race-based remedial action was necessary. *Id.* at 910, 116 S. Ct. at 1903, 135 L. Ed. 2d at 222 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277, 106 S. Ct. 1842, 1849, 90 L. Ed. 2d 260, 271 (1986) (plurality)).

a. Compelling Interest Under Section 2 of the Voting Rights Act

Before we turn our attention to consideration of individual districts, we consider the application of section 2 of the VRA in the instant case. "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47, 106 S. Ct. at 2764, 92 L. Ed. 2d at 44; *see* 52 U.S.C.S. §§ 10301-10702 (LexisNexis 2014). The question of voting discrimination *vel non*, including vote dilution, is determined by the totality of the circumstances. *Gingles*, 478 U.S. at 43-46, 106 S. Ct. at 2762-64, 92 L. Ed. 2d at 42-44 (discussing section

2(b) of the VRA, now codified at 52 U.S.C.S. § 10301(b)). Under *Gingles*, however, a reviewing court does not reach the totality of circumstances test unless the challenging party is able to establish three preconditions. *Id.* at 50-51, 106 S. Ct. at 2766-67, 92 L. Ed. 2d at 46-47. First, a "minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.* at 50, 106 S. Ct. at 2766, 92 L. Ed. 2d at 46. Second, the minority group must "show that it is politically cohesive." *Id.* at 51, 106 S. Ct. at 2766, 92 L. Ed. 2d at 47. Finally, the minority group must "be able to demonstrate that the majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Id.* at 51, 106 S. Ct. at 2766-67, 92 L. Ed. 2d at 47. Although *Gingles* dealt with multi-member districts, the same preconditions must be met when a claim of vote dilution is made regarding a single-member district. *Growe v. Emison*, 507 U.S. 25, 40-41, 113 S. Ct. 1075, 1084, 122 L. Ed. 2d 388, 403-04 (1993); *see also De Grandy*, 512 U.S. at 1006-07, 114 S. Ct. at 2654-55, 129 L. Ed. 2d at 788.

Unlike cases such as *Gingles*, in which minority groups use section 2 as a sword to challenge districting legislation, here we are considering the General Assembly's use of section 2 as a shield. Defendants argue that, because the *Gingles* test considers race, the State has a compelling interest in preemptively factoring race into its redistricting process to ensure that its plans would survive a legal challenge brought under section 2. To establish that this state interest is legitimate, defendants must show a strong basis in evidence that the possibility of a section 2 violation existed at the time of the redistricting. *See Shaw II*, 517 U.S. at 910, 916, 116 S. Ct. at 1903, 1905-06, 135 L. Ed. 2d at 222, 225-26. But because this inquiry addresses only the possibility of a section 2 violation, and because a totality of the circumstances inquiry is by its nature fact-specific, defendants' evidence need only address "the three *Gingles* preconditions" to establish a compelling governmental interest. *See Vera*, 517 U.S. at 978, 116 S. Ct. at 1961, 135 L. Ed. 2d at 269 (citing *Growe*, 507 U.S. at 40, 113 S. Ct. at 1084, 122 L. Ed. 2d at 403-04).

Thus, to establish a compelling interest in complying with section 2 when the redistricting plans were developed, the legislature at that time must have had a strong basis in evidence that the TBVAP in a geographically compact area was fifty percent plus one of the area's voting population. Such evidence would satisfy the first *Gingles* precondition. *Pender County*, 361 N.C. at 503, 649 S.E.2d at 372. In addition, a strong basis in evidence of racially polarized voting in that same geographical area would satisfy the second and third preconditions set out in *Gingles*. *LULAC*, 548 U.S. at 427, 126 S. Ct. at 2615, 165 L. Ed. 2d at 637 (majority).

Against this background, we consider the three-judge panel's application of these standards in discerning whether defendants here could legitimately claim a compelling interest in complying with section 2.

The three-judge panel's decision included two extensive appendices. In the body of the Judgment and Memorandum, the panel described the legislative record that existed when the plans were enacted, then referred to Appendix A, where this information was presented in detail. Appendix A, titled "Findings of Fact Relevant to the Issue of Racial Polarization in Specific Locations where Voting Rights Act Districts were Placed in the Enacted Plans," is incorporated by reference into the three-judge panel's decision.

Appendix A is broken into three parts. Part I, titled "General Findings of Fact," opens with a summary of the background of the case, then notes results of recent elections. For instance, the three-judge panel observed that all black incumbents elected to the North Carolina General Assembly or the United States Congress in 2010 were elected in districts that were either majority black or majority-minority coalition districts. In addition, no black candidate elected in 2010 was elected from a majority white crossover district, and two black incumbent state senators running in majority white districts were defeated in that election. No black candidate for the United States Congress was elected in a majority white district between 1992 and 2010, while from 2004 through 2010, no black candidate was elected to office in a statewide partisan election.

In this Part I of Appendix A, the court also considered an academic study of racially polarized voting conducted by Ray Block, Jr., Ph.D. This study, prepared for the Southern Coalition of Social Justice, is titled "Racially Polarized Voting in 2006, 2008, and 2010 in North Carolina State Legislative Contests." Dr. Block employed Justice Brennan's conclusion in *Gingles* that racially polarized voting occurs when there is a consistent relationship between the race of the voter and the way in which that person votes, and found that such a relationship existed in the areas examined. He added that he also found evidence that "majority-minority districts facilitate the election of [black] candidates." The court determined that Dr. Block's study provided "substantial evidence regarding the presence of racially polarized voting in almost all of the counties[[15]] in which the General Assembly enacted the 2011 VRA districts."

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15. These counties were Beaufort, Bertie, Chowan, Craven, Cumberland, Durham, Edgecombe, Gates, Guilford, Granville, Greene, Halifax, Hertford, Hoke, Jones, Lenoir, Martin, Mecklenburg, Nash, Northampton, Pasquotank, Perquimans, Pitt, Robeson, Sampson, Scotland, Vance, Wake, Warren, Washington, Wayne, and Wilson.

Nevertheless, the three-judge panel observed that the North Carolina General Assembly identified a few limitations in Dr. Block's study. For instance, the study did not pinpoint the percentage of white voters in majority black or majority-minority districts who voted for the candidate of choice of black voters. In addition, his study could analyze a legislative election only when the black candidate had opposition. As a result, the General Assembly commissioned Dr. Brunell to prepare a supplementary report. Dr. Brunell's study, titled "Report on Racially Polarized Voting in North Carolina," examined the forty North Carolina counties covered by section 5 of the Voting Rights Act, plus Columbus, Duplin, Durham, Forsyth, Jones, Mecklenburg, Richmond, Sampson, Tyrrell, Wake, and Warren Counties. Dr. Brunell found "statistically significant racially polarized voting" in fifty of these fifty-one counties.[16]

The three-judge panel made additional findings of fact in Part I of Appendix A that we believe would be pertinent to a *Gingles* totality of circumstances test and that, by extension, indicate a strong basis in evidence that the *Gingles* preconditions existed. At the beginning of the redistricting process, the General Assembly noted that North Carolina had been ordered to create majority black districts as a remedy for section 2 violations in Bertie, Chowan, Edgecombe, Forsyth, Gates, Halifax, Martin, Mecklenburg, Nash, Northampton, Wake, Washington, and Wilson Counties. *See Gingles v. Edmisten*, 590 F. Supp. 345, 365-66, 376 (E.D.N.C. 1984), *aff'd in part, rev'd in part sub nom. Thornburg v. Gingles*, 478 U.S. at 80, 106 S. Ct. at 2782, 92 L. Ed. 2d at 65. Faculty at the North Carolina School of Government advised the chairs of the General Assembly's redistricting committees that North Carolina is still bound by the holding in *Gingles*. In addition, the United States District Court noted on remand from the decision in *Cromartie I* that the parties there had stipulated that legally significant racially polarized voting was present in North Carolina's First Congressional District. *Cromartie v. Hunt*, 133 F. Supp. 2d at 422-23. The three-judge panel found that consideration of race in the construction of the First District was reasonably necessary to protect the State from liability under the Voting Rights Act. *Id.* at 423. This finding by the three-judge panel was not appealed and thus is not affected by the holding in *Cromartie II* and remains valid.

In addition, the three-judge panel found as fact that the documents submitted by plaintiffs included a law review article prepared by an attorney for the North Carolina NAACP. Anita S. Earls et al., *Voting Rights in North Carolina 1982-2006*, 17 S. Cal. Rev. L. & Soc. Just. 577 (2008).

16. There was insufficient information for Dr. Brunell to determine whether racially polarized voting occurred in Camden County.

The court observed that this article "also provided evidence of racially polarized voting as alleged or established in voting rights lawsuits filed in many of the counties[17] in which 2011 VRA districts were enacted." The court added as a finding of fact that no witness testified that racial polarization had disappeared either statewide or in those areas in which the General Assembly previously had created VRA districts.

In Part II of Appendix A, the three-judge panel conducted an individualized analysis of each of the VRA districts created by the General Assembly in 2011. Generally, each finding of fact relates to one district. While four of the findings of fact deal with more than one district, in each such instance those districts are situated within the same county. Each finding of fact in this Part II follows a similar pattern. The finding of fact begins with data that explain how the information in Part I of the Appendix applies to the district under examination. The finding of fact lists the counties included in the district, along with that district's TBVAP. This information is pertinent to the first *Gingles* precondition, that the minority group is able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. *See Pender County*, 361 N.C. at 503, 649 S.E.2d at 372 (discussing *Gingles*, 478 U.S. at 50, 106 S. Ct. at 2766, 92 L. Ed. 2d at 46). Subsequent sections of each finding of fact set out how racially polarized voting was found in many of the counties contained within the district or districts, under either Dr. Block's analysis or Dr. Brunell's analysis, or both. This information is pertinent to both the second and third *Gingles* preconditions: that the minority group is politically cohesive and that the majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate. *LULAC*, 548 U.S. at 427, 126 S. Ct. at 2615, 165 L. Ed. 2d at 637. Additional information in the findings of fact conveys how many counties within the district or districts are affected by *Gingles* or *Cromartie II*, or both. This information is useful in determining the totality of circumstances.

Plaintiffs have not challenged any of the three-judge panel's findings of fact relating to the twenty-six VRA districts, and thus those findings are binding on appeal. *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731. The three-judge panel's findings of fact indicate that each of the challenged districts had a TBVAP exceeding fifty percent, thus satisfying the first *Gingles* precondition. *See Pender County*, 361 N.C. at 503, 649 S.E.2d

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17. The article included references to cases involving the following counties: Beaufort, Bladen, Cumberland, Duplin, Forsyth, Franklin, Granville, Halifax, Lenoir, Montgomery, Pasquotank, Person, Pitt, Richmond, Sampson, Scotland, Tyrrell, Vance, Wayne, and Washington.

at 372. The facts found by the three-judge panel also indicate that the maps are sufficient to satisfy the second and third *Gingles* preconditions, as each district demonstrates racially polarized voting according to Dr. Brunell's analysis. *See LULAC*, 548 U.S. at 427, 126 S. Ct. at 2615, 165 L. Ed. 2d at 637. Although Dr. Block's analysis did not cover some of the counties in some of the challenged districts, they reached the same conclusions where the two studies overlapped.

Moreover, the three-judge panel made additional findings of fact, recited above, that would be relevant to the *Gingles* totality of circumstances test for twenty-two of the challenged VRA districts.[18] Specifically, of the twenty-six VRA districts challenged here, fifteen include counties lying within the area where the *Gingles* court found section 2 violations; nine include counties lying within the area which the parties in the *Cromartie* litigation stipulated to have racially polarized voting; and thirteen include counties that were subject to various section 2 lawsuits filed between 1982 and 2006 in which plaintiffs alleged or established racially polarized voting.[19] While we assume from the Supreme Court's language in *Vera*, 517 U.S. at 978, 116 S. Ct. at 1960-61, 135 L. Ed. 2d at 269, that satisfaction of the *Gingles* preconditions is sufficient to trigger a State's compelling interest in avoiding section 2 liability, we believe that this additional evidence, while pertaining to only some of the covered districts, is consistent with and reinforces the three-judge panel's conclusions of law.

Based upon the totality of this evidence, we are satisfied that the three-judge panel correctly found that the General Assembly identified past or present discrimination with sufficient specificity to justify the creation of VRA districts in order to avoid section 2 liability. *See Shaw II*, 517 U.S. at 909, 116 S. Ct. at 1902, 135 L. Ed. 2d at 221. In addition, we see that the General Assembly, before making its redistricting decisions, had a strong basis in evidence on which to reach a conclusion that race-based remedial action was necessary for each VRA district. *Id.* at 910, 116 S. Ct. at 1903, 135 L. Ed. 2d at 222. Accordingly, we conclude that the three-judge panel's findings of fact as to these VRA districts support its conclusion of law that defendants established a compelling state interest in creating districts that would avoid liability under section 2 of the Voting Rights Act. While avoiding liability under section 2

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18. The districts not affected by this evidence are Senate 28, House 29, House 31, and House 57.

19. The only districts not affected by at least one of these three pieces of evidence are Senate 28, House 29, House 31, and House 57.

is sufficient to establish a compelling state interest, we now turn to the State's additional desire to comply with section 5.

b. Compelling Interest Under Section 5 of the Voting Rights Act

As noted above, forty of North Carolina's one hundred counties were covered by section 5 at the time of redistricting. This section, which prevents retrogression, forbids "[a]ny voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color . . . to elect their preferred candidates of choice." 52 U.S.C.S. § 10304(b).[20] Section 5 requires preclearance, either by the USDOJ or by a three-judge panel of the United States District Court for the District of Columbia, of any election procedure that is different from that in force on the relevant coverage date. *See Perry v. Perez*, ___ U.S. ___, ___, 132 S. Ct. 934, 939, 181 L. Ed. 2d 900, 904 (2012) (per curiam) (citing *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S 193, 198, 129 S. Ct. 2504, 2509, 174 L. Ed. 2d 140, 147 (2009)). The Supreme Court has left no doubt, however, that in fashioning its redistricting plans, a State must comply with the substantive requirements of section 5, not merely obtain preclearance from the Department of Justice. *Miller*, 515 U.S. at 922, 115 S. Ct. at 2491, 132 L. Ed. 2d at 783. As the Supreme Court intimated in *Miller*, the Department of Justice is not infallible, so courts have "an independent obligation in adjudicating consequent equal protection challenges to ensure that the State's actions are narrowly tailored to achieve a compelling interest." *Id.* at 922, 115 S. Ct. at 2491, 132 L. Ed. 2d at 783.

We concluded above that compliance with section 5 was a compelling state interest at the time the plan was adopted. Turning then to the facts of this case, we take into account the evidence recited above in our discussion regarding the State's concern about possible section 2 liability. In addition, the appendices to the three-judge panel's Judgment and Memorandum of Decision indicate that all of North Carolina Senate Districts 5, 21, and 28, and all of North Carolina House Districts 5, 7, 12, 24, 42, and 57 are in counties covered by section 5. Also, section 5 covers most of the territory contained in Congressional District 1, Senate Districts 4 and 20, and House Districts 21, 32, and 48. Moreover, all of the

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20. In light of *Shelby County v. Holder*, in which the Supreme Court declared section 4(b)'s "coverage formula" unconstitutional, this statute no longer applies in North Carolina. ___ U.S. ___, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013). Because *Shelby County* was decided after the General Assembly enacted the current redistricting plans, however, section 5 is still relevant to our analysis in this case.

twenty-six challenged districts contain areas that previously have been part of majority-minority districts. As a result of their connection with counties covered under section 5, these districts may become subject to nonretrogression analysis. Accordingly, we conclude from the totality of the evidence that a history of discrimination justified the General Assembly's concern about retrogression and compliance with section 5. We further conclude that the General Assembly had a strong basis in evidence on which to reach a conclusion that race-based remedial action was necessary.

3. Narrow Tailoring

Having determined that defendants had a compelling interest both in avoiding section 2 liability and in avoiding retrogression under section 5, we now consider whether the redistricting was sufficiently narrowly tailored to advance those state interests as to the twenty-six districts created to comply with the Voting Rights Act. *See Stephenson I*, 355 N.C. at 377, 562 S.E.2d at 393.

a. Narrow Tailoring Under Section 2 of the Voting Rights Act

In the context of redistricting,

> the "narrow tailoring" requirement of strict scrutiny allows the States a limited degree of leeway in furthering such interests [as VRA compliance]. If the State has a "strong basis in evidence" for concluding that creation of a majority-minority district is reasonably necessary to comply with § 2, and the districting that is based on race "substantially addresses the § 2 violation," it satisfies strict scrutiny.

Vera, 517 U.S. at 977, 116 S. Ct. at 1960, 135 L. Ed. 2d at 268 (internal citations omitted). Thus, while a State does not have a free hand when crafting districts with the intent of avoiding section 2 liability, the Supreme Court has acknowledged that "[a] § 2 district that is *reasonably* compact and regular, taking into account traditional districting principles such as maintaining communities of interest and traditional boundaries, may pass strict scrutiny without having to defeat rival compact districts designed by plaintiffs' experts in endless 'beauty contests.' " *Id.* at 977, 116 S. Ct. at 1960, 135 L. Ed. 2d at 269.

As discussed above, the three-judge panel found that the General Assembly designed each of the challenged districts to consist of a TBVAP exceeding fifty percent of the total voting age population in that district. The Supreme Court and this Court have held that doing so is permissible as a method of addressing potential liability under section 2.

Strickland, 556 U.S. at 19-20, 129 S. Ct. at 1246, 173 L. Ed. 2d at 187; *Pender County*, 361 N.C. at 503, 649 S.E.2d at 372. Unlike redistricting plans that have been faulted for setting arbitrary thresholds for TBVAP, *see, e.g.*, *Smith v. Beasley*, 946 F. Supp. 1174 (D.S.C. 1996) (order declaring certain majority-minority districts required to have to least 55% TBVAP unconstitutational), the target of fifty percent plus one of the TBVAP chosen by North Carolina's General Assembly is consistent with the requirements of the first *Gingles* precondition. *See Strickland*, 556 U.S. at 19-20, 129 S. Ct. at 1246, 173 L. Ed. 2d at 187 ("[A] party asserting § 2 liability must show by a preponderance of the evidence that the minority population in the potential election district is greater than 50 percent."). Nevertheless, because section 2 limits the use of race in creating remedial districts by allowing race to be considered only to the extent "reasonably necessary" for compliance, the question arises whether the percentages of TBVAP in each of North Carolina's challenged districts are higher than "reasonably necessary" to avoid the risk of vote dilution. *See Vera*, 517 U.S. at 979, 116 S. Ct. at 1961, 135 L. Ed. 2d at 269.

The TBVAP percentage ranges from a low of 50.45% to a high of 57.33% in the twenty-six districts in question; however, the *average* TBVAP of the challenged districts is only 52.28%. Twenty-one of the twenty-six districts have TBVAPs of less than 53%, and only two of these districts, Senate District 28 and House District 24, exceed 55% TBVAP. We are mindful that a host of other factors were considered in addition to race, such as the Whole County Provision of the Constitution of North Carolina, protection of incumbents, and partisan considerations, and these factors were considered against a backdrop of the state constitutional requirement of plus or minus five percent population deviation. As a result, we are satisfied that these districts are sufficiently narrowly tailored. They do not classify individuals based upon race to an extent greater than reasonably necessary to comply with section 2 of the VRA, while simultaneously taking into account traditional districting principles.

Plaintiffs argue that creating districts with a TBVAP percentage exceeding fifty percent constitutes impermissible racial packing, citing *id.* at 983, 116 S. Ct. at 1963, 135 L. Ed. 2d at 272; *Missouri v. Jenkins*, 515 U.S. 70, 88, 115 S. Ct. 2038, 2049, 132 L. Ed. 2d 63, 80 (1995); and *Shaw I*, 509 U.S. at 655, 113 S. Ct. at 2831, 125 L. Ed. 2d at 534. Plaintiffs also argue that districts with a TBVAP exceeding fifty percent are not automatically necessary because minority voters in crossover and coalition districts have elected candidates of their choice where the TBVAP was between forty and fifty percent. This Court previously has considered,

but declined to adopt, similar arguments. *Pender County*, 361 N.C. at 502-04, 649 S.E.2d at 371-73. We concluded in *Pender County* that applying a bright line rule—that the presence of more than fifty percent of the TBVAP satisfied the first *Gingles* prong—was logical and gave the General Assembly "a safe harbor for the redistricting process." *Id.* at 505, 649 S.E.2d at 373; *see Strickland*, 556 U.S. at 13, 129 S. Ct. at 1242, 173 L. Ed. 2d at 183 ("This Court has held that § 2 does not require the creation of influence districts." (citation omitted)).

Although the burden is upon the State under strict scrutiny, the parties challenging the redistricting must also make a showing.

> In a case such as this one where majority-minority districts (or the approximate equivalent) are at issue and where racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. That party must also show that those districting alternatives would have brought about significantly greater racial balance.

Cromartie II, 532 U.S. at 258, 121 S. Ct. at 1466, 149 L. Ed. 2d at 453. Here, when the evidence is undisputed that racial identification correlates highly with party affiliation, plaintiffs have failed to meet this obligation. The General Assembly's plans fall within the safe harbor provisions of *Pender County* while respecting, to the extent possible, the Whole County Provision, as mandated by *Stephenson I*. In contrast, plaintiffs' proposals would effectively invite the type of litigation over section 2 claims envisioned in *Pender County*, *see* 361 N.C. at 505-06, 649 S.E.2d at 373, while failing to provide for the legitimate nonracial political goals pursued by the General Assembly in its plans.

We are aware of the Supreme Court's warning that "if there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments." *Strickland*, 556 U.S. at 24, 129 S. Ct. at 1249, 173 L. Ed. 2d at 190 (citations omitted). In addition, we acknowledge the Supreme Court's caution in *Alabama* against a "mechanical interpretation" of the VRA. *Alabama*, ___ U.S. at ___, 135 S. Ct. at 1273, 191 L. Ed. 2d at 335. In addressing these concerns, we note that the legislature adopted a TBVAP threshold of fifty percent plus one, a baseline number that allowed for flexibility within each

district. The average TBVAP in the twenty-six VRA districts is 52.28% of the total voting age population, and no district's TBVAP is higher than 57.33%. This figure indicates that minority voters were moved out of other districts only to the extent necessary to meet *Pender County*'s safe harbor provision, while simultaneously pursuing other legitimate nonracial political goals, including those mentioned above. Unlike in *Alabama*, where it was "difficult to explain just why . . . maintain[ing] the black population at 70% is 'narrowly tailored' to" ensure that the minority community can maintain its ability to elect its candidate of choice, *id.* at ___, 135 S. Ct. at 1273, 191 L. Ed. 2d at 335, the TBVAP here was well within a reasonable range to ensure that a section 2 district was drawn where a minority community was actually a majority of the population. Where racial identification correlates highly with party affiliation, placing additional Democratic voters in districts that already vote Democratic is not forbidden as long as the motivation for doing so is not primarily racial. *See Cromartie I*, 526 U.S. at 551-52, 119 S. Ct. at 1551, 143 L. Ed. 2d at 741; *see also Strickland*, 556 U.S. at 20, 129 S. Ct. at 1246, 173 L. Ed. 2d at 188 ("Section 2 does not guarantee minority voters an electoral advantage."). Accordingly, we conclude that plaintiffs have failed to demonstrate improper packing or gerrymandering based upon race and that the districts are narrowly tailored to comply with section 2.

b. Narrow Tailoring Under Section 5 of the Voting Rights Act

We first note that, as discussed above, the twenty-six challenged VRA districts survive strict scrutiny on the basis of section 2 alone. Nevertheless, we conclude that the challenged VRA districts are also narrowly tailored to advance the State's compelling interest in avoiding retrogression under section 5.

The "purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141, 96 S. Ct. 1357, 1364, 47 L. Ed. 2d 629, 639 (1976). Section 5, however, does not "give covered jurisdictions *carte blanche* to engage in racial gerrymandering in the name of nonretrogression. A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression." *Shaw I*, 509 U.S. at 655, 113 S. Ct. at 2831, 125 L. Ed. 2d at 534.

In *Alabama*, the Supreme Court made it clear that section 5 "does not require a covered jurisdiction to maintain a particular numerical minority percentage" in covered jurisdictions. ___ U.S. at ___, 135 S. Ct. at 1272,

191 L. Ed. 2d at 334. But section 5 does require a covered "jurisdiction to maintain a minority's ability to elect a preferred candidate of choice." *Id.* at ___, 135 S. Ct. at 1272, 191 L. Ed. 2d at 334. The Court explained that "we do not insist that a legislature guess precisely what percentage reduction a court or the Justice Department might eventually find to be retrogressive." *Id.* at ___, 135 S. Ct. at 1273, 191 L. Ed. 2d at 335. Rather, "the legislature must have a 'strong basis in evidence' in support of the (race-based) choice that it has made." *Id.* at ___, 135 S. Ct. at 1274, 191 L. Ed. 2d at 336. As an example, the Court noted that a "[one percent] reduction in a [seventy percent] black population district" is not "necessarily retrogressive." *Id.* at ___, 135 S. Ct. at 1273, 191 L. Ed. 2d at 335. The Court cautioned against heavy reliance "upon a mechanically numerical view as to what counts as forbidden retrogression," as opposed to "the more purpose-oriented view reflected in the statute's language." *Id.* at ___, 135 S. Ct. at 1273, 191 L. Ed. 2d at 335.

Plaintiffs argue that by increasing the TBVAP in the challenged VRA districts to at least fifty percent plus one, the legislature improperly relied upon section 5 to unnecessarily augment, not just maintain, black voters' ability to elect their preferred candidate of choice. *See Vera*, 517 U.S. at 983, 116 S. Ct. at 1963, 135 L. Ed. 2d at 272 (concluding that an increase in TBVAP from 40.8% to 50.9% was unnecessary to ensure nonretrogression). Plaintiffs argue that such a substantial increase in TBVAP in districts where black voters were already able to elect their candidates of choice goes beyond what was necessary to ensure nonretrogression. Plaintiffs essentially ask us to force the State to "unpack" majority-minority districts and replace them with coalition, crossover, and influence districts. In enacting amendments to the VRA in 2006, however, Congress made clear that section 5 was designed to prevent legislatures from "unpacking majority-minority districts" and that it did not "lock into place coalition or influence districts." S. Rep. No. 109-295, at 18-19 (2006); *see Miller*, 515 U.S. at 923, 115 S. Ct. at 2492, 132 L. Ed. 2d at 784 ("Wherever a plan . . . increas[es] the number of majority-minority districts, it 'cannot violate § 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution." (quoting *Beer*, 425 U.S. at 141, 96 S. Ct. at 1364, 47 L. Ed. 2d at 639)); *see also Strickland*, 556 U.S. at 23, 129 S. Ct. at 1248, 173 L. Ed. 2d at 190 (stating that the VRA "does not mandate creating or preserving crossover districts"). "[T]he various provisions of an act should be read so that all may, if possible, have their due and conjoint effect without repugnancy or inconsistency, so as to render the statute a consistent and harmonious whole." *Walker v. Am. Bakeries Co.*, 234 N.C. 440, 442, 67 S.E.2d 459, 461 (1951) (quoting 50 Am. Jur. *Statutes*

§ 363 (1944)); *see FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S. Ct. 1291, 1301, 146 L. Ed. 2d 121, 134 (2000). As discussed above, the legislature adopted a fifty percent plus one threshold to avoid liability under section 2. That threshold is the exact number that the Supreme Court approved in *Strickland* for a State to use in creating districts to comply with section 2. If, on the one hand, a TBVAP exceeding fifty percent is required to avoid section 2 liability, we cannot, on the other hand, conclude that this percentage is higher than necessary to avoid retrogression under section 5. In other words, section 5 cannot forbid what section 2 requires. While the legislature may have chosen a threshold of fifty plus one percent, such a deliberate decision was not arbitrary and was made with the "purpose-oriented view" of complying with section 2. *See Alabama*, ___ U.S. at ___, 135 S. Ct. at 1273, 191 L. Ed. 2d at 335.

Plaintiffs' argument seeks to undo the Supreme Court's holding in *Strickland*, which affirmed this Court's decision in *Pender County*. In *Strickland* the Supreme Court explicitly rejected State election officials' claim that "[section] 2 required them to override state law and split Pender County, drawing District 18 with [a black] voting-age population of 39.36 percent rather than keeping Pender County whole and leaving District 18 with [a black] voting-age population of 35.33 percent." 556 U.S. at 14, 129 S. Ct. at 1243, 173 L. Ed. 2d at 184. The Supreme Court stated that "[t]here is a difference between a racial minority group's 'own choice' and the choice made by a coalition," *id.* at 15, 129 S. Ct. at 1244, 173 L. Ed. 2d at 185, and the Court made it clear that the creation of crossover districts is "a matter of legislative choice or discretion," to be exercised within the bounds of state law, *id.* at 23, 129 S. Ct. at 1248, 173 L. Ed. 2d at 190.

As the Supreme Court stated in *Alabama*, "legislators may have a strong basis in evidence to use racial classifications in order to comply with a statute when they have *good reasons* to believe such use is required, even if a court does not find that the actions were necessary for statutory compliance." ___ U.S. at ___, 135 S. Ct. at 1274, 191 L. Ed. 2d at 336 (citation and quotation marks omitted). Here the legislature had a strong basis in evidence of racially polarized voting to justify creating majority-black districts with a TBVAP in excess of fifty percent even though that same action resulted in an increase in the TBVAP in former coalition districts. Accordingly, we conclude that the challenged VRA districts were narrowly tailored to achieve a compelling interest in complying with both section 2 and section 5 of the VRA. Therefore, they survive strict scrutiny.

4. Proportionality

Finally, because plaintiffs challenge the General Assembly's consideration of proportionality, the three-judge panel analyzed whether the legislature used proportionality in the enacted plans improperly to "link[ ] the number of majority-minority voting districts to minority members' share of the relevant population." *See De Grandy*, 512 U.S. at 1014 n.11, 114 S. Ct. at 2658 n.11, 129 L. Ed. 2d at 792 n.11. The three-judge panel found as fact that "the General Assembly acknowledges that it intended to create as many VRA districts as needed to achieve a 'roughly proportionate' number of Senate, House and Congressional districts as compared to the Black population in North Carolina," adding that each VRA district had to be at least fifty percent black in voting age population. The three-judge panel specifically found that the General Assembly's enacted plans

> endeavored to create VRA districts in roughly the same proportion as the ratio of Black population to total population in North Carolina. In other words, because the 2010 census figures established that 21% of North Carolina's population over 18 years of age was 'any part Black,' the corresponding rough proportion of Senate seats, out of 50 seats, would be 10 seats, and hence 10 VRA Senate districts. Likewise, of the 120 House seats, 21% of those seats would be roughly 25 House seats, and hence 25 VRA districts.

Based on these and other findings, the three-judge panel concluded that "the General Assembly had a strong basis in evidence for concluding that 'rough proportionality' was reasonably necessary to protect the State from anticipated liability under § 2 of the VRA and ensuring preclearance under § 5 of the VRA."

Plaintiffs argue that this conclusion is erroneous as a matter of law because racial proportionality is neither a compelling governmental interest nor a requirement of the VRA. They contend that, because "[t]he VRA was not designed to guarantee majority-minority voting districts, but to guarantee that the processes, procedures, and protocols would be fair and free of racial discrimination," the legislature's redistricting was based upon an unconstitutional premise. Plaintiffs contend that, by focusing on proportionality at the statewide level, the General Assembly necessarily predetermined how many VRA districts to draw without first considering where potential liability existed for section 2 violations. Plaintiffs maintain that, as a result, the General Assembly's

process sought " 'outright racial balancing,' " which is "patently unconstitutional" under such cases as *Fisher v. University of Texas at Austin*, ___ U.S. ___, ___, 133 S. Ct. 2411, 2419, 186 L. Ed. 2d 474, 486 (2013); *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 729-30, 127 S. Ct. 2738, 2757, 168 L. Ed. 2d 508, 529 (2007) (plurality); and *Grutter v. Bollinger*, 539 U.S. 306, 330, 123 S. Ct. 2325, 2339, 156 L. Ed. 2d 304, 333 (2003), and thus can neither be required by section 2 nor constitute a compelling state interest.

The VRA provides that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 52 U.S.C.S. § 10301(b). Consistent with this proviso, the Supreme Court has repeatedly held that proportionality does not provide a safe harbor for States seeking to comply with section 2. *LULAC*, 548 U.S. at 436, 126 S. Ct. at 2620, 165 L. Ed. 2d at 642-43 (citing *De Grandy*, 512 U.S. at 1017-21, 114 S. Ct. at 2660-62, 129 L. Ed. 2d at 794-97). Such a rule "would be in derogation of the statutory text and its considered purpose . . . and of the ideal that the Voting Rights Act of 1965 attempts to foster," *De Grandy*, 512 U.S. at 1018, 114 S. Ct. at 2660, 129 L. Ed. 2d at 795, and could allow "the most blatant racial gerrymandering . . . so long as proportionality was the bottom line," *id.* at 1019, 114 S. Ct. at 2661, 129 L. Ed. 2d at 796. Even so, the Court has also held that proportionality can be an element of the "totality of circumstances" test under *Gingles*. *Id.* at 1000, 114 S. Ct. at 2651, 129 L. Ed. 2d at 784. When considered in this manner, the Court has instructed that the "probative value assigned to proportionality may vary with other facts" and "[n]o single statistic provides courts with a shortcut to determine whether a set of single-member districts unlawfully dilutes minority voting strength." *Id.* at 1020-21, 114 S. Ct. at 2661-62, 129 L. Ed. 2d at 797; *see also LULAC*, 548 U.S. at 436, 126 S. Ct. at 2620, 165 L. Ed. 2d at 642.

In light of these standards, the record here demonstrates that the General Assembly did not use proportionality improperly to guarantee the number of majority-minority voting districts based on the minority members' share of the relevant population. We believe that such an effort, seeking to guarantee proportional representation, proportional success, or racial balancing, would run afoul of the Equal Protection Clause. *See De Grandy*, 512 U.S. at 1017-22, 114 S. Ct. at 2658-62, 129 L. Ed. 2d at 794-98. Instead, the General Assembly considered rough proportionality in a manner similar to its precautionary consideration of the *Gingles* preconditions, as a means of protecting the redistricting plans from potential legal challenges under section 2's totality of the circumstances test. Proportionality was not a dispositive factor, but merely

one consideration of many described in the materials and other contributions from numerous organizations, experts, and lay witnesses. The General Assembly's consideration of rough proportionality was a means of ensuring against voter dilution and potential section 2 liability, not an attempt to trade "the rights of some minority voters under § 2 . . . off against the rights of other members of the same minority class." *Id.* at 1019, 114 S. Ct. at 2661, 129 L. Ed. 2d at 796. Accordingly, we conclude that this factor does not constitute grounds for a violation of section 2.

Thus, with regard to the VRA districts, we hold that, while the General Assembly considered race, the three-judge panel erred by concluding prematurely that race was the predominant factor motivating the drawing of the districts without first performing adequate fact finding. Nonetheless, because we held above that the three-judge panel correctly found that each of the twenty-six districts survives strict scrutiny, we need not remand the case for reconsideration under what may be a less demanding level of scrutiny.

C. Non-VRA Districts

[4] We now turn to the four districts that the three-judge panel found were not drawn as VRA districts but which were challenged by plaintiffs as being the result of racial gerrymandering. For trial, the three-judge panel characterized the issue as follows: "For six specific districts (Senate Districts 31 and 32, House Districts 51 and 54 and Congressional Districts 4 and 12 – none of which is identified as a VRA district), what was the predominant factor in the drawing of those districts?" Although the plaintiffs did not challenge Senate District 31 or House District 51, the three-judge panel found an examination of Senate District 32 and House District 54 to be intertwined with the associated districts because of the groupings required under the state constitution's Whole County Provision. Thus, the three-judge panel recognized that, because of the Whole County Provision, a determination of the predominant motive necessarily included the motivation in creating the required county pairings.

After receiving evidence, the three-judge panel made numerous specific findings of fact, district by district, as to whether race was the General Assembly's predominant motive in drafting these districts. Looking first at the challenged Congressional Districts, the court found that race was not a factor in drawing Congressional Districts 4 or 12. In fact, the record indicates that the drafters of these two districts did not consider any racial data. The panel found that political goals were a factor in drawing these two Congressional Districts, as well as compliance with *Cromartie II*.

Turning to the two challenged state legislative districts, Senate District 32 and House District 54, the three-judge panel received evidence and made a number of uncontested specific factual findings regarding the creation of each of these non-VRA districts. The three-judge panel found that, in addition to complying with federal and state law, the General Assembly desired to create districts "more competitive for" the majority party. The panel noted the "undisputed" fact that in North Carolina "racial identification correlates highly with political affiliation." The desire to create districts more competitive for the majority party had to occur within the requirements of the state constitution's Whole County Provision. Thus, while the three-judge panel noted the General Assembly's desire "to equalize population among the districts," for state redistricting purposes, this finding must be viewed in the context of the Whole County Provision, which recognizes political subdivisions. *See Stephenson I*, 355 N.C. at 366, 562 S.E.2d at 386 (recognizing "the importance of the county to our system of government" and that "[i]t is through [counties], mainly, that the powers of government reach and operate directly upon the people" (quoting *White v. Comm'rs of Chowan Cty.*, 90 N.C. 437, 438 (1884))). In light of the Whole County Provision, equalizing population is not simply a matter of deciding how many voters are placed in each district; the districting proceedings also determine which voters are included in the joined counties. In addition, the Whole County Provision establishes a hierarchy regarding the required number of contiguous counties to be joined.

Ultimately, regarding the four challenged non-VRA districts, the three-judge panel concluded "that race was not the predominant motive in the creation of [these] districts." The panel then applied rational basis review and concluded that the General Assembly's creation of the non-VRA districts was constitutional. The three-judge panel noted that plaintiffs

> have not proffered, as they must in this instance, any alternative redistricting plans that show that the General Assembly could have met its legitimate <u>political</u> objectives in alternative ways that are comparably consistent with traditional districting principles, and that any such alternative plan would have brought about significantly greater racial balance. (Citations omitted.)

The Supreme Court has recognized that compliance with federal law, incumbency protection, and partisan advantage are all legitimate governmental interests, *see Shaw I*, 509 U.S. at 654, 113 S. Ct. at 2830, 125 L. Ed. 2d at 533 (compliance with federal law); *Karcher*, 462 U.S.

at 740, 103 S. Ct. at 2663, 77 L. Ed. 2d at 147 (incumbency protection); *Cromartie I*, 526 U.S. at 551, 119 S. Ct. at 1551, 143 L. Ed. 2d at 741 (partisan interests), as is honoring traditional districting principles, such as compactness, contiguity, and respect for political subdivisions, *Miller*, 515 U.S. at 916, 115 S. Ct. at 2488, 132 L. Ed. 2d at 779-80, which is embodied in our state constitution's Whole County Provision, *Stephenson I*, 355 N.C. at 371, 562 S.E.2d at 389 ("We observe that the State Constitution's limitations upon redistricting and apportionment [the Whole County Provision] uphold what the United States Supreme Court has termed 'traditional districting principles.' These principles include factors such as 'compactness, contiguity, and *respect for political subdivisions*.' The United States Supreme Court has 'emphasize[d that these criteria are important not because they are constitutionally required—they are not—but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines.' " (internal citations omitted)). In light of this authority and the three-judge panel's findings of fact, we agree that plaintiffs failed to establish that race was the dominant factor in drafting these districts and conclude that the panel's application of the rational basis test was appropriate. The court's findings of fact support its conclusions of law. The General Assembly's actions in creating these districts were rationally related to all its expressed goals. Accordingly, we affirm the three-judge panel as to these non-VRA districts.

IV. Plaintiffs' State Claims

[5] We now consider plaintiffs' claims brought under state law. Initially, we note that our analysis here is unaffected by the holding in *Alabama*. Plaintiffs argue that the three-judge panel erred when it failed to find that the enacted Senate and House plans violate the Whole County Provision of the North Carolina Constitution. Article II, Section 3(3) of the Constitution of North Carolina provides that "[n]o county shall be divided in the formation of a senate district," while Article II, Section 5(3) contains a similar provision with regard to each representative district.

The tension between the Whole County Provision and federal requirements is apparent. In 1983, a three-judge panel of the United States District Court for the Eastern District of North Carolina held that the Whole County Provision was unenforceable anywhere in the state. *Cavanagh v. Brock*, 577 F. Supp. 176, 181-82 (E.D.N.C. 1983). This Court subsequently rejected *Cavanagh*'s analysis and held that the Whole County Provision remained enforceable to the extent that it could be harmonized with federal law. *Stephenson I*, 355 N.C. at 374, 562 S.E.2d at 391. This Court provided a roadmap to compliance with the Whole

County Provision, requiring each created district to be contained within a single county or be part of a pairing with other districts containing as few contiguous counties as possible. *Id.* at 383-84, 562 S.E.2d at 396-97. As a result, the Whole County Provision remains in effect but must accommodate both the one-person, one-vote mandate and the requirements of the VRA. Because the Constitution of North Carolina requires that each senator and each representative represent "as nearly as may be" an equal number of inhabitants, N.C. Const. art. II, §§ 3(1), 5(1), the former federal requirement is met by definition. Thus, we consider plaintiffs' contentions that the challenged House and Senate Districts violate the Whole County Provision, as harmonized with the VRA.

As previously noted, this Court has set out nine criteria for ensuring that House and Senate Districts satisfy both the Whole County Provision and the Voting Rights Act. *Stephenson I*, 355 N.C. at 383-84, 562 S.E.2d at 396-97. These criteria may be summarized as follows: First, "legislative districts required by the VRA shall be formed" before non-VRA districts. *Id.* at 383, 562 S.E.2d at 396-97. Second, "[i]n forming new legislative districts, any deviation from the ideal population for a legislative district shall be at or within plus or minus five percent" to ensure "compliance with federal 'one-person, one-vote' requirements." *Id.* at 383, 562 S.E.2d at 397. Third, "in counties having a . . . population sufficient to support the formation of one non-VRA legislative district," "the physical boundaries" of the non-VRA district shall "not cross or traverse the exterior geographic line of" the county. *Id.* at 383, 562 S.E.2d at 397. Fourth, "[w]hen two or more non-VRA legislative districts may be created within a single county," "single-member non-VRA districts shall be formed within" the county, "shall be compact," and "shall not traverse" the county's exterior geographic line. *Id.* at 383, 562 S.E.2d at 397. Fifth, for non-VRA counties that "cannot support at least one legislative district," or counties "having a non-VRA population pool" that, "if divided into" legislative "districts, would not comply with" one-person, one-vote requirements, the General Assembly should combine or group "the minimum number of whole, contiguous counties necessary to comply with the at or within plus or minus five percent 'one-person, one-vote' standard." *Id.* at 383, 562 S.E.2d at 397. Moreover, "[w]ithin any such contiguous multi-county grouping, compact districts shall be formed, consistent with the [one-person, one-vote] standard, whose boundary lines do not cross or traverse the 'exterior' line of the multi-county grouping." *Id.* at 383-84, 562 S.E.2d at 397. "[T]he resulting interior county lines created by any such groupings may be crossed or traversed in the creation of districts within said multi-county grouping but only to the extent necessary to comply with the at or within plus or minus five percent 'one-person, one-vote'

standard." *Id.* at 384, 562 S.E.2d at 397. Sixth, "only the smallest number of counties necessary to comply with the at or within plus or minus five percent 'one-person, one-vote' standard shall be combined." *Id.* at 384, 562 S.E.2d at 397. Seventh, "communities of interest should be considered in the formation of compact and contiguous [legislative] districts." *Id.* at 384, 562 S.E.2d at 397. Eighth, "multi-member districts shall not be" created "unless it is established that such districts are necessary to advance a compelling governmental interest." *Id.* at 384, 562 S.E.2d at 397. Ninth, "any new redistricting plans . . . shall depart from strict compliance with" these criteria "only to the extent necessary to comply with federal law." *Id.* at 384, 562 S.E.2d at 397.

In their discussion of the Whole County Provision, plaintiffs contend that the test of a plan's compliance with *Stephenson I*'s fifth and sixth criteria is the number of counties left undivided. They argue that the current plan violates *Stephenson I* because it divides counties and traverses county lines to an unnecessary extent. In support of their argument, plaintiffs submit charts indicating that their suggested "House Fair and Legal" plan results in five fewer divided counties and six fewer county line traversals than the enacted House plan, while maintaining the same number of groupings. Similarly, plaintiffs' charts indicate that their suggested "Senate Fair and Legal" plan divides five fewer counties and contains eleven fewer traversals of county lines than the enacted Senate plan.

