No. COA 19-384 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE and CLEAN AIR CAROLINA,	)	
Plaintiffs-Appellees,	)	
	)	From Wake County
v.	)	
TIM MOORE, in his official capacity, and PHILIP BERGER, in his official capacity,	)	
Defendants-Appellants.	)	

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AMICUS CURIAE BRIEF OF THE NORTH CAROLINA VALUES COALITION[1]

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[1] No person or entity other than this amicus curiae and its counsel, directly or indirectly, either wrote this brief or contributed money for its preparation.

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****

AMICUS CURIAE BRIEF OF THE NORTH CAROLINA VALUES COALITION

****

Pursuant to Rule 28(i) of the North Carolina Rules of Appellate Procedure, the North Carolina Values Coalition hereby submits this brief as amicus curiae in support of defendants-appellants Phil Berger and Tim Moore, who have been sued in their official capacities as President

Pro Tempore of the North Carolina Senate and Speaker of the North Carolina House of Representatives, respectively.

INTEREST OF THE AMICUS CURIAE

The North Carolina Values Coalition was founded in 2011 as a non-partisan, statewide grassroots network of North Carolinians who support and advocate for pro-family positions. Based in Raleigh, it is a non-profit education and lobbying organization that qualifies for tax-exempt status under Section 501(c)(4) of the Internal Revenue Code.

The North Carolina Values Coalition engages in a range of activities to educate voters and motivate activists to become a powerful positive political force that advances a culture in North Carolina where human life is valued, religious liberty thrives, and marriage and families flourish. Much of the organization's work is expressed in advocating for or against amendments to the state constitution. For example, the N.C. Values Coalition worked for passage of Amendment One in 2012, which defined marriage as a union of one man and one woman. This constitutional amendment was adopted by 61% of the vote. In the most recent election, the North Carolina Values Coalition endorsed all six of

the proposed state constitutional amendments on the ballot, including the two amendments that were struck down by the trial court in this case.

Because of its frequent involvement in the state constitutional amendment process, the North Carolina Values Coalition has an interest in upholding the integrity of the process by which those amendments are subsequently subjected to judicial review.

SUMMARY OF THE ARGUMENT

The constitutional separation of powers is vital to the protection of individual liberty at both the state and federal levels of government. The constitutional requirements for standing are a key component of the separation of powers and help ensure courts are constrained to deciding cases and controversies instead of making judgments that are properly left to the other branches of government.

The trial court here erred in concluding that plaintiffs satisfied the requirements of standing imposed by the North Carolina Constitution. Plaintiffs have alleged only vague and unsubstantiated bases for standing, not any concrete and particularized injury in fact. Thus, plaintiffs' case should have been dismissed for lack of standing.

Accordingly, the decision of the Superior Court below should be vacated and the case remanded with instructions to dismiss the action.

ARGUMENT

I. THE REQUIREMENTS OF STANDING ARE VITAL TO THE SEPARATION OF POWERS AND THUS THE PROTECTION OF INDIVIDUAL LIBERTY.

It has been recognized since the founding of our nation that "the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta v. United States,* 488 U.S. 361, 380 (1989) (citations omitted); *Plaut v. Spendthrift Farm*, 1 F.3d 1487, 1491 (6th Cir. 1993) ("'[T]he preservation of liberty requires that the three great departments of power should be separate and distinct.'") (quoting *The Federalist* 47 (James Madison)). "The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power." *Myers v. United States*, 272 U.S. 52, 293 (1926).

The requirement that a party have standing in order to maintain an action in court gives effect to the separation of powers because it ensures that the judiciary limits itself to deciding cases and controversies rather than exercise power that is legislative in nature. *See, e.g., Warth*

v. Seldin, 422 U.S. 490, 498 (1975); *see also Allen v. Wright*, 468 U.S. 737, 750-51 (1984) ("The requirement of standing . . . has a core component derived directly from the Constitution.") (citing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 474-75 (1982)); *cf.* U.S. Const. art. III, § 2. Use of the terms "cases" and "controversies" is necessarily understood to "mean cases and controversies of the sort traditionally amenable to and resolved by the judicial process. Such a meaning is fairly implied by the text, since otherwise the purported restriction upon the judicial power would scarcely be a restriction at all." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102 (1998) (internal citation omitted).