Defendants respond that plaintiffs have misinterpreted the requirements of *Stephenson I*. According to defendants, *Stephenson I* is satisfied by minimizing the number of counties contained within each multi-county grouping. In other words, a proper plan maximizes the number of possible two-county groupings before going on to create three-county groupings, maximizes the number of possible three-county groupings before creating four-county groupings, and so on. Defendants argue that plaintiffs have misread *Stephenson I* because, under *Stephenson I*, divisions of counties and traversals of county lines are relevant only if plaintiffs' alternative maps are comparable to the State's maps in terms of the number of counties within each grouping. In support of its argument, the State provides charts showing that the enacted House and Senate plans result in a greater number of groupings that contain fewer counties, as compared with the various proposed alternative plans, all of which create groupings that contain more counties than the enacted plans. To illustrate, the enacted House district plan contains eleven groupings consisting of one county and fifteen groupings consisting of two counties. The closest comparable alternative plan proposed by

plaintiffs, House Fair and Legal, also contains eleven groupings consisting of one county but only nine groupings consisting of two counties. Similarly, while both the enacted Senate plan and plaintiffs' proposed Senate Fair and Legal contain one grouping consisting of one county and eleven groupings consisting of two counties, the enacted plan contains four districts consisting of three counties while Senate Fair and Legal contains only three groupings consisting of three counties.

While we are conscious of the efforts of the litigants to interpret *Stephenson I*'s requirements faithfully, after careful review of our opinions in *Stephenson I* and *Pender County*, we are satisfied that defendants' interpretation is correct. *Stephenson I*'s fifth factor states that, when combining two or more counties to comply with the one-person, one-vote standard, "the requirements of the [Whole County Provision] are met by combining or grouping the minimum number of whole, contiguous counties necessary" for compliance. 355 N.C. at 384, 562 S.E.2d at 397. Only after these groupings have been established does *Stephenson I* state that "the resulting interior county lines . . . may be crossed or traversed . . . only to the extent necessary to comply with the . . . 'one-person, one-vote' standard." *Id.* at 384, 562 S.E.2d at 397. Thus, the process established by this Court in *Stephenson I* and its progeny requires that, in establishing legislative districts, the General Assembly first must create all necessary VRA districts, single-county districts, and single counties containing multiple districts. Thereafter, the General Assembly should make every effort to ensure that the maximum number of groupings containing two whole, contiguous counties are established before resorting to groupings containing three whole, contiguous counties, and so on. As shown by the charts provided by defendants, plaintiffs have not produced an alternative plan that complies with a correct reading of *Stephenson I*'s fifth and sixth factors better than the plans enacted by the General Assembly. Because the enacted plans result in groupings containing fewer whole, contiguous counties than do any of plaintiffs' plans, we need not discuss the number of counties divided or county lines traversed.

In addition, the maps that plaintiffs employ to support their arguments regarding the Whole County Provision are not helpful because they are inconsistent with our holding in *Pender County* as affirmed by the Supreme Court in *Strickland*. In *Strickland* the Supreme Court held that the first *Gingles* precondition can be shown only where the minority population is fifty percent plus one of the TBVAP. *Strickland*, 556 U.S. at 19-20, 129 S. Ct. at 1246, 173 L. Ed. 2d at 187 ("[A] party asserting § 2 liability must show by a preponderance of the evidence that the minority

population in the potential election district is greater than 50 percent."); *Pender County*, 361 N.C. at 502, 649 S.E.2d at 371 (The "minority group must constitute a numerical majority of the voting population in the area under consideration before Section 2 of the VRA requires the creation of a legislative district to prevent dilution of the votes of that minority group."). Here, like the plaintiffs in *Strickland*, plaintiffs argue that we should adopt a standard that allows VRA requirements to be satisfied by other forms of minority districts, such as coalition and crossover districts. Not only is plaintiffs' argument inconsistent with the Supreme Court's holding in *Strickland*, but this flawed approach adversely affects the first step of the process required by *Stephenson I*, the formation of VRA districts. As a result, plaintiffs' maps are distorted *ab initio* and the distortion is compounded at each subsequent step. Consequently, even if plaintiffs' proposed alternative plans were comparable to the enacted plans in terms of the number and composition of county groupings, their incompatibility with *Pender County* means that they cannot serve as an adequate basis for comparison with the enacted plans.

Plaintiffs have also compared the General Assembly's enacted plans with earlier redistricting plans approved in North Carolina; however, those plans were tailored to a particular time and were based upon then-existing census numbers and population concentrations. The requirement that the State maintain its one-person, one-vote standard as populations shift makes comparisons between current and previous districting plans of limited value. The utility of prior plans is further diminished by subsequent clarifications of the legal standards in effect when these earlier plans were promulgated. *See, e.g.*, *Pender County*, 361 N.C. at 503-04, 649 S.E.2d at 372 (explaining the requirements of the first *Gingles* precondition). As a result, no meaningful comparisons can be made in this case.

[6] Separately, plaintiffs argue that this Court should consider the purported lack of compactness of the districts created by the General Assembly and the harm resulting from splitting precincts. While these may be valid considerations, neither constitutes an independent legal basis for finding a violation, and we are unaware of any justiciable standard by which to measure these local factors. *See Vera*, 517 U.S. at 999, 116 S. Ct. at 1972, 135 L. Ed. 2d at 284 (Kennedy, J., concurring) ("Districts not drawn for impermissible reasons or according to impermissible criteria may take any shape, even a bizarre one," so long as "the bizarre shape . . . is [not] attributable to race-based districting unjustified by a compelling interest.").

[7] Finally, plaintiffs argue that the enacted plans violate the "Good of the Whole" clause found in Article I, Section 2 of the Constitution of North Carolina. We do not doubt that plaintiffs' proffered maps represent their good faith understanding of a plan they believe to be best for our State as a whole; however, the maps enacted by the duly elected General Assembly also represent an equally legitimate understanding of legislative districts that will function for the good of the whole. Because plaintiffs' argument is not based upon a justiciable standard, and because acts of the General Assembly enjoy "a strong presumption of constitutionality," *Pope v. Easley*, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001) (per curiam) (citation omitted), plaintiffs' claims fail.

V. Conclusion

We agree with the unanimous three-judge panel that the General Assembly's enacted plans do not violate plaintiffs' constitutional rights. We hold that the enacted House and Senate plans, as well as the federal Congressional plan, satisfy state and federal constitutional and statutory requirements and, specifically, that the three-judge panel's decision fully complies with the Supreme Court's decision in *Alabama*. Accordingly, we reaffirm the three-judge panel's Judgment and Memorandum of Decision.

AFFIRMED.

Justice BEASLEY, concurring in part and dissenting in part.

I agree with the judgment of the Court as to plaintiffs' challenge under the "Good of the Whole" Clause in Article I, Section 2 of the North Carolina Constitution; however, because I would conclude that the parties and the jurisprudence of this State would be better served by vacating the trial court's Judgment and remanding this case to the trial court for more complete findings of fact consistent with the guidance provided in *Alabama Legislative Black Caucus v. Alabama*, I respectfully dissent.

The order of the United States Supreme Court (the Supreme Court) vacating and remanding this Court's judgment in *Dickson v. Rucho*, 367 N.C. 542, 766 S.E.2d 238 (2014), directed this Court to *reconsider* the case in light of *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. ___, 135 S. Ct. 1257, 191 L. Ed. 2d 314 (2015) (ALBC). *See Dickson v. Rucho*, 575 U.S. ___, 135 S. Ct. 1843, 191 L. Ed. 2d 719 (2015). The majority reads *ALBC* so narrowly that its implications for the case before this Court are negligible at best. In my view, if the Supreme Court saw fit to vacate and remand the previous judgment for reconsideration

in light of *ALBC*, this Court would do well to give credence to the legal principles imparted in that decision.[1]

To that end, I am of the opinion that *ALBC* bolsters all the points made in my previous dissent, particularly with respect to the General Assembly's use of proportionality as a benchmark, and provides authoritative guidance on how the trial court should have viewed the record of evidence before it. I stand by everything espoused in that dissent, and for that reason, portions of my previous dissent appear in this opinion.

The *ALBC* plaintiffs, like plaintiffs here, contended that their state legislature's enacted redistricting plans constituted racial gerrymanders in violation of the Equal Protection Clause of the Fourteenth Amendment. *ALBC*, 575 U.S. at ___, 135 S. Ct. at 1262, 191 L. Ed. 2d at 323. Alabama defended its enacted plans by arguing that the plans reflected its goals of coming close to a one-person, one-vote ideal, with no more than a 1% deviation from that ideal, and avoiding retrogression under § 5 of the Voting Rights Act of 1965.[2] *Id.* at ___, 135 S. Ct. at 1263, 191 L. Ed. 2d at 324. The federal district court held that the plaintiffs "had failed to prove their racial gerrymandering claims." *Id.* at ___, 135 S. Ct. at 1264, 191 L. Ed. 2d at 325. The Supreme Court vacated the district court's judgment, citing errors in the district court's application and interpretation of the pertinent law. *Id.* at ___, 135 S. Ct. at 1264, 191 L. Ed. 2d at 325-26. Although the arguments made by the parties in *ALBC* are somewhat different from the arguments made by the parties here, *ALBC* illuminates errors in the trial court's analysis of plaintiffs' racial gerrymandering claims in this case, and as stated above, provides guidance

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1. The State took a contrary view of the Supreme Court's order vacating our previous judgment. During oral arguments, in response to Justice Hudson's question, "What do you think that the U.S. Supreme Court wants us to do?", the State replied: "The Supreme Court often remands cases when a landmark decision like *Alabama* comes out and quite often the court that gets the remand reaffirms their decision and the Supreme Court doesn't take review of it. So, the Supreme Court did not make any opinions or judgments on the North Carolina plans. They just asked this Court to take a look at it as an initial matter and based upon the standards that they articulated in *Alabama*. . . . They want you to look to see if the test in *Alabama* is the same one that you applied in your previous decision. And whether under that test should these plans still be reaffirmed. They are giving you the first chance to make that decision instead of them taking the time to look through the case. And again, that's quite common in Supreme Court jurisprudence for remand to take place and for the lower court to reaffirm its decision and for the Supreme Court of the United States not to take the appeal back." Data disc: Oral Argument 31 August 2015 201PA12-3 *Dickson v. Rucho*.

2. The Supreme Court declined to speak to the plaintiffs' § 2 vote dilution claim. *ALBC*, 575 U.S. ___, 135 S. Ct. at 1274, 191 L. Ed. 2d at 336.

on how the trial court should approach the analysis on remand. This Court's majority does not give the trial court the opportunity to get it right and fails to require the trial court to make conclusions of law resting on adequate findings of fact that reflect a correct application of the law. I cannot agree with this decision.

I.

"Classifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.' " *Shaw v. Reno*, 509 U.S. 630, 643, 113 S. Ct. 2816, 2824, 125 L. Ed. 2d 511, 526 (1993) (*Shaw I*) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100, 63 S. Ct. 1375, 1385, 87 L. Ed. 1774, 1786 (1943)). "One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." *Rice v. Cayetano*, 528 U.S. 495, 517, 120 S. Ct. 1044, 1057, 145 L. Ed. 2d 1007, 1026 (2000). "Furthermore, '[i]t is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree.' These principles apply to the drawing of electoral and political boundaries." *Johnson v. De Grandy*, 512 U.S. 997, 1029-30, 114 S. Ct. 2647, 2666, 129 L. Ed. 2d 775, 802 (1994) (Kennedy, J., concurring in part and concurring in the judgment) (alteration in original) (internal citations omitted) (quoting *Powers v. Ohio*, 499 U.S. 400, 410, 111 S. Ct. 1364, 1370, 113 L. Ed. 2d 411, 425 (1991)). Accordingly, the Supreme Court has held that "the Fourteenth Amendment requires state legislation that expressly distinguishes among citizens because of their race to be narrowly tailored to further a compelling governmental interest." *Shaw I*, 509 U.S. at 643, 113 S. Ct. at 2825, 125 L. Ed. 2d at 526 (citations omitted). "Applying traditional equal protection principles in the voting-rights context is 'a most delicate task' . . . because a legislature may be conscious of the voters' races without using race as a basis for assigning voters to districts." *Shaw v. Hunt*, 517 U.S. 899, 905, 116 S. Ct. 1894, 1900, 135 L. Ed. 2d 207, 218 (1996) (*Shaw II*) (quoting *Miller v. Johnson*, 515 U.S. 900, 905, 115 S. Ct. 2475, 2483, 132 L. Ed. 2d 762, 772 (1995)). Therefore, race must be "the predominant factor motivating the legislature's decision" in order to trigger strict scrutiny. *Miller*, 515 U.S. at 916, 115 S. Ct. at 2488, 132 L. Ed. 2d at 779.

The burden to make this showing falls to the plaintiff:

> The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that

> race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations.

Id. at 916, 115 S. Ct. at 2488, 132 L. Ed. 2d at 779-80.

If the plaintiff satisfies this initial burden of production,[3] the redistricting legislation "cannot be upheld unless it satisfies strict scrutiny, [the] most rigorous and exacting standard of constitutional review." *Id.* at 920, 115 S. Ct. at 2490, 132 L. Ed. 2d at 782. Once strict scrutiny review is triggered, the burden shifts to the State to "show not only that its redistricting plan was in pursuit of a compelling state interest, but also that 'its districting legislation is narrowly tailored to achieve [that] compelling interest.' " *Shaw II*, 517 U.S. at 908, 116 S. Ct. at 1902, 135 L. Ed. 2d at 220-21 (alteration in original) (quoting *Miller*, 515 U.S. at 920, 115 S. Ct. at 2490, 132 L. Ed. 2d at 782).

a.

In my earlier dissent, I questioned this Court's handling of the apparent deficiencies in the trial court's findings of fact with respect to whether race was the predominant motivating factor for the General Assembly in the creation of the twenty-six VRA districts. *See Dickson v. Rucho*, 367 N.C. 542, 578-79, 766 S.E.2d 238, 262-63 (2014) (Beasley, J., concurring in part and dissenting in part). The trial court found that

> [t]he Plaintiffs collectively challenge as racial gerrymanders 9 Senate, 18 House and 3 U.S. Congressional districts created by the General Assembly in the Enacted Plans. Of those 30 challenged districts, it is undisputed that the General Assembly intended to create 26 of the challenged districts to be "Voting Rights Act districts" [hereinafter

3. "If, however, [the] plaintiff[ ] cannot show that race was the 'predominant factor' to which traditional districting principles were 'subordinated,' and thus cannot meet the threshold for triggering strict scrutiny, it follows that the facially neutral classification (the electoral district) will be subject, at most, to rational basis review." *Quilter v. Voinovich*, 981 F. Supp. 1032, 1050 (N.D. Ohio 1997) (citing *Miller*, 515 U.S. at 915-16, 115 S. Ct. at 2488, 132 L. Ed. 2d at 779-80), *aff'd mem.*, 523 U.S. 1043, 118 S. Ct. 1358, 140 L. Ed. 2d 508 (1998).

> "VRA districts"] and that it set about to draw each of these VRA districts so as to include at least 50% Total Black Voting Age Population [hereinafter "TBVAP"]. Moreover, the General Assembly acknowledges that it intended to create as many VRA districts as needed to achieve a "roughly proportionate" number of Senate, House and Congressional districts as compared to the Black population in North Carolina. To draw districts based upon these criteria necessarily requires the drafters of districts to classify residents by race so as to include a sufficient number of black voters inside such districts, and consequently exclude white voters from the districts, in an effort to achieve a desired racial composition of >50% TBVAP and the desired "rough proportionality." This is a racial classification.

(Footnote call numbers omitted.) Accordingly, the trial court "conclude[d] . . . that in drawing [the] VRA districts . . . [,] the shape, location and racial composition of each VRA district was predominantly determined by a racial objective and was the result of a racial classification sufficient to trigger the application of strict scrutiny as a matter of law."

On remand, this Court holds, just as it did before, that the trial court's finding that "no factual inquiry was required regarding the General Assembly's predominant motivation in forming the twenty-six VRA districts beyond the General Assembly's concession that the districts were drafted to be VRA-compliant" was insufficient to show "whether race fairly can be described as the predominant factor." The majority then proceeds under the assumption that race was the predominant motivating factor and, accordingly, embarks on a strict scrutiny analysis. I maintain that, instead of perpetuating the trial court's mistake in making "truncated findings of fact," this Court should remand this case to the trial court to correct the deficiency because the citizens of this state would be better served if we held to our usual course and vacated the trial court's Judgment and remanded the case to the trial court for proper findings of fact and conclusions of law based upon a correct interpretation of the law. When viewed in light of the guidance provided in *ALBC*, the deficiencies in the trial court's findings with respect to predominance and the error of this Court in ignoring the same are clear.

One of the Alabama legislature's goals in developing its redistricting plan was to come as close as possible to the ideal one-person, one-vote population with a deviation of no more than 1%. *ALBC*, 575 U.S.

at ___, 135 S. Ct. at 1263, 191 L. Ed. 2d at 324. In other words, Alabama endeavored to create districts of approximately equal population. The district court concluded that race was not a predominant motivating factor because, on balance, the plans reflected nonracial motivations, such as an attempt to equalize population. *Id.* at ___, 135 S. Ct. at 1270, 191 L. Ed. 2d at 331. The Supreme Court took issue with the district court's "calculat[ion]" of predominance, reasoning that "an equal population goal is not one factor among others to be weighed against the use of race to determine whether race 'predominates.' Rather, it is part of the redistricting background, taken as a given, when determining whether race, or other factors, predominate in a legislator's determination as to *how* equal population objectives will be met." *Id.* at ___, 135 S. Ct. at 1270, 191 L. Ed. 2d at 332. Further, the Supreme Court explained that predominance has a special meaning in the context of racial gerrymandering claims because "[i]t is not about whether a legislature believes that the need for equal population takes ultimate priority. Rather, it is, as we said, whether the legislature placed race above traditional districting considerations in determining which persons were placed in appropriately apportioned districts." *Id.* at ___, 135 S. Ct. at 1271, 191 L. Ed. 2d at 332 (citation, emphasis, and quotation marks omitted). The Supreme Court noted that, if the district court had applied the predominance test correctly, its conclusions may have been different, *id.* at ___, 135 S. Ct. at 1271, 191 L. Ed. 2d at 333, and, hence reconsideration on remand was appropriate.

While the precise issue identified in *ALBC* is not present in the case before us, the takeaway is relevant: the predominance test—whether "the legislature subordinated traditional race-neutral districting principles . . . to racial considerations," *Miller*, 515 U.S. at 916, 115 S. Ct. at 2488, 132 L. Ed. 2d at 779-80—must be applied correctly. The lower court in *ALBC* balanced race against traditional redistricting principles, but improperly included equal population as a traditional principle, and the Supreme Court took exception to the court's misapplication of the law. Here the trial court skipped the balancing of race against traditional redistricting principles entirely and instead concluded that it could "bypass this factual inquiry" for the twenty-six VRA districts. The Supreme Court acknowledged that a misapplication of the law can lead to erroneous conclusions and, therefore, remand under those circumstances is necessary to ensure proper application. Remand is also necessary here. But, as I noted in my previous dissent, there is ample evidence that the General Assembly subordinated traditional redistricting principles to racial considerations, and thus, the record contains sufficient evidence to support a predominance finding.

Plaintiffs and *amici* point to evidence showing that State Senator Robert Rucho and State Representative David Lewis, the respective chairs of the Senate and House Redistricting Committees, instructed Dr. Thomas Brooks Hofeller, the "chief architect" of the redistricting plans, to draw the plans to provide "substantial proportional[ity]" between the percentage of the state's population that is Black and the percentage of districts that would be majority-Black. Dr. Hofeller was also told to "draw a 50% plus one district wherever in the state there is a sufficiently compact black population" to do so. The public statements released by Senator Rucho and Representative Lewis also reflect these legislative goals, saying that, in order to comply with VRA § 2, the VRA districts are designed to provide Black voters with "substantial proportionality" and "must be established with a BVAP of 50% plus one." Because the Supreme Court has held that similar evidence demonstrated that race was the predominant motivating factor, the trial court would have ample justification for determining that strict scrutiny is the appropriate level of review to apply to the Enacted Plans.[4]

Assuming that the trial court makes a proper predominance finding on remand, the trial court must properly apply the strict scrutiny standard. In its decision the trial court states that, if plaintiffs meet the threshold burden of establishing that "race was the overriding consideration behind a redistricting plan," then

> the state . . . has the burden of "producing evidence that the plan's use of race is narrowly tailored to further a compelling state interest, and the plaintiffs bear the ultimate burden of persuading the court either that the proffered justification is not compelling or that the plan is not narrowly tailored to further it." *Shaw v. Hunt*, 861 F. Supp. 408, 436 (E.D.N.C. 1994).

4. *See*, *e.g.*, *Bush v. Vera*, 517 U.S. 952, 958-59, 116 S. Ct. 1941, 1951-52, 135 L. Ed. 2d 248, 257 (1996) (plurality) (explaining that strict scrutiny applies when race is "the predominant factor" in a legislature's redistricting plan) (citation, emphasis, and internal quotation marks omitted); *Id.* at 1002-03, 116 S. Ct. at 1974, 135 L. Ed. 2d at 286 (Thomas & Scalia, JJ., concurring in the judgment) (explaining that Texas's admission that "it intentionally created majority-minority districts" in order to comply with the VRA was "enough to require application of strict scrutiny in this suit"); *Shaw II*, 517 U.S. at 906, 116 S. Ct. at 1901, 135 L. Ed. 2d at 219 ("fail[ing] to see how" a court could reach any conclusion other than that "race was the predominant factor" in the General Assembly's drawing of redistricting lines when the State admitted that its "overriding purpose" was to obtain preclearance from DOJ) (citation, emphasis, and quotation marks omitted); *Miller*, 515 U.S. at 918-19, 115 S. Ct. at 2489, 132 L. Ed. 2d at 780-81 (concluding that Georgia's express "desire" to obtain preclearance was "powerful evidence that the legislature subordinated traditional districting principles to race when it ultimately enacted a plan creating three majority-black districts" and thus strict scrutiny applied).

In support of this proposition, the trial court quotes the district court's decision in *Shaw II*. In *Shaw II*, however, the Supreme Court reversed the trial court and, in doing so, held that under strict scrutiny, "*North Carolina . . . must show* not only that its redistricting plan was in pursuit of a compelling state interest, but also that 'its districting legislation is narrowly tailored to achieve [that] compelling interest.' " *Shaw II*, 517 U.S. at 908, 116 S. Ct. at 1902, 135 L. Ed. 2d at 220-21 (alteration in original) (emphasis added) (quoting *Miller*, 515 U.S. at 920, 115 S. Ct. at 2490, 132 L. Ed. 2d 782). This language from *Shaw II* clearly places the burden of proof on the State once strict scrutiny is triggered.

This conclusion is bolstered by the Supreme Court's earlier statement in *Miller* that, "[t]o satisfy strict scrutiny, *the State must demonstrate* that its districting legislation is narrowly tailored to achieve a compelling interest." 515 U.S. at 920, 115 S. Ct. at 2490, 132 L. Ed. 2d at 782 (emphasis added) (citations omitted). More recently, in the affirmative action context, the Supreme Court has been more explicit on this point: Under strict scrutiny, "*it remains at all times the [government]'s obligation to demonstrate*, and the Judiciary's obligation to determine," that the challenged action is narrowly tailored to achieve a compelling governmental interest. *Fisher v. Univ. of Tex. at Austin*, ___ U.S. ___, ___, 133 S. Ct. 2411, 2420, 186 L. Ed. 2d 474, 486-87 (2013) (emphasis added).

Here, the trial court attempted to distinguish *Fisher* on the ground that the General Assembly is entitled to some degree of deference given that redistricting is "an inherently political process." The Supreme Court, however, has declined to defer to political decision makers and apply something less than strict scrutiny to race-based classifications:

> But we have refused to defer to state officials' judgments on race in . . . areas where those officials traditionally exercise substantial discretion. For example, ... in the redistricting context, despite the traditional deference given to States when they design their electoral districts, we have subjected redistricting plans to strict scrutiny when States draw district lines based predominantly on race.

Johnson v. California, 543 U.S. 499, 512, 125 S. Ct. 1141, 1150, 160 L. Ed. 2d 949, 962-63 (2005) (citations omitted); *accord Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 744, 127 S. Ct. 2738, 2766, 168 L. Ed. 2d 508, 539 (2007) (plurality) (explaining that "deference is fundamentally at odds with our equal protection jurisprudence" and that courts "put the burden on State actors to demonstrate that their

race-based policies are justified" (citations and quotation marks omitted)). Moreover, to whatever extent the legislature may be entitled to deference, that "limited degree of leeway in furthering [its] interests" in complying with the VRA relates to whether the state has met its burden of establishing "the 'narrow tailoring' requirement of strict scrutiny." *Bush v. Vera*, 517 U.S. 952, 977, 116 S. Ct. 1941, 1960, 135 L. Ed. 2d 248, 268 (1996) (plurality). Nonetheless, this deference does not relieve the State of "the *burden to prove* 'that the reasons for any [racial] classification [are] clearly identified and unquestionably legitimate.' " *Fisher*, ___ U.S. at ___, 133 S. Ct. at 2419, 186 L. Ed. 2d at 485 (alterations in original) (emphasis added) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505, 109 S. Ct. 706, 728, 102 L. Ed. 2d 854, 889 (1989)).

Even though the evidence, in my view, provides ample justification for the conclusion made by the trial court—that race predominated—it is important that the trial court do the work, as required by *Miller* and now *ALBC*, and properly determine whether the General Assembly subordinated traditional redistricting principles to racial considerations. Moreover, the trial court's misunderstanding and misapplication of the strict scrutiny analytical framework provides additional justification for a decision to vacate the trial court's decision and remand this case to the trial court for reconsideration in light of correct principles. *See Fisher*, *id.* at ___, 133 S. Ct. at 2421-22, 186 L. Ed. 2d at 487-89 (remanding after determining the trial court and court of appeals misapplied strict scrutiny standard so that challenged admissions policy could be "considered and judged under a correct analysis"). Failure to apply properly the operative constitutional test is, in itself, a sufficient basis for overturning the trial court's decision. *See id.* at ___, 133 S. Ct. at 2421-22, 186 L. Ed. 2d at 487-89. This Court should not forgive the misapplication of the law because, as the Court in *ALBC* confirmed, a misapplication of the law upon which a conclusion depends, infects the remainder of the analysis.

b.

After the trial court concluded that race predominated in the General Assembly's decision to create twenty-six VRA districts and that strict scrutiny applied, the trial court also side-stepped its compelling state interest analysis with respect to § 2. Specifically, the trial court's findings were insufficient as they relate to determining whether the challenged districts met all three *Gingles* preconditions. The trial court concluded "that the General Assembly had a strong basis in evidence to conclude that each of the *Gingles* preconditions was present in substantial portions of North Carolina and that, based upon the totality of circumstances, VRA districts were required to remedy against vote dilution."

At the outset, the trial court's conceptualization of the *Gingles* preconditions analysis was faulty. The *ALBC* opinion explains that "[a] racial gerrymandering claim, however, applies to the boundaries of individual districts. It applies district-by-district. It does not apply to a State considered as an undifferentiated 'whole.' " *ALBC*, 575 U.S. at ___, 135 S. Ct. at 1265, 191 L. Ed. 2d at 326. The trial court's conclusion that the preconditions were present "in substantial portions of North Carolina" suggests that the trial court did not engage in a district-by-district analysis as required by law. The trial court must make findings of fact addressing the presence of *each* of the *Gingles* preconditions in *each* of the challenged districts.

Moreover, the trial court's findings of fact in the Judgment and Memorandum of Decision and in Appendix A of the Judgment related to the third precondition are deficient. In *Thornburg v. Gingles* the Supreme Court held that, in order to establish a § 2 voting dilution claim, the minority group must demonstrate that (1) "it is sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) "it is politically cohesive"; and (3) "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Thornburg v. Gingles*, 478 U.S. 30, 50-51, 106 S. Ct. 2752, 2766-67, 92 L. Ed. 2d 25, 46-47 (1986) (citations omitted); *see De Grandy*, 512 U.S. at 1006, 114 S. Ct. at 2654, 129 L. Ed. 2d at 788 (majority) (confirming that vote dilution in the case of single-member districts likewise requires proof of the three preconditions (citing *Growe v. Emison*, 507 U.S. 25, 40-41, 113 S. Ct. 1075, 1084, 122 L. Ed. 2d 388, 403-04 (1993))). Furthermore, when defendants use § 2 as a defense against claims that redistricting plans are unconstitutional, defendants bear the burden of demonstrating the existence of all three mandatory preconditions. *Pender County v. Bartlett*, 361 N.C. 491, 496, 649 S.E.2d 364, 367 (2007) (*Pender County*), *aff'd sub nom. Bartlett v. Strickland*, 556 U.S. 1, 129 S. Ct. 1231, 173 L. Ed. 2d 173 (2009) (*Strickland*) (plurality).

The trial court summarized the evidence relevant to the three preconditions that was before the General Assembly when it enacted the plans. Most of the evidence related to the existence of racially polarized voting in North Carolina. To a certain extent, explaining the evidence of racial polarization was appropriate because, in *Gingles* the Supreme Court explained:

> The purpose of inquiring into the existence of racially polarized voting is twofold: to ascertain whether minority group members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc

> usually to defeat the minority's preferred candidates. . . . A showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim, and, consequently, establishes minority bloc voting within the context of § 2. *And, in general, a white bloc vote that normally will defeat the combined strength of minority support plus white "crossover" votes rises to the level of legally significant white bloc voting.*

Gingles, 478 U.S. at 56, 106 S. Ct. at 2769, 92 L. Ed. 2d at 50 (emphasis added) (citations omitted). The trial court found as fact that experts and community members had concluded that racially polarized voting exists in the challenged districts. Yet, neither the Judgment and Memorandum of Decision nor Appendix A to the Judgment makes a finding as to whether the majority usually bloc votes to defeat the minority's preferred candidate, the third precondition under *Gingles*. To the contrary, the third part of Appendix A is dedicated to describing the election results over time in the 2003 version of Senate Districts 14, 20, 21, 28, 38, and 40, the 2009 version of House Districts 12, 21, 29, 31, 48, 99, and 107, and the 2001 version of Congressional Districts 1 and 12.[5] The trial court found that each highlighted district was a majority-minority district in its pre-2011 form. The trial court also found that in each of these districts, an African-American Democratic candidate had been successful over a Republican opponent. This is evidence that voters in these majority-minority districts tended to elect African-American Democratic candidates, thereby suggesting that the minority group is politically cohesive in those districts. The findings do not establish, however, that the majority votes in a manner that usually defeats the minority group's preferred candidate of choice in those same districts.

The closest the findings come to demonstrating that the majority bloc votes in a way that usually defeats the minority group's preferred candidate is by recalling that

> [n]o African American candidate elected in 2010 was elected from a majority-white crossover district. . . . From 2006 through 2010, no African American candidate was elected to more than two consecutive terms to the legislature in a majority-white district. From 1992 through 2010,

5. The 2011 versions of each of these districts are challenged by plaintiffs as racial gerrymanders.

> no black candidate for Congress was elected in a majority-white district.
>
> From 2004 through 2010, no African American candidate was elected to state office in North Carolina in a statewide partisan election.

(Numeral and internal citations omitted.) These generalized findings have limited value. There is no indication that this set of data applies to the challenged VRA districts or reflects voting patterns over a period of time rather than the results of a single election. It is unlikely that the data would apply to the challenged VRA districts because they are all majority-minority districts, and many have been so under previous plans. In addition, generalized findings of fact do not constitute a district-by-district analysis as required by *ALBC*.

The trial court's findings clearly indicate racially polarized voting, and Supreme Court decisions establish that evidence of racially polarized voting is relevant to the second and third preconditions, *see Gingles*, 478 U.S. at 56, 106 S. Ct. at 2769, 92 L. Ed. 2d at 50; however, the fact remains that *Gingles* requires a showing of *all* three preconditions. Without adequate findings of fact related to the third precondition, the trial court's conclusion that all three preconditions have been met is unsupported by its findings. Therefore, I would remand this case to the trial court for adequate findings regarding the third precondition. It is worth noting that when one precondition is not satisfied, the General Assembly is not required to create a § 2 district. *See Pender County*, 361 N.C. at 499, 649 S.E.2d at 369. If the third precondition is not satisfied with respect to any district in a case such as this in which there is substantial evidence to suggest that race predominated the General Assembly's redistricting decisions for the twenty-six VRA districts, it follows that the General Assembly developed a race conscious redistricting plan that was not justified by § 2 as a compelling state interest.

c.

The trial court's narrow tailoring analysis also misses the mark in other respects. First, because the trial court failed to provide adequate findings of fact related to the third *Gingles* precondition, the trial court cannot rely on *Strickland* to conclude that creating VRA districts with a TBVAP greater than 50% was necessary to avoid liability under § 2. Second, *ALBC* disapproves of the use of mechanical numerical targets to avoid retrogression under § 5. Third, the General Assembly's use of racial proportionality to establish the total number of VRA districts was impermissible under *De Grandy*. I will discuss each in turn.

Plaintiffs argued at trial that drawing the VRA districts such that each would contain a TBVAP greater than 50%, thereby creating a majority-minority district, could not be narrow tailoring. The trial court rejected plaintiffs' argument and determined that "the General Assembly had a strong basis in evidence for concluding that it was reasonably necessary to endeavor to create all VRA districts within the Enacted Plans with 50% TBVAP to protect the state from anticipated liability under § 2 of the VRA and to ensure preclearance under § 5 of the VRA." The trial court relied upon this Court's decision in *Pender County v. Bartlett*.

In *Pender County* this Court considered "whether [the first *Gingles*] precondition, that a minority group must be 'sufficiently large and geographically compact to constitute a majority in a single-member district,' requires that the minority group constitute a numerical majority of the relevant population, or whether a numerous minority can satisfy the precondition." *Pender County*, 361 N.C. at 499, 649 S.E.2d at 370 (citation omitted). The majority of this Court answered that question by creating a bright line rule: "[A] minority group that otherwise meets the *Gingles* preconditions [must] constitute a numerical majority of citizens of voting age . . . ." *Id.* at 504, 649 S.E.2d at 373. The Court reasoned that "[a] bright line rule for the first *Gingles* precondition 'promotes ease of application without distorting the statute or the intent underlying it' " and serves as a "safe harbor" for the General Assembly in the redistricting process. *Id.* at 505, 649 S.E.2d at 373 (quoting *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 942 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031, 109 S. Ct. 1769, 104 L. Ed. 2d 204 (1989)). Affirming the majority's conclusion, the Supreme Court in *Strickland* reiterated that "the dispositive question is: What size minority group is sufficient to satisfy the first *Gingles* requirement?" *Strickland*, 556 U.S. at 12, 129 S. Ct. at 1242, 173 L. Ed. 2d at 183 (plurality). The Court reasoned, as this Court did in *Pender County*, that a majority-minority rule provided "workable standards and sound judicial and legislative administration." *Id.* at 17, 129 S. Ct. at 1244, 173 L. Ed. 2d at 186.

The trial court explained the *Strickland* holding as follows: "[W]hen the State has a strong basis in evidence to have a reasonable fear of § 2 liability, the State must be afforded the leeway to avail itself of the 'bright line rule' and create majority-minority districts, rather than cross-over districts, in those areas where there is a sufficiently large and geographically compact minority population and racial polarization exists." Writing for the plurality in *Strickland*, Justice Kennedy made the following crucial observations:

> *Our holding also should not be interpreted to entrench majority-minority districts by statutory command, for that, too, could pose constitutional concerns.* States that wish to draw crossover districts are free to do so where no other prohibition exists. Majority-minority districts are only required if all three *Gingles* factors are met and if § 2 applies based on a totality of the circumstances. In areas with substantial crossover voting it is unlikely that the plaintiffs would be able to establish the third *Gingles* precondition—bloc voting by majority voters. *In those areas majority-minority districts would not be required in the first place; and in the exercise of lawful discretion States could draw crossover districts as they deemed appropriate.* States can—and in proper cases should—defend against alleged § 2 violations by pointing to crossover voting patterns and to effective crossover districts. Those can be evidence, for example, of diminished bloc voting under the third *Gingles* factor or of equal political opportunity under the § 2 totality-of-the-circumstances analysis. *And if there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments.* There is no evidence of discriminatory intent in this case, however. *Our holding recognizes only that there is no support for the claim that § 2 can require the creation of crossover districts in the first instance.*

Id. at 23-24, 129 S. Ct. at 1248-49, 173 L. Ed. 2d at 190-91 (emphases added) (internal citations omitted). Justice Kennedy's qualification of the holding suggests that it is a mistake to interpret *Strickland* as requiring majority-minority districts in order to comply with § 2 under all circumstances. Taking into consideration the limitations of *Strickland*'s holding, it is not possible to determine whether all the majority-minority districts created by the General Assembly are required in this case because, as explained above, the trial court did not make adequate findings of fact regarding whether the third *Gingles* precondition was satisfied, necessitating the determination that there are inadequate findings of fact to support the conclusion that each of the VRA districts was justified.

Even assuming that the State had a compelling interest in avoiding liability under VRA § 2 and obtaining preclearance under VRA § 5,[6] and assuming that the factors set forth in *Thornburg v. Gingles* have been properly addressed, the trial court's findings with respect to the greater than 50% TBVAP threshold and proportionality do not support its ultimate conclusion that the redistricting plans pass strict scrutiny. Therefore, this Court should vacate and remand regarding the twenty-six VRA districts.

As explained in *ALBC*, "Alabama believed that, to avoid retrogression under § 5, it was required to maintain roughly the same black population percentage in existing majority-minority districts." 575 U.S. at ___, 135 S. Ct. at 1263, 191 L. Ed. 2d at 324. The Supreme Court rejected this view by establishing that, to avoid "forbidden retrogression," setting fixed percentages or pursuing a "mechanically numerical view" differs significantly from a "more purpose-oriented view," *id.* at ___, 135 S. Ct. at 1273, 191 L. Ed. 2d at 335, which inquires whether "minority voters retain the ability to elect their preferred candidates," *id.* at ___, 135 S. Ct. at 1273, 191 L. Ed. 2d at 334. As the Supreme Court explained:

> [W]e conclude that the District Court and the legislature asked the wrong question with respect to narrow tailoring. They asked: "How can we maintain present minority percentages in majority-minority districts?" But given § 5's language, its purpose, the Justice Department Guidelines, and the relevant precedent, they should have asked: "To what extent must we preserve existing minority percentages in order to maintain the minority's present ability to elect the candidate of its choice?" Asking the wrong question may well have led to the wrong answer. Hence, we cannot accept the District Court's "compelling interest/narrow tailoring" conclusion.

Id. at ___, 135 S. Ct. at 1274, 191 L. Ed. 2d at 336.

Similarly, the North Carolina General Assembly did not ask the right question. The trial court here found that "it is undisputed that

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6. The United States Supreme Court has repeatedly assumed, without deciding, that compliance with the VRA can be a compelling state interest in the strict scrutiny context, but that Court has not expressly decided the issue. *See Shaw II*, 517 U.S. at 915, 116 S. Ct. at 1905, 135 L. Ed. 2d at 225 ("We assume, *arguendo*, for the purpose of resolving this suit, that compliance with § 2 could be a compelling interest . . . ."); *Miller*, 515 U.S. at 921, 115 S. Ct. at 2490, 132 L. Ed. 2d at 782 (assuming that satisfying "the Justice Department's preclearance demands" can be compelling interest).

the General Assembly intended to create 26 of the challenged districts to be [VRA districts] and that it set about to draw each of these VRA districts so as to include at least 50% [TBVAP].” Although Alabama and North Carolina sought to avoid retrogression differently—by drawing the challenged districts so as to maintain the same percentage of minority voters in Alabama, and to ensure at least 50% TBVAP in North Carolina—both legislatures used a mechanical numerical target in that effort. This is precisely what *ALBC* forbids.

Under a § 5 retrogression analysis conducted in accordance with *ALBC*, the trial court must consider to what extent the number of minority voters within each existing majority-minority district must change, if at all. If, within an existing majority-minority district, the minority group is able to elect the candidate of its choice, based on the record of evidence related to voting patterns and other indicia, there are no grounds to increase the minority voter percentages under § 5. Conversely, if the minority group within an existing majority-minority district is no longer able to elect the candidate of its choice because of demographic shifts or other changes, then § 5 requires an increase in the percentage of minority voters within that district to avoid retrogression. Without asking the correct question—“To what extent must we preserve existing minority percentages in order to maintain the minority’s present ability to elect the candidate of its choice?”—the trial court authorized the legislature to move minority voters into certain districts based solely on their race without justification.

Finally, the General Assembly endeavored “to create as many VRA districts as needed to achieve a ‘roughly proportionate’ number of Senate, House and Congressional districts as compared to the Black population in North Carolina.” The General Assembly reasoned that, because 21% of North Carolina’s voting age population identified as any part Black, roughly 21% of the Senate, House, and Congressional seats should be filled by candidates elected by voters in VRA districts, *i.e.*, majority-minority districts. The trial court found that the General Assembly used rough proportionality as a “benchmark” for the number of VRA districts it would create, and the court concluded that this methodology was appropriate to avoid any potential § 2 liability. But as I noted in my previous dissent, this conclusion is based on a misapprehension of *De Grandy*.

In *De Grandy* the State of Florida argued “that as a matter of law no dilution occurs whenever the percentage of single-member districts in which minority voters form an effective majority mirrors the minority

voters' percentage of the relevant population." 512 U.S. at 1017, 114 S. Ct. at 2660, 129 L. Ed. 2d at 795. The Supreme Court rejected this safe harbor rule because such a rule "would be in derogation of the statutory text and its considered purpose, however, and of the ideal that the Voting Rights Act of 1965 attempts to foster. An inflexible rule would run counter to the textual command of § 2, that the presence or absence of a violation be assessed 'based on the totality of circumstances.' " *Id.* at 1018, 114 S. Ct. at 2660, 129 L. Ed. 2d at 795 (citation omitted). In addition, such a rule would lead to a tendency on the part of the State to create majority-minority districts even when they may not be necessary to achieve equal opportunity for a minority voter to elect his or her preferred candidate. *Id.* at 1019-20, 114 S. Ct. at 2661, 129 L. Ed. 2d at 796.

Here, however, defendants' public statements undermine their adherence to the applicable standards and demonstrate the central role proportionality played in the 2011 redistricting plan. On 17 June 2011, defendants announced a public hearing concerning redistricting issues, in which defendants expressed the intention to propose redistricting plans containing a sufficient number of majority-minority districts to provide substantial proportionality. Defendants proposed "that each plan include a sufficient number of majority African American districts to provide North Carolina's African American citizens with a substantially proportional and equal opportunity to elect their preferred candidate of choice." Defendants explained that "proportionality for the African American citizens in North Carolina means the creation of 24 majority African American House districts and 10 majority Senate districts. . . . Unlike the 2003 benchmark plans, the Chairs' proposed 2011 plans will provide substantial proportionality for North Carolina's African American citizens."

In light of its misreading of *De Grandy*, the trial court cites approvingly defendants' use of proportionality as the "benchmark" for creating the Enacted Plans—beginning with proportionality as the goal and then working backwards to achieve that goal. Similarly, the trial court reasoned: "When the Supreme Court says 'no violation of § 2 can be found' under certain circumstances, prudence dictates that the General Assembly should be given the leeway to seek to emulate those circumstances in its Enacted Plans." (Quoting *De Grandy*, 512 U.S. at 1000, 114 S. Ct. at 2651, 129 L. Ed. 2d at 784.) But this approach is precisely what the Supreme Court rejected in *De Grandy*: proportionality is relevant as a *means* to an end (compliance with the VRA), but it is not an *end* in itself and it does not—contrary to the trial court's reasoning—provide a safe harbor for redistricting plans premised on race. The Court in

De Grandy centered its analysis on the role of proportionality in the totality-of-the-circumstances analysis in a § 2 claim. *See id.* at 1013-14, 114 S. Ct. at 2658, 129 L. Ed. 2d at 792-93 ("The court failed to ask whether the totality of facts, including those pointing to proportionality, showed that the new scheme would deny minority voters equal political opportunity." (footnote call number omitted)). The Court made clear that equal political opportunity is the focus of the inquiry, not proportionality. By not focusing on whether the Enacted Plans denied minority voters equal political and electoral opportunity, the trial court misapplied the law, resulting in an erroneous conclusion that defendants' use of proportionality as an end is constitutionally permissible.