At its essence, standing is "founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth*, 492 U.S. at 498 (citing *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 221-27 (1974), and *United States v. Richardson*, 418 U.S. 166, 188-97 (1974) (Powell, J., concurring)). "It tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial

action." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

II. AS WITH THE U.S. CONSTITUTION, THE NORTH CAROLINA CONSTITUTION REQUIRES AN INJURY-IN-FACT FOR A PLAINTIFF TO HAVE STANDING AND THUS FOR A COURT TO HAVE SUBJECT MATTER JURISDICTION.

A. North Carolina Courts Have Historically Adhered To Federal Standing Requirements, Including The Requirement Of An Injury In Fact.

Article I, Section 18, of the North Carolina Constitution provides that, in our courts, "every person for an *injury* done him in his lands, goods, person, or reputation shall have remedy by due course of law[.]" N.C. Const. art. I, § 18 (emphasis added). Moreover, the state constitution establishes a mandatory separation of powers.[1] *Id.* § 6 ("The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.").

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[1] Numerous other state constitutions likewise expressly require a separation of powers among the branches of government. *See* Ariz. Const. art. III; Ark. Const. art. 4, §§ 1-2; Cal. Const. art. III, § 3; Colo. Const. art. III; Ga. Const. art. I, § II, ¶ III; Fla. Const. art. II, § 3; Ill. Const. art. II, § 1; Me. Const. art. III, §§ 1-2; Mass. Const. pt. 1, art. XXX; Minn. Const. art. III, § 1; Nev. Const. art. 3, § 1; N.H. Const. pt. I, art. 37; N.J. Const. art. III; N.M. Const. art. III, § 1; Okla. Const. art. IV, § 1; Tenn. Const. art. II, §§ 1-2; Tex. Const. art. 2, § 1; Utah Const. art. V, § 1; Vt. Const. ch. II, § 5; Va. Const. art. I, § 5; W. Va. Const. art. V, § 1.

"This principle is fundamental to our form of government and has appeared in each of our state's constitutions." *State ex rel. McCrory v. Berger*, 368 N.C. 633, 645, 781 S.E.2d 248 (2016) (citing N.C. Const. of 1971, art. I, § 6; N.C. Const. of 1868, art. I, § 8; N.C. Const. of 1776, Declaration of Rights § IV; and *Wallace v. Bone*, 304 N.C. 591, 595-601, 596 n.2, 286 S.E.2d 79 (1982)). "[T]he Framers believed [the separation of powers] was essential to preserve liberty and prevent tyranny." *Richmond Cty. Bd. of Educ. v. Cowell*, 803 S.E.2d 27, 30 (N.C. Ct. App. 2017) (citation omitted), *appeal dismissed and review denied*, 809 S.E.2d 872 (N.C. 2018).

The North Carolina Constitution similarly requires that a party suing allege and prove an injury in fact in order for the court to have subject matter jurisdiction. "A general rule of standing is that only persons 'who have been injuriously affected . . . in their persons, property or constitutional rights' may challenge the validity of a [law]." *Dunn v. Pate*, 334 N.C. 115, 119, 431 S.E.2d 178 (1993) (quoting *Canteen Service v. Johnson*, 256 N.C. 155, 166, 123 S.E.2d 582 (1962)) (other citations omitted). Therefore, under the North Carolina Constitution, "only one with a genuine grievance, one personally injured" is permitted to

maintain a lawsuit to challenge a legislative enactment. *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 642, 669 S.E.2d 279 (2008) (quoting *Stanley v. Dep't of Conservation & Dev.*, 284 N.C. 15, 28, 199 S.E.2d 641 (1973)); *see American Woodland Indus., Inc. v. Tolson*, 155 N.C. App. 624, 626, 574 S.E.2d 55 (2002) ("Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy such that he or she may properly seek adjudication of the matter.") (citations omitted).