The majority concludes that "the record here demonstrates that the General Assembly did not use proportionality improperly to guarantee the number of majority-minority voting districts based on the minority members' share of the relevant population." The majority is only able to draw this conclusion by overlooking the trial court's determination—based upon "the undisputed evidence"—that the General Assembly used proportionality as a "benchmark." The majority's conclusion becomes more confusing given its statement that "[w]e believe that such an effort, seeking to guarantee proportional representation, proportional success, or racial balancing, would run afoul of the Equal Protection Clause." (Citing *De Grandy*, 512 U.S. at 1017-22, 114 S. Ct. at 2658-62, 129 L. Ed. 2d at 794-98.) I agree "that such an effort . . . would run afoul of the Equal Protection Clause," and its use in this instance has that effect.

By characterizing the General Assembly's consideration of race as a "precautionary consideration" used "as a means of protecting the redistricting plans from potential legal challenges under section 2's totality of the circumstances test," the majority appears to join the trial court in using race as a legislative safe harbor in derogation of the clear prohibition against reliance upon such criteria set forth by the Supreme Court of the United States. *De Grandy*, 512 U.S. at 1018-20, 114 S. Ct. at 2660-61, 129 L. Ed. 2d at 795-97. In light of these errors, this Court should vacate the trial court's Judgment and remand the case for reconsideration under a correct understanding of the law.

Based on the foregoing, I would remand this case to the trial court for more complete findings of fact on the VRA districts with respect to whether the General Assembly subordinated traditional redistricting principles to racial considerations, with respect to the third *Gingles* precondition, and with respect to the proper application of the non-retrogression requirement. Even if race predominated the General Assembly's motivations and §§ 2 and 5 constitute compelling state

interests, the trial court's findings of fact do not suffice to support a conclusion that the Enacted Plans were narrowly tailored to achieve those interests and did not violate the Equal Protection Clause of the Fourteenth Amendment.

On remand, the trial court should begin by determining how many majority-minority districts, if any, need to be created and where those districts should be located in order to comply with § 2 and § 5. In addition, after determining the total number of majority-minority districts needed to comply with the VRA, the trial court should determine, where necessary, the percentages of TBVAP in each district needed to ensure the minority group's present ability to elect its candidate of choice and to avoid retrogression. In answering these questions on remand, the trial court should engage in the following district-by-district analysis in accordance with the directives provided in *ALBC* and existing law.

As to the former inquiry, the trial court must look to § 2 and consider whether defendants have established the existence of the three mandatory *Gingles* preconditions for each majority-minority district that defendants created, and if so, whether the totality of the circumstances establishes that each of these districts was required by § 2 (unless the creation of that district was mandated by a prior court order that remains in effect[7]). Again, proportionality may be considered in the totality-of-the-circumstances determination but must not be the starting point for a redistricting plan. To the extent that defendants fail to establish that any of the majority-minority districts were required by § 2 based on the existence of the three mandatory *Gingles* factors and the totality of the circumstances, or a valid court order, the creation of such a majority-minority district is not justified.

As to the latter inquiry, the trial court must look to § 5 and determine on a district-by-district basis which actions, if any, were necessary to ensure non-retrogression in any district created pursuant to § 5. In doing so, the court should look to the districts as they existed under the prior redistricting plan to discern the TBVAP of each district and whether the minority group had the ability to elect its candidate of choice in that district. In the event the answer to that question is in the negative, then the

7. The trial court's findings suggest that the General Assembly believed that it was obligated to create and maintain certain majority-Black districts in accordance with *Gingles v. Edmisten*, 590 F. Supp. 345, 365-66 (E.D.N.C. 1984), *aff'd in part, rev'd in part sub nom. Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986), and *Cromartie v. Hunt*, 133 F. Supp. 2d 407, 408 (E.D.N.C. 2000), *rev'd sub nom. Easley v. Cromartie*, 532 U.S. 234, 121 S. Ct. 1452, 149 L. Ed. 2d 430 (2001), based upon advice received from the University of North Carolina School of Government and other sources.

court needs to determine what TBVAP is needed to permit the election of the minority group's candidate of choice. In the event that the answer to that question is in the affirmative, then the court must determine whether defendants impermissibly increased the TBVAP in that district.

II.

Plaintiffs also challenged four non-VRA districts, which are districts with a TBVAP of less than 50%—Congressional Districts 12 and 4, Senate District 32, and House District 54. The discussion in *ALBC* concerning the proper analysis for determining whether race was the predominant motivating factor in drawing the districts supports the conclusion that the trial court viewed equalizing population among the districts as a traditional redistricting principle rather than as "part of the redistricting background, taken as a given." 575 U.S. at ___, 135 S. Ct. at 1270, 191 L. Ed. 2d at 332.

The Court in *ALBC* was clear in its instruction that "an equal population goal is not one factor among others to be weighed against the use of race to determine whether race 'predominates.' Rather, it is part of the redistricting background, taken as a given, when determining whether race, or other factors, predominate in a legislator's determination as to *how* equal population objectives will be met." *Id.* at ___, 135 S. Ct. at 1270, 191 L. Ed. 2d at 332. The majority, in its attempt to show that the principles articulated in *ALBC* do not apply to the case at bar, reasons that, "[i]n effect, North Carolina's Whole County Provision, of which equal population is a component, establishes a framework to address the neutral redistricting requirement that 'political subdivisions' be respected." In its framing of the Whole County Provision, the majority essentially concludes that equal population is a traditional redistricting principle in North Carolina and, in the process, ignores the Supreme Court's holding that equal population is not a traditional redistricting principle to be weighed among other such principles.

In concluding that the non-VRA districts were not drawn with race as the predominant motivation, the trial court explained:

> Based upon these findings of fact, the trial court concludes that the shape, location and composition of the four non-VRA districts challenged by the Plaintiffs as racial gerrymanders was dictated by a number of factors, which included a desire of the General Assembly to avoid § 2 liability and to ensure preclearance under § 5 of the VRA, but also included *equally dominant legislative motivations* to comply with the Whole County Provision,

> *to equalize population among the districts*, to protect incumbents, and to satisfy the General Assembly's desire to enact redistricting plans that were more competitive for Republican candidates than the plans used in past decades or any of the alternative plans.

(Emphases added.) This statement reflects the trial court's understanding that equalizing population was as relevant to its predominance analysis as other legislative motivations, including compliance with the Whole County Provisions, protection of incumbents, and creating districts in which Republicans would be more competitive. The trial court's more specific findings of fact in Appendix B of the Judgment related to Congressional Districts 4 and 12 provide further evidence of the trial court's view of equal population as a factor to be weighed. The trial court found that, in Congressional District 4, "[a]ll of the divisions were done to equalize population among the Fourth Congressional District and the adjoining Congressional districts, to make the district contiguous, or for political reasons. None of the [Vote Tabulation Districts] were divided based upon racial data." Similarly, the trial court found that, in the Twelfth Congressional District, "[a]ll of [the] divisions were done to equalize population among the Twelfth Congressional District and other districts or for political reasons." If the trial court were to remove equalizing population as a traditional redistricting factor in accordance with *ALBC*, it would be left to consider only whether these two factors were subordinated to racial considerations: making the Fourth Congressional District contiguous and political considerations. In the case of the Twelfth Congressional District, the trial court would be left with only political reasons to weigh against race. This balance is particularly troublesome in the case of Congressional District 12.

The shape of Congressional District 12 has been the subject of much litigation over the last two decades, and for good reason. *See, e.g.*, *Easley v. Cromartie*, 532 U.S. 234, 121 S. Ct. 1452, 149 L. Ed. 2d 430 (2001) (*Cromartie II*); *Hunt v. Cromartie*, 526 U.S. 541, 119 S. Ct. 1545, 143 L. Ed. 2d 731 (1999); *Shaw II*, 517 U.S. 899, 116 S. Ct. 1894, 135 L. Ed. 2d 207; *Shaw I*, 509 U.S. 630, 113 S. Ct. 2816, 125 L. Ed. 2d 511. In *Cromartie II* the Supreme Court observed that "racial identification correlates highly with political affiliation" in North Carolina, 532 U.S. at 258, 121 S. Ct. at 1466, 149 L. Ed. 2d at 453, and that the plaintiffs in that case "ha[d] not successfully shown that race, rather than politics, predominantly account[ed] for" the shape, location, and composition of the 1997 version of Congressional District 12, *id.* at 257, 121 S. Ct. 1466, 149 L. Ed. 2d at 453. Here the trial court found as fact that Congressional

District 12 (and District 4) were drawn based on the locations where President Obama received the highest voter totals during the 2008 presidential election. Even if these voter totals were "[t]he only information on the computer screen," we cannot ignore the fact that race played an extraordinary role in that election. *See* Bob Hall, *2008 Recap: Same-Day Registration & Other Successes*, Democracy North Carolina (Dec. 26, 2008, updated Mar. 19, 2009), http://www.democracy-nc.org/downloads/WrapUpYearofVoterPR2008.pdf ("[I]n 2008, a record 72% of registered blacks voted, which surpassed the rate of whites (69%) for the first time. . . . That record level of participation proved crucial for many candidates, beginning with Obama."). To justify this serpentine district, which follows the I-85 corridor between Mecklenburg and Guilford Counties, on partisan grounds allows political affiliation to serve as a proxy for race and effectively creates a "magic words" test for use in evaluating the lawfulness of this district. Because race and politics historically have been and currently remain intertwined in North Carolina, the record contains evidence tending to suggest that politics are no more than a pretext for this excruciatingly contorted district. Therefore, given the inadequacy of its findings of fact, the trial court erred by concluding that "the shape, location and composition of [this district] . . . included equally dominant legislative motivations . . . to protect incumbents[ ] and to . . . enact redistricting plans that were more competitive for Republican candidates." Upholding this district's tortured construction creates an incentive for legislators to stay "on script" and avoid mentioning race on the record, and in this instance, it is disingenuous to suggest that race is not the predominant factor. As such, this Court should vacate and remand as to Congressional District 12.

With respect to Senate District 32, plaintiffs contend that the trial court's findings actually undermine its conclusion that strict scrutiny does not apply because the non-VRA districts are not race-based. The trial court found the following relevant facts:

> 204. As was true under the 2000 Census, under the 2010 Census there is insufficient TBVAP in Forsyth County to draw a majority-TBVAP Senate district in Forsyth County. However, because of concerns regarding the State's potential liability under § 2 and § 5, Dr. Hofeller was instructed by the redistricting chairs to base the 2011 Senate District 32 on the 2003 versions of Senate District 32.
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> . . . .

> 207. The first version of Senate District 32 that was released by the General Assembly had a TBVAP of 39.32%. Subsequently, the [AFRAM][8] plan was released. Its version of District 32 was located in a three-county and three-district group (Forsyth, Davie, Davidson). The [AFRAM] District 32 had a TBVAP of 41.95%. The [AFRAM] District 32 was a majority-minority coalition district with a non-Hispanic white population of 43.18%.
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> 208. The redistricting chairs were concerned that any failure to match the TBVAP % found in the [AFRAM] District 32 could potentially subject the state to liability under § 2 or § 5 of the VRA. Therefore, Dr. Hofeller was instructed by the Redistricting Chairs to re-draw the State's version of Senate District 32 so that it would at least equal the [AFRAM] version in terms of TBVAP.

As discussed above, the Supreme Court has held that when redistricting plans drawn in an attempt to preempt VRA § 2 litigation or obtain VRA § 5 preclearance are predominantly race-based, such plans attract strict scrutiny. *See Vera*, 517 U.S. at 959, 116 S. Ct. at 1952, 135 L. Ed. 2d at 257; *Shaw II*, 517 U.S. at 906, 116 S. Ct. at 1901, 135 L. Ed. 2d at 219; *Miller*, 515 U.S. at 920, 115 S. Ct. at 2490, 132 L. Ed. 2d at 782.

The trial court acknowledged that compliance with the VRA was a motivating factor behind the enacted plans, but concluded that "comply[ing] with the Whole County Provision, . . . equaliz[ing] population among the districts, . . . protect[ing] incumbents, and . . . satisfy[ing] the General Assembly's desire to enact redistricting plans that were more competitive for Republican candidates" were "equally dominant legislative motivations." But, in the section of its fact-finding Judgment addressing Senate District 32, the trial court made no findings regarding these other considerations. While the evidence might support such a conclusion, the trial court's actual findings do not. Accordingly, this Court should vacate the trial court's Judgment and remand this case to the trial court to address whether race was the predominant motivation behind the shape, location, and composition of Senate District 32.

With respect to House District 54 and Congressional District 4, the trial court also found that race was not the predominant motivating

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8. The trial court mistakenly refers to plaintiffs' alternative redistricting map as being proposed by the Southern Coalition for Social Justice; it was actually drawn by the Alliance for Fair Redistricting and Minority Voting Rights (AFRAM).

factor. Plaintiffs do not contest these determinations, and they are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). As stated above, however, because the shapes and compositions of the four non-VRA districts are necessarily affected by the VRA districts, it would be impossible to vacate and remand piecemeal.

Because I conclude that the issue of whether race was the predominant motivating factor in drawing the non-VRA districts should be remanded to the trial court for more complete findings of fact taking into account the guidance provided by *ALBC*, I do not find it necessary to address the trial court's application of the rational basis test or the majority's approval of it.

III.

Plaintiffs contend that the trial court erred in concluding that the enacted House and Senate plans do not violate the provisions of the state constitution, which dictate that "[n]o county shall be divided in the formation of a senate district," N.C. Const. art. II, § 3(3), and "[n]o county shall be divided in the formation of a representative district," *id.* § 5(3). In *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) (*Stephenson I*), this Court construed the Whole County Provisions in light of federal law and "mandated that in creating legislative districts, counties shall not be divided except to the extent necessary to comply with federal law, including the 'one-person, one-vote' principle and the VRA." *Stephenson v. Bartlett*, 357 N.C. 301, 309, 582 S.E.2d 247, 251-52 (2003) (*Stephenson II*) (citing *Stephenson I*, 355 N.C. at 363-64, 562 S.E.2d at 384-85). To ensure complete compliance with federal law and to provide maximum enforcement of the Whole County Provisions, this Court "outlined in *Stephenson I* the following requirements that must be present in any constitutionally valid redistricting plan":

> [1.] . . . [T]o ensure full compliance with federal law, legislative districts required by the VRA shall be formed prior to creation of non-VRA districts. . . . In the formation of VRA districts within the revised redistricting plans on remand, we likewise direct the trial court to ensure that VRA districts are formed consistent with federal law and in a manner having no retrogressive effect upon minority voters. *To the maximum extent practicable, such VRA districts shall also comply with the legal requirements of the WCP, as herein established . . . .*
>
> [2.] In forming new legislative districts, any deviation from the ideal population for a legislative

district shall be at or within plus or minus five percent for purposes of compliance with federal "one-person, one-vote" requirements.

[3.] In counties having a 2000 census population sufficient to support the formation of one non-VRA legislative district . . . , the WCP requires that the physical boundaries of any such non-VRA legislative district not cross or traverse the exterior geographic line of any such county.

[4.] When two or more non-VRA legislative districts may be created within a single county, . . . single-member non-VRA districts shall be formed within said county. *Such non-VRA districts shall be compact and shall not traverse the exterior geographic boundary of any such county.*

[5.] In counties having a non-VRA population pool which cannot support at least one legislative district . . . or, alternatively, counties having a non-VRA population pool which, if divided into districts, would not comply with the . . . "one-person, one-vote" standard, the requirements of the WCP are met by combining or grouping the *minimum number of whole, contiguous counties necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard. Within any such contiguous multi-county grouping, compact districts shall be formed, consistent with the at or within plus or minus five percent standard, whose boundary lines do not cross or traverse the "exterior" line of the multi-county grouping*; provided, however, that the resulting interior county lines created by any such groupings may be crossed or traversed in the creation of districts within said multi-county grouping but only to the extent necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard.

[6.] The intent underlying the WCP must be enforced to the maximum extent possible; thus, *only the smallest number of counties necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard shall be combined*[.]

> [7.] . . . *[C]ommunities of interest should be considered in the formation of compact and contiguous electoral districts.*
>
> [8.] . . . [M]ulti-member districts shall not be used in the formation of legislative districts unless it is established that such districts are necessary to advance a compelling governmental interest.
>
> [9.] Finally, we direct that any new redistricting plans, including any proposed on remand in this case, *shall depart from strict compliance with the legal requirements set forth herein only* to the extent necessary to comply with federal law.

Stephenson II, 357 N.C. at 305-07, 582 S.E.2d at 250-51 (alterations in original) (emphases added) (quoting *Stephenson I*, 355 N.C. at 383-84, 562 S.E.2d at 396-97).

The majority concludes that its analysis of the Enacted Plans under the Whole County Provisions remains "unaffected" by *ALBC*. Yet, a Whole County Provisions analysis conducted in accordance with the framework set forth in *Stephenson I*, requires application of the nine rules listed above, the first of which is premised on designing any legislative districts required by the VRA. *Stephenson I*, 355 N.C. at 383, 562 S.E.2d at 396-97. One cannot sever compliance with the VRA from compliance with the Whole County Provisions. Because *ALBC* provides legal principles that must be applied in determining the constitutionality of VRA districts, *ALBC* affects an analysis under the Whole County Provisions, albeit indirectly.

In view of the necessity for a remand to the trial court to address the equal protection claim, the trial court must also address the Whole County Provisions issue on remand given that the General Assembly, in attempting to comply with *Stephenson I*'s Rule 1, drew the VRA districts before applying Rules 2 through 9. Because I conclude that the trial court's findings of fact fail to establish that the VRA districts are constitutional, the trial court must, after making a valid determination relating to the VRA districts, and to the extent necessary, revisit the Whole County Provisions issues as well. Simply put, to the extent that the VRA districts are unconstitutional, that fact would necessarily affect the result reached with respect to the General Assembly's application of the rubric set forth in *Stephenson I*. *See Pender County*, 361 N.C. at 508-09, 649 S.E.2d at 375 (concluding that a house district created with the intent to comply with VRA § 2 was not required by the VRA and

thus, "must be drawn in accordance with the WCP and the *Stephenson I* requirements"). As such, I would vacate and remand on this issue.

IV.

When addressing the parties' arguments in support of and in opposition to the Enacted Plans, we cannot lose sight of the purpose of the VRA. The House Report accompanying the original Voting Rights Act of 1965 noted:

> A salient obligation and responsibility of the Congress is to provide appropriate implementation of the guarantees of the 15th amendment to the Constitution. Adopted in 1870, that amendment states the fundamental principle that the right to vote shall not be denied or abridged by the States or the Federal Government on account of race or color.
>
> The historic struggle for the realization of this constitutional guarantee indicates clearly that our national achievements in this area have fallen far short of our aspirations. The history of the 15th amendment litigation in the Supreme Court reveals both the variety of means used to bar Negro voting and the durability of such discriminatory policies [such as grandfather clauses, white primaries, racial gerrymandering, improper challenges, and the discriminatory use of tests].
>
> The past decade has been marked by an upsurge of public indignation against the systematic exclusion of Negroes from the polls that characterizes certain regions of this Nation.

H.R. Rep. No. 89-439, at 8 (1965) (titled "Voting Rights Act of 1965"), *as reprinted in* 1965 U.S.C.C.A.N. 2437, 2439-40 (citations omitted). In *Gingles* the Supreme Court noted the "historical pattern of statewide official discrimination" in North Carolina.[9] 478 U.S. at 39, 106 S. Ct. at 2760, 92 L. Ed. 2d at 39. The VRA was intended to remove barriers to

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9. The Court in *Gingles* summarized the trial court's findings on the types of voting discrimination mechanisms that persisted in North Carolina. The trial court found that "North Carolina had officially discriminated against its black citizens with respect to their exercise of the voting franchise from approximately 1900 to 1970 by employing at different times a poll tax, a literacy test, a prohibition against bullet (single-shot) voting and designated seat plans for multimember districts"; that "historic discrimination in education,

enfranchisement and ensure that new barriers did not arise in their place; however, "[s]ince the adoption of the Voting Rights Act [some] jurisdictions have substantially moved from direct, over[t] impediments to the right to vote to more sophisticated devices that dilute minority voting strength." *De Grandy*, 512 U.S. at 1018, 114 S. Ct. at 2660, 129 L. Ed. 2d at 795 (second and third alterations in original) (citation and internal quotation marks omitted). Although those new barriers may not look the same as the old barriers, it is this Court's duty to identify and invalidate policies or tactics that effectively impede the minority group's ability to elect its candidate of choice in compliance with the VRA and the Equal Protection Clause.

Here, even if the legislature considered traditional redistricting principles, such as compactness and the protection of incumbents or other political motivations, the fact remains that the General Assembly started with the premise that African-American voters in North Carolina should only be guaranteed the opportunity to elect candidates of their choice to 21% of the seats in each chamber. From there, the legislature worked backwards to avoid liability under § 2 and ensure preclearance under § 5. The implications of such a premise reach beyond the challenged VRA districts, affecting the non-VRA districts as well.

When the legislature purposely carves out majority-minority districts, increasing or decreasing the TBVAP by a few percentage points while maintaining a greater than 50% TBVAP, the district-drawing process necessarily requires the identification of voters by race and the movement of the district lines to incorporate or exclude those voters accordingly. This scheme compels the question: Is the ability of the minority voters who are suddenly no longer represented by their preferred candidate of choice in a VRA district unimportant? If the only way to ensure that the minority group has the ability to elect the candidate of its choice is to create majority-minority districts, the General Assembly has the power to determine which of the voters in the minority group will be represented by the candidate of their choice, and which voters will not.

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housing, employment, and health services had resulted in a lower socioeconomic status for North Carolina blacks as a group than for whites"; that North Carolina had a majority vote requirement for primaries that operated as an impediment to African-American voters' ability to elect their preferred candidates of choice; that white candidates appealed to racial prejudice; that African-Americans enjoyed very little electoral success; and that "voting in the challenged districts was racially polarized." *Gingles*, 478 U.S. at 38-41, 106 S. Ct. at 2760-61, 92 L. Ed. 2d at 39-41 (footnote call numbers omitted).

Writing separately in *De Grandy*, Justice Kennedy warned:

> Operating under the constraints of a statutory regime in which proportionality has some relevance, States might consider it lawful and proper to act with the explicit goal of creating a proportional number of majority-minority districts in an effort to avoid § 2 litigation. . . . Those governmental actions, in my view, tend to entrench the very practices and stereotypes the Equal Protection Clause is set against. As a general matter, the sorting of persons with an intent to divide by reason of race raises the most serious constitutional questions.

Id. at 1029, 114 S. Ct. at 2666, 129 L. Ed. 2d at 802 (Kennedy, J., concurring) (internal citation omitted). In my view, the trial court's decision to uphold the Enacted Plans in the absence of adequate findings demonstrates that Justice Kennedy's concerns may be well-founded.

For all the complexity of VRA jurisprudence, the bottom line is that the manipulation of district lines based on race to a greater extent than necessary to comply with the VRA is unconstitutional. The record in this case contains evidence tending to show that the General Assembly used numerical targets formulated by racial considerations to avoid liability under § 2 and ensure preclearance under § 5 without fully considering whether the decisions made were necessary to enable the minority group to elect its preferred candidate of choice in compliance with the VRA.[10] Any such scheme would be unconstitutional. The trial court's findings are not adequate to support a conclusion that this unconstitutional scheme did not occur. Any impermissibly racially gerrymandered districts affect the entire state under the Whole County Provisions of the North Carolina Constitution. For any of these errors, this Court would do well to vacate and remand rather than prematurely affirm a defective districting plan.

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10. The *amici* constitutional law professors point out that "[t]he distinction between the affirmative purpose of complying with federal law and a state's negative interest in avoiding future liability is constitutionally significant. A legislature concerned about compliance with the Voting Rights Act is ultimately pursuing the same goal of protecting the minority voters whom 'Acts such as the Voting Rights Act sought to help,' *ALBC*, 135 S. Ct. at 1263, and has a strong motivation to craft its redistricting to that end. A legislature intent on avoiding future liability is likely to do no more than the minimum necessary to escape legal difficulties: its interests and those of minority voters are not the same and, indeed, potentially are in conflict."

Accordingly, I concur in that part of the majority's opinion regarding plaintiffs' remaining state claims related to the "Good of the Whole" Clause in Article I, Section 2 of the Constitution of North Carolina, and respectfully dissent from those parts of the opinion affirming the trial court's erroneous judgment.

Justices HUDSON and ERVIN join in this opinion.

STEPHANIE L. NEEDHAM, Individually and as Guardian ad Litem for John Doe, Jane Doe, and June Doe, minor children
v.
ROY ALAN PRICE

No. 81PA15

Filed 18 December 2015

Parent and Child—parent-child doctrine—unemancipated minors—not a bar to gross negligence, intentional infliction of emotional distress, or punitive damages—bars ordinary negligence

The Court of Appeals erred in a negligence, premises liability, negligent infliction of emotional distress, intentional infliction of emotional distress, gross negligence, and punitive damages case by reversing in part the trial court's order granting summary judgment in favor of defendant. The parent-child immunity doctrine neither bars unemancipated minors' claims based on gross negligence and intentional infliction of emotional distress nor defeats their claims for punitive damages. The parent-child immunity doctrine 'bars actions between unemancipated children and their parents based on ordinary negligence.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 768 S.E.2d 160 (2015), affirming in part and reversing in part an order entered on 3 February 2014 by Judge J. Thomas Davis in Superior Court, Buncombe County. Heard in the Supreme Court on 5 October 2015.

Paul Louis Bidwell and Douglas A. Ruley for plaintiff-appellee.

Allegra Collins and Jack W. Stewart for defendant-appellant.

BEASLEY, Justice.

We consider whether the Court of Appeals erred by reversing in part the trial court's order granting summary judgment in favor of defendant. We reverse that decision by the Court of Appeals.

Plaintiff Stephanie L. Needham (Plaintiff Needham) and defendant had been involved in a long-term domestic relationship but they separated before 20 November 2009 when the events described below occurred. The couple had three children during the course of the relationship, all of whom were minors at the time of the incident that led to the present action.

On 26 September 2012, plaintiff filed a complaint alleging individual claims against defendant as well as claims asserted in her capacity as guardian ad litem on behalf of the three unemancipated minors. On the children's behalf, plaintiff brought claims seeking compensatory damages based on negligence, premises liability, negligent infliction of emotional distress, intentional infliction of emotional distress, and gross negligence, plus punitive damages. Plaintiff alleges in the complaint that around 1:25 a.m. on 20 November 2009, when she and the unemancipated minors still occupied defendant's home, defendant surreptitiously entered the home through the garage and attic. As defendant attempted to penetrate into the interior of the home via the attic stairs, he caused the attic ladder to unfold into the hallway below, striking plaintiff Needham on the back of her head, neck, and, shoulders. Plaintiff Needham sustained serious and permanent injuries. The unemancipated minors awoke because of the noise, observed plaintiff being struck by the ladder, and "recoiled in terror screaming . . . and watched in shock as [defendant] descended the ladder shouting obscenities at their fallen mother[.]" Plaintiff Needham alleged that the children suffered emotional distress and psychological injuries, including post-traumatic stress disorder.

Defendant filed an answer and counterclaims followed by a motion for summary judgment in his favor on all claims asserted in the action. In his summary judgment motion, defendant argued, *inter alia*, that no issue of material fact existed regarding the unemancipated minors' claims because plaintiff's claims on their behalf are barred under the parent-child immunity doctrine. After hearing the motion, the trial court entered an order on 3 February 2014 granting summary judgment in defendant's favor and dismissing all the children's claims.[1] Plaintiff appealed.

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1. The trial court also denied a separate motion by defendant for summary judgment in his favor on plaintiff's individual claims. That ruling was not challenged before the Court of Appeals and thus, that determination is not before this Court.

Using a de novo standard of review, the Court of Appeals agreed with plaintiff's argument that the parent-child immunity doctrine neither bars the unemancipated minors' claims based on gross negligence and intentional infliction of emotional distress, nor does it defeat their claim for punitive damages.[2] *Needham v. Price*, ___ N.C. App. ___, ___, 768 S.E.2d 160, 164 (2015). Relying on this Court's decision in *Holt*, the Court of Appeals explained that "[t]he parent-child immunity doctrine 'bar[s] actions between unemancipated children and their parents based on *ordinary* negligence.' " *Id.* at ___, 768 S.E.2d at 164 (second alteration in original) (quoting *Doe v. Holt*, 332 N.C. 90, 95, 418 S.E.2d 511, 514 (1992)). The Court of Appeals recognized the exception to the parent-child immunity doctrine found in *Holt* that any injuries sustained by unemancipated minors arising from a parent's willful and malicious acts may be actionable. *Id.* at ___, 768 S.E.2d at 164 (citing *Holt*, 332 N.C. at 96, 418 S.E.2d at 514)). The Court of Appeals also concluded that the terms "willful and wanton conduct" and "gross negligence" are used interchangeably in describing conduct falling between ordinary negligence and intentional conduct. *Id.* at ___, 768 S.E.2d at 164 (quoting *Yancy v. Lea*, 354 N.C. 48, 52, 550 S.E.2d 155, 157 (2001)). The Court of Appeals ultimately concluded that because gross negligence and intentional infliction of emotional distress require conduct that goes beyond ordinary negligence, an unemancipated minor could pursue those claims against a parent. *Id.* at ___, 768 S.E.2d at 164 (citations omitted). In analyzing the forecast of evidence regarding the unemancipated minors' intentional infliction of emotional distress and gross negligence claims, the Court of Appeals held that the trial court erred by dismissing those claims as well as the related punitive damages claim. *Id.* at ___, 768 S.E.2d at 165-66 (citations omitted). This Court allowed defendant's petition for discretionary review.

In *Holt*, this Court examined whether unemancipated minors could pursue an action against their father in tort arising from repeated incidents of rape and sexual molestation over nine years. *Holt*, 332 N.C. at 91-92, 418 S.E.2d at 512. This Court recognized that the purpose of the parent-child immunity doctrine is "maintenance of family harmony" so that "suits by children against their parents for negligent injury" do not

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2. Plaintiff conceded that the doctrine of parent-child immunity bars the unemancipated minors' claims for ordinary negligence. The Court of Appeals concluded that the trial court's decision to dismiss the unemancipated minors' claims of negligence, premises liability, and negligent infliction of emotional distress was not at issue and affirmed the trial court's entry of summary judgment and dismissal on those claims. Thus, the Court of Appeals limited its consideration to the children's claims for gross negligence, intentional infliction of emotional distress, and punitive damages.

"destroy parental authority and undermine the security of the home." *Id.* at 95, 418 S.E.2d at 514 (quoting *Small v. Morrison*, 185 N.C. 577, 584, 118 S.E. 12, 15 (1923)). Therefore, this Court concluded that except where statutorily abrogated, *id.* at 93, 418 S.E.2d at 512-13, the parent-child immunity doctrine "bar[s] actions between unemancipated children and their parents based on *ordinary* negligence," *id.* at 95, 418 S.E.2d at 514. This Court also concluded that "the parent-child immunity doctrine in North Carolina has never applied to, and may not be applied to, actions by unemancipated minors to recover for injuries resulting from their parent's willful and malicious acts." *Id.* at 96, 418 S.E.2d at 514.

In *Holt* this Court took great care to emphasize the importance of allowing unemancipated minors to seek damages for injuries suffered as a result of a parent's willful and malicious conduct through repeated use of that phrase. *Id.* at 94-97, 418 S.E.2d at 513-15. An act is willful "when it is done purposely and deliberately in violation of law" or "when it is done knowingly" and for a particular purpose. *Id.* at 96, 418 S.E.2d at 514 (quoting *Foster v. Hyman*, 197 N.C. 189, 191, 148 S.E. 36, 37 (1929)). An act is malicious when committed deliberately. . . "without just cause, excuse[,] or justification, and is "reasonably calculated to injure another." *Id.* at 96, 418 S.E.2d at 514 (quoting *Betts v. Jones*, 208 N.C. 410, 411, 181 S.E. 334, 335 (1935)). Therefore, the term "willful and malicious acts" refers to intentional acts. *See Holt*, *Id.* at 96, 418 S.E.2d at 514.

The Court of Appeals concluded that the terms "willful and wanton conduct" and "gross negligence" apply to conduct that falls "between ordinary negligence and intentional conduct." *Needham*, ___ N.C. App. at ___, 768 S.E.2d at 164 (quoting *Yancey v. Lea*, 354 N.C. at 52, 550 S.E.2d at 157). However, based upon this Court's holding in *Holt*, the standard for determining whether an unemancipated child's claim can survive summary judgment in an action for damages against a parent is whether the parent's actions are "willful and malicious." Anything short of willful and malicious conduct does not support a valid claim against a parent. We therefore hold that there must be willful and malicious conduct for an unemancipated child's claims to survive summary judgment in an action for damages against a parent.

Notably, the unemancipated minors here were bystanders to plaintiff Needham's injuries while the children in *Holt* were direct victims of repeated sexual abuse by their father over the course of many years. There was no evidence forecast to show that defendant's conduct was directed towards the unemancipated minors. There was also no evidence

forecast to show that defendant's conduct rose to the level of malicious conduct "reasonably calculated to injure another." *See Holt*, 332 N.C. at 96, 418 S.E.2d at 514. We hold that defendant's conduct did not rise to the level of willful and malicious conduct against the unemancipated minors.

We therefore hold that the trial court's entry of summary judgment in favor of defendant on the children's claims for intentional infliction of emotional distress and gross negligence, as well as their related punitive damages claim, was correct, and that the Court of Appeals erred in reversing that portion of the trial court's order. Accordingly, we reverse the decision of the Court of Appeals on the issue before this Court and remand this case to that court for further remand to the trial court for further proceedings not inconsistent with this opinion. The remaining issues addressed by the Court of Appeals were not before this Court and that court's decision as to these issues remains undisturbed.

REVERSED IN PART AND REMANDED.

STATE OF NORTH CAROLINA
v.
MICHAEL SCOTT HAMILTON

No. 124PA15

Filed 18 December 2015

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 772 S.E.2d 13 (2015), finding no error in part, but vacating defendant's convictions after appeal from judgments entered on 27 March 2014 by Judge W. Russell Duke, Jr. in Superior Court, Halifax County, remanding for resentencing in part, and ordering that defendant receive a new trial in part. Heard in the Supreme Court on 7 December 2015.

Roy Cooper, Attorney General, by Joseph L. Hyde, Assistant Attorney General, for the State-appellant.

Staples S. Hughes, Appellate Defender,[1] by Benjamin Dowling-Sendor, Assistant Appellate Defender, for defendant-appellee.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

1. Defendant's new brief was filed on 29 October 2015. Effective 1 November 2015, Glenn Gerding succeeded Staples S. Hughes as Appellate Defender.

STATE OF NORTH CAROLINA
v.
ANNA LAURA HUCKELBA

No. 156A15

Filed 18 December 2015

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 771 S.E.2d 809 (2015), reversing judgments entered on 3 October 2013 by Judge R. Stuart Albright in Superior Court, Guilford County, and remanding for a new trial. Heard in the Supreme Court on 17 November 2015.

Roy Cooper, Attorney General, by Catherine F. Jordan, Assistant Attorney General, for the State-appellant.

Edward Eldred for defendant-appellee.

PER CURIAM.

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

REVERSED.

STATE OF NORTH CAROLINA
v.
KEITH A. LEAK

No. 206A15

Filed 18 December 2015

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 773 S.E.2d 340 (2015), reversing an order denying defendant's motion to suppress signed on 26 November 2013 *nunc pro tunc* 6 August 2013 by Judge Tanya T. Wallace, and vacating defendant's guilty plea and a judgment entered on 14 November 2013 by Judge Mark E. Klass, all in Superior Court, Anson County. Heard in the Supreme Court on 17 November 2015.

Roy Cooper, Attorney General, by Derrick C. Mertz, Assistant Attorney General, for the State-appellant.

Narendra K. Ghosh for defendant-appellee.

PER CURIAM.

We vacate the decision of the Court of Appeals and remand this case to that court for further remand to the trial court for reconsideration of defendant's motion to suppress in light of *Rodriguez v. United States*, ___ U.S. ___, 135 S. Ct. 1609 (2015).

VACATED AND REMANDED.

STATE OF NORTH CAROLINA
v.
RONALD MICHAEL McCRARY

No. 413A14

Filed 18 December 2015

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 764 S.E.2d 477 (2014), affirming in part and remanding in part for additional findings of fact an order denying motions to suppress and to dismiss entered on 18 March 2013, which resulted in judgments entered on 21 March 2013, all by Judge W. Osmond Smith in Superior Court, Chatham County. On 10 June 2015, the Supreme Court allowed defendant's petition for writ of certiorari and the State's petition for discretionary review. Heard in the Supreme Court on 16 November 2015.

Roy Cooper, Attorney General, by Catherine F. Jordan, Assistant Attorney General, for the State-appellant/appellee.

John L. Wait for defendant-appellant/appellee.

PER CURIAM.

This case comes before this Court from the Court of Appeals, which affirmed the trial court's 18 March 2013 order denying defendant's motion to dismiss, but remanded the case "to the trial court to make additional findings of fact addressing the availability of a magistrate and the additional time and uncertainties in obtaining a warrant, as well as the other attendant circumstances that bear upon the conclusion of law that exigent circumstances existed that justified the warrantless blood draw. *State v. McCrary*, ___ N.C. App. ___, ___, 764 S.E.2d 477, 483 (2014) (internal quotation marks omitted). In considering this case, the trial court did not have the benefit of the opinion of the United States Supreme Court in *Missouri v. McNeely*, ___ U.S. ___, 133 S. Ct. 1552 (2013). Moreover, in remanding to the trial court for further findings of fact, the Court of Appeals did not vacate or reverse the trial court's previous order.

We affirm the Court of Appeals majority opinion to the extent it affirms the trial court's denial of defendant's motion to dismiss. In addition, we remand to the Court of Appeals with instructions to that court to vacate the portion of the trial court's 18 March 2013 order denying

defendant's motion to suppress and further remand to the trial court for (1) additional findings and conclusions—and, if necessary—a new hearing on whether the totality of the events underlying defendant's motion to suppress gave rise to exigent circumstances, and (2) thereafter to reconsider, if necessary, the judgments and commitments entered by the trial court on 21 March 2013. Defendant's petition for a writ of certiorari and the State's petition for discretionary review were improvidently allowed.

AFFIRMED IN PART AND REMANDED; PETITIONS FOR WRIT OF CERTIORARI AND FOR DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA
v.
JOSHUA WINKLER

No. 440PA14

Filed 18 December 2015

Drugs—conspiracy to traffic in opium—motion to dismiss—circumstantial evidence

There was sufficient evidence to support defendant's conviction for conspiracy to traffic in more than four but less that fourteen grams of opium in violation of N.C.G.S. § 90-95(h)(4)(a). In the light most favorable to the State, the record showed that defendant mailed sixty Oxycodone pills in an unmarked pill bottle to a person whom he knew to have a history of using and selling controlled substances. The State may rely on circumstantial evidence to survive a motion to dismiss.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 767 S.E.2d 150 (2014), vacating a judgment entered on 7 November 2013 by Judge William H. Coward in Superior Court, Buncombe County. Heard in the Supreme Court on 5 October 2015.

Roy Cooper, Attorney General, by Barry H. Bloch, Assistant Attorney General, for the State-appellant.

Craig M. Cooley for defendant-appellee.

ERVIN, Justice.

The sole issue presented for our consideration in this case is whether the record contains sufficient evidence to support defendant's conviction for conspiracy to traffic in more than four, but less that fourteen, grams of opium in violation of N.C.G.S. § 90-95(h)(4)(a). After examining the evidence utilizing the applicable standard of review, we conclude that the State presented sufficient evidence to support the jury's determination that defendant agreed with another individual to traffic in opium by transportation. In light of that determination, we reverse the Court of Appeals' decision to vacate the trial court's judgment and remand this case to the Court of Appeals for the purpose of allowing it to address defendant's remaining challenge to the trial court's judgment. *State v. Winkler*, ___ N.C. App. ___, 767 S.E.2d 150, 2014 WL 6433161, at *4-5 (2014) (unpublished).

On 2 April 2013, the Buncombe County grand jury returned a bill of indictment charging defendant with conspiracy to traffic in at least four, but less than fourteen, grams of opium in violation of N.C.G.S. § 90-95(h)(4)(a). More specifically, the grand jury alleged that, on 16 January 2013, defendant "conspire[d] with Jamie Thomas Harris to commit the felony [of] Trafficking in Opium or Heroin, by transporting in excess of 4 grams but less than 14 grams of a mixture containing Oxycodone, an opium derivative, . . . which is included in Schedule II of the North Carolina Controlled Substances Act."[1] The charge against defendant came on for trial before the trial court and a jury at the 4 November 2013 criminal session of the Superior Court, Buncombe County. At trial, the State relied on circumstantial, as opposed to direct, evidence for the purpose of establishing that defendant had conspired with Mr. Harris to traffic in Oxycodone. After the State presented its case in chief, defendant unsuccessfully moved to dismiss the conspiracy charge, arguing that the evidence was insufficient to establish that (1) defendant and Mr. Harris had formed an agreement to traffic in Oxycodone by transportation and (2) the Oxycodone pills had been "transported." Upon announcing his decision to rest without presenting evidence, defendant unsuccessfully renewed his dismissal motion, which was predicated on the same grounds that had been asserted in support of the dismissal

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1. The North Carolina Controlled Substances Act is codified in Article 5 of Chapter 90 of the North Carolina General Statutes. *See* N.C.G.S. § 90-86 (2013) (stating that Article 5 of Chapter 90 "shall be known and may be cited as the 'North Carolina Controlled Substances Act' "). "Oxycodone" is explicitly listed as a "Schedule II controlled substance[ ]" in N.C.G.S. § 90-90(1)(a)(14). *Id.* § 90-90(1)(a)(14) (2013).

motion that he had made at the conclusion of the State's evidence. On 6 November 2013, the jury returned a verdict convicting defendant as charged. After accepting the jury's verdict, the trial court entered a judgment on 7 November 2013 sentencing defendant to an active term of 70 to 93 months imprisonment and ordering defendant to pay $54,320.50 in costs, fines, and fees. Defendant noted an appeal to the Court of Appeals from the trial court's judgment.

On appeal to the Court of Appeals, defendant argued that the trial court had erred by denying his dismissal motion on the grounds that the evidence developed at trial did not suffice to establish that (1) defendant and Mr. Harris had entered into an agreement to traffic in Oxycodone and (2) the Oxycodone had been "transported." A unanimous panel of the Court of Appeals concluded that "the trial court erred by denying [defendant's] motions to dismiss because the State presented insufficient evidence that [defendant] conspired or formed an agreement with Mr. Harris to traffic in Oxycodone." *Winkler*, 2014 WL 6433161, at *2. As a result, the Court of Appeals vacated the trial court's judgment without addressing defendant's challenge to the sufficiency of the evidence to establish that the Oxycodone had been "transport[ed]." *Id.* at *4. On 9 April 2015, we allowed the State's request for discretionary review of the Court of Appeals' decision.

> "In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion.

State v. Mann, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (citations omitted) (quoting *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998)), *cert. denied*, 537 U.S. 1005, 123 S. Ct. 495, 154 L. Ed. 2d 403 (2002). In ascertaining whether the record contains substantial evidence tending to show the existence of an element of a criminal offense:

> The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion.

State v. Powell, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980) (citations omitted). According to well-established North Carolina law:

> Circumstantial evidence may be utilized to overcome a motion to dismiss " 'even when the evidence does not rule out every hypothesis of innocence.' " [*State v.*] *Thomas*, 350 N.C. [315,] [343], 514 S.E.2d [486,] 503 (quoting *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988))[, *cert. denied*, 528 U.S. 1006, 120 S. Ct. 503, 145 L. Ed. 2d 388 (1999)]. If the trial court finds substantial evidence, whether direct or circumstantial, or a combination, "to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988). If, however, the evidence "is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed." *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983).

State v. Golphin, 352 N.C. 364, 458, 533 S.E.2d 168, 229-30 (2000), *cert. denied*, 532 U.S. 931, 121 S. Ct. 1379, 149 L. Ed. 2d 305, and *cert. denied*, *id.* at 931, 121 S. Ct. at 1380, 149 L. Ed. 2d at 305 (2001).

N.C.G.S. § 90-95(h)(4)(a) provides that any person "who sells, manufactures, delivers, transports, or possesses four grams or more of opium or opiate, or any salt, compound, derivative, or preparation of opium or opiate[,] . . . or any mixture containing such substance, shall be guilty of a felony which felony shall be known as 'trafficking in opium or heroin' " and shall be punished as a Class F felon "if the quantity of such controlled substance or mixture involved . . . [i]s four grams or more, but less than 14 grams." N.C.G.S. § 90-95(h)(4)(a) (2013). "The penalties provided in subsection (h) of this section . . . also apply to any person who is convicted of conspiracy to commit any of the offenses described in subsection (h) of this section." *Id.* § 90-95(i) (2013).

"A criminal conspiracy is an agreement between two or more people to do an unlawful act or to do a lawful act in an unlawful manner. In order to prove conspiracy, the State need not prove an express agreement; evidence tending to show a mutual, implied understanding will suffice." *State v. Morgan*, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991) (citations omitted).

> Direct proof of [a conspiracy] charge is not essential, for such is rarely obtainable. It may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy. When resorted to by adroit and crafty persons, the presence of a common design often becomes exceedingly difficult to detect. Indeed, the more skillful and cunning the accused, the less plainly defined are the badges which usually denote their real purpose. Under such conditions, the results accomplished, the divergence of those results from the course which would ordinarily be expected, the situation of the parties and their antecedent relations to each other, together with the surrounding circumstances, and the inferences legitimately deducible therefrom, furnish, in the absence of direct proof, and often in the teeth of positive testimony to the contrary, ample ground for concluding that a conspiracy exists.

State v. Whiteside, 204 N.C. 710, 712-13, 169 S.E. 711, 712 (1933) (citations omitted). We will now review the sufficiency of the evidence adduced at trial to support defendant's conviction in light of the applicable standard of review.

In January 2013, probation and parole officer Melissa Whitson received information that Jamie Harris, a probationer subject to Officer Whitson's supervision, was selling Oxycodone out of his residence. As a condition of his probation, Mr. Harris was required, among other things, to submit to warrantless searches of his person, premises, and vehicle for anything that was reasonably related to his supervision.

On 16 January 2013, Officer Whitson contacted Mr. Harris and requested that he come to her office. A drug test administered to Mr. Harris at the time that he came to Officer Whitson's office for the requested visit was positive for Oxycodone. In view of the fact that she had received information to the effect that Mr. Harris was not living at the location that he had provided to the probation office, Officer Whitson asked Mr. Harris where he was living. In response, Mr. Harris said that "he had been staying . . . some" at 83 Dix Creek Chapel Road and that he was planning to move to that residence on a permanent basis in the near future. Although he was required to keep Officer Whitson informed in the event that he changed his address, Mr. Harris had not told any representative of the probation office that he had already moved to the Dix Creek Chapel Road address. In light of the information that she had

developed, Officer Whitson and two other officers transported Mr. Harris to the Dix Creek Chapel Road residence for the purpose of searching it.

Upon arriving at the residence, which was a two bedroom mobile home, the officers encountered Mr. Harris' girlfriend, Crystal Green, and Mr. Harris' minor son. While searching the mobile home, the officers found various items of drug paraphernalia associated with intravenous drug use, including needles, a spoon containing a partially melted pill, and tourniquets, plus a firearm.

As Officer Whitson entered the living room to converse with one of the other officers and to question Mr. Harris about the firearm, a United States mail carrier knocked at the door for the purpose of delivering a package addressed to "Jamie Harris, 83 Dix Creek Chapel Road, Asheville, North Carolina 28806." The package, which had been sent using priority mail, required a signature confirmation that had been requested by "J. Winkler, 1219 Everglades Avenue, Clearwater, Florida 33764."

In spite of the fact that he "seemed nervous" when the package arrived, Mr. Harris consented to the officers' request to open it. Upon opening the package, the officers found a prescription pill bottle from which all identifying labels and other information had been removed. Inside the bottle, into which tissue that prevented the contents from rattling or making any other noise had been inserted, the officers found sixty pills. After making this discovery, Officer Whitson contacted the poison control center for the purpose of ascertaining the identity of the pills that had been discovered in the bottle and was told that they contained Oxycodone. According to a subsequent analysis performed by Amanda Battin, a forensic scientist with the North Carolina State Crime Laboratory, each of these pills contained thirty milligrams of Oxycodone, a Schedule II opium derivative; twenty of the pills had been made by one manufacturer and the remaining forty pills had been made by another, and the sixty pills had a total combined weight of 6.01 grams.

In light of the report that she had received to the effect that Mr. Harris might have been selling drugs, the quantity of Oxycodone pills contained in the unmarked prescription bottle, and the fact that Mr. Harris "confirmed" the information that she had received concerning his involvement in drug-related activities, Officer Whitson contacted the Buncombe County Anti-Crime Taskforce for the purpose of having further investigative activities performed. Approximately fifteen to twenty minutes later, Officer Tammy Bryson and Agent Amy Seed, who worked with the drug diversion unit of the Buncombe County Anti-Crime Taskforce, arrived at the Dix Creek Chapel Road residence. At

that time, Officer Whitson handed Officer Bryson the package containing the pill bottle.

As of the date of defendant's trial, Officer Bryson had been a law enforcement officer for eighteen years and had conducted "hundreds of drug diversion" investigations.[2] According to Officer Bryson, "Oxycodone and most of the opiates" were the primary prescription medications involved in drug diversion activities. A single thirty milligram Oxycodone pill had a street value of approximately $30.00. As a result, the pills contained in the package that had been shipped to Mr. Harris had a street value of approximately $1,800.00.

Based upon her training and experience, Officer Bryson concluded that the condition of the bottle in which the sixty pills were contained reflected the existence of drug diversion activities. According to Officer Bryson, officers frequently encounter pill bottles from which the labels and other identifying information have been removed during drug diversion investigations. Also, given that individuals are not permitted to ship medications by mail, pill bottles utilized in drug diversion activities are frequently stuffed with tissue to muffle any sounds that the pills might make during the transmission process.

In addition, Officer Bryson suspected that Mr. Harris was involved in drug diversion activities based on the location from which the package in question had been sent. According to Officer Bryson, Florida was a primary "hub" or source state from which unlawfully diverted drugs entered Buncombe County. Officer Bryson had investigated individuals who had transported several hundred to more than a thousand pills dispensed from Florida pharmacies as a result of the fact that Florida did not have "a prescription monitoring system" that law enforcement officers could utilize for the purpose of tracking and investigating prescriptions for controlled substances.

After arresting Mr. Harris, Officer Bryson and Agent Seed began attempting to determine the identity of "J. Winkler," who had sent the package containing the pills to Mr. Harris. As part of that process, the officers listened to recordings of the phone calls that Mr. Harris made from jail. In a phone conversation that occurred on 17 January 2013, Mr. Harris mentioned an individual named "Josh" and stated that Josh was "in town."

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2. According to Officer Bryson, "drug diversion" occurs when a legal drug, such as a prescription medication, is redirected and used illegally or in a manner differing from the purpose for which the drug in question was originally prescribed.

The next day, Officer Bryson and Agent Seed learned that there was an individual named Joshua Winkler, who had a Farmville, North Carolina address and possessed both North Carolina and Florida driver's licenses. Upon obtaining that information, Agent Seed returned to the Dix Creek Chapel Road residence for the purpose of conducting surveillance activities there. At the Dix Creek Chapel Road residence, Agent Seed observed the presence of a vehicle that had not been there on 16 January 2013; however, Agent Seed was unable to ascertain the number of the license plate attached to the vehicle at that time. On 22 January 2013, Officer Bryson observed that the vehicle in question bore a North Carolina license plate that was registered to Joshua Winkler of 4281 West Pine Street in Farmville.

On 28 January 2013, an officer employed by the Asheville Police Department observed defendant leaving the Dix Creek Chapel Road residence and stopped his vehicle. After Officer Bryson and Agent Seed arrived at the scene of the traffic stop, they informed defendant that they were law enforcement officers and asked to speak with him. In response to that request, defendant joined Officer Bryson in the front seat of her vehicle. At that point, Officer Bryson informed defendant that she and Agent Seed wanted to discuss the package that he had sent to Mr. Harris and advised defendant of his rights against compulsory self-incrimination. After defendant executed a rights waiver form and indicated that he was willing to speak with Officer Bryson and Agent Seed, Officer Bryson questioned defendant while Agent Seed took notes.

In the course of his conversation with Officer Bryson and Agent Seed, defendant admitted that he had mailed the Oxycodone pills to Mr. Harris, claimed to be the owner of the pills contained in the package that had been addressed to Mr. Harris, and asserted that he had a prescription for thirty milligram Oxycodone pills. Although defendant lived in Farmville, defendant told the officers a doctor practicing in Miami had written his Oxycodone prescription. Defendant also told the officers that his North Carolina physician had refused to prescribe Oxycodone for him as a result of the fact that he was on probation for "doctor shopping."[3] Defendant claimed to have come from Florida to Buncombe County for the purpose of visiting "several grandchildren" and stated

3. Officer Bryson described "doctor shopping" as an offense in which an individual obtains or seeks to obtain a prescription from a health care practitioner after having already obtained the same prescription from another practitioner without disclosing the existence of the initial prescription to the practitioner from whom the subsequent prescription had been sought or obtained.

that he had visited a couple of his other grandchildren before arriving at Mr. Harris' residence for the purpose of visiting Mr. Harris' son, who was also defendant's grandson.

In the course of his conversation with Officer Bryson and Agent Seed, defendant acknowledged that he knew that "Mr. Harris did pills and sold pills." When asked why he had chosen to mail his Oxycodone pills to Mr. Harris' residence, defendant initially stated that he had acted in this manner because he did not want to travel to North Carolina with the pills in his possession and believed that he would arrive at Mr. Harris' residence before the package containing the pills was delivered. Defendant could not provide any response to Officer Bryson's request for an explanation of the reason that defendant did not want to travel with medication that had been prescribed for him and that he claimed to need. In addition, defendant could not provide any explanation for his decision to place the pills in an unmarked bottle into which tissue had been stuffed and to send the pills to Mr. Harris in light of his knowledge that Mr. Harris used drugs and engaged in unlawful drug transactions.

Defendant told Officer Bryson and Agent Seed that the last occasion on which he had filled his prescription was on 14 January 2013, when he obtained one hundred twenty, thirty milligram Oxycodone pills. At that point, defendant kept half of the pills and sent the other half to Mr. Harris. Although defendant claimed that he took three Oxycodone pills each day, none of the sixty pills that defendant said that he had kept in his possession remained by the time that defendant came to North Carolina. Defendant claimed that his probation officer knew that he took Oxycodone and asserted that he had never produced a positive result when tested for the presence of that medication at the request of his probation officer.

Officer Bryson found defendant's description of the manner in which he obtained, used, and mailed the Oxycodone pills to be "unusual" given that, in order for defendant's account to be true, he would have had to have consumed sixty pills in a couple of days. In addition, Officer Bryson expressed an inability to understand how defendant could have failed to test positive for the presence of Oxycodone. After defendant stated that his claim to this effect should be deemed to be credible because Oxycodone left an individual's system within a day, Officer Bryson reminded defendant that he had admitted consuming Oxycodone three times each day. After this exchange, defendant refrained from engaging in any further discussion of the extent to which he had ever tested positive for the presence of Oxycodone.

In seeking to persuade us to overturn the Court of Appeals' decision, the State argues that the Court of Appeals failed to correctly apply the established standard for evaluating a challenge to the denial of a motion to dismiss for insufficiency of the evidence and that, when the evidence contained in the present record is evaluated and all reasonable inferences permitted by that evidence have been drawn, the State presented more than enough evidence to permit a jury to conclude that defendant and Mr. Harris agreed to traffic in Oxycodone by transportation as part of a drug diversion scheme. Defendant, on the other hand, argues, in reliance upon *State v. Massey*, 76 N.C. App. 660, 662, 334 S.E.2d 71, 72 (1985), that the record evidence shows, at most, the existence of a relationship between defendant and Mr. Harris arising from Mr. Harris' status as the father of defendant's grandson and that evidence of such a relationship, without more, does not sufficiently establish the existence of an unlawful conspiracy. In addition, defendant notes that the record contains no evidence tending to show that defendant and Mr. Harris had communicated in any way, such as by telephone, text message, or e-mail, concerning their alleged agreement to transport Oxycodone despite the fact that they lived in different states. We find the position espoused by the State to be more persuasive than the position espoused by defendant.

When viewed in the light most favorable to the State, the record tends to show that defendant sent sixty Oxycodone pills in an unmarked pill bottle that was packed to prevent its contents from making any noise to an individual that defendant knew to have a history of using and dealing in controlled substances. Defendant acted in this manner despite the fact that he claimed to have a valid Oxycodone prescription, that he could have lawfully travelled from Florida to North Carolina with these Oxycodone pills in his possession, and that he could have sent the package containing the Oxycodone pills to the residences occupied by any of the multiple grandchildren with whom he planned to visit. In addition, Mr. Harris manifested obvious signs of nervousness at the time that he received the package that contained the bottle of pills.[4] Moreover, the fact that defendant knew that Mr. Harris had begun to spend time at the Dix Creek Chapel Road address and elected to send the Oxycodone pills to him at that address even though Mr. Harris' probation officer was ignorant of the fact that Mr. Harris had been staying there tends to support an inference that defendant and Mr. Harris had been in communication

4. Defendant's argument that many people become nervous during encounters with law enforcement officers goes to the weight, rather than the sufficiency, of the State's evidence.

with each other. Finally, defendant was unable to offer any logical explanation for the inconsistencies and logical flaws inherent in the account of his conduct that he provided to Officer Bryson, including his failure to arrive at the Dix Creek Chapel Road residence before the package containing the pill bottle was delivered and his inability to explain what happened to the sixty pills that he claimed to have retained in his possession after mailing the package containing the pill bottle to Mr. Harris. Although defendant denied having been engaged in drug diversion activities with Mr. Harris and offered an innocent explanation for his conduct, this Court has clearly stated that "[c]ircumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Thomas*, 350 N.C. at 343, 514 S.E.2d at 503 (quoting *State v. Stone*, 323 N.C. at 452, 373 S.E.2d at 433). As a result, for the reasons set forth above, we believe that the record, when taken in the light most favorable to the State and when all reasonable inferences permitted by that evidence are drawn in favor of the State, shows much more than a "suspicion or conjecture" of defendant's guilt and provides ample support for the jury's determination that defendant conspired with Mr. Harris to traffic in at least four, but less than fourteen, grams of Oxycodone by transportation. *Golphin*, 352 N.C. at 458, 533 S.E.2d at 229.

The arguments that defendant has advanced in support of the result reached in the Court of Appeals' decision rest, in our opinion, upon a misapprehension of the applicable law. Although defendant correctly notes that he and Mr. Harris were located in different states at the time that they allegedly formed their agreement to traffic in cocaine and that the record is devoid of any direct evidence tending to show that the two men had communicated by telephone, text message, or e-mail concerning their alleged plan to engage in drug diversion activities, the absence of such evidence does not conclusively resolve the issue that is currently before this Court. Simply put, while the presence or absence of such evidence is certainly relevant to the issue of defendant's guilt or innocence, the State is not required to attempt to prove defendant's guilt in any particular manner. In addition, defendant's emphasis upon the absence of direct evidence that he and Mr. Harris had entered into an agreement to traffic in Oxycodone by transportation is inconsistent with the principle that the agreement necessary to support a conspiracy conviction can be established by either direct or circumstantial evidence, or both. Similarly, defendant's reference to this Court's decisions requiring that the circumstantial evidence utilized to establish the existence of an unlawful conspiracy point "unerringly" to the defendant's guilt overlooks the fact that the same decision in which that language initially

appeared indicates that circumstantial evidence can establish the existence of a conspiracy despite the defendant's explicit denial that such an agreement ever existed, *Whiteside*, 204 N.C. at 712-13, 169 S.E. at 712, and the fact that this Court has stated that the circumstantial evidence utilized to properly establish a defendant's guilt need not eliminate "every hypothesis of innocence," *Thomas*, 350 N.C. at 343, 514 S.E.2d at 503. Finally, although defendant correctly cites the Court of Appeals' decision in *Massey* for the proposition that the mere existence of a relationship between two individuals is not, standing alone, sufficient to establish that a defendant entered into an unlawful agreement with another person, the evidence contained in the present record permits a reasonable inference that there was much more than a mere relationship between defendant and Mr. Harris. As a result, given our conclusion that the record evidence, when considered in the light most favorable to the State, tends to show that defendant agreed with Mr. Harris to traffic in at least four, but not more than fourteen, grams of Oxycodone, by transportation, the Court of Appeals' decision is reversed and this case is remanded to the Court of Appeals for consideration of defendant's remaining challenge to the trial court's judgment.

REVERSED AND REMANDED.

THOMAS C. WETHERINGTON, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY (F/K/A N.C. DEPARTMENT OF CRIME CONTROL & PUBLIC SAFETY; NORTH CAROLINA HIGHWAY PATROL), RESPONDENT

No. 22PA14

Filed 18 December 2015

Police Officers—dismissal of highway trooper—failure to exercise discretion—misapprehension of law

The commanding officer of the North Carolina State Highway Patrol acted under a misapprehension of law when he dismissed a State Trooper (petitioner) from employment for an alleged violation of the Patrol's truthfulness policy. The commanding officer erroneously believed that he was required to dismiss petitioner and thus failed to exercise his discretion based on the circumstances of the case. The Supreme Court remanded the matter to the employing

agency for determination of whether petitioner's conduct constituted just cause for dismissal.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 752 S.E.2d 511 (2013), affirming a decision and order entered on 14 December 2012 by Judge Howard E. Manning, Jr. in Superior Court, Wake County. On 18 December 2014, the Supreme Court allowed petitioner's conditional petition for discretionary review as to additional issues. Heard in the Supreme Court on 19 May 2015.

McGuinness Law Firm, by J. Michael McGuinness, for petitioner-appellee/appellant.

Roy Cooper, Attorney General, by John F. Maddrey, Solicitor General, and Thomas J. Ziko, Special Counsel, for respondent-appellant/appellee.

George J. Franks IV and Richard C. Hendrix for National Association of Police Organizations, amicus curiae.

Crabbe, Brown & James, LLP, by Larry H. James, pro hac vice, and Christina L. Corl, pro hac vice, for National Fraternal Order of Police; and Richard Hattendorf for North Carolina State Lodge of Fraternal Order of Police, amici curiae.

Edelstein and Payne, by M. Travis Payne, for Professional Fire Fighters and Paramedics of North Carolina, amicus curiae.

Bailey & Dixon, LLP, by J. Heydt Philbeck and Sabra J. Faires, for Southern States Police Benevolent Association and North Carolina Police Benevolent Association, amici curiae.

Law Offices of Michael C. Byrne, by Michael C. Byrne, for State Employees Association of North Carolina, amicus curiae.

JACKSON, Justice.

On 4 August 2009, Thomas Wetherington (petitioner) was dismissed from the North Carolina State Highway Patrol (the Patrol) for alleged violations of the Patrol's truthfulness policy. The State Personnel Commission (SPC) determined that petitioner's dismissal was supported

by just cause. Petitioner filed for judicial review in Superior Court, Wake County, and the superior court reversed, concluding that petitioner's "misconduct . . . did not amount to just cause for dismissal" and that "the decision to dismiss [petitioner] was arbitrary and capricious." On appeal, the North Carolina Court of Appeals affirmed the superior court's order. *Wetherington v. N.C. Dep't of Crime Control & Pub. Safety*, ___ N.C. App. ___, 752 S.E.2d 511 (2013). We allowed the petition for discretionary review filed by respondent, the North Carolina Department of Crime Control and Public Safety,[1] and the conditional petition for discretionary review filed by petitioner. Because it appears that the official who dismissed petitioner proceeded under a misapprehension of the law, namely that he had no discretion over the range of discipline he could administer, we now modify and affirm the opinion of the Court of Appeals and remand.

Petitioner was employed as a Trooper with the Patrol. On 21 May 2009, a complaint was filed against petitioner with the Patrol's Internal Affairs Section alleging that petitioner had provided contradictory statements about an incident in which he lost his campaign hat and in doing so had violated the Patrol's truthfulness policy. This policy states: "Members shall be truthful and complete in all written and oral communications, reports, and testimony. No member shall willfully report any inaccurate, false, improper, or misleading information." After an investigation, the Patrol dismissed petitioner on 4 August 2009.

On 23 October 2009, petitioner filed a petition for a contested case hearing in the Office of Administrative Hearings (OAH), and a hearing was conducted on 17 and 18 March 2010. On 3 September 2010, the administrative law judge (ALJ) filed a recommended decision making findings of fact and concluding that the Patrol's decision to dismiss petitioner was supported by the evidence. The ALJ made extensive findings of fact that included:

> 5. On March 29, 2009, Petitioner, while on duty, observed a pickup truck pulling a boat and made a traffic stop of that truck on US 70 at approximately 10:00 pm. During that traffic stop, Petitioner discovered two loaded handguns in the truck and smelled the odor of alcohol coming from the interior of the truck. The two male occupants of the truck were cooperative and not belligerent.

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1. Subsequently, this Court allowed respondent's motion to substitute the North Carolina Department of Public Safety as respondent.

Petitioner took possession of the handguns. At the conclusion of that traffic stop, Petitioner proceeded to a stopped car that had pulled off to the side of the road a short distance in front of the truck and boat trailer.

6. Petitioner testified that he first noticed his hat missing during his approach to the car parked in front of the truck. Petitioner heard a crunch noise in the roadway and saw a burgundy eighteen-wheeler drive by.

7. Petitioner testified that after the conclusion [of] his investigation of the stopped car, he looked for his hat. Petitioner found the gold acorns from his hat in the right hand lane near his patrol vehicle. The acorns were somewhat flattened.

. . . .

9. After searching for, but not locating his hat, Petitioner contacted Sergeant Oglesby, his immediate supervisor, and told him that his hat blew off of his head and that he could not find it.

. . . .

11. Trooper Rink met Petitioner on the side of the road of US 70. Trooper Rink asked Petitioner when he last saw his hat. Petitioner said he did not know. . . . Petitioner said that he was going down the road . . . and was putting something in his seat when he realized he did not have his hat. Petitioner then indicated that he turned around and went back to the scene of the traffic stops and that is when he found the acorns from his hat. Petitioner was very upset and Trooper Rink told Petitioner that everybody loses stuff and that if Petitioner did not know what happened to his hat, then he should just tell his Sergeants that he didn't know what happened to it. Petitioner replied that it was a little late for that because he already had told his Sergeant that a truck came by and blew it off of his head.

. . . .

13. The testimony of Trooper Rink provides substantial evidence that Petitioner did not know what happened to his hat, was untruthful to Sergeant Oglesby when he

said it blew off of his head, and that Petitioner's untruthfulness was willful.

. . . .

15. The next day, March 30, 2009, Sergeant Oglesby and several other members of the Patrol looked for Petitioner's hat.

16. Sergeant Oglesby had a detailed conversation with Petitioner on the side of the road regarding how the hat was lost. During the conversation, Petitioner remained consistent with his first statement to Sergeant Oglesby from the night of March 29, 2009 as he explained to Sergeant Oglesby that a gust of wind blew his hat off of his head. Petitioner continued stating that the wind was blowing from the southeast to the northwest. Petitioner said he turned back towards the direction of the roadway and saw a burgundy eighteen[-]wheeler coming down the road so he could not run out in the roadway and retrieve his hat. Petitioner then heard a crunch and did not see his hat anymore.

. . . .

18. Petitioner was not truthful to Sergeant Oglesby on March 30, 2009, when he explained how he lost his hat.

. . . .

20. Petitioner testified that, approximately three to four days after the loss of the hat, he suddenly realized that the hat did not blow off of his head, but that he had placed the hat on the light bar of his Patrol vehicle and it blew off of the light bar. Petitioner never informed any supervisors of this sudden realization.

21. Approximately three weeks after the hat was lost, Petitioner received a telephone call from Melinda Stephens, during which Petitioner was informed that her nephew, the driver of the truck and boat trailer on March 29, 2009, had Petitioner's hat.

22. Petitioner informed Sergeant Oglesby that his hat had been found.

23. Petitioner's hat subsequently was returned to Sergeant Oglesby. When returned, the hat was in good condition and did not appear to have been run over.

24. Due to the inconsistencies in Petitioner's statements and the condition of the hat, First Sergeant Rock and Sergeant Oglesby called Petitioner to come in for a meeting. During the meeting, First Sergeant Rock asked Petitioner to clarify that the hat blew off of his head and that the hat was struck by a car. Petitioner said yes. First Sergeant Rock then pulled Petitioner's hat out of the cabinet and told Petitioner that his story was not feasible because the hat did not appear to have been run over. At that point, Petitioner broke down in tears and said he wasn't sure what happened to his hat. He didn't know if it was on the trunk lid of the truck, the boat, or behind the light bar, and blew off. Petitioner stated that he told Sergeant Oglesby that the hat blew off his head because he received some bad counsel from someone regarding what he should say about how the hat was lost.

25. During his meeting with First Sergeant Rock and Sgt. Oglesby, Petitioner was untruthful when he told First Sergeant Rock that the hat blew off of his head because by Petitioner's own testimony, three days after losing his hat he realized that he placed it on his light bar. However, three weeks after the incident, in the meeting with First Sergeant Rock and Sergeant Oglesby he continued to claim that the hat blew off of his head. It wasn't until First Sergeant Rock took the hat out and questioned Petitioner more that Petitioner admitted that the hat did not blow off of his head, but blew off of the light bar. Therefore, even if Petitioner was confused on March 29, 2009, as he claims, he still was being untruthful to his Sergeants by continuing to tell them that the hat blew off of his head . . . .

. . . .

33. Petitioner's untruthful statements to First Sergeant Rock and Sergeant Oglesby were willful and were made to protect himself against possible further reprimand because of leaving the patrol vehicle without his cover.

(Citations omitted.) The findings also noted that Colonel Randy Glover ultimately was responsible for determining what type of discipline to impose upon petitioner for his conduct. The ALJ observed that Colonel Glover "considers the policy on truthfulness so paramount to the organization that, in his opinion, a member who is untruthful must be terminated"; however, the ALJ found that Colonel Glover "was aware that he had discretion" regarding what type of discipline to impose and "exercised that discretion in deciding to dismiss [p]etitioner." The ALJ concluded that "Respondent had just cause to discipline Petitioner in the form of dismissal." The SPC adopted the ALJ's findings of fact and conclusions of law, found that "Respondent met its burden of proving that it had just cause to dismiss Petitioner," and affirmed.

On 25 February 2011, petitioner filed for judicial review in Superior Court, Wake County, and on 14 December 2012, the superior court entered an order reversing the final decision of the SPC. Although the superior court determined that the evidence supported the agency's findings that petitioner engaged in untruthful conduct and that his actions constituted unacceptable personal conduct, the court ultimately concluded that the conduct did not provide just cause for dismissal. In addition, the superior court ruled that the decision to dismiss petitioner "was arbitrary and capricious" and that Colonel Glover failed to "consider alternative, lesser sanctions against [petitioner] over this incident involving the temporary loss of a $50.00 hat during a legitimate traffic stop and [petitioner's] variable recollections of the circumstances under which the hat disappeared."

Respondent appealed to the Court of Appeals, and petitioner filed a cross appeal. On 17 December 2013, the Court of Appeals filed a unanimous, published opinion affirming the superior court's order. *Wetherington*, ___ N.C. App. at ___, ___, 752 S.E.2d at 511, 517. We allowed both respondent's petition for discretionary review and petitioner's conditional petition for discretionary review.

Respondent argues that the Court of Appeals erred by affirming the superior court's order reversing the SPC's decision. We disagree. Because Colonel Glover did not understand that he had discretion to consider the full range of potential discipline, his decision was "[a]ffected by [an] error of law." *See* N.C.G.S. § 150B-51(b)(4) (2009).[2]

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2. The General Assembly amended section 150B-51 in 2011. Act of June 18, 2011, ch. 398, sec. 27, 2011 N.C. Sess. Laws 1678, 1689. The amendments apply only to contested cases commenced on or after 1 January 2012. *Id.*, sec. 63, at 1701. The petition for a contested case hearing in the case *sub judice* was filed 23 October 2009.

"On judicial review of an administrative agency's final decision, the substantive nature of each assignment of error dictates the standard of review." *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 658, 599 S.E.2d 888, 894 (2004) (citing, *inter alia*, *ACT-UP Triangle v. Comm'n for Health Servs.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997), *questioned in Shackleford-Moten v. Lenoir Cty. Dep't of Soc. Servs.*, 155 N.C. App. 568, 572, 573 S.E.2d 767, 770 (2002), *disc. rev. denied*, 357 N.C. 252, 582 S.E.2d 609 (2003), and *State ex rel. Utils. Comm'n v. Bird Oil Co.*, 302 N.C. 14, 21, 273 S.E.2d 232, 236 (1981)). The reviewing court may, *inter alia*,

> reverse or modify the agency's decision . . . if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence . . . in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

N.C.G.S. § 150B-51(b). This Court has explained that if "the gravamen of an assigned error is that the agency violated subsections 150B-51(b)(1), (2), (3), or (4) . . . a court engages in *de novo* review." *Carroll*, 358 N.C. at 659, 599 S.E.2d at 895 (citing, *inter alia*, *Meads v. N.C. Dep't of Agric.*, 349 N.C. 656, 665, 509 S.E.2d 165, 171 (1998)). "Under the de novo standard of review, the trial court 'consider[s] the matter anew[ ] and freely substitutes its own judgment for the agency's.' " *Id.* at 660, 599 S.E.2d at 895 (quoting *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002) (alterations in original)).

Chapter 126 of our General Statutes provides that "[n]o career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." N.C.G.S. § 126-35(a) (2009). A career State employee is defined as

> a State employee or an employee of a local entity who is covered by this Chapter pursuant to G.S. 126-5(a)(2) who:

> (1) Is in a permanent position appointment; and
>
> (2) Has been continuously employed by the State of North Carolina or a local entity as provided in G.S. 126-5(a)(2) in a position subject to the State Personnel Act for the immediate 24 preceding months.

Id. § 126-1.1 (2009).

As authorized by N.C.G.S. § 126-35(a), the SPC has adopted rules that define just cause for discipline of a career state employee. *See* 25 NCAC 01J .0604 (June 2014). These rules establish two grounds for discipline: unsatisfactory job performance and unacceptable personal conduct. *Id.* Unacceptable personal conduct is defined, *inter alia*, as

> (a) conduct for which no reasonable person should expect to receive prior warning;
>
> (b) job-related conduct which constitutes a violation of state or federal law;
>
> (c) conviction of a felony or an offense involving moral turpitude that is detrimental to or impacts the employee's service to the State;
>
> (d) the willful violation of known or written work rules;
>
> (e) conduct unbecoming a state employee that is detrimental to state service[.]

25 NCAC 01J .0614(8) (June 2014).

"Nonetheless, the fundamental question in a case brought under N.C.G.S. § 126-35 is whether the disciplinary action taken was 'just.' Inevitably, this inquiry requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations." *Carroll*, 358 N.C. at 669, 599 S.E.2d at 900. Just cause "is a 'flexible concept, embodying notions of equity and fairness,' that can only be determined upon an examination of the facts and circumstances of each individual case." *Id.* at 669, 599 S.E.2d at 900-01 (citations omitted) (quoting *Crider v. Spectralite Consortium, Inc.*, 130 F.3d 1238, 1242 (7th Cir. 1997)). It follows that, pursuant to *Carroll*'s "flexible" definition of "just cause," Colonel Glover has discretion, as a matter of law, in dismissing an employee for violating the Patrol's truthfulness policy.

Here, the ALJ found that petitioner behaved as alleged and that his behavior violated a written work rule. The error of law occurred when Colonel Glover was unaware of his responsibility to exercise discretion. Colonel Glover's testimony at the OAH hearing establishes that he decided to dismiss petitioner not based upon consideration of the facts and circumstances of petitioner's conduct, but instead because of his erroneous view that any violation of the Patrol's truthfulness policy must result in dismissal. Colonel Glover testified that because petitioner's conduct "was obviously a violation of the truthfulness policy," dismissal was required, and he repeatedly asserted that he "had no choice" to impose any lesser punishment. After petitioner's counsel asked Colonel Glover whether, "when there is a substantiated or adjudicated finding of untruthfulness . . . [a trooper] would necessarily need to be terminated," Colonel Glover reiterated that if "that's the violation, again . . . I have no choice because that's the way I view it." Petitioner's counsel then asked, "[D]oes that mean if you find a substantiated or adjudicated violation of the truthfulness policy . . . that you don't feel like that gives you any discretion as Colonel to do anything less than termination?" Colonel Glover agreed with that statement.

As written, the truthfulness policy applies to "all written and oral communications," and it applies to a wide range of untruthful, inaccurate, "improper," or "misleading" statements. Nothing in the text of the policy limits its application to statements related to the trooper's duties, the Patrol's official business, or any other significant subject matter. Notwithstanding the potentially expansive scope of this policy, Colonel Glover confirmed that he could not impose a punishment other than dismissal for any violation, apparently regardless of factors such as the severity of the violation, the subject matter involved, the resulting harm, the trooper's work history, or discipline imposed in other cases involving similar violations. We emphasize that consideration of these factors is an appropriate and necessary component of a decision to impose discipline upon a career State employee for unacceptable personal conduct.

Colonel Glover's mistaken view that he had no discretion over the appropriate measure of discipline was a misapprehension of the law, which subjects his decision to reversal or modification pursuant to N.C.G.S. § 150B-51(b)(4) because it is "[a]ffected by other error of law." The approach employed by Colonel Glover in applying a fixed punishment of dismissal for any violation is antithetical to the flexible and equitable standard described in *Carroll* and is at odds with both the ALJ's and the SPC's finding of fact that Colonel Glover exercised discretion in reaching his decision to dismiss petitioner.

Application of an inflexible standard deprives management of discretion. While dismissal may be a reasonable course of action for dishonest conduct, the better practice, in keeping with the mandates of both Chapter 126 and our precedents, would be to allow for a range of disciplinary actions in response to an individual act of untruthfulness, rather than the categorical approach employed by management in this case.

As such, by upholding respondent's use of a per se rule of mandatory dismissal for all violations of a particular policy, the SPC failed to examine the facts and circumstances of petitioner's individual case as required by this state's jurisprudence. For these reasons, we conclude that the superior court correctly reversed the SPC's decision.

Nevertheless, the superior court determined that petitioner's conduct did not constitute just cause for dismissal, and the Court of Appeals affirmed that determination. Because we conclude that Colonel Glover's use of a rule requiring dismissal for all violations of the Patrol's truthfulness policy was an error of law, *see* N.C.G.S. § 150B-51(b)(4), we find it prudent to remand this matter for a decision by the employing agency as to whether petitioner should be dismissed based upon the facts and circumstances and without the application of a per se rule. As a result, we do not decide whether petitioner's conduct constitutes just cause for dismissal.

Accordingly, the decision of the Court of Appeals is modified and affirmed, and the case is remanded to the Court of Appeals with instructions to that court to remand to the Superior Court, Wake County for subsequent remand to the SPC and further remand to the employing agency for additional proceedings not inconsistent with this opinion. We further conclude that petitioner's conditional petition for discretionary review was improvidently allowed.

MODIFIED, AFFIRMED, AND REMANDED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

[368 N.C. 594 (2015)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Cumberland County
	)	
QUINTEL AUGUSTINE, TILMON	)	
GOLPHIN, AND CHRISTINA WALTERS	)	

No. 139PA13

ORDER

The trial court granted respondents' motions for appropriate relief under the Racial Justice Act, N.C.G.S. §§ 15A-2010 to -2012 (2009) and N.C.G.S. §§ 15A-2010 to -2012 (2011 & Supp. 2012). After careful review, we conclude that the error recognized in this Court's Order in *State v. Robinson*, ___ N.C. ___, ___ S.E.2d ___ (2015) (411A94-5), infected the trial court's decision, including its use of issue preclusion, in these cases. Accordingly, the trial court's order is vacated. Furthermore, the trial court erred when it joined these three cases for an evidentiary hearing. These cases are therefore remanded to the senior resident superior court judge of Cumberland County for reconsideration of respondents' motions for appropriate relief. *Cf.* Gen. R. Pract. Super. & Dist. Cts. 25(4), 2016 Ann. R. N.C. 22.

We express no opinion on the merits of respondents' motions for appropriate relief at this juncture. On remand, the trial court should address petitioner's constitutional and statutory challenges pertaining to the Act. In any new hearings on the merits, the trial court may, in the interest of justice, consider additional statistical studies presented by the parties. The trial court may also, in its discretion, appoint an expert under N.C. R. Evid. 706 to conduct a quantitative and qualitative study, unless such a study has already been commissioned pursuant to this Court's Order in *Robinson*, in which case the trial court may consider that study. If the trial court appoints an expert under Rule 706, the Court hereby orders the Administrative Office of the Courts to make funds available for that purpose.

By order of the Court in Conference, this 15th day of December, 2015.

s/Jackson, J.
For the Court

Justice BEASLEY and Justice ERVIN did not participate in the consideration or decision of these cases.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this 18th day of December, 2015

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Cumberland County
	)	
MARCUS REYMOND ROBINSON	)	

No. 411A94-5

ORDER

The trial court granted respondent's motion for appropriate relief under the Racial Justice Act, N.C.G.S. §§ 15A-2010 to -2012 (2009). We allowed a petition for writ of certiorari to review the trial court's order.

Central to respondent's proof in this case is a statistical study that professors at the Michigan State University College of Law conducted between 2009 and 2011. Respondent gave petitioner all of the data used for the study in May 2011 and a report summarizing the study's findings in July 2011. Respondent then provided the final version of the study to petitioner in December 2011, approximately one month before the hearing on respondent's motion began. At the start of the hearing, petitioner moved for a third continuance because it needed more time to collect additional data from prosecutors throughout the state and to address respondent's study. The trial court denied the motion.

Section 15A-952 of the Criminal Procedure Act requires a trial court ruling on a motion to continue in a criminal proceeding to consider whether a case is "so unusual and so complex" that the movant needs more time to adequately prepare. N.C.G.S. § 15A-952(g)(2) (2013). Respondent's study concerned the exercise of peremptory challenges in capital cases by prosecutors in Cumberland County, the former Second Judicial Division, and the State of North Carolina between 1990 and 2010. The breadth of respondent's study placed petitioner in the position of defending the peremptory challenges that the State of North Carolina had exercised in capital prosecutions over a twenty-year period. Petitioner had very limited time, however, between the delivery of respondent's study and the hearing date. Continuing this matter to give petitioner more time would have done no harm to respondent, whose remedy under the Act was a life sentence without the possibility of parole. See N.C.G.S. § 15A-2012(a)(3). Under these exceptional circumstances, fundamental fairness required that petitioner have an adequate opportunity to prepare for this unusual and complex proceeding. Therefore, the trial court abused its discretion by denying petitioner's third motion for a continuance.

The trial court's failure to give petitioner adequate time to prepare resulted in prejudice. *See* N.C.G.S. § 15A-952(g)(1)-(2). Without adequate time to gather evidence and address respondent's study, petitioner did not have a full and fair opportunity to defend this proceeding. *Cf. State v. Wong*, No. 424P09, 2009 N.C. LEXIS 1263 (N.C. Oct. 9, 2009); *State v. Stuart*, 359 N.C. 279, 609 S.E.2d 224 (2004); *State v. Nicholson*, 533 S.E.2d 463 (N.C. 1999). Accordingly, the trial court's order is vacated and the matter is remanded to the senior resident superior court judge of Cumberland County for reconsideration of respondent's motion for appropriate relief. *Cf.* Gen. R. Pract. Super. & Dist. Cts. 25(4), 2016 Ann. R. N.C. 22.

We express no opinion on the merits of respondent's motion for appropriate relief at this juncture. On remand, the trial court should address petitioner's constitutional and statutory challenges pertaining to the Act. In any new hearing on the merits, the trial court may, in the interest of justice, consider additional statistical studies presented by the parties. The trial court may also, in its discretion, appoint an expert under N.C. R. Evid. 706 to conduct a quantitative and qualitative study, unless such a study has already been commissioned pursuant to this Court's Order in *State v. Augustine*, ___ N.C. ___, ___ S.E.2d ___ (2015) (139PA13), in which case the trial court may consider that study. If the trial court appoints an expert under Rule 706, the Court hereby orders the Administrative Office of the Courts to make funds available for that purpose.

By order of the Court in Conference, this 15th day of December, 2015.

s/Jackson, J.
For the Court

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

WITNESS my hand and the seal of the Supreme Court of North Carolina, this 18th day of December, 2015.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

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

15 DECEMBER 2015

050P00-3	State v. Albert Lee Stevenson, Jr.	1. Def's *Pro Se* Motion for Temporary Stay 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP15-610) 3. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied **12/11/2015** 2. Denied **12/11/2015** 3. Allowed **12/11/2015**
056PA14-2	Kirby, et al. v. N.C. Department of Transportation	1. Motion to Admit Mark Miller *Pro Hac Vice* 2. Pacific Legal Foundation and Center for Law and Freedom's Motion for Leave to File *Amicus* Brief	1. Allowed 2. Allowed
084P15-3	State v. Curtis Louis Sangster	1. Def's *Pro Se* Petition for *Writ of Mandamus* 2. Def's *Pro Se* Petition for *Writ of Mandamus* 3. Def's *Pro Se* Petition for *Writ of Mandamus*	1. 2. 3. Denied **11/25/2015**
119PA15	In the Matter of N.T.	Guardian *ad Litem*'s Motion to Substitute Counsel	Allowed **12/02/2015**
123A13	Vincent Burley, Employee v. U.S. Foods, Inc., Employer, and Indemnity Insurance Company of North America, Carrier (with Gallagher Bassett Services, Inc., Third-Party Administrator)	Plt's Petition for Rehearing Under N.C. R. App. 31	Denied **11/12/2015**
172P15-4	State v. Mohammed Nadder Jilani	1. Def's *Pro Se* Petition for *Writ of Mandamus* 2. Def's *Pro Se* Petition for *Writ of Habeas Corpus*	1. Dismissed **11/25/2015** 2. Denied **11/25/2015**
207PA14-2	State v. Curtis Mario Benton	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA13-1204-2) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed

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

15 DECEMBER 2015

216P15	Amy Pharr Elam, Elizabeth F. Bailey, and Reid T. Deramus v. William Douglas Management, Inc. and Charlotte House Association of Unit Owners, Inc.	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA14-1377) 2. Plts' Motion for Temporary Stay 3. Plts' Petition for *Writ of Supersedeas*	1. Denied 2. Allowed **07/22/2015** Dissolved **12/15/2015** 3. Denied **Ervin, J., recused**
219P15	State v. William Lowery, Jr.	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP15-385)	Denied
222P15	Thomas F. Adcox v. Clarkson Brothers Construction Company and UTICA National Insurance Group	1. Defs' Motion for Temporary Stay (COA14-313-2) 2. Defs' Petition for *Writ of Supersedeas* 3. Defs' PDR Under N.C.G.S. § 7A-31 4. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **07/02/2015** Dissolved **12/15/2015** 2. Denied 3. Denied 4. Dismissed as moot **Beasley, J., recused**
238P15	State v. Grady Lee Nicholson	1. Def's *Pro Se* Motion for PDR 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA 3. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 4. Def's *Pro Se* Motion to Appoint Counsel	1. Denied 2. Denied 3. Allowed 4. Dismissed as moot

Disposition of Petitions for Discretionary Review Under G.S. 7A-31

15 December 2015

247P15	The Estate of Robert Eugene Tipton, Jr., by and through his Ancillary Administrator Deborah Dunklin Tipton v. High Point University, Delta Sigma Phi Fraternity, Inc., Jeffrey A. Karpovich, Michael Qubein, and Marshall Jefferson	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA14-1286) 2. Motion to Admit Douglas G. Fierberg *Pro Hac Vice* 3. Motion to Admit Douglas C. Melcher *Pro Hac Vice*	1. Denied 2. Allowed 3. Allowed **Martin, C.J., recused**
252PA14-2	State v. Thomas Craig Campbell	1. State's Motion for Temporary Stay (COA13-1404-2) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/10/2015** 2. 3.
266P15	State v. Thomas Rashad Armstrong	Def's PDR Under N.C.G.S. § 7A-31 (COA14-765)	Denied **Ervin, J., recused**
271P14-2	State v. Rodney Moucell Jones	1. Def's *Pro Se* Motion for PDR 2. Def's *Pro Se* Petition for *Writ of Habeas Corpus* 3. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed **11/25/2015** 2. Denied **11/25/2015** 3. Allowed **11/25/2015**
274P15-2	Robert K. Stewart v. Honorable James M. Webb	1. Plt's *Pro Se* Motion for Complaint 2. Plt's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Plt's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot

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

15 DECEMBER 2015

284P15	Francisco K. Avoki and Ekoko K. Avoki v. Larry Eugene Ferebee, Jr., Does I-XX (Unknown), and Intervenor Government Employees Insurance	1. Plts' *Pro Se* Motion for Notice of Appeal (COA15-484) 2. Plts' *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Mecklenburg County 3. Plts' *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed *ex mero motu* 2. Denied 3. Allowed **Ervin, J., recused**
286P15	State v. Crystal Gail Mangum	1. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA14-909) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Withdraw PDR	1. Denied 2. --- 3. Allowed
292P15	State v. Lucious Bernard Sullivan, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA15-76)	Denied **Ervin, J., recused**
295P15	State v. Claude Edward Dammons	1. Def's *Pro Se* Motion for PDR (COAP15-499) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied **11/19/2015** 2. Allowed **11/19/2015**
303P15	Melchor Zapata Dominguez, Employee v. Francisco Dominguez Masonry, Inc., Employer and Builders Mutual Insurance Company, Carrier	Plt's PDR Under N.C.G.S. § 7A-31 (COA14-1307)	Denied
304P15	Salvatore Marsico and David Hand v. New Hanover County Board of Education	Petitioners' PDR Under N.C.G.S. § 7A-31 (COA14-1370)	Denied
305P97-7	State v. Egbert Francis, Jr.	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP15-255)	Dismissed

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

15 DECEMBER 2015

306P15	Karen Jensen v. Blake Jessamy, in his individual and official capacities; Rodney Monroe, in his individual and official capacities; The City of Charlotte; Richard Stahnke, in his individual and official capacities; Sgt. Elliot, in his individual and official capacities; Sheriff Daniel Chipp Bailey, in his individual and official capacities; Sheriff A. Conner, in his individual and official capacities; Sheriff G. Coble, in his individual and official capacities; Sheriff Employees at the Mecklenburg County Jail; John Doe, in his individual and official capacities; Deputy Horn, in his individual and official capacities; Deputy Pillow, in his individual and official capacities; Deputy Durant, in his individual and official capacities; and Deputy Williams, in his individual and official capacities	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA15-35) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Defs' (Mecklenburg County Sheriff Defendants) Motion to Dismiss Appeal 4. Defs' (City Defendants) Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed 4. Allowed **Ervin, J., recused**
322P15-3	State v. Raymond Alan Griffin	1. Def's *Pro Se* Petition for *Writ of Mandamus* 2. Def's *Pro Se* Petition for *Writ of Mandamus* 3. Def's *Pro Se* Petition for *Writ of Mandamus*	1. Dismissed 2. Dismissed 3. Dismissed
328P15	In the Matter of The Estate of Charles W. Pickelsimer, Jr.	Caveators' PDR Under N.C.G.S. § 7A-31 (COA14-1192)	Denied

Disposition of Petitions for Discretionary Review Under G.S. 7A-31

15 December 2015

332PA14-2	State v. Gregory Aldon Perkins	1. Def's Notice of Appeal Based on A Constitutional Question (COA15-15) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Withdraw as Private Assigned Counsel 4. Def's Motion to Appoint the Appellate Defender 5. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed 4. Allowed 5. Allowed
331P15	State v. Harley Ray Alligood, Jr.	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Beaufort County (COAP15-103) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
338P15	State v. Christopher Adam Turbyfill	Def's PDR Under N.C.G.S. § 7A-31 (COA14-1003)	Denied
341A15	Julie Lancaster and Brannon Lancaster v. Harold K. Jordan and Co., Inc., Withers & Ravenel, Inc., Arthur R. Cogswell, and Lighthouse Engineering, PA	1. Plts' Notice of Appeal Based Upon a Constitutional Question (COA14-1413) 2. Def's (Harold K. Jordan and Co., Inc.) Motion to Dismiss Appeal	1. --- 2. Allowed
342P15	State v. Teddy Rudolph King	Def's PDR Under N.C.G.S. § 7A-31 (COA15-54)	Denied
344P15	State v. Dymond Jevon-Demetrius Moore	Def's Petition for *Writ of Certiorari* to Review Decision of COA (COA15-52)	Denied
345P15-2	State v. Jonathan Lavon Friend El	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed
348P15	State v. Michael Antony Paige	Def's PDR Under N.C.G.S. § 7A-31 (COA14-1324)	Denied
349P12-2	Harold Bright Harris, Jr. v. Department of Public Safety, Division of Adult Prisons; Lawrence Parsons	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Dismissed **11/30/2015** **Ervin, J., recused**

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

15 DECEMBER 2015

349P15	Timothy W. Holliday, Employee v. Tropical Nut & Fruit Co., Employer; Farmington Casualty Co., Carrier	Defs' PDR Under N.C.G.S. § 7A-31 (COA14-1030)	Denied
350P15	State v. Jimmy Scott Sisk	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA	Denied **Ervin, J., recused**
352P15	State v. Aswad Malik Jones	Def's PDR Under N.C.G.S. § 7A-31 (COA15-173)	Denied
354P15	State v. Christopher Mosby	Def's *Pro Se* Motion for Notice of Appeal for Discretionary Review (COAP15-597)	Dismissed
357P15	State v. James David Nanney	Def's *Pro Se* Motion for Notice of Appeal (COA15-476)	Dismissed *ex mero motu*
358P15	State v. Shawn Louis Goodman	Def's *Pro Se* Motion for PDR (COAP14-917)	Dismissed
361P15	Ardeal Roseboro v. John Roseboro, The Roseboro Law Firm, Womble Carlyle Sandridge & Rice, City of Winston-Salem, Winston-Salem Police Department, Barry D. Roundtree, and M.L. Bowens	Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA (COAP15-704)	Denied
363A15	Steven Craig Herndon v. Alison Kingrey Herndon	Plt's Motion for Additions to Record on Appeal	Allowed **11/30/2015**
367P15	State v. Christopher John Horton	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA (COA12-366) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied 2. Allowed **Ervin, J., recused**

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

15 DECEMBER 2015

368P15	Johnnie Wilkes, Employee v. City of Greenville, Employer, Self-Insured (PMA Management Group, Third-Party Administrator)	1. Def's Motion for Temporary Stay (COA14-1193) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/12/2015** 2. 3.
374P15	State v. Matthew Ray Hooks	1. Def's PDR Under N.C.G.S. § 7A-31 (COA15-212) 2. Def's Petition for *Writ of Certiorari* to Review Decision of COA	1. Dismissed 2. Denied
375A15	Dabeeruddin Khaja v. Fatima Husna	1. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA14-701) 2. Plt's Motion to Dismiss Def's Notice of Appeal 3. Plt's Motion to Dismiss Appeal 4. Def's *Pro Se* Motion for Temporary Stay 5. Def's *Pro Se* Petition for *Writ of Supersedeas*	1. --- 2. Allowed 3. Allowed 4. Denied **11/25/2015** 5. Dismissed as moot
378P09-2	State v. Kawamie Shonta Cole	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel 4. Def's *Pro Se* Motion to Amend Petition for *Writ of Certiorari* with Addendum	1. Denied 2. Allowed 3. Dismissed as moot 4. Allowed **Jackson, J., recused**
379P15	State v. Jesus Rafael Rodriguez	1. Def's *Pro Se* Motion for Notice of Appeal (COAP15-794) 2. Def's *Pro Se* Motion for PDR	1. Dismissed *ex mero motu* 2. Denied
380P15	State v. Deonza Lamar Carmichael	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed
381P15	State v. Jeremie Labrandon Stevenson	Def's *Pro Se* Motion for PDR (COA10-1313)	Denied **Ervin, J., recused**

Disposition of Petitions for Discretionary Review Under G.S. 7A-31

15 December 2015

385P15	State v. Archimede N. Nkiam	1. State's Motion for Temporary Stay (COA14-1164) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Constitutional Question 4. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/23/2015** 2. 3. 4.
387P15	State v. Judy Hardison	1. State's Motion for Temporary Stay (COA15-150) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/23/2105** 2. 3.
391P15	City of Asheville, a municipal corporation v. State of North Carolina and the Metropolitan Sewerage District of Buncombe County	1. Plt's Motion for Temporary Stay 2. Plt's Petition for *Writ of Supersedeas* 3. Plt's Notice of Appeal Based Upon a Constitutional Question 4. Plt's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/25/2015** 2. 3. 4.
416P15	State v. Nijel Ramsey Lee	1. Def's *Pro Se* Motion for Notice of Appeal (COAP14-351) 2. Def's *Pro Se* Petition in the Alternative for *Writ of Habeas Corpus*	1. 2. Denied **12/15/2015**
468P13-3	State v. Donald Jay Young	1. Def's *Pro Se* Motion for PDR (COAP15-745) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
497P12-3	State v. Jay Mikal Brooks-Bey	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied **Ervin, J., recused**
525P13-3	State v. Dennis O'Keith Blackwell	1. Def's *Pro Se* Motion for Notice of Appeal 2. Def's *Pro Se* Motion for Collateral Review Consideration Petition Second Review of Judgment Supplementary Petition Not Challenging Conviction Only the Sentencing Phase 3. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 4. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed *ex mero motu* 2. Denied 3. Allowed 4. Dismissed as moot

Disposition of Petitions for Discretionary Review Under G.S. 7A-31

15 December 2015

606A05-3	State v. Eric Glenn Lane (DEATH)	1. Def's Motion for Extension of Time to Prepare Transcript 2. Def's Motion in the Alternative to Declare the One Hundred Twenty-Five Day Deadline for Capitally Tried Cases Applies	1. Allowed by Special Order **11/18/2015** 2. Denied **Jackson, J., recused**
629P01-4	State v. John Edward Butler	Def's *Pro Se* Petition for Writ of Certiorari to Review Order of COA (COAP14-558)	Denied
667PA03-5	Kenneth D. Bobbitt v. Danny Safrit, Administrator, Alexander Correctional Institution and Roy A. Cooper, III, Attorney General, State of North Carolina	State's Motion to Withdraw the Appeal	Allowed **11/24/2015**

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

18 DECEMBER 2015

124PA15	State v. Michael Scott Hamilton	1. Def's Petition for *Writ of Habeas Corpus* 2. Def's Motion in the Alternative for Appropriate Relief	1. Dismissed without prejudice 2. Dismissed without prejudice
139PA13	State v. Quintel Augustine, Tilmon Golphin, and Christina Walters	1. Defs' Petition for *Writ of Mandamus* 2. Defs' Motion to Withdraw Petition for *Writ of Mandamus* to the Clerk of Superior Court of Cumberland County 3. Defs' Motion to Strike 4. Defs' Motion to Supplement the Record 5. Defs' Motion to Supplement Record	1. Withdrawn **01/02/2014** 2. Allowed **01/02/2014** 3. Denied 4. Allowed **01/23/2014** 5. Allowed **12/18/2014** **Ervin, J., recused** **Beasley, J., recused**
201PA12-3	Margaret Dickson, et al. v. Robert Rucho, et al.	1. Plts' (NAACP) Notice of Filing of Affidavit of John W. O'Hale 2. Affidavit of John W. O'Hale 3. Motion to Supplement Record on Appeal by Taking Judicial Notice of Certain Materials	1. --- 2. --- 3. Allowed

TYKI SAKWAN IRVING
v.
CHARLOTTE-MECKLENBURG BOARD OF EDUCATION

No. 557PA13

Filed 29 January 2016

Tort Claims Act—jurisdiction—school activity bus accident—not covered by waiver of governmental immunity

The Industrial Commission did not have jurisdiction over plaintiff's action brought under the Torts Claims Act to recover for alleged negligence by an employee of a local board of education in the operation of an activity bus transporting students and school staff to an extracurricular event. The waiver of governmental immunity provided in N.C.G.S. § 143-300.1 of the Tort Claims Act did not apply to this set of facts. Public school buses, school transportation service vehicles, and school activity buses are distinct categories of vehicles, and school activity buses were not incorporated into the waiver of immunity contemplated by the Tort Claims Act.

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

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 750 S.E.2d 1 (2013), reversing an order filed on 8 August 2012 by the North Carolina Industrial Commission and remanding for further proceedings. Heard in the Supreme Court on 16 February 2015.

Osborne Law Firm, P.C., by Curtis C. Osborne, for plaintiff-appellee.

Roy Cooper, Attorney General, by Olga E. Vysotskaya de Brito and Amar Majmundar, Special Deputy Attorneys General, for defendant-appellant.

Law Office of Kevin J. Williams, PLLC, by Kevin J. Williams; and Perry Perry & Perry, P.A., by Maria Singleton, for North Carolina Advocates for Justice, amicus curiae.

JACKSON, Justice.

In this case, we consider whether plaintiff Tyki Sakwan Irving may bring an action pursuant to the Tort Claims Act before the North Carolina Industrial Commission (the Commission) to recover for alleged negligence by an employee of a local board of education in the operation of an activity bus transporting students and school staff to an extracurricular event. Because the waiver of governmental immunity provided in the relevant section of the Tort Claims Act does not apply to the set of facts before us, we conclude that the Commission does not have jurisdiction over plaintiff's action.

In October 2007, plaintiff's car was struck by a school activity bus transporting student athletes and staff to a football game in Mecklenburg County. The bus was driven by Randall Long, an employee of defendant Charlotte-Mecklenburg Board of Education. Plaintiff contends that as a result of Long's negligence, she received serious personal injuries, for which she now seeks compensation.

Plaintiff initiated this action on 29 September 2010 by filing a claim against defendant with the Commission pursuant to the Tort Claims Act—specifically, section 143-300.1. This statute establishes a limited waiver of local governmental immunity by authorizing lawsuits against county and city boards of education for the negligent operation of "school buses" and "school transportation service vehicles" when certain criteria are met, and the statute confers jurisdiction upon the Commission to hear these claims. N.C.G.S. § 143-300.1 (2013).

On 8 August 2012, the Commission granted defendant's motion for summary judgment on the grounds that the Commission lacked subject matter jurisdiction over plaintiff's claim because the claim did not fall within the parameters of section 143-300.1.

Plaintiff appealed, and the Court of Appeals unanimously reversed the Commission and remanded the matter for further proceedings. *Irving v. Charlotte-Mecklenburg Bd. Of Educ.*, ___ N.C. App. ___, ___, 750 S.E.2d 1,9 (2013). Defendant filed a petition for discretionary review, which this Court allowed on 19 August 2014.

In its appeal defendant argues that section 143-300.1 does not confer jurisdiction over plaintiff's action to the Commission because this section applies only to accidents involving "public school bus[es] or school transportation service vehicle[s]," occurrences that do not include accidents involving school activity buses. In response, plaintiff contends that school activity buses fall within the ambit of a "public school bus or school transportation service vehicle." We conclude that public school buses, school transportation service vehicles, and school activity buses

are distinct categories of vehicles, and that school activity buses were not incorporated into the waiver of immunity contemplated by the Tort Claims Act.

When considering a case on discretionary review from the Court of Appeals, we review the decision for errors of law. N.C. R. App. P. 16(a). Questions of law regarding the applicability of sovereign or governmental immunity are reviewed de novo. *White v. Trew*, 366 N.C. 360, 362-63, 736 S.E.2d 166, 168 (2013); *accord Craig v. New Hanover Cty. Bd. Of Educ.*, 363 N.C. 334, 335-37, 678 S.E.2d 351, 353-54 (2009).

"The State and its governmental units cannot be deprived of the sovereign attributes of immunity except by a plain, unmistakable mandate of the [General Assembly]." *Orange County v. Heath*, 282 N.C. 292, 296, 192 S.E.2d 308, 310 (1972). In addition, "State statutes waiving this immunity, being in derogation of the sovereign right to immunity, must be strictly construed." *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 537-38, 299 S.E.2d 618, 627 (1983) (citations omitted). Here "[defendant] is a county agency. As such, the immunity it possesses is more precisely identified as governmental immunity, while sovereign immunity applies to the State and its agencies." *Craig*, 363 N.C. at 335 n.3, 678 S.E.2d at 353 n. 3 (2009). Although this claim implicates sovereign immunity because the State is financially responsible for the payment of judgments against local boards of education for claims brought pursuant to the Tort Claims Act, N.C.G.S. §§ 143-299.4, -300.1(c) (2013), the specific question of the Commission's subject matter jurisdiction over this claim is one of governmental immunity because the named party is the local board of education.

Section 143-300.1 states in pertinent part:

> (a) The North Carolina Industrial Commission shall have jurisdiction to hear and determine tort claims against any county board of education or any city board of education, which claims arise as a result of any alleged . . . negligent act or omission of the driver . . . of a *public school bus or school transportation service vehicle* when:
>
> (1) The driver is an employee of the county or city administrative unit of which that board is the governing body, and the driver is paid or authorized to be paid by that administrative unit. . . .
>
> and which driver was at the time of the alleged negligent act or omission *operating a public school bus or school*

> *transportation service vehicle in accordance with G.S. 115C-242* in the course of his employment by or training for that administrative unit or board . . . .

Id. § 143-300.1(a) (emphases added). In 1998 the General Assembly added the language "in accordance with G.S. 115C-242" to the statute. *See* Current Operations Appropriations and Capital Improvement Appropriations Act of 1998, ch. 212, sec. 9.17(b), 1997 N.C. Sess. Laws, 937, 975-76 (Reg. Sess. 1998). Section 115C-242, titled "Use and operation of school buses," is part of the statutory scheme regulating school transportation, and it limits the permissible use of school buses to seven purposes. N.C.G.S. § 115C-242 (2013). As a result, the waiver of immunity and jurisdictional dictates of section 143-300.1 apply only when the bus at issue is being operated "in accordance with" one of the purposes authorized in section 115C-242.

Therefore, in order for the Commission to possess jurisdiction over plaintiff's claim, the government vehicle involved must, *inter alia*, constitute "a public school bus or school transportation service vehicle." Because the vehicle at issue here is a school activity bus, to resolve this matter, we first must address whether a school activity bus is considered a "school bus" or a "school transportation service vehicle" pursuant to section 143-300.1.

Since 1955 the General Assembly has authorized local boards of education to own and operate school buses, as well as provide other transportation for students, "in accordance with rules and regulations adopted by the State Board of Education [(State Board)]" and subject to other specific statutory limits. *Id.* §§ 115C-239 to -262 (2013). Activity buses and transportation service vehicles are among the other significant classes of regulated school transportation vehicles operated by local boards. In accordance with its statutory authority, the State Board has adopted rules and policies directing the operation of all three of these categories of vehicles within the school transportation system.

The General Assembly has defined a "school bus" as

> a vehicle whose primary purpose is to transport school students over an established route to and from school for the regularly scheduled school day, that is equipped with alternately flashing red lights on the front and rear and a mechanical stop signal, that is painted primarily yellow below the roofline, and that bears the plainly

> visible words "School Bus" on the front and rear. The term includes a public, private, or parochial vehicle that meets this description.

Id. § 20-4.01(27)(d4) (2013). The ownership and operation of school buses in particular are subject to a considerable amount of regulation both by statute and the State Board. *See, e.g.*, *id.* § 115C-240(c) (appearance and equipment); *id.* §§ 115C-240(e)-(f), -249 (funding for purchase and maintenance); *id.* §§ 115C-241, -244, -246 (allocation and routes); *id.* §§ 115C-242, -243, -254 (permissible uses); Sch. Support Div., Transp. Servs., N.C. Dep't of Pub. Instruction, *NC Bus Fleet: North Carolina School Transportation Fleet Manual* 5 (June 2015) [hereinafter Manual] (N.C. State Bd. of Educ. Policy EEO-H-005) (requirements related to purchase, maintenance, and operation of public school transportation vehicles), http://www.ncbussafety.org/Manuals/NCBusFleet%20Manual04June2015.pdf.

As noted previously, section 115C-242 directs that "[p]ublic school buses may be used for the following purposes only," and nearly all of those authorized uses relate directly to a school's provision of instruction to students. *See* N.C.G.S. § 115C-242(1) (limiting use to "transportation of pupils enrolled in and employees in the operation of the school to which [the] bus is assigned" and "transportation to and from such school for the regularly organized school day"); *id.* § 115C-242(3) (authorizing operation of school buses one day before the opening of the regular school term to transport pupils to and from school for registration and for the distribution of textbooks); *id.* § 115C-242(5) (permitting use and operation for transportation of pupils and instructional personnel as local boards of education "deem[ ] necessary to serve the instructional programs of the schools," including "transportation of children with disabilities and children enrolled in . . . special vocational or occupational programs" within the state). Those sanctioned uses in section 115C-242 that do not relate directly to instruction of students allow for the use of school buses for the community at large and do not involve schools or students at all. *See id.* § 115C-242(6) (use for "emergency management purposes in any state of disaster"); *id.* § 115C-242(7) (use by senior citizen groups).

Other legal constraints are imposed upon the operation of school buses. By statute, the maximum speed for a school bus is forty-five miles per hour. *Id.* § 20-218(b) (2013). In addition, the State Board has adopted uniform, statewide specifications for the appearance, color, and

lettering of school buses, and has made certain safety equipment mandatory for school buses only.[1]

In contrast, the General Assembly has defined a "school activity bus" as

> a vehicle, generally painted a different color from a school bus, whose primary purpose is to transport school students and others to or from a place for participation in an event other than regular classroom work. The term includes a public, private, or parochial vehicle that meets this description.

Id. § 20-4.01(27)(d3) (2013). Further, section 115C-247 of the North Carolina General Statutes, which specifically addresses the purchase and use of activity buses as part of the school transportation statutory scheme, provides:

> The several local boards of education in the State are hereby authorized and empowered to take title to school buses purchased with local or community funds for the purpose of transporting pupils to and from athletic events and for other local school activity purposes, and commonly referred to as activity buses.
>
> Each local board of education that operates activity buses shall adopt a policy relative to the proper use of the vehicles. The policy shall permit the use of these buses for travel to athletic events during the regular season and playoffs and for travel to other school-sponsored activities.
>
> The provisions of G.S. 115C-42 shall be fully applicable to the ownership and operation of such activity buses.

N.C.G.S. § 115C-247. Section 115C-42, titled "Liability insurance and immunity," allows local boards of education to waive their immunity from tort claims by purchasing liability insurance. *Id.* § 115C-42 (2013). By statute, the maximum speed for a school activity bus is fifty-five

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1. The State Board's policy states that "[e]ach school bus (not activity bus) shall be equipped with" lights in specific configurations, stop signals, and other safety features unique to school buses. *See* Sch. Support Div., Transp. Servs., N.C. Dep't of Pub. Instruction, *North Carolina School Bus and Activity Bus Specifications Type C - Conventional Bus* 23 (Nov. 2011), http://www.ncbussafety.org/documents/buses/TypeCSpecs2011.pdf.

miles per hour—ten miles per hour higher than for a school bus. *Id.* § 20-218(b). The State Board also allows more flexibility in the lettering shown on the exterior of activity buses and permits "[a]ctivity bus colors [to] vary."[2]

Although the term "school transportation service vehicle" has not been defined by statute, the State Board has defined these vehicles as "the service vehicles required for maintenance of [school buses for basic to-and-from-school transportation] and delivery of fuel to those buses."[3] The State Board's policy describes these service vehicles as a category of "local vehicles" which "are typically not directly involved in the to/from school transportation for grades K-12" and prohibits State funds from being spent on servicing, maintenance, and fuel for such vehicles. *Manual* at 9. In addition, the policy places activity buses in this same category. *Id.* (listing activity buses among the examples shown as types of local vehicles).

When we review a statute that operates to waive governmental immunity, the statute must not only be strictly construed, *Guthrie*, 307 N.C. at 537-38, 299 S.E.2d at 627, but also be given its plain meaning and enforced as written, so long as its language is clear and unambiguous, *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 811, 517 S.E.2d 874, 878 (1999). We note that the term "activity bus" has never appeared in section 143-300.1, but is treated as a separate category of vehicle in other statutes and regulations.[4] Therefore, we must conclude that the General Assembly and the State Board have defined and managed school buses, activity buses, and school transportation service vehicles as distinct categories of vehicles. This conclusion is further supported by the fact that school buses and activity buses, both of which share the clear purpose of transporting passengers, are patently distinguishable from school transportation service vehicles, which are to be used for the maintenance and repair of school buses. Consequently, we conclude that an activity bus does not fall within the category of a "school transportation service vehicle."

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2. *Id.* at 32, 34.

3. *Manual* at 8.

4. For example, section 115C-255 refers individually to "school bus drivers, school transportation service vehicle drivers and school activity bus drivers," indicating that the General Assembly recognized a distinction among them all. N.C.G.S. § 115C-255. Numerous other provisions refer to activity buses separately. *See, e.g.*, *Manual* at 5, 6, 9, 13, 18, 31; *see also* N.C.G.S. § 20-4.01(27)(d3); *id.* §§ 115C-247, -248.

Even though school buses and school activity buses are immediately and plainly distinguishable by statutory definition, their differing treatment by the legislature in other relevant respects further indicates that a school activity bus is not a mere subset of a school bus. As compared with school buses, which are subject to significant regulation such that the State has remained a functional part-owner of them, the ownership and operation of activity buses are the exclusive province of local school boards. *See* N.C.G.S. § 115C-247. Every use of a school bus that the General Assembly has authorized that involves schools and the transport of students is for a purpose that is fundamentally curricular in nature.

The role of an activity bus within the school transportation system is governed by a separate statute in Chapter 115C, which indicates that activity buses are to be used for students' extracurricular transport needs, specifically, "for the purpose of transporting pupils to and from athletic events and for other local school activity purposes." *Id.* Perhaps most importantly, the General Assembly explicitly provided in this statute the method by which local school boards waive immunity for tort claims arising from the negligent operation of activity buses. Section 115C-247 states that section 115C-42—which authorizes local boards of education to waive their immunity from tort claims by purchasing liability insurance—"shall be fully applicable to the ownership and operation of such activity school buses." *Id.* The General Assembly enacted sections 115C-247 and 143-300.1 the same year—which supports our conclusion that activity buses were contemplated to be used for school transportation services—yet the method of waiving immunity for the operation of activity buses is markedly different than that employed for a waiver for the operation of a school bus. *Compare* N.C.G.S. § 115C-247 (waiving immunity for operation of activity buses by purchasing liability insurance) *with id.* § 143-300.1 *id.* § 143-300.1 (bringing negligent acts by drivers of "school buses and school transportation service vehicles" under the limited waiver of sovereign immunity provided in the State Tort Claims Act). Therefore, we conclude that activity buses constitute an independent category of school transportation vehicles. Although certain regulations apply equally to both school buses and activity buses, when the legislature has sought to couple the two, it has done so expressly. *See, e.g.*, *id.* § 115C-249.1(a)(2) (defining a "school bus" for purposes of that section as a "school bus" or a "school activity bus"). The legislature has taken no such action with respect to section 143-300.1 or its subject matter. Activity buses plainly are excluded from section 143-300.1, therefore they are not a category of vehicle covered by this statute.

Because section 143-300.1 confers jurisdiction upon the Commission only when "a public school bus or school transportation service vehicle" is at issue, and we have concluded that the school activity bus in this case does not meet this requirement, the Commission does not have jurisdiction in this case. Accordingly, we hold that the Commission properly granted defendant's motion for summary judgment.

REVERSED.

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

JUSTIN LLOYD
v.
DANIEL BAILEY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS SHERIFF OF MECKLENBURG COUNTY, AND OHIO CASUALTY INSURANCE COMPANY

No. 181PA15

Filed 29 January 2016

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 772 S.E.2d 874 (2015), reversing and remanding an order entered on 21 May 2014 by Judge Calvin Murphy in Superior Court, Mecklenburg County. Heard in the Supreme Court on 7 December 2015.

Kennedy, Kennedy, Kennedy and Kennedy, LLP, by Harold L. Kennedy, III and Harvey L. Kennedy, for plaintiff-appellant.

Womble, Carlyle, Sandridge and Rice, LLP, by Sean F. Perrin, for defendant-appellees.

PER CURIAM.

For the reasons stated in *Young v. Bailey*, ___ N.C. ___, ___ S.E.2d ___ (2016) (355PA14-2), the decision of the Court of Appeals is affirmed.

AFFIRMED.

IVAN McLAUGHLIN and TIMOTHY STANLEY
v.
DANIEL BAILEY, in his individual and official capacity as Sheriff of Mecklenburg County, and OHIO CASUALTY INSURANCE COMPANY

No. 163A15

Filed 29 January 2016

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 771 S.E.2d 570 (2015), affirming an order granting summary judgment entered on 6 January 2014 by Judge Robert C. Ervin in Superior Court, Mecklenburg County. On 20 August 2015, the Supreme Court allowed plaintiffs' petition for discretionary review of additional issues. Heard in the Supreme Court on 7 December 2015.

Kennedy, Kennedy, Kennedy and Kennedy, LLP, by Harold L. Kennedy, III and Harvey L. Kennedy, for plaintiff-appellants.

Womble, Carlyle, Sandridge and Rice, LLP, by Sean F. Perrin, for defendant-appellees.

Tin Fulton Walker & Owen, PLLC, by William G. Simpson, Jr.; and Pinto Coates Kyre & Bowers, PLLC, by Jon Ward, for North Carolina Advocates for Justice, amicus curiae.

Edmond W. Caldwell, Jr., General Counsel, North Carolina Sheriffs' Association, amicus curiae.

Bailey & Dixon, LLP, by Jeffrey P. Gray; and McGuinness Law Firm, by J. Michael McGuinness, for North Carolina State Lodge of the Fraternal Order of Police, amicus curiae.

PER CURIAM.

For the reasons stated in *Young v. Bailey*, ___ N.C. ___, ___ S.E.2d ___ (2016) (355PA14-2), plaintiffs' suit under N.C.G.S. § 153A-99 fails. In addition, the suit brought by plaintiff Stanley pursuant to the North Carolina Constitution and the United States Constitution fails for the reasons set out in *Young v. Bailey*.

Unlike plaintiff Stanley, however, plaintiff McLaughlin was not a sworn law enforcement officer, and thus *Young v. Bailey* does

not dispose of McLaughlin's constitutional claims. We need not address whether a non-deputy employee of a sheriff, like McLaughlin, may be legally fired on the basis of political speech. Instead, the record indicates that plaintiff McLaughlin violated the department's policies by failing to properly conduct his pod tours and by falsifying paperwork submitted to his supervisors. The record also shows that plaintiff conceded to such allegations and that his termination was upheld by a department review board.

Based on this record, and applying de novo review, *Robins v. Town of Hillsborough*, 361 N.C. 193, 196, 639 S.E.2d 421, 423 (2007), we conclude that the trial court properly granted defendants' motion for summary judgment. Even if defendant Bailey knew that plaintiff McLaughlin did not contribute to his reelection campaign, defendant Bailey had sufficient job-related reasons to terminate this plaintiff. Accordingly, plaintiff McLaughlin's constitutional claims also fail. *See Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002) (per curiam) ("[T]he courts of this State will avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds.").

AFFIRMED.

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

STATE OF NORTH CAROLINA
v.
RYAN MATTHEW WILLIAMS

No. 333PA14

Filed 29 January 2016

Indictment and Information—registered sex offender change of address—"three business days" statutory language

The indictment charging defendant, a registered sex offender, with failure to provide timely written notice of his change of address in violation of N.C.G.S. § 14-208.11 was valid and conferred jurisdiction upon the trial court. Omission of the word "business" from the phrase "third business day" as set forth in § 14-208.9(a) did not deprive defendant of notice of the charge against him. The indictment included the critical language of § 14-208.11, alleging that defendant failed to report "as a person required by Article 27A of Chapter 14."

Justice BEASLEY dissenting.

Justice HUDSON joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 763 S.E.2d 926 (2014), finding no error after appeal of a judgment entered on 7 June 2013 by Judge Eric L. Levinson in Superior Court, Burke County. Heard in the Supreme Court on 17 March 2015.

Roy Cooper, Attorney General, by William P. Hart, Jr., Assistant Attorney General, for the State.

Ryan McKaig for defendant-appellant.

EDMUNDS, Justice.

As a registered sex offender, defendant Ryan Matthew Williams was required to report to the appropriate sheriff when he changed his address. He was convicted of failing to make such a report. Before this Court, defendant argues that the indictment failed to allege properly the time period within which he was required to file the report. We conclude that the indictment adequately apprised defendant of the conduct that was the basis of the charge against him. Accordingly, we affirm the

ruling of the Court of Appeals that the trial court correctly denied defendant's motion to dismiss.

Ryan Matthew Williams was convicted of indecent liberties with a minor on 15 March 2001 and, as a result, is a registered sex offender subject to the requirements of N.C.G.S. §§ 14-208.9 and 14-208.11. Defendant maintained his registration with the Burke County Sheriff's Office and reported several changes of address. Evidence presented at defendant's trial indicated that from 17 February 2010 to 5 April 2011, defendant's registered address was 107-D Ross Street in Morganton, where he lived with Sunshine Blevins. In April 2011, defendant and Blevins moved to 2022 Bristol Creek Avenue in Morganton and registered that address with the Burke County Sheriff's Office. In June 2011, defendant left the Bristol Creek Avenue home for 107-D Ross Street, Morganton, a move he registered on 29 June 2011.

On 8 September 2011, Deputy Sheriff Chuck Fisher went to defendant's last registered address at 107-D Ross Street. When no one answered his knock, Deputy Fisher contacted the property owner, Tim Norman, who reported that defendant had been living at a different address, 109-D Ross Street. Other evidence indicated that defendant had never resided at 107-D Ross Street. Norman advised Deputy Fisher that defendant stopped paying rent for the 109-D Ross Street residence and had vacated the premises in late July 2011 after Norman demanded that he either pay up or leave. At least six weeks passed after defendant's departure before Deputy Fisher came searching for him. Defendant was arrested on 13 September 2011.

On 5 October 2011, defendant was indicted by a Burke County Grand Jury for violating N.C.G.S. § 14-208.11 by failing to provide timely written notice of his change of address. The indictment included a preprinted block containing information in the following format:

DATE OF OFFENSE	ON OR ABOUT
09/08/2011	- after 4/2011

The body of the indictment beneath this block did not include a date but instead alleged that "on or about the date of offense shown," defendant committed the charged crime.

Defendant filed a motion to dismiss the indictment on the grounds that "it does not allege a specific enough date of offense to allow the Defendant to formulate a defense and is violative of his due process rights." After considering arguments presented by counsel for both

sides, the trial court denied defendant's motion to dismiss. On 7 June 2013, a jury found defendant guilty and the trial court imposed a sentence in the presumptive range of twenty-three to twenty-eight months of imprisonment.

Defendant appealed to the Court of Appeals, challenging the sufficiency of the indictment. *State v. Williams*, ___ N.C. App. ___, 763 S.E.2d 926, 2014 WL 3824252 (2014) (unpublished). He argued that the indictment was fatally defective because it identified the date of offense as a five month span, and that, because the indictment was defective, the trial court lacked jurisdiction to hear his case. *Id.* at *3. The Court of Appeals concluded that section 14-208.9(a)'s requirement that defendant register a new address within three business days of the change "does not make the specific day or year an essential element of the crime." *Id.* at *4. The court held that the indictment sufficiently alleged that defendant failed to notify the sheriff's office of a change of address within the prescribed statutory time period. *Id.* The court further held that defendant failed to demonstrate that he was misled by the times set out in the indictment and that no basis existed for concluding the indictment was fatally defective. *Id.* Consequently, the trial court properly denied the motion to dismiss. *Id.* On 9 October 2014, this Court allowed defendant's Petition for Discretionary Review.

Although defendant argued to the trial court and the Court of Appeals that the time span alleged in the indictment rendered it defective, he takes a different tack before us. Defendant contends his constitutional right to notice was violated because the indictment alleged that he failed to register his change of address with the sheriff's office within three days, rather than within three *business* days. Defendant made the latter argument in his Petition for Discretionary Review while candidly acknowledging that he had not raised it below. We will consider the petition because conflicting analyses of this issue may be found in opinions of the Court of Appeals.

"[W]here an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court." *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (citations omitted), *cert. denied*, 531 U.S. 1018, 121 S. Ct. 581, 148 L. Ed. 2d 498 (2000). The alleged failure of a criminal pleading to charge the essential elements of a stated offense is an error of law that this Court reviews de novo. *See State v. Sturdivant*, 304 N.C. 293, 308-11, 283 S.E.2d 719, 729-31 (1981).

The North Carolina Constitution guarantees that, "[i]n all criminal prosecutions, every person charged with crime has the right to be informed of the accusation." N.C. Const. art. I, § 23. Ordinarily, a person accused of a felony is charged by means of an indictment, which must contain

> [a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

N.C.G.S. § 15A-924(a)(5) (2013). In interpreting this statute, we have held that "it is not the function of an indictment to bind the hands of the State with technical rules of pleading," *Sturdivant*, 304 N.C. at 311, 283 S.E.2d at 731 (citing *State v. Gregory*, 223 N.C. 415, 27 S.E.2d 140 (1943)), and that we are no longer bound by the "ancient strict pleading requirements of the common law," *State v. Freeman*, 314 N.C. 432, 436, 333 S.E.2d 743, 746 (1985). Instead, contemporary criminal pleadings requirements have been "designed to remove from our law unnecessary technicalities which tend to obstruct justice." *Id.* Consistent with this retreat from archaic pleading standards, the General Assembly has provided that

> [e]very criminal proceeding by . . . indictment . . . is sufficient in form for all intents and purposes if it expresses the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill or proceeding, sufficient matter appears to enable the court to proceed to judgment.

N.C.G.S. § 15-153 (2013). We now consider whether defendant's indictment passes muster.

The indictment alleged that defendant violated N.C.G.S. § 14-208.11, which states, in pertinent part, that: "A person required by this Article to register who willfully does any of the following is guilty of a Class F felony: . . . (2) Fails to notify the last registering sheriff of a change of address as required by this Article." N.C.G.S. § 14-208.11(a)(2) (2013). Defendant's indictment cited "G.S. 14-208.11" and alleged that "defendant named above unlawfully, willfully, and feloniously did as a person required by Article 27A of Chapter 14 of the North Carolina General

Statutes to register with the Sheriff's office in the county wherein he resides . . . failed [sic] to provide written notice of his change of address no later than the 3rd day after his change in address . . . . This act was in violation of the law referenced above."

Details of the registration requirements are set out in N.C.G.S. § 14-208.9, which states that "[i]f a person required to register changes address, the person shall report in person and provide written notice of the new address not later than the third business day after the change to the sheriff of the county with whom the person had last registered." *Id.* § 14-208.9(a) (2014). Defendant acknowledges that he was required to register, but contends that the indictment is fatally defective because it omitted the word "business" as found in section 14-208.9(a).

Defendant cites *State v. Abshire* for the proposition that "three business days" is an essential element of the offense. 363 N.C. 322, 677 S.E.2d 444 (2009). In *Abshire*, we addressed an earlier version of the statute at bar and stated that the third element of the offense was that "the defendant '[f]ails to notify the last registering sheriff of [the] change of address,' [N.C.G.S. § 14-208.11(a)(2)], 'not later than the tenth day after the change,' N.C.G.S. § 14-208.9(a).' " *Id.* at 328, 677 S.E.2d at 449 (first and second alterations in original). However, our reference in *Abshire* to the ten-day deadline was not critical to the holding in that case. Moreover, we are reluctant to assume from *Abshire* that if the statute had said "ten business days," we would have found that the word "business" was essential to the pleading, especially when no such issue was before us. Instead, *Abshire* discussed the meaning of the term "address" in that earlier version of the statute, along with the unremarkable requirement that essential elements be included in the indictment. *Id.* at 328-32, 677 S.E.2d at 449-51. *Abshire* did not set out specific language to be used in an indictment alleging an offense under section 14-208.11, and the holding in that case is consistent with the flexible pleading standards expressed in sections 15-153 and 15A-924(a).

Defendant also argues that the Court of Appeals holding in *State v. Osborne*, ___ N.C. App. ___, 763 S.E.2d 16, 2014 WL 2993855 (2014) (unpublished), entitles him to a new trial. The defendant in *Osborne* was, as here, a convicted sex offender required to register with the sheriff of his county of residence. The indictment in *Osborne* alleged only that the defendant was required to register within three days of his move to a new address. The Court of Appeals vacated the defendant's conviction for a violation of N.C.G.S. § 14-208.11(a)(2) on the grounds that "three days," as alleged in the indictment, is different from "not later than the third business day," as found in section 14-208.9(a). 2014 WL 2993855 at

*3. In contrast, in the case at bar, the Court of Appeals concluded that time was not of the essence for this reporting offense and "[i]t does not matter when the crime occurred so long as the evidence shows that the defendant did not give the proper notification." The court then held "that an indictment under N.C. Gen. Stat. § 14-208.11 is sufficient if it alleges . . . the pertinent time element." *Williams*, 2014 WL 3824252, at *4. In other words, the absence of the term "business" before "days" in the indictment was found fatal in *Osborne* but not in *Williams*.

We have found no other case in which a panel of the Court of Appeals has adopted *Osborne*'s rationale. In *State v. Leaks*, ___ N.C. App. ___, 771 S.E.2d 795 (2015), the defendant sex offender was charged with failure to report a change of address under N.C.G.S. § 14-208.11(a)(2). He claimed the indictment was invalid because it failed to allege that he was required to provide "written notice" as set out in N.C.G.S. § 14-208.9. *Id.* at ___, 771 S.E.2d at 797-98. In a published opinion, the Court of Appeals distinguished *Osborne* and held that written notice was an evidentiary matter to be proved at trial but need not be alleged in an indictment brought under section 14-208.11. *Id.* at ___, 771 S.E.2d at 798-99. We denied discretionary review. *State v. Leaks*, ___ N.C. ___, 775 S.E.2d 870 (2015). In *State v. Furr*, ___ N.C. App. ___, 775 S.E.2d 693, 2015 WL 3791729 (2015) (unpublished), the defendant sex offender was indicted under N.C.G.S. § 14-208.11(a)(2) for failing to report a new address. The defendant claimed the indictment was invalid because it did not allege that he was required to provide "written notice" within "three business days," as set out in N.C.G.S. § 14-208.9. 2015 WL 3791729 at *2. The Court of Appeals declined to follow *Osborne* and found no error. *Id.* at *4. We denied discretionary review. *State v. Furr*, ___ N.C. ___, 775 S.E.2d 854 (2015). In *State v. McLamb*, ___ N.C. App. ___, 777 S.E.2d 150 (2015), the defendant sex offender was charged under N.C.G.S. § 14-208.11(a)(2) with failing to register. He claimed the indictment was invalid for failing to allege that he was required to provide "written notice" within "three business days." *Id.* at ___, 777 S.E.2d at 151. In a published opinion, the Court of Appeals declined to follow *Osborne* and found no error. *Id.* at ___, 777 S.E.2d at 152-53.

Moreover, the Court of Appeals declined to subject indictments to the type of hypertechnical scrutiny employed in *Osborne* before that opinion was issued. In *State v. Pierce*, ___ N.C. App. ___, 766 S.E.2d 854 (2014), the defendant sex offender was charged with failing to provide notification of an address change. He argued that the indictment was fatally defective because it omitted the purportedly essential element that he report to the sheriff of the new county to which he had moved.

Id. at ___, 766 S.E.2d at 857. The Court of Appeals determined that the indictment, "read in totality," gave the defendant adequate notice. *Id.* at ___, 766 S.E.2d at 858. We denied discretionary review. *State v. Pierce*, 368 N.C. 262, 772 S.E.2d 734 (2015). In *State v. Harrison*, 165 N.C. App. 332, 598 S.E.2d 261 (2004), the defendant claimed that the indictment charging him with failure to report was defective because it did not identify the specific dates of the moves or the defendant's new address. The Court of Appeals found that the indictment provided defendant "ample notice of the charge," even though it did not identify the specific dates on which the defendant moved or his new address. *Id.* at 336, 598 S.E.2d at 263. We denied discretionary review. *State v. Harrison*, 359 N.C. 72, 604 S.E.2d 922 (2004).

Consistent with these Court of Appeals opinions, this Court has acknowledged the general rule that an indictment using "either literally or substantially" the language found in the statute defining the offense is facially valid and that "the quashing of indictments is not favored." *State v. James*, 321 N.C. 676, 681, 365 S.E.2d 579, 582 (1988) (citations omitted). Here, defendant's indictment included the critical language found in N.C.G.S. § 14-208.11, alleging that he failed to meet his obligation to report "as a person required by Article 27A of Chapter 14." This indictment language was consistent with that found in the charging statute and provided defendant sufficient notice to prepare a defense. Additional detail about the reporting requirement such as that found in section 14-208.9 was neither needed nor required in the indictment.

Because defendant's indictment substantially tracks the language of section 14-208.11(a)(2), the statute under which he was charged, thereby providing defendant adequate notice, we conclude that the Court of Appeals' analysis in *Williams* is consistent with the applicable statutes and holdings cited above. Accordingly, we hold that defendant's indictment is valid and conferred jurisdiction upon the trial court.

AFFIRMED.

Justice ERVIN took no part in the consideration or decision of this case.

Justice BEASLEY dissenting.

The majority, in concluding that the indictment here was not facially invalid, violates a defendant's right to be placed on reasonable notice of the charges pending against him. The majority incorrectly concludes

that the term "business day" is not an essential element of an indictment under N.C.G.S. § 14-208.11. Our case law supports a defendant's right to be placed on reasonable notice of the charges against him and the indictment here failed to provide reasonable notice. Because subject matter jurisdiction does not vest with the trial court under a fatally defective indictment, I respectfully dissent.

Defendant, a registered sex offender, is required to register as such pursuant to N.C.G.S. § 14-208.11. This statute states that one who willfully "[f]ails to report in person to the sheriff's office" as required by sections 14-208.7, 14-208.9, and 14-208.9A is guilty of a Class F felony. N.C.G.S. § 14-208.11(a)(7) (2013). Section 14-208.9 sets out the specific reporting requirements and states, in relevant part, "[i]f a person required to register changes address, the person shall report in person and provide written notice of the new address *not later than the third business day* after the change to the sheriff of the county with whom the person had last registered." *Id.* § 14-208.9(a) (2014) (emphasis added).

I note here that defendant failed to object to the sufficiency of the indictment in the trial court or before the Court of Appeals. Defendant now raises the argument that the indictment was facially invalid, and therefore the trial court lacked subject matter jurisdiction. Defendant may timely raise this jurisdictional argument for the first time on appeal to this Court because an argument that the trial court lacked subject matter jurisdiction may be raised at any time after a verdict. S*ee State v. Sturdivant*, 304 N.C. 293, 307-08, 283 S.E.2d 719, 729-30 (1981); s*ee also State v. Harwood*, ___ N.C. App. ___, ___, 777 S.E.2d 116, 118 (2015) ("The issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal or by a court *sua sponte*."). While it appears defendant raised an argument under the North Carolina Constitution, his analysis is consistently grounded in the interpretation of section 14-208.9. Further, given the conflicting analyses in recent Court of Appeals opinions, this Court properly addresses defendant's petition for discretionary review.

In determining essential elements to be included in an indictment, it is important to recognize that there is a long-standing trend which disfavors hypertechnical, common law pleadings and favors more practical, liberal pleadings. The General Assembly adopted the Criminal Procedure Act of 1975, which modernized archaic pleading requirements for criminal indictments. *See State v. Freeman*, 314 N.C. 432, 436, 333 S.E.2d 743, 746 (1985) ("It is unnecessary for us to decide here whether that rule drawn from the ancient strict pleading requirements of the common law has survived the more liberal criminal pleading requirements of our

new Criminal Procedure Act and other recent legislation designed to remove from our law unnecessary technicalities which tend to obstruct justice."); *see also State v. Worsley*, 336 N.C. 268, 279, 443 S.E.2d 68, 73 (1994) (observing that N.C.G.S. § 15A-924 "supplanted prior law" requiring more strictly pleaded indictments (citations omitted)); *State v. Palmer*, 293 N.C. 633, 638, 239 S.E.2d 406, 410 (1977) (explaining the requirements of N.C.G.S. § 15A-924 (citations omitted)).

The Criminal Procedure Act sets forth the minimum standard for a sufficient indictment in North Carolina by requiring

> [a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

N.C.G.S. § 15A-924(a)(5) (2013). Indictments serve "(1) [to provide] such certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged; (2) to protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial, and (4) to enable the court, on conviction or plea of *nolo contendere* or guilty to pronounce sentence according to the rights of the case." *State v. Greer*, 238 N.C. 325, 327, 77 S.E.2d 917, 919 (1953) (citations omitted).

"An indictment charging a statutory offense must allege all of the essential elements of the offense." *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996) (citations omitted). "It is well settled that 'a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony.' " *State v. Abraham*, 338 N.C. 315, 339, 451 S.E.2d 131, 143-44 (1994) (quoting *Sturdivant*, 304 N.C. at 308, 283 S.E.2d at 729). "The existence of subject matter jurisdiction is a matter of law and 'cannot be conferred upon a court by consent.' " *In re K.J.L.*, 363 N.C. 343, 345-46, 677 S.E.2d 835, 837 (2009) (quoting *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006)).[1] An appellate court must vacate any judgment or conviction based upon a facially invalid indictment because the indictment fails to confer jurisdiction to the trial court. *See State v. Petersilie*, 334 N.C. 169, 175-76, 432 S.E.2d 832, 835-36 (1993)

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1. Although the case cited is a civil case, if a party to a civil action cannot waive subject matter jurisdiction, because subject matter jurisdiction must vest with the trial court, a criminal defendant must also be prohibited from such waiver.

(citations omitted); *see also State v. Jarvis*, 50 N.C. App. 679, 680-81, 274 S.E.2d 852, 852 (1981) (where the trial court dismissed the indictment *sua sponte* for lack of subject matter jurisdiction).

Critically, in the statute at issue, the General Assembly amended the time by which an offender must report his address change to the local sheriff's department. Initially, in 1996 the legislature required that an offender submit his change of address to the sheriff no later than the tenth day after the change. Act of July 29, 1995, ch. 545, sec. 1, 1995 N.C. Sess. Laws 2046, 2048 (effective 1 January 1996). In 2008 the legislature reduced the time period by which an offender must report his address change from *the tenth day* to the *third business day* after the change. Act of July 18, 2008, ch. 117, sec. 9, 2007 N.C. Sess. Laws (Reg. Sess. 2008) 426, 430-31 (emphases added).

The majority errs by discounting the significance of the "third business day" reporting requirement established by the General Assembly. In 2006 Congress enacted the Sex Offender Registration and Notification Act (SORNA) to provide a comprehensive system for nationwide sex offender registration.[2] *See United States v. Price*, 777 F.3d 700, 703 (4th Cir.), *cert. denied*, ___ U.S. ___, 192 L. Ed. 2d 941 (2015).

> Congress through SORNA has not commandeered . . . nor compelled the state[s] to comply with its requirements. Congress has simply placed conditions on the receipt of federal funds. A state is free to keep its existing sex-offender registry system in place (and risk losing funding) or adhere to SORNA's requirements (and maintain funding).

United States v. White, 782 F.3d 1118, 1128 (10th Cir. 2015) (quoting *United States v. Felts*, 674 F.3d 599, 608 (6th Cir. 2012)). In North Carolina, by amending section 14-208.9 to require notification of an address change within three business days, the legislature intended to comply with the SORNA requirement to adopt the statutory language in 42 U.S.C. § 16913(c), which provides that "[i]f a sex offender

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2. SORNA, also known as the Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh Act), is mostly codified at 42 U.S.C. §§ 16901-16962. *See* Adam Walsh Act, Pub. L. No. 109-248, Title I, 120 Stat. 587 (2006). North Carolina is one of numerous states that have not substantially implemented SORNA, but the State complies with many of its provisions as a requirement to receive federal funding for crime labs, prisons and jails, and other law enforcement programs. Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART), Office of Justice Programs, U.S. Dep't of Justice, *SORNA*, http://www.smart.gov/sorna.htm (last visited Jan. 25, 2016); *see, e.g.*, *White*, 782 F.3d at 1128.

changes his residence, employment, or student status, he must update his registration within three business days." *Price*, 777 F.3d at 703-04 (emphasis added).[3]

The legislature also intended to shorten the "grace period" during which an offender must report an address change and to specify the method by which the address change period is calculated. The legislature's deliberate change from "day" to "business day" alleviates confusion for offenders and law enforcement. For example, if a defendant's address changes on Thursday, without this business day requirement, it would be unclear whether that defendant is required to report his change of address to the sheriff by the following Sunday or by the following Tuesday. This statute provides clarity and reasonable notice to a defendant. Because the legislature deliberately carved out this distinction, this nomenclature is not hypertechnical surplusage.

The majority cites three recent opinions from the Court of Appeals as support that the term "business days" is not an element of the offense and, therefore, not compulsory language in an indictment under section 14-208.9. In *State v. Leaks*, upon the sheriff's office's realization that defendant was no longer occupying the address he previously registered, the sheriff's office sent defendant "an address verification letter" that was later returned as "undeliverable." ___ N.C. App. ___, ___, 771 S.E.2d 795, 797 (2015). In *Leaks* the defendant argued that his indictment was insufficient because it did not state that "he was required to provide 'written notice' " of his address change. ___ N.C. App. at ___, 771 S.E.2d at 797-98. The defendant relied on *State v. Osborne*, an unpublished Court of Appeals decision, which held that "written notice" and "three business days" are essential elements of the offense. *Id.* at ___, 771 S.E.2d at 798 (citing *State v. Osborne*, ___ N.C. App. ___, 763 S.E.2d 16, 2014 WL 2993855 (2014) (unpublished). The issue of whether "three

3. Though not defined in this context by the legislature, we assume that a business day occurs Monday through Friday during "bankers' hours."

Further, N.C.G.S. § 90-95 is another example in which the legislature intended to distinguish business days and calendar days. Time is an essential element in this statute in that the Legislature has codified time limits by which a defendant has a right to object to the State's admitting certain toxicology evidence at trial. *See* N.C.G.S. § 90-95(g) (2014) (requiring the State to provide notice to a defendant at least 15 business days before a judicial proceeding of its intent to introduce a toxicology report into evidence and allowing the defendant up to five business days to object to introduction of the report into evidence). Although section 90-95 is based on the Confrontation Clause, this statute highlights the importance of distinguishing between business days and calendar days in the criminal context.

business days" is an element of N.C.G.S. § 14-208.9(a) was not raised in *Leaks*. The Court of Appeals held in *Leaks* that the statutory requirement that notice be provided "in writing" is an evidentiary matter and not an element of the offense. *Id.* at ___, 771 S.E.2d at 799. Moreover, the Court of Appeals relied on *State v. Abshire*, 363 N.C. 322, 677 S.E.2d 444 (2009), to reject the defendant's argument that the indictment failed to confer subject matter jurisdiction to the trial court. *Id.* at ___, 771 S.E.2d at 799.

Similarly, in *State v. McLamb*, following the sheriff's office's discovery that defendant had vacated his last registered address without notifying that office, the defendant was convicted for failing to register. ___ N.C. App. ___, ___, 777 S.E.2d 150, 151 (2015). On appeal the defendant argued that the indictment was deficient because it failed to contain language alleging the required "written notice" and "three business days." *Id.* at ___, 777 S.E.2d at 151. The Court of Appeals rejected the analysis in *Osborne*, noting that the court had since issued *Leaks* and *State v. James*, ___ N.C. App. ___, 774 S.E.2d 871 (2015), which held respectively that the exclusion of "written notice" in *Leaks* and of "three business days" in *James* was not a fatal defect. *McLamb*, ___ N.C. App. at ___, 777 S.E.2d at 152. The court noted, however, that the better practice is for the indictment to include the words "written notice" and "three business days." *Id.* at ___, 777 S.E.2d at 153.[4]

The majority also cites *State v. Furr*, an unpublished opinion, to support its conclusion that "three business days is not required for an indictment under N.C.G.S. § 14-208.11." In *Furr* the sheriff's office received information that the defendant did not reside at his registered address, which was confirmed by the woman with whom the defendant was living. ___ N.C. App. ___, 775 S.E.2d 693, 2015 WL 3791729 at *1-2 (2015). On appeal the defendant argued that the indictment did not confer subject matter jurisdiction because of its omission of "written notice" and "three business days." 2015 WL 3791729 at *2. In *Furr* the Court of Appeals again declined to follow *Osborne*, concluding that *Osborne* is not controlling because the opinion is unpublished. *Id.* at *4. The Court of Appeals instead relied on its published opinions in *State v. Pierce*, ___ N.C. App. ___, 766 S.E.2d 854 (2014), and *State v. Harrison*, 165 N.C. App. 332, 598 S.E.2d 261 (2004), both of which held that the indictments

4. *James* noted that defendant was not prejudiced by the omission of the words "three business days" from the indictment. Further, the court opined that the "indictment nevertheless gave [the d]efendant sufficient notice of the charge against him." ___ N.C. App. at ___, 774 S.E.2d at 875.

were sufficient despite their failure to allege "additional elements." *Furr*, 2015 WL 3791729 at *4.

It is noteworthy that *State v. Leaks*, *State v. McLamb*, and *State v. Furr* were all decided by the Court of Appeals *after* the present case was decided by that court. The conflicts in the Court of Appeals' opinions, as reflected in *Leaks*, *McLamb*, *Furr*, and *Osborne*, suggest that the court has not settled this issue, as the split in its own precedent demonstrates and, therefore, is not persuasive.

Here defendant also argues that the "timing of the offense is a specific element" and that the indictment was invalid because it alleged "a window of five months during which [defendant] could have committed a crime involving a three day threshold." The majority cites *State v. Harrison* for the proposition that the time of the commission of the offense is not essential. In *Harrison*, decided by the Court of Appeals before *Osborne*, the Court of Appeals rejected the defendant's argument that the indictment failed to confer jurisdiction to the trial court because the indictment did not identify the specific dates of the moves or the new address. 165 N.C. App. at 336, 598 S.E.2d at 263. The Court of Appeals ultimately held that the indictment gave the defendant adequate notice of the charges pending against him. *Id.* at 336, 598 S.E.2d at 263.

It cannot be that, as the majority writes, "it does not matter when the crime occurred" because it is imperative that if a failure to report an address change is alleged, a defendant must have notice of the time by which he must have reported an address change. It proves impossible for a defendant to be properly noticed, as the statute requires, of the time by which he must report an address change to the sheriff if the indictment does not inform that defendant of the time during which the State alleges he violated the statute. Neither the statute nor SORNA makes that time requirement a fluid one. It does appear that when, as here, the time period is alleged, the proof thereof is an evidentiary matter.

The majority correctly assesses that defendant's reliance on *State v. Abshire* is misguided for the proposition that "three business days" is an essential element of the offense. The majority also correctly characterizes the holding in *Abshire* as defining "address" consistent with SORNA's intent. *Abshire* did not address whether "three business days," or ten days per the statute at the time *Abshire* was decided, is an essential element.

Therefore, because I would hold that the term "business day" is an essential element for an indictment charging a defendant under N.C.G.S. § 14-208.11, and thus the indictment at issue here is facially invalid,

I respectfully dissent. I would remand this case to the Court of Appeals for remand to the trial court with instructions to vacate the judgment based upon this fatally defective indictment.

Justice HUDSON joins in this dissenting opinion.

STATE OF NORTH CAROLINA, UPON THE RELATION OF PATRICK L. McCRORY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA; JAMES B. HUNT, JR.; AND JAMES G. MARTIN

v.

PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; AND, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE COAL ASH MANAGEMENT COMMISSION, HARRELL JAMISON AUTEN III, TIM L. BENNETT, D. ALLEN HAYES, SCOTT FLANAGAN, RAJARAM JANARDHANAM, AND LISA D. RIEGEL

No. 113A15

Filed 29 January 2016

1. Constitutional Law—review of state constitutional issues—de novo—presumed constitutionality

The North Carolina Supreme Court reviews constitutional questions de novo. In exercising de novo review, it is presumed that laws enacted by the General Assembly are constitutional, and a law will not be declared invalid unless it is determined that the law is unconstitutional beyond reasonable doubt. To determine whether the violation is plain and clear, the Supreme Court looks to the text of the state Constitution, the historical context in which the people of North Carolina adopted the applicable constitutional provision, and the Court's precedents.

2. Constitutional Law—state constitution—appointments clause—authority of governor and legislature

Considering whether the appointments clause in Article III, Section 5(8) of the North Carolina Constitution prohibits the General Assembly from appointing statutory officers, the North Carolina Supreme Court concluded that this clause gives the Governor the exclusive authority to appoint constitutional officers whose appointments are not otherwise provided for by the constitution. The appointments clause does not prohibit the General Assembly from appointing statutory officers to administrative commissions.

3. Constitutional Law—state constitution—separation of powers—legislative appointments to administrative commissions

Challenged statutory provisions involving legislative appointments to administrative commissions violated the separation of powers clause in the North Carolina Constitution by preventing the Governor from performing his constitutional duty. When the General Assembly appoints executive officers that the Governor has little power to remove, it can appoint them essentially without the Governor's influence. That leaves the Governor with little control over the views and priorities of the officers that the General Assembly appoints. When those officers form a majority on a commission that has the final say on how to execute the laws, the General Assembly, not the Governor, can exert most of the control over the executive policy that is implemented in any area of the law that the commission regulates. As a result, the Governor cannot take care that the laws are faithfully executed in that area. The separation of powers clause plainly and clearly does not allow the General Assembly to take this much control over the execution of the laws from the Governor and lodge it with itself.

Justice NEWBY concurring in part and dissenting in part.

Appeal pursuant to N.C.G.S. § 7A-27(a1) from a decision and judgment entered on 16 March 2015 by a three-judge panel of the Superior Court, Wake County, appointed under N.C.G.S. § 1-267.1(b1). Heard in the Supreme Court on 30 June 2015.

Robinson, Bradshaw & Hinson, P.A., by John R. Wester, David C. Wright, III, and Andrew A. Kasper, for plaintiff-appellee Governors; and Office of General Counsel to the Governor, by Robert C. Stephens, Jr., General Counsel, and Jonathan R. Harris, Associate General Counsel, for Governor McCrory, plaintiff-appellee.

K&L Gates LLP, by John H. Culver III and Brian C. Fork, for legislator defendant-appellants; and Roy Cooper, Attorney General, by Alexander McC. Peters, Senior Deputy Attorney General, and Melissa L. Trippe and Ann W. Matthews, Special Deputy Attorneys General, for Coal Ash Management Commission defendant-appellants.

Arch T. Allen III, pro se, amicus curiae.

Troutman Sanders LLP, by Christopher G. Browning, Jr. and C. Elizabeth Hall, for Carolinas AGC (Associated General Contractors), Employers Coalition of North Carolina, National Federation of Independent Business Small Business Legal Center, North Carolina Chamber, North Carolina Forestry Association, North Carolina Home Builders Association, North Carolina Manufacturers Alliance, and North Carolina Retail Merchants Association, amici curiae.

Blanchard, Miller, Lewis & Isley, P.A., by E. Hardy Lewis, for North Carolina Council of State members Cherie Berry, Commissioner of Labor; Wayne Goodwin, Commissioner of Insurance; Steve Troxler, Commissioner of Agriculture; and Beth A. Wood, State Auditor, amici curiae.

Campbell Shatley, PLLC, by Robert F. Orr, for North Carolina Institute for Constitutional Law, amicus curiae.

MARTIN, Chief Justice.

Our founders believed that separating the legislative, executive, and judicial powers of state government was necessary for the preservation of liberty. The Constitution of North Carolina therefore vests each of these powers in a different branch of government and declares that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6.

Each branch of government has a distinctive purpose. The General Assembly, which comprises the legislative branch, enacts laws that "protect or promote the health, morals, order, safety, and general welfare of society." *State v. Ballance*, 229 N.C. 764, 769, 51 S.E.2d 731, 734 (1949); *see also* N.C. Const. art. II, §§ 1, 20. The executive branch, which the Governor leads, faithfully executes, or gives effect to, these laws. *See* N.C. Const. art. III, §§ 1, 5(4). The judicial branch interprets the laws and, through its power of judicial review, determines whether they comply with the constitution. *See id.* art. IV, § 1; *Bayard v. Singleton*, 1 N.C. 5, 6-7 (1787).

The constitution also incorporates a system of checks and balances that gives each branch some control over the others. For example, the Lieutenant Governor is the President of the Senate and casts tie-breaking votes when the Senate is equally divided. N.C. Const. art. III, § 6.

At the same time, the General Assembly can assign duties to the Lieutenant Governor. *Id.* Still, the separation of powers clause requires that, as the three branches of government carry out their duties, one branch will not prevent another branch from performing its core functions. *See Hart v. State*, 368 N.C. 122, 126-27, 774 S.E.2d 281, 285 (2015).

In this case, plaintiffs challenge legislation that authorizes the General Assembly to appoint a majority of the voting members of three administrative commissions. Plaintiffs contend that, by giving itself the power to appoint commission members, the General Assembly has usurped Governor McCrory's constitutional appointment power and interfered with his ability to take care that the laws are faithfully executed. Plaintiffs' contentions raise two important questions about the function and structure of state government: (1) Does the appointments clause in Article III, Section 5(8) of the state constitution prohibit the General Assembly from appointing statutory officers to administrative commissions? (2) If not, do the specific appointment provisions challenged in this case violate the separation of powers clause in Article I, Section 6?

We hold that, while the appointments clause itself places no restrictions on the General Assembly's ability to appoint statutory officers, the challenged provisions violate the separation of powers clause. In short, the legislative branch has exerted too much control over commissions that have final executive authority. By doing so, it has prevented the Governor from performing his express constitutional duty to take care that the laws are faithfully executed.

I

The Energy Modernization Act and the Coal Ash Management Act of 2014 create three administrative commissions that are housed in the executive branch of government: the Oil and Gas Commission, the Mining Commission, and the Coal Ash Management Commission. *See generally* N.C.G.S. §§ 143B-290 to -293.6 (2014) (effective July 31, 2015); *id.* §§ 130A-309.200 to -309.231 (2014). The Acts also specify how commission members will be appointed and how they may be removed. *See generally id.*

The Oil and Gas Commission is housed in the Department of Environment and Natural Resources (DENR)[1] and has the power to

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1. The Department of Environment and Natural Resources is now called the Department of Environmental Quality. Current Operations and Capital Improvements Appropriations Act of 2015, ch. 241, sec. 14.30(c), 2015-5 N.C. Adv. Legis. Serv. 38, 322

promulgate rules, make determinations, and issue orders consistent with the Oil and Gas Conservation Act. N.C.G.S. § 143B-293.1. The commission has nine members: three appointed by the Governor and six appointed by the General Assembly. Id. § 143B-293.2(a1). Each member serves a three-year term. *Id.* § 143B-293.2(b). A majority of the members constitutes a quorum for the transaction of business. *Id.* § 143B-293.2(e). The commission elects one of its members to serve as chair. *Id.* § 143B-293.4. The chair appoints members of the commission to a Committee on Civil Penalty Remissions, which has the power to remit civil environmental penalties that DENR imposes. *Id.* § 143B-293.6(b), (c). The Governor may remove any member of the commission for misfeasance, malfeasance, or nonfeasance. *Id.* § 143B-293.2(c)(1).

Like the Oil and Gas Commission, the Mining Commission is housed in DENR. *Id.* § 143B-290. The Mining Commission has the power to promulgate mining rules and affirm, modify, or overrule permit decisions that DENR makes. *Id.* § 143B-290(1)(c)-(e). This commission has eight members: two appointed by the Governor; four appointed by the General Assembly; the chair of the North Carolina State University Minerals Research Laboratory Advisory Committee; and the State Geologist, who is ex officio and nonvoting. *Id.* § 143B-291(a1). Each member serves a six-year term. *Id.* § 143B-291(b). As with the Oil and Gas Commission, a majority of the Mining Commission's members constitutes a quorum for the transaction of business, and the Governor may remove any member for misfeasance, malfeasance, or nonfeasance. *Id.* § 143B-291(d), (f).

The Coal Ash Management Commission is administratively located in the Division of Emergency Management of the Department of Public Safety but is expressly required to exercise its powers and duties "independently," without "the supervision, direction, or control of the Division or Department." *Id.* § 130A-309.202(n). This commission has the power to review and approve coal ash surface impoundment classifications and closure plans that DENR proposes. *Id.* § 130A-309.202(f); *see also id.* §§ 130A-290(a)(4a), -309.213, -309.214. The commission has nine members: three appointed by the Governor and six appointed by the General Assembly. *Id.* § 130A-309.202(b). Each member serves a six-year term. *Id.* § 130A-309.202(o). Five members constitute a quorum for the transaction of business. *Id.* § 130A-309.202(h). The Governor appoints the chair of the Coal Ash Management Commission from among the

(LexisNexis). Because the Energy Modernization Act and the Coal Ash Management Act predate this name change and refer to the department as the Department of Environment and Natural Resources, we will continue to use this superseded name.

nine members, and that member serves as chair at the pleasure of the Governor. *Id.* § 130A-309.202(c). As with the other two commissions, the Governor may remove any member of the Coal Ash Management Commission for misfeasance, malfeasance, or nonfeasance. *Id.* § 130A-309.202(e).

On 13 November 2014, plaintiffs filed a complaint in Superior Court, Wake County, that challenged the constitutionality of certain provisions in the Acts. Plaintiffs argued that the provisions authorizing the General Assembly to appoint members to the commissions—specifically, N.C.G.S. §§ 130A-309.202(b), 143B-291(a1), and 143B-293.2(a1)—violate the appointments clause in Article III, Section 5(8) and the separation of powers clause in Article I, Section 6. Plaintiffs also argued that the provision requiring the Coal Ash Management Commission to exercise its powers and duties independently of the Division of Emergency Management and the Department of Public Safety, *see* N.C.G.S. § 130A-309.202(n), violates Article I, Section 6 and Article III, Sections 1 and 5(4). Plaintiffs sought a declaration that the challenged provisions are unconstitutional.[2] In addition, because the General Assembly had already made appointments to the Coal Ash Management Commission, plaintiffs requested that those appointees be removed.

On 16 March 2015, a three-judge panel of the superior court determined that the challenged appointment provisions did not violate the appointments clause but did violate the separation of powers clause. The panel also determined that the Coal Ash Management Commission's independent status violated the separation of powers clause. Finally, the panel dismissed without prejudice plaintiffs' action to remove Coal Ash Management Commission appointees. Defendants appealed directly to this Court pursuant to N.C.G.S. § 7A-27(a1) (2014).

II

[1] This Court construes and applies the provisions of the Constitution of North Carolina with finality. *Hart*, 368 N.C. at 130, 774 S.E.2d at 287; *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 479

2. Plaintiffs also sought a declaration that a provision of the Coal Ash Management Act requiring the Governor to issue an executive order, *see* N.C.G.S. § 130A-309.202(j) (2014) (repealed 2015), was unconstitutional. The three-judge panel granted declaratory relief to plaintiffs on this issue, and the General Assembly subsequently repealed the provision. Act of Apr. 16, 2015, ch. 9, sec. 1.1, 2015-1 N.C. Adv. Legis. Serv. 63, 65 (LexisNexis). Defendants did not appeal this issue and, in any event, it is moot.

(1989). We review constitutional questions de novo. *Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001). In exercising de novo review, we presume that laws enacted by the General Assembly are constitutional, and we will not declare a law invalid unless we determine that it is unconstitutional beyond reasonable doubt. *Hart*, 368 N.C. at 131, 774 S.E.2d at 287-88; *Baker v. Martin*, 330 N.C. 331, 334-35, 410 S.E.2d 887, 889 (1991). In other words, the constitutional violation must be plain and clear. *Preston*, 325 N.C. at 449, 385 S.E.2d at 478. To determine whether the violation is plain and clear, we look to the text of the constitution, the historical context in which the people of North Carolina adopted the applicable constitutional provision, and our precedents. *See id.* at 449, 385 S.E.2d at 479 ("In interpreting our Constitution—as in interpreting a statute—where the meaning is clear from the words used, we will not search for a meaning elsewhere."); *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."); *Elliott v. State Bd. of Equalization*, 203 N.C. 749, 753, 166 S.E. 918, 921 (1932) ("Likewise, we may have recourse to former decisions, among which are several dealing with the subject under consideration."). With these principles in mind, we now examine the two questions raised by defendants' appeal.

A

[2] We first address whether the appointments clause in Article III, Section 5(8) prohibits the General Assembly from appointing statutory officers. This clause states: "The Governor shall nominate and by and with the advice and consent of a majority of the Senators appoint all officers whose appointments are not otherwise provided for." N.C. Const. art. III, § 5(8). Plaintiffs contend that the clause gives the Governor broad power to appoint both constitutional and statutory officers. In defendants' view, the appointments clause implicitly gives the appointment power to the General Assembly. They cite the maxim that all power not expressly limited by the people in the constitution remains with the people and "is exercised through the General Assembly, which functions as the arm of the electorate." *Pope v. Easley*, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001) (per curiam). Based on our review of the text of the appointments clause, its historical development, and our precedents interpreting it, we conclude that this clause gives the Governor the exclusive authority to appoint *constitutional* officers whose appointments are not otherwise provided for *by the constitution*.

The appointments clause does not prohibit the General Assembly from appointing *statutory* officers to administrative commissions.[3]

The Constitution of 1776 did not have an analogue to the appointments clause. That constitution had specific provisions that expressly authorized the General Assembly to appoint certain officers. These officers included the Governor, N.C. Const. of 1776, § 15; all seven members of the Council of State, *id.* § 16; and the judges of the Supreme Courts of Law and Equity, *id.* § 13. As a result, the General Assembly was the general appointing authority under our state's first constitution. *People ex rel. Nichols v. McKee*, 68 N.C. 429, 431-32 (1873).

In 1835, the people ratified a constitutional amendment that gave them the power to directly elect the Governor. N.C. Const. of 1776, Amends. of 1835, art. II, § 1. When they ratified the Constitution of 1868, they then shifted appointment power from the General Assembly to the Governor. *McKee*, 68 N.C. at 433. The Constitution of 1868 removed all of the provisions that had authorized the General Assembly to appoint executive and judicial officers.[4] Instead, it introduced the appointments clause, which stated:

> The Governor shall nominate, and, by and with the advice and consent of a majority of the Senators elect, appoint, all officers whose offices are established by this Constitution, or which shall be created by law, and whose appointments are not otherwise provided for, and no such officer shall be appointed or elected by the General Assembly.

N.C. Const. of 1868, art. III, § 10.

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3. Our interpretation of the appointments clause in the state constitution differs from the United States Supreme Court's interpretation of the federal constitution's appointments clause. Under the latter clause, "[p]rincipal officers are selected by the President with the advice and consent of the Senate," and Congress may allow "[i]nferior officers . . . to be appointed by the President alone, by the heads of departments, or by the Judiciary." *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (per curiam); *see* U.S. Const. art. II, § 2, cl. 2. The text and drafting history of the federal clause indicate that the framers of the United States Constitution deliberately denied Congress "any authority itself to appoint those who were 'Officers of the United States.' " *Buckley*, 424 U.S. at 129. Congress therefore may not vest the appointment of any officers of the United States with itself or its own officers. *Id.* at 127. North Carolina's appointments clause, however, differs in both text and history.

4. The Constitution of 1868 did give the General Assembly the power to appoint members of the Board of Public Charities. *See* N.C. Const. of 1868, art. XI, § 7.

Shortly after the Constitution of 1868 was ratified, this Court stated that the phrase "whose appointments are not otherwise provided for" referred to those appointments not otherwise provided for by the constitution itself. *People ex rel. Welker v. Bledsoe*, 68 N.C. 457, 462-64 (1873); *State ex rel. Clark v. Stanley*, 66 N.C. 59, 63 (1872). By 1875, it was "settled that the words 'otherwise provided for' mean[t] otherwise provided for by the Constitution." *People ex rel. Cloud v. Wilson*, 72 N.C. 155, 158 (1875) (citing *Clark* and *Welker*); *accord Trs. of Univ. of N.C. v. McIver*, 72 N.C. 76, 83 (1875). This Court also observed that the Constitution of 1868 had "superadded" the phrase "and no such officer shall be appointed or elected by the General Assembly" to ensure that the General Assembly could not appoint constitutional or statutory officers, except where the constitution expressly provided for it. *Clark*, 66 N.C. at 63; *see also Welker*, 68 N.C. at 463-64; *McKee*, 68 N.C. at 432-34. Under the original version of the appointments clause, then, the Governor had the exclusive power to appoint all constitutional and statutory officers unless the constitution itself provided otherwise. *See also State ex rel. Salisbury v. Croom*, 167 N.C. 223, 226, 83 S.E. 354, 354-55 (1914); *State Prison v. Day*, 124 N.C. 362, 366 67, 32 S.E. 748, 749 (1899).

This expansive shift in the appointment power was "not . . . satisfactory to the dominant sentiment in the State," *Salisbury*, 167 N.C. at 226, 83 S.E. at 355, and was short-lived. In 1876, the people ratified a set of thirty constitutional amendments. John L. Sanders, *Our Constitutions: A Historical Perspective*, *in* Elaine F. Marshall, N.C. Dep't of Sec'y of State, *North Carolina Manual 2011-2012* 73, 76, https://www.secretary.state.nc.us/Publications/manual.aspx. These amendments restored much of the power that the General Assembly had lost in the Constitution of 1868. *Id.* at 77. One amendment modified the appointments clause, which now stated:

> The Governor shall nominate, and by and with the advice and consent of a majority of the Senators elect, appoint all officers, whose offices are established by this Constitution, and whose appointments are not otherwise provided for.

N.C. Const. of 1868, art. III, § 10 (1876). We have indicated that the people purposefully deleted the phrases "or which shall be created by law" and "and no such officer shall be appointed or elected by the General Assembly" to restore the General Assembly's ability to appoint statutory officers. *See State ex rel. Cherry v. Burns*, 124 N.C. 761, 765, 33 S.E. 136, 137 (1899). In other words, the amended clause no longer gave the Governor the constitutional power to appoint statutory officers. *Id.*; *see also Salisbury*, 167 N.C. at 226, 83 S.E. at 355 ("It will thus be

noted that the inhibition on the legislative power to appoint to office is removed and the inherent power of the Governor to appoint is restricted to constitutional offices and where the Constitution itself so provides."). But the amendment did not change the language of the phrase "whose appointments are not otherwise provided for," even though it was ratified in the wake of this Court's authoritative and then-recent pronouncements about that phrase's meaning. *See Welker*, 68 N.C. at 462-64; *Clark*, 66 N.C. at 63. That phrase continued to mean "provided [for] by the constitution." *Cherry*, 124 N.C. at 764, 33 S.E. at 137.

In sum, this amendment to the appointments clause authorized the Governor to appoint only constitutional officers whose appointments were not otherwise provided for by the constitution. Because the scope of the appointments clause after 1876 no longer encompassed statutory officers, the clause did not prohibit the General Assembly from appointing them. *Salisbury*, 167 N.C. at 226, 83 S.E. at 355; *Cherry*, 124 N.C. at 765, 33 S.E. at 137; *Cunningham v. Sprinkle*, 124 N.C. 638, 641, 33 S.E. 138, 138-39 (1899); *Day*, 124 N.C. at 366-67, 32 S.E. at 749; *State ex rel. Ewart v. Jones*, 116 N.C. 570, 571-74, 21 S.E. 787, 787-88 (1895).

The appointments clause did not change again until the people adopted the current version of the clause in the Constitution of 1971. The current appointments clause states:

> Appointments. The Governor shall nominate and by and with the advice and consent of a majority of the Senators appoint all officers whose appointments are not otherwise provided for.

N.C. Const. art. III, § 5(8). When the people enacted the current version of the clause, they deleted the phrase "whose offices are established by this Constitution." But, as in 1876, they did not disturb the phrase "whose appointments are not otherwise provided for." *Compare* N.C. Const. of 1868, art. III, § 10 (1876), *with* N.C. Const. art. III, § 5(8).

We conclude that the latter phrase still means "whose appointments are not otherwise provided for *by the Constitution*." *Welker*, 68 N.C. at 463 (emphasis added). To conclude otherwise would imply that the drafters of the Constitution of 1971 intended to change the meaning of this phrase while using the same words. That inference would not be justified, especially since this Court had already given the phrase a settled construction before 1971.

We also conclude that the omission of the phrase "whose offices are established by this Constitution" in the current version of the

appointments clause does not affect the clause's meaning. At first glance, this omission seems to restore the Governor's exclusive power to appoint statutory officers, whose offices are *not* established by the constitution. But the text of the current clause, as a whole, is unclear. Just as the phrase "whose appointments are not otherwise provided for" refers only to those appointments not otherwise provided for in the constitution itself, the phrase "all officers" might refer only to *constitutional* officers. The report of the North Carolina State Constitution Study Commission that drafted and proposed the Constitution of 1971 resolves this ambiguity. *Cf. Sneed*, 299 N.C. at 615-16, 264 S.E.2d at 112 (relying on this report to discern the meaning of another provision in the current constitution). That report shows that the current appointments clause does not enlarge the Governor's appointment power.

According to the report, the Study Commission did not intend for the proposed constitution's revisions "to bring about any 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* 4 (1968). The report explains that the proposed constitution contained "editorial pruning, rearranging, rephrasing, and modest amendments," but that the Study Commission had reserved its "more substantial changes" for a separate set of amendments that it was proposing along with the proposed constitution. *Id.* at 29. And the report notes that "[a]bbreviation of the constitution for brevity's sake . . . has been an incident of [the Study Commission's] work, since the great majority of the changes embraced in the proposed constitution take the form of deletions of or contractions in language." *Id.*

The report then addresses the proposed changes to Article III specifically. It states that, although the Study Commission "reorganized and abbreviated" Article III "by the omission of repetitive, legislative-type, and executed provisions," the proposed constitution "contains few substantive changes of note" to that Article. *Id.* at 31. The report goes on to discuss these few substantive changes but does not mention the appointments clause or anything about the appointment power. *See id.*

The report also states that the Study Commission was "recommending several changes that affect the executive branch of state government and especially the Governor," but that "these [changes] are of sufficient moment that they take the form of separate amendments." *Id.* And the Study Commission did propose a separate amendment that would have made significant substantive changes to the appointments clause. *See id.* at 47. The amendment would have given the Governor the power to

"appoint and . . . remove the heads of all administrative departments and agencies of the State," and would have stated that "[a]ll other officers in the administrative service of the State shall be appointed and may be removed as provided by law." *Id.* (quoting the Study Commission's proposed Amendment No. 5). Unlike the "general editorial revision" that the adopted language embodied, this amendment entailed "a substantive constitutional change of such importance that . . . the voters should have a chance to act upon it independently." *Id.* at 4. The House Committee on Constitutional Amendments gave the amendment an unfavorable report, however, and the General Assembly did not submit it to the people for ratification. *See* N.C. House Journal, Reg. Sess. 1969, at 518, 520 (recording the introduction of the proposed amendment in H.B. 880); *id.* at 755, 757 (recording the unfavorable committee report on H.B. 880; no further action noted).

Given how careful the Study Commission was to identify any substantive changes in the proposed constitution—and given that the Study Commission proposed major substantive changes by separate amendments—it would be unreasonable to say that deleting the phrase "whose offices are established by this Constitution" dramatically changed the appointments clause's meaning. The Governor's power to appoint officers under the clause thus continues to extend only to constitutional officers.

As a result, the appointments clause means the same thing now that it did in 1876. It authorizes the Governor to appoint all constitutional officers whose appointments are not otherwise provided for by the constitution. It follows that the appointments clause does not prohibit the General Assembly from appointing statutory officers to administrative commissions.

We now turn to plaintiffs' separation of powers challenge.

B

[3] Plaintiffs argue that the challenged provisions violate the separation of powers clause in Article I, Section 6 by preventing the Governor from performing his constitutional duty under Article III, Section 5(4). To address an Article I, Section 6 challenge, we necessarily examine the text of the constitution, our constitutional history, and this Court's separation of powers precedents.

The separation of powers clause declares that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I,

§ 6. This principle is fundamental to our form of government and has appeared in each of our state's constitutions. *See id.*; N.C. Const. of 1868, art. I, § 8; N.C. Const. of 1776, Declaration of Rights § IV; *see also State ex rel. Wallace v. Bone*, 304 N.C. 591, 595-601, 596 n.2, 286 S.E.2d 79, 81-84, 82 n.2 (1982).

Although the text of the separation of powers clause has changed very little since 1776, the powers that the current constitution allocates to the legislative and executive branches have changed significantly. In particular, the General Assembly lost the power to appoint the Governor in 1835, *see* N.C. Const. of 1776, Amends. of 1835, art. II, § 1; lost the power to appoint the Council of State in 1868, *see* N.C. Const. of 1868, art. III, §§ 1, 14; and has never regained the full scope of appointment power that it had in 1776. And unlike the Constitution of 1776, our subsequent state constitutions have given the Governor the duty to take care that the laws are faithfully executed. *See* N.C. Const. art. III, § 5(4); N.C. Const. of 1868, art. III, § 7. Because the "powers" that must be kept "forever separate and distinct from each other," N.C. Const. art. I, § 6, are different in the current constitution than they were in the original constitution, the separation of powers clause applies differently as well.

The clearest violation of the separation of powers clause occurs when one branch exercises power that the constitution vests exclusively in another branch. *See Houston v. Bogle*, 32 N.C. 496, 503-04 (1849). Other violations are more nuanced, such as when the actions of one branch prevent another branch from performing its constitutional duties. *See Bacon v. Lee*, 353 N.C. 696, 715, 549 S.E.2d 840, 853, *cert. denied*, 533 U.S. 975 (2001). When we assess a separation of powers challenge that implicates the Governor's constitutional authority, we must determine whether the actions of a coordinate branch "unreasonably disrupt a core power of the executive." *Id.* at 717, 549 S.E.2d at 854; *see also In re Alamance Cty. Ct. Facils.*, 329 N.C. 84, 100-01, 405 S.E.2d 125, 133 (1991) (stating that one branch "must minimize the encroachment" on another branch "in appearance and in fact"). As part of the inquiry in this case, we must also consider whether the General Assembly has "retain[ed] some control" over the executive branch's functions. *Wallace*, 304 N.C. at 608, 286 S.E.2d at 88.

In the current constitution, Article III, Section 5(4) gives the Governor the duty to "take care that the laws be faithfully executed." The challenged legislation implicates this constitutional duty because, as the three-judge panel correctly observed, all three commissions "are primarily administrative or executive in character," and because they have final authority over executive branch decisions. *See* N.C.G.S.

§ 130A-309.202(f) (authorizing the Coal Ash Management Commission to overrule DENR classifications and closure plans for coal ash surface impoundments); *id.* § 143B-290 (authorizing the Mining Commission to overrule certain permit decisions that DENR makes); *id.* § 143B-293.6(b) (authorizing a committee within the Oil and Gas Commission to remit civil environmental penalties that DENR imposes). In light of the final executive authority that these three commissions possess, the Governor must have enough control over them to perform his constitutional duty.[5]

The degree of control that the Governor has over the three commissions depends on his ability to appoint the commissioners, to supervise their day-to-day activities, and to remove them from office. The legislation that plaintiffs challenge here limits each of these methods of control. It gives the General Assembly the power to appoint a majority of each commission's voting members and gives the Governor only two or three appointees per commission. *See id.* § 130A-309.202(b); *id.* §§ 143B 291(a1), -293.2(a1). It also gives each commission final executive authority over certain DENR decisions, sapping the power of a principal administrative department over which the Governor has greater control. *See id.* § 130A-309.202(f); *id.* §§ 143B-290(1)(c), -293.6; *see also id.* §§ 143B-9, -6(6). It insulates the Coal Ash Management Commission from executive branch control even more by requiring the commission to exercise its powers and duties "independently," without the "supervision, direction, or control" of the Division of Emergency Management or the Department of Public Safety. *Id.* § 130A-309.202(n). And the challenged legislation sharply constrains the Governor's power to remove members of any of the three commissions, allowing him to do so only for cause. *Id.* § 130A-309.202(e); *id.* §§ 143B 291(d), -293.2(c)(1).

We cannot adopt a categorical rule that would resolve every separation of powers challenge to the legislative appointment of executive officers. Because each statutory scheme will vary the degree of control that legislative appointment provisions confer on the General Assembly, we must resolve each challenge by carefully examining its specific factual

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5. Our opinion takes no position on how the separation of powers clause applies to those executive departments that are headed by the independently elected members of the Council of State. *See* N.C. Const. art. III, § 7 (providing for the election of the Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Attorney General, Commissioner of Labor, Commissioner of Agriculture, and Commissioner of Insurance). The facts of this case concern DENR, which unquestionably falls under the Governor's purview. *See* N.C.G.S. § 143B-6(6) (2013) (identifying DENR as a principal department); *id.* § 143B-9 (2013) ("The head of each principal State department, except those departments headed by popularly elected officers, shall be appointed by the Governor and serve at his pleasure.").

and legal context. While the General Assembly's ability to appoint an officer obviously does not give it the power to control what that officer does, we must examine the degree of control that the challenged legislation allows the General Assembly to exert over the execution of the laws.

Using that approach here, we hold that the challenged appointment provisions violate the separation of powers clause. When the General Assembly appoints executive officers that the Governor has little power to remove, it can appoint them essentially without the Governor's influence. That leaves the Governor with little control over the views and priorities of the officers that the General Assembly appoints. When those officers form a majority on a commission that has the final say on how to execute the laws, the General Assembly, not the Governor, can exert most of the control over the executive policy that is implemented in any area of the law that the commission regulates. As a result, the Governor cannot take care that the laws are faithfully executed in that area. The separation of powers clause plainly and clearly does not allow the General Assembly to take this much control over the execution of the laws from the Governor and lodge it with itself. *See Bacon*, 353 N.C. at 717-18, 549 S.E.2d at 854; *Wallace*, 304 N.C. at 608, 286 S.E.2d at 88; *see also* N.C. Const. art. III, § 5(4).[6]

Under the rule that defendants advance, the General Assembly could appoint every statutory officer to every administrative body, even those with final executive authority, and could prohibit the Governor from having any power to remove those officers. This rule would nullify the separation of powers clause, at least as it pertained to the General Assembly's ability to control the executive branch.

Our appointment cases do not embrace defendants' proposed rule. Many do not even involve separation of powers challenges. *See, e.g.*, *Salisbury*, 167 N.C. at 227, 83 S.E. at 355 (interpreting two statutes to

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6. Because we hold that the challenged appointment provisions violate the separation of powers clause, we can no longer address plaintiffs' separate claim that the Coal Ash Management Commission's statutory mandate to act "independently" of the Division of Emergency Management and the Department of Public Safety violates that clause as well. The facts that existed when plaintiffs brought their claim—namely, that the Coal Ash Management Commission has final executive authority, that the Governor has limited removal power, *and* that the General Assembly appoints a majority of its voting members—no longer exist now that the challenged appointment provisions have been invalidated. As a result, plaintiffs' claim under the current statutory scheme is moot. We therefore vacate the portion of the three-judge panel's decision that held N.C.G.S. § 130A-309.202(n) unconstitutional.

determine that the Governor's recess appointment without Senate confirmation was valid only until the Senate reconvened and confirmed a new appointee); *Cherry*, 124 N.C. at 764-65, 33 S.E. at 137 (concluding that the "keeper of the capitol" was outside the scope of the appointments clause because it was not a constitutional office); *Ewart*, 116 N.C. at 573-74, 21 S.E. at 788 (determining that the General Assembly's creation of a new office did not create a "vacancy" in that office).

Those appointment cases that do involve separation of powers challenges do not establish the proposed rule either. *State ex rel. Martin v. Melott* does not supply a majority rationale that supports its judgment, so it does not establish any separation of powers rule at all. *Compare* 320 N.C. 518, 523-24, 359 S.E.2d 783, 786-87 (1987) (plurality opinion), *with id.* at 525-28, 359 S.E.2d at 788-89 (Meyer, J., concurring). In *Trustees of the University of North Carolina v. McIver*, where there was a clear majority, this Court held that the General Assembly could elect trustees of the University of North Carolina. 72 N.C. at 87. There, a constitutional amendment separate from the appointments clause gave the General Assembly the "unlimited power" to determine who would elect the trustees. *Id.* at 83-85. The Court concluded that this absolute discretion necessarily gave the General Assembly the power to elect them itself. *See id.* at 81-87. But that holding has no effect on this case because the constitutional provision in question—which pertained only to the University of North Carolina and its trustees—does not apply here. In *Cunningham v. Sprinkle*, a constitutional amendment that directed the General Assembly to establish the Department of Agriculture likewise gave the General Assembly "the largest latitude of regulation" in establishing that department. 124 N.C. at 641-42, 33 S.E. at 139. The provision in *Cunningham* also does not apply here.

Notably, *Cunningham* and *McIver* both conclude that appointing statutory officers is not an exclusively executive prerogative. *See Cunningham*, 124 N.C. at 643, 33 S.E. at 139; *McIver*, 72 N.C. at 85. We agree, and do not deny that the General Assembly may generally appoint statutory officers to administrative commissions.[7] We merely deny that it may appoint them in every instance and under all circumstances.

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7. As a corollary, the General Assembly may have broader latitude than it does here when it appoints members to commissions whose functions are different from those of the commissions in the present case, such as the Rules Review Commission. *See* N.C.G.S. § 143B-30.1; *id.* §§ 150B-2(1d), -21.1 to -21.14 (2013).

III

"A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty," N.C. Const. art. I, § 35, and "the principle of separation of powers is a cornerstone of our state and federal governments," *Wallace*, 304 N.C. at 601, 286 S.E.2d at 84. The appointments clause does not prohibit the General Assembly from appointing statutory officers, and the General Assembly can appoint them in many instances. But the challenged appointment provisions, in their statutory context, prevent the Governor from performing his constitutional duty to take care that the laws are faithfully executed. By doing so, these provisions violate the separation of powers clause.

We therefore modify and affirm the decision of the three-judge superior court panel in part and vacate it in part.

MODIFIED AND AFFIRMED IN PART; VACATED IN PART.

Justice NEWBY concurring in part and dissenting in part.

This case presents the issue of whether the General Assembly has the constitutional power to fill a majority of positions on executive commissions it creates. Unlike the Federal Constitution, the state constitution is not an express grant of power but a limitation on power. All power not expressly granted to the federal government or limited by the constitution resides in the people and is exercised through the General Assembly. Since our original Constitution of 1776, except for a short time by explicit limitation, the General Assembly has had the constitutional authority to provide for the filling of statutory executive positions it creates. As an exercise of the General Assembly's lawmaking power, this appointment authority, both constitutionally prescribed and jurisprudentially recognized, does not implicate separation of powers because under our jurisprudence the authority to appoint the official has never been deemed the power to control the appointee. Our state's constitutional text and history and this Court's precedent demonstrate that when the legislature statutorily enables itself to select the official, it is simply filling the position and not controlling the appointee.[1] Because

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1. "The true test is, where does the [state] Constitution lodge the power of electing the various public agents of the government . . . ." *Cunningham v. Sprinkle*, 124 N.C. 638, 642, 33 S.E. 138, 139 (1899) (quoting *Trs. of Univ. of N.C. v. McIver*, 72 N.C. 76, 85 (1875)). This precise question was asked and answered by this Court over 131 years ago. In rejecting the argument that the General Assembly violated separation of powers by exercising appointment authority over executive statutory offices, this Court stated that

the statutes at issue here are constitutional, I must respectfully dissent in part.

The idea of one branch of government, the judiciary, preventing another branch of government, the legislature, through which the people act, from exercising its power is the most serious of judicial considerations. *See Hoke v. Henderson*, 15 N.C. (4 Dev.) 1, 8 (1833) ("[T]he exercise of [judicial review] is the gravest duty of a judge, and is always, as it ought to be, the result of the most careful, cautious, and anxious deliberation."), *overruled in part on other grounds by Mial v. Ellington*, 134 N.C. 131, 162, 46 S.E. 961, 971 (1903); *Trs. of Univ. of N.C. v. Foy*, 5 N.C. (1 Mur.) 58, 89 (1805)[2] (Hall, J., dissenting) ("A question of more importance than that arising in this case [the constitutionality of a legislative act] cannot come before a court. . . . [W]ell convinced, indeed, ought one person to be of another's error of judgment . . . when he reflects that each has given the same pledges to support the Constitution."). Since its inception, the judicial branch has exercised its implied constitutional power of judicial review with "great reluctance," *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 6 (1787), recognizing that when it strikes down an act of the General Assembly, the Court is preventing an act of the people themselves, *see Baker v. Martin*, 330 N.C. 331, 336-37, 410 S.E.2d 887, 890 (1991).

All political power resides in the people, N.C. Const. art. I, § 2, and the people act through the General Assembly, *State ex rel. Ewart v. Jones*, 116 N.C. 570, 570, 21 S.E. 787, 787 (1895) ("[T]he sovereign power resides with the people and is exercised by their representatives in the General Assembly."). Unlike the Federal Constitution, "a State Constitution is in no matter a grant of power. All power which is not limited by the Constitution inheres in the people, and an act of a State legislature is legal when the Constitution contains no prohibition against it." *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961) (quoting *Lassiter v. Northampton Cty. Bd. of Elections*, 248 N.C. 102,

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"a mode of filling the offices created by law" is the prerogative of the General Assembly, acknowledging that filling the position is not exercising the power of the position. *Id.* at 642-43, 33 S.E. at 139. (Of note, many of the older opinions referenced in this opinion use the term "selection" when referring to a single appointing authority, such as the Governor, and "election" when referring to multiple decisionmakers, such as the General Assembly.)

2. The Court of Conference was the predecessor of this Court, which was statutorily established in 1818. Walter Clark, *History of the Supreme Court of North Carolina*, *in* 177 N.C. 616, 619-20 (1919); *see also Benzien's Ex'rs v. Lenoir*, 11 N.C. (4 Hawks) 403, 406 (1826) (noting "[t]he act of 1818, New Rev., ch. 962, constituting the present Supreme Court" and discussing the Court of Conference).

112, 102 S.E.2d 853, 861 (1958), *aff'd*, 360 U.S. 45, 79 S. Ct. 985, 3 L. Ed. 2d 1072 (1959)); *see also Jones*, 116 N.C. at 570-71, 21 S.E. at 787 ("The only limitation upon this power is found in the organic law, as declared by the delegates of the people in convention assembled from time to time."). The presumptive constitutional power of the General Assembly to act is consistent with the principle that a restriction on the General Assembly is in fact a restriction on the people. *Baker*, 330 N.C. at 336, 410 S.E.2d at 890 ("[G]reat deference will be paid to acts of the legislature—the agent of the people for enacting laws." (quoting *State ex rel. Martin v. Preston*, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989))). Thus, this Court presumes that legislation is constitutional, and a constitutional limitation upon the General Assembly must be express and demonstrated beyond a reasonable doubt. *E.g.*, *Hart v. State*, 368 N.C. 122, 126, 774 S.E.2d 281, 284 (2015).

This rigorous standard for constitutional challenges ensures uniformity and predictability in the application of our constitution. *State v. Emery*, 224 N.C. 581, 584, 31 S.E.2d 858, 861 (1944) ("[Constitutions] should receive a consistent and uniform construction . . . even though circumstances may have so changed as to render a different construction desirable." (citing, *inter alia*, *State ex rel. Att'y-Gen. v. Knight*, 169 N.C. 333, 85 S.E. 418 (1915))); *see also Bacon v. Lee*, 353 N.C. 696, 712, 549 S.E.2d 840, 851-52 ("A primary goal of adjudicatory proceedings is the uniform application of law. In furtherance of this objective, courts generally consider themselves bound by prior precedent, *i.e.*, the doctrine of *stare decisis*." (citations omitted)), *cert. denied*, 533 U.S. 975, 122 S. Ct. 22, 150 L. Ed. 2d 804 (2001). Adhering to this fixed standard ensures that we remain true to the rule of law, the consistent interpretation and application of the law. *State v. Bell*, 184 N.C. 701, 720, 115 S.E. 190, 199 (1922) (Stacy, J., dissenting) ("[T]here must be some uniformity in judicial decisions . . . or else the law itself, the very chart by which we are sailing, will become as unstable and uncertain as the shifting sands of the sea . . . .").

Under a proper application of these foundational principles, the constitutional challenge here cannot surmount the high bar imposed by the presumption of constitutionality given to legislative acts. A clear understanding of the constitutionally prescribed powers and their division among the branches of government is a basis for stability and cooperation within government. Because that stability instills public confidence in governmental actions, this Court should follow its time-honored approach in assessing the powers conferred upon each branch of government and applying separation of powers principles.

Since 1776 our constitutions have expressly vested the vast legislative power, the power to make laws, in two distinct chambers of the General Assembly, the Senate and the House of Representatives. N.C. Const. art. II, § 1; N.C. Const. of 1868, art. II, § 1; N.C. Const. of 1776, § I; *see also Legislative Power*, Black's Law Dictionary (10th ed. 2014) ("The power to make laws and to alter them; a legislative body's exclusive authority to make, amend, and repeal laws."). This express power to make laws is broad and has not changed; it is limited only as expressly forbidden by the constitution and by federal law. *McIntyre*, 254 N.C. at 515, 119 S.E.2d at 891-92; *Jones*, 116 N.C. at 570-71, 21 S.E. at 787; *see*, *e.g.*, *Bayard*, 1 N.C. (Mart.) at 7 (declaring an act of the General Assembly unconstitutional because it violated the constitutional right to a trial by jury); *see also Dickson v. Rucho*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (2015) (recognizing restriction of state legislative power by federal law).

In addition to federal limitations on state legislative power, the state constitution provides express restrictions safeguarding against an abuse of legislative power. *See*, *e.g.*, N.C. Const. art. II, § 23 (prescribing the procedure for the passing of revenue bills); *id.* art. II, § 24 (limiting certain local, private, or special acts); *id.* art. III, § 5(11) (limiting "reconvened sessions" to considering certain bills); *id.* art. IV, § 1 (limiting authority to establish certain courts or to deprive courts of jurisdiction "that rightfully pertains to [the courts] as a co-ordinate department of the government"); *id.* art. V, §§ 1, 2(1)-(7) (limiting taxing authority); *id.* art. V, § 3(1)-(2), 4 (limiting authority regarding debt); *id.* art. VI, § 9 (preventing the appointment of an official already serving in one branch to serve simultaneously in another branch).[3]

Moreover, the General Assembly is checked and balanced by its structure and its accountability to the people. *See* N.C. Const. art. I,

3. Every one of our state constitutions has placed express limitations or prohibitions on legislative power. *See*, *e.g.*, N.C. Const. of 1868, art. I; *id.*, art II, §§ 13, 14 (prohibiting the passing of certain private laws and providing a procedure by which to pass permissible private laws); *id.*, art. II, § 16 (prescribing the procedure for passing laws regarding state debt or credit); N.C. Const. of 1776, Declaration of Rights, § III (prohibiting "exclusive or separate emoluments or privileges," except for "in consideration of public services"); *id.*, Declaration of Rights, § XII (prohibiting seizure of person and "freehold liberties or privileges" and deprivation of "life, liberty, or property, but by the law of the land"); *id.*, Declaration of Rights, § XIV (prohibiting the suspension of trial by jury); *id.*, Declaration of Rights, § XXII (prohibiting "hereditary emoluments, privileges or honors").

§ 2. Legislative power is divided between two chambers,[4] with its combined one hundred seventy members. *Id.* art. II, §§ 2, 4 (providing for 50 senators and 120 representatives). The members of each chamber serve different constituencies with various needs and priorities. *Id.* art. II, §§ 3, 5. The General Assembly's power is diffused by its sheer magnitude, its diversity within each chamber, and, consequently, the need to find compromise. *See* 1 James Bryce, *The American Commonwealth* 480 (3d ed. 1901) ("The Americans restrain their legislatures by dividing them . . . ."). History has shown that the legislative branch is not a continuously cohesive force; disagreements between the two chambers are not infrequent.[5] The diversity within the branch, however, ensures healthy review and significant debate of each proposed statute, the enactment of which frequently reaches final form through compromise. Likewise, members of the legislative branch face the most frequent elections, serving only two-year terms,[6] N.C. Const. art. II, §§ 2, 4, and are thereby most directly accountable to the people. Lawmakers represent the particular interests of their different constituents, who are limited in number. *Id.* art. II, §§ 3, 5. In addition to these structural safeguards, the final check on the legislative power of the General Assembly is judicial review, the implied constitutional authority of the court to decide if a law violates the constitution. *See Bayard*, 1 N.C. (Mart.) at 6-7; *see generally Hoke*, 15 N.C. (4 Dev.) at 28 (observing that the constitution "guards against abuse" of legislative power through "frequent elections," protection of individual rights, division of powers, and judicial review).

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4. Our constitution has even referred to the division of legislative power between the bicameral houses as "distinct branches" of government. N.C. Const. of 1868, art. II, § 1; N.C. Const. of 1776, § I.

5. Notably, the statutes in question here do not provide for appointments by the "General Assembly" but instead distribute legislative appointments between the Senate and the House of Representatives. *See* Act of June 4, 2014, ch. 4, § 4(a), 2014 N.C. Sess. Laws 57, 61 (providing that the Oil and Gas Commission consists of nine members: three selected by the House, three by the Senate, and three by the Governor); *id.* § 5(a), 2014 N.C. Sess. Laws at 64-65 (providing that the Mining Commission consists of eight members: two selected by the House, two by the Senate, two by the Governor, along with the State Geologist and the chair of the North Carolina State University Minerals Research Laboratory Advisory Committee); Act of Sept. 20, 2014, ch. 122, § 3(a), 2014 N.C. Sess. Laws 828, 832 (providing that the Coal Ash Management Commission consists of nine members: three selected by the House, three by the Senate, and three by the Governor).

6. The terms for legislators were lengthened from one to two years by amendment in 1835. N.C. Const. of 1776, art. I, § 1 (1835).

This broad constitutional power to make laws includes the indisputable authority of the General Assembly to create executive statutory offices. Along with the power to create the office, the legislature has the power to assign the selection authority either to itself or another. *See, e.g.*, *State ex rel. Martin v. Melott*, 320 N.C. 518, 520, 524, 528, 359 S.E.2d 783, 785, 787, 789 (1987) (plurality) (stating, with one dissenting judge agreeing, that the General Assembly had the constitutional power to appoint the position itself); *State ex rel. Cherry v. Burns*, 124 N.C. 761, 765, 33 S.E. 136, 137 (1899) (concluding that the constitution "leads us to the opinion that the Legislature may fill this [statutory] office" (citations omitted)); *Cunningham v. Sprinkle*, 124 N.C. 638, 641, 33 S.E. 138, 139 (1899) ("[B]eing of legislative creation," appointments of members of the Board of Agriculture "are equally within the power of legislative appointment."); *State Prison v. Day*, 124 N.C. 362, 367, 32 S.E. 748, 749 (1899) (concluding that the constitution intended "to confer upon the General Assembly the power to fill offices created by statute"), *abrogated on other grounds by State ex rel. Salisbury v. Croom*, 167 N.C. 223, 228, 83 S.E. 354, 356 (1914); *Jones*, 116 N.C. at 574, 21 S.E. at 788 ("Here, the Legislature had the constitutional power to create the office and fill it . . . .").

The only express constitutional limitation on statutory appointments forbids any member of one branch from serving simultaneously in another branch of government; however, that prohibition does not speak to who has the authority to appoint. N.C. Const. art. VI, § 9; N.C. Const. of 1868, art. XIV, § 7 (1873); N.C. Const. of 1776, art. IV, § 4 (1835); N.C. Const. of 1776, §§ XXVI-XXX; *see also State ex rel. Wallace v. Bone*, 304 N.C. 591, 608-09, 286 S.E.2d 79, 88-89 (1982) (concluding that, if an appointing authority appoints an official from one branch to an official role in another branch, that official unconstitutionally exercises the power of two branches). There is no constitutional limitation on the General Assembly's designating itself as the appointing authority of positions it creates by statute.

The people have retained for themselves alone the only constitutional method of changing the powers of each of the branches: the constitutional amendment. As discussed below, for only an eight-year period, the people limited the General Assembly's power to designate the appointing authority for statutory offices. Thereafter, the people expressly removed any such limitation. Most recently, the people modified the legislative power by passing a constitutional amendment granting the Governor the power to veto certain legislation. *See* Act of March 8, 1995, ch. 5, §§ 3, 4, 1995 N.C. Sess. Laws 6, 8 (establishing referendum

to amend the constitution to provide gubernatorial veto to take effect 1 January 1997). A gubernatorial veto requires a three-fifths vote in each chamber to override. N.C. Const. art II, § 22. Thus, legislative power remains broad, limited only by express constitutional provision.

Unlike the unified executive present in the federal model, the state constitution has never had a unified executive; rather, executive power is dispersed among several specified constitutional executive officers, with the Governor being chief among them. N.C. Const. art. III, §§ 1, 7; N.C. Const. of 1868, art. III, § 1; N.C. Const. of 1776, §§ XIV, XIX. The 1776 constitution, like every constitution thereafter, placed the general executive power in the Governor. N.C. Const. art. III, § 1; N.C. Const. of 1868, art. III, § 1, 4; N.C. Const. of 1776, § XIX. This constitution vested the Governor with the power to "exercise all the other executive powers of government, limited and restrained as by this Constitution [as] mentioned, and according to the laws of the State." N.C. Const. of 1776, § XIX; *see also Executive Power*, Black's Law Dictionary (10th ed. 2014) ("The power to see that the laws are duly executed and enforced. . . . [G]overnors' executive powers are provided for in state constitutions."). This original constitution, like each constitution thereafter, also provided specific gubernatorial duties. *E.g.*, N.C. Const. art. III, § 5 (outlining the "Duties of Governor"); N.C. Const. of 1868, art. III, § 6 ("to grant reprieves commutations and pardons"); *id.*, art. III, § 9 ("to convene the General Assembly in extra session"); N.C. Const. of 1776, § XIX (including the "power to draw for and apply such sums of money as shall be voted by the general assembly" and to exercise clemency, "the power of granting pardons and reprieves").

The 1776 constitution, like those that followed, divided the executive responsibilities between the Governor and others, including a Council of State, even though the Governor was expressly given the general executive authority and responsibility. N.C. Const. of 1776, § XIX. This model of diffused executive power, with the Governor exercising the general executive power, was unchanged in the 1868 state constitution. *Compare id.* § XIX ("[Governor] may exercise all . . . executive powers of government . . . ."), *with* N.C. Const. of 1868, art. III, § 1 ("[Governor] shall be vested [with] the Supreme executive power . . . ."). Stylistically improved, the 1868 constitution implemented separate articles for each branch, including the first constitutional establishment of the judicial branch. *See* N.C. Const. of 1868, arts. II IV. The use of separate articles provided for more detailed descriptions of the workings of each branch. John V. Orth & Paul Martin Newby, *The North Carolina State*

Constitution 19-20 (2d ed. 2013) [hereinafter *State Constitution*].[7] As in the past, to enable the Governor to fulfill his supervisory role, the 1868 constitution authorized the Governor to gather information from the other executive branch officers and report to the General Assembly. N.C. Const. of 1868, art. III, § 7. In summarizing this supervisory role, this provision states: "[The Governor] shall take care that the laws be faithfully executed." *Id.* This phrase did not expand the Governor's powers but stated more explicitly this general supervisory aspect of the Governor's executive responsibilities in a multimember executive branch.

In other words, the constitution charged the Governor with supervising the executive branch and its functions while, at the same time, granting certain executive powers to other executive officers. *E.g.*, *id.*, art. III, § 1 (listing Governor as one of eight elected offices in the executive branch); *id.*, art. III, § 7 ("The officers of the Executive Department . . . shall . . . severally report to the Governor, who shall transmit such reports, with his message, to the General Assembly . . . ."); *id.*, art. III, § 9 (authorizing the Governor to "convene the General Assembly in extra session" "by and with the advice of the Council of State"); *id.*, art. III, § 13 ("The respective duties of the [constitutional executive officers] shall be prescribed by law."); *id.*, art. III, § 14 ("The Secretary of State, Auditor, Treasurer, Superintendent of Public Works, and Superintendent of Public Instruction, shall constitute *ex officio*, the Council of State, who shall advise the Governor in the execution of his office . . . ."). The constitution allowed the General Assembly to assign executive duties and functions by statute. *Id.*, art. III, § 13. Thus, while the Governor had general supervisory responsibility, *id.*, art. III, §§ 1, 7, each constitutional executive officer was primarily responsible for executing the laws assigned to that official by the General Assembly, *id.*, art. III, § 13.

The executive branch is fundamentally unchanged under the current constitution. The Governor continues to share the exercise of executive

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7. Professor John V. Orth is a legal historian and state constitutional scholar acknowledged and cited by both this Court and the United States Supreme Court. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 108, 120, 116 S. Ct. 1114, 1149, 1155, 134 L. Ed. 2d 252, 299, 306 (1996) (Souter, Ginsburg & Breyer, JJ., dissenting); *Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 499, 510 n.16, 520 n.20, 107 S. Ct. 2941, 2959, 2965 n.16, 2970 n.20, 97 L. Ed. 2d 389, 413, 420 n.16, 426 n.20 (1987) (Brennan, Marshall, Blackmun & Stevens, JJ., dissenting); *Hoke Cty. Bd. of Educ. v. State*, 358 N.C. 605, 648, 599 S.E.2d 365, 397 (2004) (quoting and citing John V. Orth, *The North Carolina State Constitution: A Reference Guide* (1993)); *Stephenson v. Bartlett*, 355 N.C. 354, 367, 562 S.E.2d 377, 387 (2002) (referring to Orth as "a highly respected state constitutional scholar").

powers with the other constitutional executive officers who are separately elected members of the Council of State, N.C. Const. art. III, §§ 7(1)-(2), 8, while maintaining his supervisory role, *id.* art. III, §§ 1, 5(4), notwithstanding possible conflict among these officials, *see* N.C.G.S. § 147-17 (2013) (allowing the Governor to employ independent counsel). The constitution continues to require the General Assembly to assign by statute executive duties and functions to the constitutional executive officers and the administrative departments. N.C. Const. art. III, § 5(10) ("The General Assembly shall prescribe the functions, powers, and duties of the administrative departments and agencies of the State and may alter them from time to time . . . ."); *id.* art. III, § 7(2) ("[R]espective duties [of the Council of State] shall be prescribed by law."); *id.* art. III, § 11 ("[A]ll administrative departments, agencies, and offices of the State and their respective functions, powers, and duties shall be allocated by law . . . .").

In addition to prescribing duties to the executive officers, our current constitution expressly recognizes the General Assembly's power to organize and reorganize the executive branch. *Id.* art. III, § 5(10) ("The General Assembly shall prescribe the functions, powers, and duties of the administrative departments and agencies of the State and may alter them from time to time . . . ."); *see id.* art. III, § 11 ("Regulatory, quasi-judicial, and temporary agencies may, but need not, be allocated within a principal department."). Thus, the executive power remains diffused and unchanged. *Compare* N.C. Const. of 1868, art. III, *with* N.C. Const. art. III. When the people have desired to expand executive authority, they have done so through express constitutional change. Such change occurred in the 1868 constitution, though it proved to be short-lived.

The Constitution of 1868, through a controversial provision, expressly limited the General Assembly's constitutional authority to assign the selection of statutory officers, expressly granting the appointment authority to the Governor, subject to consent of the Senate:

> The Governor shall nominate, and by and with the advice and consent of a majority of the Senators elect, appoint, all officers whose offices are established by this Constitution, or which shall be created by law, and whose appointments are not otherwise provided for, and no such officer shall be appointed or elected by the General Assembly.

N.C. Const. of 1868, art. III, § 10. Notably, a specific constitutional provision was required to limit the General Assembly's lawmaking power and to prevent it from designating an appointing authority other than the Governor.

Eight years later, the people specifically repealed this limitation on the General Assembly's legislative power by constitutional amendment in 1876. The amendment "restore[d] in considerable measure the former power of the General Assembly." Thad Eure, Sec'y of State, *North Carolina Government 1585-1974* at 798 (John L. Cheney, Jr. ed., 1975). Thereafter, the explicit constitutional power to designate the appointing authority, including the authority to designate itself, again resided in the General Assembly. *See* N.C. Const. of 1868, art. III, § 10 (1876); *Day*, 124 N.C. at 367, 32 S.E. at 749 ("[I]t is clear that the [Constitutional] Convention of 1875 intended to alter the Constitution . . . to confer upon the General Assembly the power to fill offices created by statute." (citation omitted)); *Jones*, 116 N.C. at 572-73, 21 S.E. at 788 ("[T]he [Constitutional] Convention refused to incorporate the words 'and no such officer shall be appointed or elected by the General Assembly.' " (citing Convention Journal of 1875, at 175-76)); *see, e.g.*, *Burns*, 124 N.C. at 765, 33 S.E. at 137 ("[T]he Legislature may fill [the] office [of keeper of the capitol]."); *Cunningham*, 124 N.C. at 641, 33 S.E. at 139 ("[M]embers of the Board of Agriculture . . . being of legislative creation, . . . are equally within the power of legislative appointment.").[8]

Since this fundamental return to the historical status quo, the constitutional authority to provide the method of filling statutory offices resides squarely with the General Assembly; the relevant provisions of our constitution regarding legislative power have remained unchanged. N.C. Const. art. II, § 1; *see id.* art. III, §§ 5(8), (10), 11. In 1968 the North Carolina State Constitution Study Commission acknowledged this broad legislative power. The Study Commission was tasked with drafting and proposing amendments to our current constitution. *See* N.C. State Constitution Study Comm'n, *Report of the North Carolina State Constitution Study Commission* i-ii (1968) [hereinafter *Report*]. The

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8. *See State Constitution* 25 ("[T]he General Assembly now reclaimed the power to provide for legislative appointments to executive offices created by statute."). In 1911 two of the foremost legal scholars in North Carolina, Henry G. Conner, a former Supreme Court Justice, then serving as a federal district court judge, and Joseph B. Cheshire, Jr., an attorney in Raleigh, North Carolina, published an annotation of the state constitution. Henry G. Connor & Joseph B. Cheshire, Jr., *The Constitution of the State of North Carolina Annotated* i (1911). They stated that "the amendment to this section by the Convention of 1875 altered the Constitution as construed [previously] . . . and conferred upon the General Assembly the power to fill offices created by statute." *Id.* at 140. This Court has quoted and cited this valuable work on our state constitution throughout the past century. *See, e.g.*, *Coley v. State*, 360 N.C. 493, 497, 631 S.E.2d 121, 125 (2006); *State v. Furmage*, 250 N.C. 616, 618, 109 S.E.2d 563, 564-65 (1959); *Penny v. Salmon*, 217 N.C. 276, 279, 7 S.E.2d 559, 561 (1940); *Moose v. Bd. of Comm'rs*, 172 N.C. 419, 441-42, 90 S.E. 441, 452 (1916) (Brown, J., concurring).

Study Commission reviewed our constitution and transmitted a special report to the Governor and General Assembly, which would serve "as the primary source of guidance for the 1969 legislative session" and adoption of our current constitution. *N.C. State Bar v. DuMont*, 304 N.C. 627, 635, 286 S.E.2d 89, 94 (1982). As we noted,

> a comparison . . . reveals that our Legislature relied almost exclusively on the Report. Hence, a close study of the Report allows us "to place [ourselves] as nearly as possible in the position of the men who framed the instrument" and allows us to "look to the history [and] general spirit of the times" . . . .

Id. at 635, 286 S.E.2d at 94 (brackets in original) (quoting *Perry v. Stancil*, 237 N.C. 442, 444, 75 S.E.2d 512, 514 (1953) ("The court should place itself as nearly as possible in the position of the men who framed the instrument.")).

In its report the Study Commission explained:

> The General Assembly will not be deprived of any of its present authority over the structure and organization of state government. It retains the power to make changes on its own initiative, it can disapprove any change initiated by the Governor, and it can alter any reorganization plan which it has allowed to take effect and then finds to be working unsatisfactorily.

Report at 131-32; *see also* N.C. Const. art. III, §§ 5(10), 11. Moreover, the Study Commission recommended limiting legislative appointment authority by constitutional amendment. Its proposed amendment would have vested sole authority in the Governor to "appoint and [ ] remove the heads of all administrative departments and agencies." *Report* at 113. This proposed constitutional amendment, modestly limiting some legislative appointment authority, was not adopted, thus perserving for the General Assembly its historically broad appointment authority. *See* N.C. Const. art. III, § 7.

Thus, aside from a short-lived express limitation, the constitutional authority to designate the appointing authority for statutory positions has resided and continues to reside squarely in the General Assembly under its general legislative power to make laws. Therefore, not only does the General Assembly have the undisputed constitutional power to create positions in the other branches, it may also designate to itself the authority to fill the positions.

Since 1776 our state constitutions have contained a separation of powers provision stating "[t]hat the legislative, executive, and supreme judicial powers of government, ought[9] to be forever separate and distinct from each other." N.C. Const. of 1776, Declaration of Rights, § IV; *see* N.C. Const. art. I, § 6; N.C. Const. of 1868, art. I, § 8. Notably, the plain language of the provision states that "powers" are to be "separate and distinct." A violation of separation of powers occurs when one branch of government exercises the power reserved for another branch of government.[10]

The first case in which this Court[11] addressed separation of powers, decided less than fifty years after the adoption of the original constitution, arose in a land title dispute. In *Robinson v. Barfield* the General

9. Even though the word "ought" in both the 1776 and 1868 constitutions was changed to "shall" in the 1971 constitution, the Study Commission noted there was no substantive change to the separation of powers clause. *Report* at 73-75; *see also Smith v. Campbell*, 10 N.C (3 Hawks) 590, 591, 598 (1825) (providing that "ought" is synonymous with "shall," noting that "the word *ought*, in this and other sections of the [1776 constitution], should be understood imperatively").

10. This Court has consistently recognized this application of the separation of powers principle. *See, e.g.*, *State v. Whitehead*, 365 N.C. 444, 448-49, 448 n.1, 722 S.E.2d 492, 496 & n.2 (2012) (providing that the judiciary cannot exercise executive power under N.C. Const. art. III, § 5(6) to invalidate sentence for nonlegal error); *Bacon*, 353 N.C. at 717-18, 722, 549 S.E.2d at 854-55, 857 (recognizing that the judiciary cannot impose additional constraints on the executive's "exclusive prerogative" to grant clemency under N.C. Const. art. III, § 5(6)); *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 138-40, 142-43, 337 S.E.2d 477, 483-44, 486 (1985) (holding the legislature cannot exercise judicial power extended to the Industrial Commission under the Worker's Compensation Act by retroactively altering a judgment rendered by that agency); *State v. Elam*, 302 N.C. 157, 160, 273 S.E.2d 661, 664 (1981) (holding the General Assembly cannot exercise constitutional power granted to the judiciary under N.C. Const. art. IV, § 13(2) in making rules of appellate practice and procedure); *Person v. Bd. of State Tax Comm'rs*, 184 N.C. 499, 513-14, 115 S.E. 336, 345 (1922) (holding the judiciary cannot invalidate a statute found not in conflict with the exercise of the legislature's constitutional taxation power under N.C. Const. of 1868, art. V, § 3); *Houston v. Bogle*, 32 N.C. (10 Ired.) 496, 503-04 (1849) (holding the legislature cannot exercise judicial power to retroactively determine "what the law is and what it was"); *Hoke*, 15 N.C. (4 Dev.) at 13-15 (holding the General Assembly violates separation of powers by exercising judicial power when it passes a law which attempts to settle a dispute between competing claimant to a public office); *Robinson v. Barfield*, 6 N.C. (2 Mur.) 391, 418-19 (1818) (holding that the legislature cannot exercise judicial power by deciding whether a deed "was executed according to . . . [the] law"); *see also Ivarsson v. Office of Indigent Def. Servs.*, 156 N.C. App. 628, 631, 577 S.E.2d 650, 652 ("A violation of the separation of powers required by the North Carolina Constitution occurs when one branch of state government exercises powers that are reserved for another branch of state government."), *disc. rev. denied*, 357 N.C. 250, 582 S.E.2d 269 (2003).

11. *See* footnote 2.

Assembly passed a private act attempting to cure a flaw in a deed. 6 N.C. (2 Mur.) 391, 418-19 (1818). The Court said that the General Assembly violated separation of powers by exercising power reserved for the judiciary. *Id.* at 419. The Court noted that in passing the act, the legislature was attempting to determine "the *effects* in *law* of the several deeds. By the Constitution they are restricted from this exercise of power; they are to *make* the law, and the *judicial* power is to expound and determine what cases are within its operation." *Id.*

Similarly, in a more recent case, *Bacon v. Lee*, a convicted criminal asked this Court to intrude into the Governor's clemency review—an explicit constitutional power vested in the Governor since 1776. 353 N.C. at 704, 549 S.E.2d at 846-47. The criminal defendant sought substantive review from this Court because the then-serving Governor had represented the State during Bacon's appeal. *Id.* at 701-02, 711, 549 S.E.2d at 844-45, 851. This Court concluded that clemency was an explicit constitutional power of the Governor to be exercised solely at the Governor's discretion. *Id.* at 704, 549 S.E.2d at 846-47. As such, clemency was a nonjusticiable, political question. *Id.* at 716-17, 549 S.E.2d at 854. In explaining nonjusticiability, the Court noted that any substantive review by the Court would interfere with the Governor's express constitutional authority. *Id.* at 716-17, 549 S.E.2d at 854. When one branch interferes with another branch's performance of its constitutional duties, it attempts to exercise a power reserved for the other branch. *Id.* at 721-22, 549 S.E.2d at 857. Therefore, if the Court conducted a substantive review of the clemency proceeding, the judicial branch would be exercising a power constitutionally reserved for the Governor, thus violating separation of powers. *Id.* at 721-22, 549 S.E.2d at 857.

As discussed, the General Assembly has the constitutional power to assign itself the authority to fill statutory positions; this designation does not violate separation of powers. From our founding, the authority to appoint has simply been a mode of filling the position and has not in any way implicated control over the official or an exercise of any official duties. *Cunningham*, 124 N.C. at 642-43, 33 S.E. at 139 (holding that legislative appointment is "only a mode of filling the offices" and that "[t]his view . . . was strictly in accordance with the constitutional history of this State"); *Jones*, 116 N.C. at 580, 21 S.E. at 790 (Avery, J., concurring) ("[B]efore any such express power was given or limited to the Chief Executive, when by the Constitution as amended in 1835 no express grant of authority to appoint or elect was conferred upon either of the coördinate departments, the residuary power of the people to provide for filling offices, already existing, and to create others, was exercised

by their representatives in the General Assembly."); *Trs. of Univ. of N.C. v. McIver*, 72 N.C. 76, 85 (1875) ("Now the election of officers is not an executive, legislative or judicial power, but only a mode of filling the offices created by law, whether they belong to one department or the other. The election of a judge is not a judicial power, nor the election of a Governor an executive power; for if so, all elections by the people would be an infringement upon the executive department.").

If the appointing of the official is simply a mode of filling the position and does not implicate control, then the appointment does not in any manner amount to exercising the duties of the office. Thus, whether appointing an official or a majority of a group of officials, the appointing authority is not exercising any responsibilities of the position. This principle has existed since our independence from Great Britain and has been reiterated throughout our history.

In 1776 the Drafters of the Declaration of Rights in our state constitution provided for separation of powers, N.C. Const. of 1776, Declaration of Rights, § IV; the next day, those same Drafters specified legislative appointment of the entire executive and judicial branches, N.C. Const. of 1776, §§ XIII-XVI, XXII-XXIV. In appointing the Governor, the then-seven-member Council of State, an Attorney General, Secretary of State, and Treasurer, *id.*, the General Assembly did not exercise the power of those offices. The authority to appoint all the officials of the other branches did not violate separation of powers because a separation of powers violation only occurs when one branch of government *exercises the power* belonging to another branch. Once appointed, the Governor and other executive branch officials each took an oath to perform the duties of the office and served a designated term. N.C. Const. of 1776, §§ XII, XV, XVI. Similarly, the legislature did not exercise the judicial power by creating a judicial system and appointing and removing judges. *Id.* § XIII. The judges took an oath to perform their duties and did so, despite the possibility of removal. *Id.* §§ XII, XIII.

Our original judges aptly demonstrated that a selected officer exercises independent judgment after appointment, even in the face of the legislature's removal authority. In *Bayard v. Singleton* the three judges had been appointed by the General Assembly and were subject to removal by that body. *See id.* § XIII. Nonetheless, the judges held an act of the General Assembly unconstitutional. 1 N.C. (Mart.) at 7. The Court observed

> that the obligation of their oaths and the duty of their office required them, in that situation, to give their opinion

> on that important and momentous subject; and that notwithstanding the great reluctance they might feel against involving themselves in a dispute with the Legislature of the State, yet no object of concern or respect could come in competition or authorize them to dispense with the duty they owed the public, in consequence of the trust they were invested with under the solemnity of their oaths.

Id. at 6-7. As demonstrated by the behavior of the judges and their decision in *Bayard v. Singleton*, appointment was simply a means of filling the position, not controlling the official and thereby exercising the power of the office.[12]

Our current constitution and a variety of statutes continue to recognize that the authority to appoint an official does not result in control of the appointee; having and exercising such authority does not implicate separation of powers. The constitution and statutes place with one or more officials in one branch the authority to appoint officials in another branch.[13] Moreover, various statutory schemes allow for the branches to

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12. The commissioners appointed under the statutes at issue here likewise must take oaths before taking on the responsibilities of their positions. *See* N.C.G.S. § 11-1 (2013) ("[O]aths . . . are necessary . . . to the important end of good government . . . [and] ought to be taken and administered with the utmost solemnity."); *id.* § 11-7 (2013) ("[E]very person elected or appointed to hold any office . . . shall . . . take and subscribe to the following oath: 'I . . . do solemnly and sincerely swear that I will . . . be faithful and bear true allegiance to the State of North Carolina, and to the constitutional powers and authorities which are or may be established for the government thereof; and that I will endeavor to support, maintain and defend the Constitution of said State . . . .' "); *see also id.* § 143B-13(a) (2013) ("[E]ach member [is appointed] on the basis of interest in public affairs, good judgment, knowledge, and ability in the field for which appointed, and with a view to providing diversity of interest and points of view in the membership.").

13. *See* N.C.G.S. §§ 7A-752, -753 (Chief Justice makes appointments to the Office of Administrative Hearings, housed in the executive branch); *Melott*, 320 N.C. at 526, 359 S.E.2d at 788 (Meyer, J., concurring in result) (recognizing that the Office of Administrative Hearings exercises judicial functions, yet is housed in the executive branch); *see, e.g.*, N.C. Const. art IV, § 19 (Governor fills judicial vacancies); N.C.G.S. § 163-9(a) (2013) (same); *see also* N.C. Const. art. III, §§ 3(4), (5) (General Assembly determines Governor's mental capacity and has power to impeach); *id.* art. III, § 7(6) (General Assembly determines incapacity of executive officers); N.C.G.S. § 106-2 (2013) (Governor appoints Agriculture Board, housed under elected Council of State member); *id.* §§ 162-5, -5.1 (2013) (vacancy in the office of sheriff, exercising the executive function of enforcing the laws, filled by board of county commissioners, a legislative body).

share appointments[14] and even authorize the political parties to recommend certain appointees.[15] This historically recognized principle, that appointment is simply a means of filling the position, is true regardless of the function ultimately exercised by the official.[16] Thus, for example, when the Governor appoints a judge, the Governor is not controlling the judge or exercising a judicial power; separation of powers is not implicated. N.C. Const. art. IV, § 19.

The principle of separation of powers is certainly not implicated by the General Assembly's appointment of a majority of the members of various executive commissions, particularly in light of the General Assembly's significant express constitutional authority to assign executive duties to the constitutional executive officers and organize executive departments. The executive branch executes the laws as enacted by the General Assembly. The constitution expressly acknowledges the General Assembly's power to assign duties and functions to the executive branch under its broad lawmaking power. N.C. Const. art. III, §§ 5(10), 7(1)-(2), 8, 11. The executive branch officials and their departments carry out these statutory duties and functions. *Id.* art. III, §§ 5(10), 7(1)-(2). The General Assembly retains the prerogative to change these duties, the organization of the executive branch, and the

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14. *See*, *e.g.*, N.C.G.S. § 7A-375 (2013) (Judicial Standards Commission) (providing for thirteen members severally appointed by the Chief Justice, State Bar Council, Governor, and General Assembly to serve six-year terms, and for cause and disqualification removal); *id.* § 115D-2.1 (2013) (State Board of Community Colleges) (providing for twenty-one members appointed by the Governor and General Assembly, various limited terms, and removal by vote and recommendation from the Ethics Commission); *id.* § 138A-7 (2013) (State Ethics Commission) (providing for eight members, four each appointed by the General Assembly and Governor to serve staggered terms, and removal for cause).

15. *See*, *e.g.*, N.C.G.S. § 162-5.1 (2013) (In forty six counties, the board "shall elect the person recommended by" the prior sheriff's political party to fill a vacancy in the office of sheriff.); *id.* § 163-19 (2013) (State Board of Elections) (providing for five members, requiring the Governor to appoint members from a list of nominees submitted by the two largest political parties, and limiting members to two consecutive four-year terms).

16. *See*, *e.g.*, N.C.G.S. § 62-10(f) (2013) (Utilities Commission) (independent commission performing judicial functions but residing in executive branch; members appointed by Governor subject to legislative confirmation); *id.* § 97-77(a1) (2013) (Industrial Commission) (independent commission performing judicial functions but residing in executive branch; members appointed by Governor but must be confirmed by the General Assembly).

branch's supervisory structure. *Id.* art. III, §§ 5(10), 7(1)-(2), 11. Though the General Assembly may have assigned a particular function to a constitutional executive officer at present, the constitution provides that the legislature can assign that function elsewhere. *Id.*

To overturn a law of the people acting through the General Assembly, the Court must find an express constitutional violation beyond a reasonable doubt. As demonstrated by the text and history of our constitution and by our jurisprudence, the General Assembly in exercising its express constitutional lawmaking power has the authority to appoint a majority of the members of executive commissions that it has created by statute. The authority to appoint is simply a mode of filling positions and does not result in control over the appointed officials. Absent an explicit constitutional amendment such as that proposed in 1968, the General Assembly's constitutional power, including its appointment authority, remains unchanged. While I agree with the majority that the statutes in question do not violate the appointments clause, *id.* art. III, § 5(8), I do not believe that the challenged provisions violate separation of powers. Accordingly, I concur in part and dissent in part.

TERRI YOUNG
v.
DANIEL BAILEY, in his Official Capacity as Sheriff of Mecklenburg County, and OHIO CASUALTY INSURANCE COMPANY

No. 355PA14-2

Filed 29 January 2016

1. Public Officers and Employees—wrongful termination—firing of sheriff's deputy—not a county employee—no public policy violation

The trial court did not err in a wrongful termination case, arising from the firing of a deputy by defendant sheriff for reasons allegedly attributable to her failure to support the sheriff's reelection, by granting summary judgment in favor of defendant sheriff. North Carolina is an employment-at-will state. Further, a deputy sheriff or employee of a sheriff's office is not a county employee. As a result, plaintiff was not covered by the public policy violation under N.C.G.S. § 153A-99 and her suit brought under that statute failed.

2. Constitutional Law—freedom of speech—wrongful termination based on political considerations—sheriff's deputy

The trial court did not err in a wrongful termination case by concluding plaintiff deputy sheriff's First Amendment free speech rights were not violated when she was fired allegedly based on her failure to support the sheriff's reelection. By standing in the elected sheriff's shoes, a deputy sheriff fills a role in which loyalty to the elected sheriff is necessary to ensure that the sheriff's policies are carried out. Mutual confidence and loyalty between a sheriff and a deputy are crucial in accomplishing the sheriff's policies and duties, and thus the dismissal of plaintiff based on political considerations was permissible.

3. Appeal and Error—preservation of issues—failure to raise constitutional issue at trial

Although plaintiff deputy sheriff presented additional constitutional arguments on appeal in a wrongful termination case, they were not preserved based on plaintiff's failure to raise them at trial.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 771 S.E.2d 628 (2015), affirming an order granting summary judgment entered on 25 April 2014 by Judge W. Robert Bell in Superior Court, Mecklenburg County. Heard in the Supreme Court on 7 December 2015.

Kennedy, Kennedy, Kennedy and Kennedy, LLP, by Harold L. Kennedy, III and Harvey L. Kennedy, for plaintiff-appellant.

Womble, Carlyle, Sandridge and Rice, LLP, by Sean F. Perrin, for defendant-appellees.

EDMUNDS, Justice.

Following the reelection of defendant Daniel Bailey to the office of Sheriff of Mecklenburg County, plaintiff's employment as a deputy sheriff was terminated. In response, plaintiff brought this action, alleging wrongful termination in violation of the North Carolina public policy enunciated in N.C.G.S. § 153A-99, and of Article I, Sections 14 and 36 of the North Carolina Constitution. We hold that plaintiff was not a county employee as defined in N.C.G.S. § 153A-99. As a result, she is not entitled to the protections provided in that statute and was not terminated in violation of public policy. In addition, defendant sheriff's actions did not

violate plaintiff's freedom of speech rights. Accordingly we affirm the decision of the Court of Appeals.

Plaintiff Terri Young was hired as a deputy in the Mecklenburg County Sheriff's Office in 1990 and in 2010 had reached the rank of Captain. Plaintiff's duties included oversight of a detention facility, staff operations, and inmate and staff security, along with other responsibilities the sheriff assigned to her. During her tenure as a deputy, plaintiff received three disciplinary suspensions. In addition, she was reprimanded for violations of rules of conduct in June and July 2010.

On 23 June 2009, while preparing for his 2010 run for reelection, defendant Bailey sent letters to each of his deputies, seeking contributions in support of his upcoming campaign. Plaintiff did not make a contribution. Over a year later, in November 2010, defendant Bailey was reelected Sheriff of Mecklenburg County. On 6 December 2010, defendant Bailey chose not to reappoint plaintiff to her position as a deputy sheriff, pursuant to his authority under N.C.G.S. § 153A-103(1).

On 23 May 2013, plaintiff filed suit in Superior Court, Mecklenburg County against Bailey, in his official capacity as Sheriff of Mecklenburg County, and Ohio Casualty Insurance Company, the surety bond holder for defendant Bailey. In her complaint, plaintiff alleged that she was wrongfully terminated in violation of the public policy embodied in N.C.G.S. § 153A-99, specifically contending that she was fired because she had not contributed to defendant Bailey's reelection campaign. In addition, plaintiff alleged that her termination violated her rights guaranteed to her by Article I, Sections 14 and 36 of the North Carolina Constitution. On 26 June 2013, defendant Bailey filed an answer denying all of plaintiff's material allegations, asserting an affirmative defense of sovereign immunity, and arguing that plaintiff's constitutional claims are barred because defendant Bailey would have declined to reappoint plaintiff "even in the absence of the Plaintiff's First Amendment conduct." On 21 August 2013, defendant Ohio Casualty Insurance Company filed its answer, raising similar defenses.

On 3 March 2014, defendants made a joint motion for summary judgment asserting that no genuine issues of material fact existed concerning plaintiff's claims of wrongful discharge in violation of section 153A-99 or her claims under the North Carolina Constitution. After conducting a hearing, the trial court on 25 April 2014 entered a written order allowing defendants' motion. On 22 May 2014, plaintiff filed a notice of appeal from the order.

On 21 April 2015, the Court of Appeals issued an opinion affirming the trial court's ruling. *Young v. Bailey*, ___ N.C. App. ___, 771 S.E.2d 628 (2015). The court in *Young* cited *McLaughlin v. Bailey*, ___ N.C. App. ___, 771 S.E.2d 570 (2015), in which a different plaintiff had raised the same issues after being terminated by defendant Bailey. *Young*, ___ N.C. App. at ___, 771 S.E.2d at 630 (citing *McLaughlin*, ___ N.C. App. at ___, 771 S.E.2d at 572). In *McLaughlin*, the court stated that

> employees of a county sheriff, including deputies . . . , are directly employed by the sheriff and not by the county or by a county department. Sheriff's employees are not "county employees" as defined in N.C. Gen. Stat. § 153A-99 and are not entitled to the protections of that statute.

McLaughlin, ___ N.C. App. at ___, 771 S.E.2d at 572. As a result, the court in *McLaughlin* held that the plaintiff could not establish a claim for wrongful termination in violation of section 153A-99. *Id.* at ___, 771 S.E.2d at 579. The panel here concluded that it was bound by this holding. *Young*, ___ N.C. App. at ___, 771 S.E.2d at 630-31. The panel in *Young* further concluded that plaintiff's state constitutional arguments lacked merit, *id.* at ___, 771 S.E.2d at 632, again relying on *McLaughlin*'s holding that deputy sheriffs can "lawfully be fired based on political considerations" without violating the state constitution's free speech guarantees, *McLaughlin*, ___ N.C. App. at ___, 771 S.E.2d at 581. We allowed discretionary review.

[1] We review a trial court's grant of summary judgment de novo, *Robins v. Town of Hillsborough*, 361 N.C. 193, 196, 639 S.E.2d 421, 423 (2007), to determine whether any genuine issues of material fact exist and "whether the moving party is entitled to judgment as a matter of law," *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003).

North Carolina is an employment-at-will state. *Garner v. Rentenbach Constructors, Inc.*, 350 N.C. 567, 569, 515 S.E.2d 438, 439-40 (1999) (citations omitted). Parties to a contract of employment may end their relationship at any time for any reason when that agreement does not establish a defined term of employment. *See Kurtzman v. Applied Analytical Indus., Inc.*, 347 N.C. 329, 331, 493 S.E.2d 420, 422 (1997) (citations omitted). Although exceptions are few, *see id.*, this Court has recognized one when the employer's acts violate the public policy of North Carolina, *see Coman v. Thomas Mfg. Co.*, 325 N.C. 172, 175, 381 S.E.2d 445, 447 (1989) (citations omitted). Section 153A-99 embodies the public policy of protecting county employees from specific forms of political coercion. N.C.G.S. § 153A-99 (2013). The statute, entitled "County employee

political activity," provides in part that "[n]o employee may be required as a duty or condition of employment, promotion, or tenure of office to contribute funds for political or partisan purposes." *Id.* § 153A-99(d). Subdivision (b)(1) defines " 'County employee' or 'employee' " as "any person employed by a county or any department or program thereof that is supported, in whole or in part, by county funds." *Id.* § 153A-99(b)(1).

Thus, to state a cause of action based on a violation of this statute, plaintiff must first show that, although she was hired by the sheriff and worked as the sheriff's deputy, she was a "county employee." The parties agree that plaintiff was not a direct employee of the county. Instead, they wrangle over whether plaintiff falls under the second part of the definition. Plaintiff contends that the statute's protections apply to her because the sheriff's office is financed through the county, is integral to and a part of the county, and thus is a program or department of the county. Defendants acknowledge that the sheriff's office receives funding and other support from the county in the form of salaries, insurance, and so forth, but argue that funding is not the determining factor and that the mere fact of funding does not establish that a sheriff's office is a department or program of a county. Contending instead that a sheriff's office is independent of county government, defendants argue the statute does not apply to plaintiff. Accordingly, we first address the nature of plaintiff's employer.

The office of the sheriff, one of great antiquity, is established in North Carolina by our constitution. N.C. Const. art. VII, § 2; *Borders v. Cline*, 212 N.C. 472, 476, 193 S.E. 826, 828 (1937) ("The office of sheriff is constitutional."). The General Assembly explicitly has recognized the unique nature of the sheriff's position. N.C.G.S. § 17E-1 (2013). The sheriff is elected by the people, N.C. Const. art. VII, § 2, and alone is responsible for carrying out his or her official duties, N.C.G.S. § 162-24 (2013) ("The sheriff may not delegate to another person the final responsibility for discharging his official duties . . . ."). In addition, the sheriff has singular authority over his or her deputies and employees and is responsible for their actions. Under North Carolina law, each sheriff "has the exclusive right to hire, discharge, and supervise the employees in his office." *Id.* § 153A-103(1) (2013). While certain county officials have the power to hire and fire county employees, *see id.* §§ 153A-12 (setting out powers of county boards of commissioners), -82(1) (2013) (listing powers of county manager), a county government lacks hiring, supervisory, and firing authority over deputy sheriffs.

In light of the distinct demarcation between county government and the office of the sheriff, we conclude that a sheriff's office is not a

program or department of a county and agree with the consistent holdings of the Court of Appeals that a deputy sheriff or employee of a sheriff's office is not a county employee. *See*, *e.g.*, *Peele v. Provident Mut. Life Ins. Co.*, 90 N.C. App. 447, 449, 368 S.E.2d 892, 894 ("It is clear to this Court that plaintiff was an employee of the sheriff and not Watauga County . . . ."), *appeal dismissed and disc. rev. denied*, 323 N.C. 366, 373 S.E.2d 547 (1988); *see also Sims–Campbell v. Welch*, ___ N.C. App. ___, 769 S.E.2d 643, 648 (2015) (holding that an assistant register of deeds, like a deputy sheriff, does not enjoy the protections of section 153A-99 because the county "lacks *any* authority to supervise or control the details of the work performed by employees in that office"). Because a sheriff's office is not a program or department of a county, the fact that the sheriff's office receives funds therefrom is of no moment. As a result, plaintiff is not covered by N.C.G.S. § 153A-99 and her suit brought under that statute fails.

[2] Plaintiff also claims her termination was in violation of the free speech rights guaranteed by North Carolina Constitution, Article I, Section 14.[1] Here we assume without deciding that plaintiff was terminated for reasons attributable to her failure to support defendant sheriff's reelection. In analyzing alleged violations of the state constitution's guarantee of free speech, "this Court has given great weight to the First Amendment jurisprudence of the United States Supreme Court." *State v. Packingham*, ___ N.C. ___, ___, 777 S.E.2d 738, 743 (2015) (citing *State v. Petersilie*, 334 N.C. 169, 184, 432 S.E.2d 832, 841 (1993)).

The United States Supreme Court has held that "[a] State may not condition public employment on an employee's exercise of his or her First Amendment rights." *O'Hare Truck Serv.*, *Inc. v. City of Northlake*, 518 U.S. 712, 717, 116 S. Ct. 2353, 2356, 135 L. Ed. 2d 874, 880 (1996) (citations omitted). However, this general rule is subject to exceptions when the employee's loyalty to the employer is paramount. In *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976), in which deputy sheriffs were fired or threatened with firing on the basis of their party registration, the Supreme Court recognized that "the prohibition on encroachment of First Amendment protections is not an absolute." *Id.* at 360, 96 S. Ct at 2683, 49 L. Ed. 2d at 558. To ensure the execution of policies on which the winning candidate campaigned, the Court

1. We note that plaintiff's complaint additionally cites North Carolina Article I, Section 36 but makes no argument relating to this Section. Accordingly, the claim is waived and we do not address it further. *See* N.C. R. App. P. 28(a).

held that employees in policymaking positions legally can be dismissed on grounds relating to political loyalty "to the end that representative government not be undercut by tactics obstructing the implementation of policies of [a] new administration, policies presumably sanctioned by the electorate." *Id.* at 367, 96 S. Ct. at 2687, 49 L. Ed. 2d at 562. The Supreme Court later refined its holdings regarding political patronage dismissals when it added that "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti v. Finkel*, 445 U.S. 507, 518, 100 S. Ct. 1287, 1295, 63 L. Ed. 2d 574, 584 (1980). The North Carolina Court of Appeals adopted *Elrod*'s reasoning in *Carter v. Marion*, 183 N.C. App. 449, 453-55, 645 S.E.2d 129, 131-32 (2007), *appeal dismissed and disc. rev. denied*, 362 N.C. 175, 658 S.E.2d 271 (2008).

Accordingly, the question before us is whether defendant sheriff has satisfied the tests set out in *Elrod* and *Branti*. The state constitution mandates popular election of sheriffs, officials who establish procedures, guidelines, priorities, and policies for his or her office. N.C. Const. art. VII, § 2; *see also* N.C.G.S. § 162-1 (2013). The election of a particular candidate signifies public support for that candidate's platform, policies, and ideology. The General Assembly has concluded that the politics of the elected sheriff are sufficiently important that in many counties, including the populous counties of Buncombe, Forsyth, Guilford, Mecklenburg, and Wake, if a vacancy in the office occurs and the departed sheriff had been nominated by a political party, the county board of commissioners filling the vacancy is *required* to consult with the political party of the previous sheriff and must elect the person recommended by that party's executive committee. N.C.G.S. § 162-5.1 (2013).

Deputies are a reflection of their sheriff. They serve as the alter egos of the sheriff and, if liability results from the acts of a deputy, the sheriff is held responsible. *Styers v. Forsyth Cty.*, 212 N.C. 558, 565, 194 S.E. 305, 309 (1937) ("If there be a nonfeasance of neglect of duty by the under-sheriff, the sheriff alone is responsible to the party injured . . . .") (quoting *Lyle v. Wilson*, 26 N.C. (4 Ired.) 226, 228 (1844)); *see also* N.C.G.S. § 162-24 (stating that, although a sheriff may not delegate the final responsibility for discharging his or her responsibilities, "he may appoint a deputy or employ others to assist him in performing his official duties"). After considering these statutory and decisional factors, we conclude that, by standing in the elected sheriff's shoes, a deputy

sheriff fills a role in which loyalty to the elected sheriff is necessary to ensure that the sheriff's policies are carried out.

The Fourth Circuit undertook a similar analysis in *Jenkins v. Medford*, 119 F.3d 1156 (4th Cir. 1997), *cert. denied*, 522 U.S. 1090, 118 S. Ct. 881, 139 L. Ed. 2d 869 (1998). After conducting an exhaustive examination of the role of deputy sheriffs in North Carolina and other jurisdictions, and after acknowledging the unique status of deputies in this state as recognized in such statutes as N.C.G.S. §§ 17E-1, 153A-103(2), and 162-24, that court concluded that "in North Carolina, the office of deputy sheriff is that of a policymaker, and that deputy sheriffs are the alter ego of the sheriff generally." *Id.* at 1164. As a result, "North Carolina deputy sheriffs may be lawfully terminated for political reasons under the *Elrod–Branti* exception to prohibited political terminations." *Id.* While *Jenkins* is not binding on us, we find the Fourth Circuit's analysis persuasive. When, as here, mutual confidence and loyalty between a sheriff and a deputy are crucial in accomplishing the sheriff's policies and duties, the dismissal of plaintiff here based on political considerations falls squarely within the rule established in *Elrod* and *Branti*. Accordingly, we hold that plaintiff's rights under the Constitution of North Carolina were not violated.

[3] Plaintiff also presented to this Court an argument based upon an alleged violation of her rights under the Constitution of the United States. This issue was neither raised below nor in plaintiff's petition for discretionary review. As a result, we do not address this contention. *See State v. Anthony*, 354 N.C. 372, 389, 555 S.E.2d 557, 571 (2001) (citing *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001)), *cert. denied*, 536 U.S. 930, 122 S. Ct. 2605, 153 L. Ed. 2d 791 (2002).

Because plaintiff has failed to raise any meritorious claims, the trial court correctly concluded defendants were entitled to judgment as a matter of law. Accordingly, we conclude the Court of Appeals correctly held the trial court's grant of summary judgment in favor of defendants was proper.

AFFIRMED.

MARGARET DICKSON, *et al.*)
)
v.)
)
ROBERT RUCHO, *et al.*)
)
NORTH CAROLINA STATE CONFERENCE) From Wake County
OF BRANCHES OF THE NAACP, *et al.*)
)
v.)
)
THE STATE OF NORTH CAROLINA, *et al.*)

No. 201PA12-3

ORDER

Plaintiff-Appellants' Rule 31 Petition for Rehearing is denied as to the second and third issues. As to the remaining first issue, plaintiff-appellants' petition is dismissed on procedural grounds. Plaintiff-appellants waived review of this argument by failing to raise it in their brief on remand. *See* N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned."); N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

This Court's 18 December 2015 opinion is modified as follows: the sentence stating "Alabama's Constitution does not contain a Whole County Provision" is deleted, and the words in the next sentence, "that state," are replaced with the word, "Alabama." *Dickson v. Rucho*, No. 201PA12-3, 2015 N.C. LEXIS 1281, at *34 (Dec. 18, 2015).

By order of the Court in Conference, this 11th day of February, 2016.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 11th day of February, 2016.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

KING v. BRYANT

[368 N.C. 674 (2016)]

ROBERT E. KING AND WIFE, JO ANN O'NEAL	)	
v.	)	From Cumberland County
MICHAEL S. BRYANT, M.D., AND VILLAGE SURGICAL ASSOCIATES, P.A.	)	

No. 294PA14

ORDER

On 21 August 2015, this Court ordered this case certified to the trial court for additional findings of fact as to "[w]hether a physician-patient relationship existed at the time Mr. King signed the arbitration agreement." On 6 November 2015, the trial court entered the additional findings of fact.

Now, the Court, on its own motion, orders that the parties submit supplemental briefs on the effect of the trial court's additional findings of fact on the proceedings in this case. Appellants' supplemental brief shall be filed no later than thirty days after the date of this order, and appellees' supplemental brief shall be filed no later than thirty days following appellants' filing.

By order of the Court in Conference, this 19th day of February, 2016.

s/Hudson, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 19th day of February, 2016.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE v. PERRY

[368 N.C. 675 (2016)]

STATE OF NORTH CAROLINA)
)
v.) From Guilford County
)
DOMINIQUE JEVON PERRY)

No. 81A14

ORDER

The Court, on its own motion, orders that the parties submit supplemental briefs on the effect of *Montgomery v. Louisiana*, No. 14-280, 2016 WL 280758 (U.S. Jan. 25, 2016, revised Jan. 27, 2016), on the proceedings in this case. Defendant's supplemental brief shall be filed no later than thirty days after the date of this order, and the State's supplemental brief shall be filed no later than thirty days following defendant's filing.

By order of the Court in Conference, this 28th day of January, 2016.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 29th day of January, 2016.

CHRISTIE SPEIR CAMERON
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE v. SEAM

[368 N.C. 676 (2016)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Davidson County
	)	
SETHY TONY SEAM	)	

No. 82A14

ORDER

The Court, on its own motion, orders that the parties submit supplemental briefs on the effect of *Montgomery v. Louisiana*, No. 14-280, 2016 WL 280758 (U.S. Jan. 25, 2016, revised Jan. 27, 2016), on the proceedings in this case. The State's supplemental brief shall be filed no later than thirty days after the date of this order, and defendant's supplemental brief shall be filed no later than thirty days following the State's filing.

By order of the Court in Conference, this 28th day of January, 2016.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 29th day of January, 2016.

CHRISTIE SPEIR CAMERON
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE v. YOUNG

[368 N.C. 677 (2016)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Buncombe County
	)	
DAVID MARTIN BEASLEY YOUNG	)	

No. 80A14

ORDER

The Court, on its own motion, orders that the parties submit supplemental briefs on the effect of *Montgomery v. Louisiana*, No. 14-280, 2016 WL 280758 (U.S. Jan. 25, 2016, revised Jan. 27, 2016), on the proceedings in this case. The State's supplemental brief shall be filed no later than thirty days after the date of this order, and defendant's supplemental brief shall be filed no later than thirty days following the State's filing.

By order of the Court in Conference, this 28th day of January, 2016.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 29th day of January, 2016.

CHRISTIE SPEIR CAMERON
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE OF NORTH CAROLINA, upon the relation of PATRICK L. McCRORY, individually and in his official capacity as Governor of the State of North Carolina; JAMES B. HUNT, JR.; and JAMES G. MARTIN	)	
v.	)	From Wake County
PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate; TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives; and, in their official capacities as members of the Coal Ash Management Commission, HARRELL JAMISON AUTEN III, TIM L. BENNETT, D. ALLEN HAYES, SCOTT FLANAGAN, RAJARAM JANARDHANAM, and LISA D. RIEGEL	)	

No. 113A15

ORDER

Plaintiffs' petition for writ of certiorari is allowed for the limited purpose of reversing the superior court's dismissal of plaintiffs' quo warranto claim, and remanding to the superior court for consideration of that claim on the merits.

By order of the Court in Conference, this 28th day of January, 2016.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 28th day of January, 2016.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

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

28 JANUARY 2016

001P16	State v. Ronald Farrow	1. Def's PDR Under N.C.G.S. § 7A-31 (COA15-583) 2. Def's Petition for *Writ of Certiorari* To Review Order of Superior Court of New Hanover County	1. Denied 2. Denied
002P16	Khalid Edward Cochran v. State of N.C.	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Denied **01/05/2016**
003P16	State v. Scott Matthew Spiron	1. Def's *Pro Se* Motion for Notice of Appeal (COAP15-281) 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA	1. Dismissed 2. Dismissed
013P16	Landover Homeowners Association, Inc. v. Thomas B. Sanders, Anna B. Sanders; Sanders Equipment Company, Inc.; and Sanders Development	1. Defs' Motion for Temporary Stay (COA14-1337) 2. Defs' Petition for *Writ of Supersedeas*	1. Allowed **01/15/2016** 2.
016P16	Maurice Antonio Burris v. Kelly J. Thomas, Commissioner of the North Carolina Division of Motor Vehicles	1. Plt's Motion for Temporary Stay (COA15-312) 2. Plt's Petition for *Writ of Supersedeas* 3. Plt's PDR	1. Allowed **01/20/2016** 2. 3.
024P16	State v. Oakland McCulloch	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **01/21/2016** 2.
026P14-2	William Thomas Fox and Scott Everett Sanders v. Mitchell Johnson, Timothy R. Bellamy, Gary W. Hastings, and Martha T. Kelly, in their individual capacities	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA15-206) 2. N.C. Association of Defense Attorneys' Conditional Motion for Leave to File Amicus Brief	1. Denied 2. Dismissed as moot **Edmunds, J., recused** **Ervin, J., recused**

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

28 JANUARY 2016

026P16	Shaka Greene v. Trustee Services of Carolina, LLC and US Bank, N.A. ——— In the Matter of the Foreclosure of Real Property Under Deed of Trust from Jeffrey S. Kenley and Laura L. Kenley, in the Original Amount of $296,700, and Dated September 29, 2005 and Recorded on September 30, 2005, in Book 3935 at Page 427, of Union County Registry	1. Plt's Motion for Temporary Stay (COA15-90 & COA15-97) 2. Plt's Petition for *Writ of Supersedeas*	1. Allowed **01/22/2016** 2.
027P16	State v. Keyshawn Jones	1. State's Motion for Temporary Stay (COA15-804) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/26/2016** 2. 3.
035PA12-2	Connie Chandler, Employee, by her Guardian ad Litem, Celeste M. Harris v. Atlantic Scrap & Processing, Employer, and Liberty Mutual Insurance Company, Carrier	1. Defs' Motion for Temporary Stay (COA14-1351) 2. Defs' Petition for *Writ of Supersedeas* 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed **01/06/2016** 2. 3.
040P15-5	State v. Napoleon Junior Rankin	Def's *Pro Se* Motion for PDR (COA07-1232)	Dismissed **Ervin, J., recused**
080A14	State v. David Martin Beasley Young		Special Order
081A14	State v. Dominque Javon Perry		Special Order
082A14	State v. Sethy Tony Seam		Special Order

Disposition of Petitions for Discretionary Review Under G.S. 7A-31

28 January 2016

101P15-2	State v. Christopher Anthony Clegg	1. Def's *Pro Se* Motion for Beal [sic] of Particulars and Probable Cause Indictment 2. Def's *Pro Se* Motion for Clerk Discharge of Debtors	1. Dismissed 2. Dismissed
112A15	Dana Marie Ribelin (fka Creel) v. Phillip Ray Creel	Plt's Motion for Leave to File Reply Brief	Denied **01/27/2016**
113A15	Patrick L. McCrory, et al. v. Philip E. Berger, et al.	Plt's PWC to Review Order of Superior Court of Wake County	Special Order
132P11-8	State v. Gregory Lynn Gordon	1. Def's *Pro Se* Petition for *Writ of Mandamus* (COAP15-180) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion for Ex-Parte Petition for *Writ of Certiorari*	1. Denied 2. Allowed 3. Dismissed
139PA13	State v. Quintel Augustin, Tilmon Golphin, and Christina Walters (DEATH)	1. Defs' Motion for Temporary Stay of the Mandate 2. Defs' Motion for Clarification 3. Defs' Motion for Leave to File Reply to Response to Clarification	1. Denied **01/07/2016** 2. Denied **01/07/2016** 3. Allowed **01/07/2016** **Beasley, J., recused** **Ervin, J., recused**
150P15-2	State v. Quincy Lamar Hill	Def's *Pro Se* Motion for Re-Hearing	Dismissed **Beasley, J., recused**
162P95-6	State v. Isaac Jackson Stroud	Def's *Pro Se* Motion for a Redetermination of Its Order	Dismissed
182P10-2	State v. Charles R. Goodson	1. Def's *Pro Se* Motion for PDR 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed **Ervin, J., recused**
208P15	The North Carolina State Bar v. Jerry R. Tillett, Attorney	Def's PDR Prior to a Determination of COA	Denied

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

28 JANUARY 2016

225P15-2	State v. Connie Prentice Reaves	Def's *Pro Se* Motion for Appeal	Dismissed
228A15	N.C. Association of Educators, Inc., et al. v. The State of North Carolina	N.C. Retired Governmental Employees' Association's Motion for Leave to File *Amicus* Brief	Allowed **12/21/2015**
232A93-4	State v. Warren Robert Gregory (DEATH)	Def's Petition for *Writ of Certiorari* to Review Order of Superior Court of Pitt County	Denied
248P15	Paul Frampton v. University of North Carolina at Chapel Hill	1. Respondent-Defendant's PDR Under N.C.G.S. § 7A-31 (COA14-1117) 2. Petitioner-Plaintiff's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
250P15	The North Carolina State Bar v. Robert L. Scott, Attorney	1. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA14-1008) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 3. Plt's Motion to Dismiss Appeal 4. Def's *Pro Se* Motion to Amend Notice of Appeal and PDR 5. Def's *Pro Se* Motion to Amend the Face Page of the Printed Record in this Appeal	1. --- 2. Denied 3. Allowed 4. Allowed 5. Allowed
278P15	State v. David Matthew Lowe	1. Def's Motion for Temporary Stay (COA14-1360) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31 4. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/11/2015** 2. Allowed 3. Allowed 4. Allowed
297P15	State v. Terrance Javarr Ross	1. State's Motion for Temporary Stay (COA15-87) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed 0**8/21/2015** 2. Allowed 3. Allowed
305P15	State v. Roger Lewis Smyre	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA14-1178) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Def's Petition for *Writ of Certiorari* to Review Decision of COA 4. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Denied 4. Allowed

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

28 JANUARY 2016

309P15	State v. Reginald Underwood Fullard	1. Def's PDR Under N.C.G.S. § 7A-31 (COA15-93) 2. Def's *Pro Se* Petition for *Writ of Mandamus*	1. 2. Denied **01/13/2016**
320P15	Leroy Courtland Broadnax v. Jason Edward Ramey, Attorney for the State	Petitioner's *Pro Se* Motion for Relief from Conviction and Sentence (COAP15-584)	Dismissed
337P15	State v. Aron Harper	1. Def's Motion for Temporary Stay (COA14-1182) 2. Def's Petition for *Writ of Supersedeas* 3. Def's Petition for *Writ of Certiorari* to Review Decision of COA 4. Def's Motion to Amend Petition for *Writ of Certiorari* and Petition for *Writ of Supersedeas* and Motion for Temporary Stay	1. Denied **10/08/2015** 2. Denied 3. Denied 4. Allowed
351P15	State v. Paul Gregory Perry	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA14-1328) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
353P15	Carolyn Joyner Driggers, Individually and as Co-Trust and Co-Beneficiary of the Barney G. Joyner Family Trust, and Phyllis M. Joyner, by and through Carolyn Driggers as Attorney-in-Fact v. David Lee Joyner and Ronald Dorrestein	1. Plt's (Carolyn Joyner Driggers) Petition for *Writ of Certiorari* to Review Order of COA (COA15-434) 2. Plt's (Carolyn Joyner Driggers) Petition for *Writ of Certiorari* to Review Order of Superior Court of Wake County 3. Defs' Motion for Extension of Time to File Response to Petition for *Writ of Certiorari*	1. Denied 2. Denied 3. Allowed **10/27/2015**
360P15	State v. Jorge Juarez	1. State's Motion for Temporary Stay (COA15-152) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/27/2015** 2. Allowed 3. Allowed

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

28 JANUARY 2016

364P15	Gaillard Bellows and her husband, Jon Bellows v. Asheville City Board of Education dba Asheville High School and SKA Consulting Engineers, Inc., Formerly Sutton-Kennerly & Associates, Inc., and Zebulon W. Wells, Jr., Individually	Plts' PDR Under N.C.G.S. § 7A-31 (COA15-131)	Denied
366P15	In the Matter of: T.F.L., S.D.L., and B.A.N.L.	Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA15-144-2)	Denied
368P12-3	Sherif A. Philips, M.D. v. Pitt County Memorial Hospital, Inc., Paul Bolin, M.D., Ralph Whatley, M.D., Sanjay Patel, M.D., and Cynthia Brown, M.D.	Plt's *Pro Se* Motion for Petition for Reconsideration	Denied
372P15	William Shannon, M.D. v. Bob Testen, Joseph P. Jordan, and North Carolina Physicians Health Program, Inc.	Plt's PDR Under N.C.G.S. § 7A-31 (COA15-64)	Denied
373A15	State v. Nisandro Conzelez Sanchez	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA14-1381) 2. State's Motion to Dismiss Appeal	1. --- 2. Allowed
376A15	Paramount RX, Inc. v. Robert E. Duggan and Agelity, Inc.	Plt's Motion to Stay the Appeal	Allowed **12/21/2015**
377P15	State v. Victor Jay Crisco, Jr.	1. Def's PDR Under N.C.G.S. § 7A-31 (COA15-272) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Withdraw Def's *Pro Se* PDR	1. Denied 2. --- 3. Allowed
378P15	State v. Eric Cornell Wilson	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA15-234)	Denied

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

28 JANUARY 2016

382P10-4	State v. John Lewis Wray, Jr.	1. Def's *Pro Se* Motion to Remand 2. Def's *Pro Se* Motion to Vacate/ Dismiss Conviction Based on Altered/ Falsified Documents	1. Dismissed 2. Dismissed **Beasley, J., recused**
382P15	State v. Richard Jackson Hall	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP15-767)	Denied
383P15	State v. Lesiba Simon Matsoake	Def's PDR Under N.C.G.S. § 7A-31 (COA15-304)	Denied
384P15	State v. Sherry Endoleen Austin	Def's PDR Under N.C.G.S. § 7A-31 (COA15-44)	Denied
385P15	State v. Archimede N. Nkiam	1. State's Motion for Temporary Stay (COA14-1164) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Constitutional Question 4. State's PDR Under N.C.G.S. § 7A-31 5. Def's Motion to Dismiss Appeal 6. Def's Motion to Dismiss PDR	1. Allowed **11/23/2015** 2. Allowed 3. --- 4. Allowed 5. Allowed 6. Dismissed as moot **Ervin, J., recused**
387P05-3	State v. Earl James Watson	Def's *Pro Se* Motion for PDR (COAP15-753)	Dismissed **Ervin, J., recused**
387P15	State v. Judy Hardison	1. State's Motion for Temporary Stay (COA15-150) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/23/2105** Dissolved **01/28/2016** 2. Denied 3. Denied
388P15	State v. Ralph Lewis Gettys	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA15-51) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed

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389A15	State v. Tae Kwon Hammonds	1. Def's Notice of Appeal Based Upon a Dissent (COA15-53) 2. Def's PDR As to Additional Issues	1. --- 2. Allowed
391P15	City of Asheville, a municipal corporation v. State of North Carolina and the Metropolitan Sewerage District of Buncombe County	1. Plt's Motion for Temporary Stay (COA14-1255) 2. Plt's Motion for *Writ of Supersedeas* 3. Plt's Notice of Appeal Based Upon a Constitutional Question 4. Plt's PDR Under N.C.G.S. § 7A-31 5. International Municipal Lawyers Association's Motion for Leave to File *Amicus* Brief 6. Brunswick Regional Water & Sewer H2GO's Conditional Motion for Leave to File *Amicus* Brief 7. City of Wilson's Conditional Motion for Leave to File *Amicus* Brief 8. State's Motion to Dismiss Appeal 9. North Carolina League of Municipalities Conditional Motion for Leave to File *Amicus* Brief	1. Allowed **11/25/2015** 2. Allowed 3. Retained 4. Allowed 5. Allowed 6. Allowed 7. Allowed 8. Denied 9. Allowed
392PA13-3	State v. Robert T. Walston, Sr.	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **12/18/2015** 2.
392P15	State v. Joshua Donyell Walker	Def's PDR Under N.C.G.S. § 7A-31 (COA15-340)	Denied
395P15	State v. Timothy Jerome Lawing	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA14-1288) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
396P15	State v. Eric Douglas Hicks	Def's PDR Under N.C.G.S. § 7A-31 (COA15-491)	Denied
397P15	State v. Marlette Toomer and Vernon Toomer	Def's (Vernon Toomer) *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA14-1246)	Denied

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398P15	State v. Samuel Lee Gaskins	Def's *Pro Se* Motion for PDR (COAP15-798)	Dismissed
399P15	State v. Devon Armond Gayles	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Buncombe County 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
401P15	John M. McCormick, Employee v. EXEL/ DPWN Holdings, Inc., Employer, Self-Insured (Sedgwick CMS, Servicing Agent)	Plt's Petition for *Writ of Certiorari* to Review Order of COA (COA15-690)	Denied
402P11-6	State v. Sylvester Eugene Harding	1. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA15-148) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 3. Def's *Pro Se* Motion to Amend Notice of Appeal and PDR	1. Dismissed *ex mero motu* 2. Denied 3. Allowed
402P15	State v. Donna Helms Ledbetter	1. Def's PDR Under N.C.G.S. § 7A-31 (COA15-414) 2. State's Motion to Strike Def's Reply to State's Response 3. Def's Motion to Hold PDR in Abeyance 4. Def's Motion for Temporary Stay 5. Def's Petition for *Writ of Supersedeas*	1. 2. 3. 4. Allowed **12/17/2015** 5.
403P15	State v. James Earl Parker	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied
404P13-2	Robert A. Izydore v. City of Durham (Durham Board of Adjustment)	Petitioner's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA14-1378)	Denied

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404P15	Prince Jerry Jones v. Harnett County District Court Jacqualyn L. Lee	Plt's *Pro Se* Petition for *Writ of Mandamus*	Denied
405P15	State v. Jesus Adan Cruz Rios	Def's *Pro Se* Motion for PDR (COA07-1232)	Denied **Jackson, J., recused**
406P15	State v. David Sellers	Def's *Pro Se* Motion for PDR (COA15-10)	Denied
408P15	State v. Marty Allan Lewis	Def's PDR Under N.C.G.S. § 7A-31 (COA15-408)	Denied
410P15	Joleando Lyndell Jones v. Harnett County District Court Jacqualyn L. Lee	Plt's *Pro Se* Petition for *Writ of Mandamus*	Denied
411A94-5	State v. Marcus Reymond Robinson (DEATH)	1. Def's Motion for Temporary Stay of the Mandate 2. Def's Motion for Clarification 3. Def's Motion for Leave to File Reply to Response to Motion for Clarification	1. Denied **01/07/2016** 2. Denied **01/07/2016** 3. Allowed **01/07/2016** **Ervin, J., recused**
411P15	State v. John W. Hearne	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Vance County	Dismissed
413P15	Christopher W. Abells v. Tiffany J. Martin (formerly Abells)	1. Def's PDR Under N.C.G.S. § 7A-31 (COA15-88) 2. Def's Conditional Petition for *Writ of Certiorari* to Review Decision of COA	1. Denied 2. Denied
416P15	State v. Nijel Ramsey Lee	1. Def's *Pro Se* Motion for Notice of Appeal (COAP14-357) 2. Def's *Pro Se* Petition in the Alternative for *Writ of Habeas Corpus*	1. Dismissed 2. Denied **12/15/2015**
417P15	State v. Dustin Jamal Warren	Def's PDR Under N.C.G.S. § 7A-31 (COA15-499)	Denied

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418P15	Marcus Larent Henderson v. Harnett County District Court Jacqualyn L. Lee	Plt's *Pro Se* Petition for *Writ of Mandamus*	Denied
419P15	State v. Emile George Fryou	1. Def's PDR Under N.C.G.S. § 7A-31 (COA14-1168) 2. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
420P15	State v. Marlon E. Mendoza-Mejia	1. State's Motion for Temporary Stay (COA14-1261) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **12/21/2015** 2.
421P15	Law Offices of Peter H. Priest, PLLC v. Gabriel Coch and Information Pattern, LLC	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA15-254) 2. Plt's Petition for *Writ of Certiorari* to Review Decision of COA	1. Denied 2. Dismissed as moot
422P15	State v. Christopher Blake Squire	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied **01/05/2016**
423P15	State v. Clyde Gary Whisenant	1. Def's Motion for Temporary Stay (COA15-607) 2. Def's Petition for *Writ of Supersedeas*	1. Allowed **12/30/2015** 2. **Ervin, J., recused**
425P15	State v. Dwayne D. Knolton	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **12/22/2015**
427P15	State v. James Cornelius McNeill	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA15-94)	Denied
428P15	Trevon DeAndre Rice v. Harnett County District Court Jacqualyn L. Lee	Plt's *Pro Se* Petition for *Writ of Mandamus*	Denied
429P15	Nathaniel Ray McLean v. Harnett County District Court Jacqualyn L. Lee	Plt's *Pro Se* Petition for *Writ of Mandamus*	Denied

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430P15	State v. Omar Jackson	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied **01/05/2016**
434P15	Curtis Kantawiti White, Jr. v. North Carolina, Carl F. Fox, Chief Judge	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **12/29/2015**
435A96-5	State v. Walic Christopher Thomas (DEATH)	1. Def's Motion to Stay PWC 2. Def's PWC to Review the Decision of the Superior Court of Guilford County 3. Def's *Pro Se* Motion to Withdraw All Appeals 4. State's Motion for Leave to Substitute Counsel of Record 5. Def's *Pro Se* Motion for Ineffective Assistance of Post Conviction Counsel 6. Kathyrn Vandenberg and Marvin Sparrow's Motion to Withdraw 7. Def's Motion to Authorize IDS to Appoint Substitute Counsel	1. 2. 3. Dismissed **12/15/2010** 4. Allowed **06/12/2013** 5. Dismissed **12/18/2014** 6. Allowed **11/05/2015** 7. Allowed **11/05/2015**
435P15	State v. Sulyaman Alisla Wasalaam	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **12/29/2015**
436P15	State v. Tony Eugene Howell	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Alexander County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
437P15	Herman V. Tate v. North Carolina Department of Public Safety	1. Plt's *Pro Se* Motion to Safeguard Constitutional Rights (COA14-1274) 2. Plt's *Pro Se* Motion for PDR	1. Dismissed 2. Dismissed
439P15	State v. James Emmanuel Nettles	Def's *Pro Se* Motion for PDR (COA11-638)	Denied **Ervin, J., recused**

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441P92-7	State v. Johnnie L. Harrington	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Lee County	Dismissed **Ervin, J., recused**
441P15	Arnold Powell v. Bourlon & Davis	1. Petitioner's *Pro Se* Motion for Request for an Order to Compel (COAP15-866) 2. Petitioner's *Pro Se* Petition in the Alternative for *Writ of Certiorari* to Review Order of COA	1. Dismissed 2. Dismissed
455P14-4	State v. Reginald Fullard	1. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 2. Def's *Pro Se* Motion for Appeal Seeking Recusal 3. Def's *Pro Se* Motion to Compel Constitutional Disclosure of Exculpatory Evidence 4. Def's *Pro Se* Motion to Withdraw Unconstitutionally Construed Instrument that Violates Due Process 5. Def's *Pro Se* Motion for *Writ of Mandamus* 6. Def's *Pro Se* Motion for Case Calendaring 7. Def's *Pro Se* Motion for Evidence Hearing 8. Def's *Pro Se* Motion for Appointment of Competent Criminal Attorney 9. Def's *Pro Se* Motion for Jury Trial	1. Allowed 2. Dismissed 3. Dismissed 4. Dismissed 5. Dismissed 6. Dismissed 7. Dismissed 8. Dismissed 9. Dismissed
459P00-5	State v. William M. Huggins	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed

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471P13-2	John Walter Lawson and Margaret (Meg) Elizabeth Lawson Darling v. Heidi Cavanagh Lawson; Jacqueline Cavanagh Hughes; Mark Caprise; Deputy Sheriff PJ Mullen, in his official capacity and individually; Deputy Sheriff Michael Brannon, in his official capacity and individually; Corporal Claybourn Harper, in his official capacity and individually; Sheriff William Schatzman, in his official capacity as Sheriff of Forsyth County, NC; Hartford Insurance, as surety; Lieutenant Max Creason, in his official capacity and individually; and Chief Kenneth Gamble	1. Plts' *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA14-1224) 2. Plts' *Pro Se* PDR Under N.C.G.S. § 7A-31 3. Def's (Lt. Max Creason) Motion to Dismiss Appeal 4. Defs' (Schatzman, Mullen, Brannon, and Harper) Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed 4. Allowed **Ervin, J., recused**
536P00-7	Terrance L. James v. State of North Carolina	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **01/21/2016** **Ervin, J., recused**
629P01-5	State v. John Edward Butler	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP14-558) 2. Def's *Pro Se* Petition for *Writ of Mandamus* (COAP15-886)	1. Denied 2. Denied

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