To establish standing, the plaintiff must have sustained an "'injury in fact' as a direct result of the [law at issue]." *Dunn*, 334 N.C. at 199, 431 S.E.2d 178 (quoting *Murphy v. Davis*, 61 N.C. App. 597, 300 S.E.2d 871 (1983)); *see Hart v. State*, 368 N.C. 122, 140, 774 S.E.2d 281 (2015); *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113, 574 S.E.2d 48 (2002) ("Standing most often turns on whether the party has alleged 'injury in fact' in light of the applicable statutes or caselaw.") (citation omitted).

Adopting the standards established by the U.S. Supreme Court, this Court has explained that "'[t]he 'irreducible constitutional minimum' of standing contains three elements: (1) 'injury in fact' . . .; (2) the injury

is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *Neuse River Found., Inc.*, 155 N.C. App. at 114, 574 S.E.2d 48 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)), *disc. rev. denied*, 356 N.C. 675, 577 S.E.2d 628 (2003). Furthermore, "an injury in fact is 'an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical[.]" *Id.*, 574 S.E.2d 48 (quoting *Lujan*, 504 U.S. at 560-61). "To be imminent, an injury must 'proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all.'" *Coker v. DaimlerChrysler Corp.*, 172 N.C. App. 386, 391, 617 S.E.2d 306 (2005) (quoting *Lujan*, 504 U.S. at 564 n.2).

B. <u>A Plaintiff Who Fails To Establish Standing Thereby Fails To Establish Subject Matter Jurisdiction.</u>

For a court to have subject matter jurisdiction, the plaintiff must prove that she has standing. *See Street v. Smart Corp.*, 157 N.C. App. 303, 305, 578 S.E.2d 695 (2003) ("Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction.") (internal quotation omitted). In the absence of subject matter jurisdiction due to

a lack of standing, a case should be dismissed, and any judgment previously entered is properly vacated on appeal. *See, e.g., Estate of Apple v. Commercial Courier Express, Inc.*, 168 N.C. App. 175, 180-81, 607 S.E.2d 14 (2005) (citations omitted); *Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43 (2001) ("Standing concerns the trial court's subject matter jurisdiction and is therefore properly challenged by a Rule 12(b)(1) motion to dismiss.") (citation omitted).

III. THE PLAINTIFFS HERE HAVE FAILED TO ARTICULATE A VALID BASIS FOR STANDING, AND THUS THIS CASE SHOULD BE DISMISSED FOR LACK OF JURISDICTION.

A. Plaintiffs Cannot Establish Standing To Challenge The Constitutional Amendment Authorizing A Voter Identification Requirement.

There is no *per se* constitutional impediment to a state requiring voters to produce valid identification in order to cast a ballot. *See Crawford v. Marion County Election Bd.*, 553 U.S. 181, 202-03 (2008) (upholding Indiana voter ID statute); *Frank v. Walker*, 768 F.3d 744, 751-52 (7th Cir. 2014) (upholding Wisconsin voter ID requirement). Indeed, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415

U.S. 724, 730 (1974). Though a prior North Carolina statute enacting a voter ID requirement was struck down by the Fourth Circuit, *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016), the Fourth Circuit subsequently clarified that this decision was driven by particular facts found to be present in that case, *see Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 603-04 (4th Cir. 2016) (upholding Virginia voter ID requirement).

When plaintiffs' claims here are properly understood, it is seen that they allege harm arising not from the particular constitutional amendment passed by the voters, but from subsequent enactments of the General Assembly. (*See* R pp 121-26, 129). When "the line of causation between the illegal conduct and injury [is] too attenuated," the plaintiff has not identified an injury that is fairly traceable to the challenged law and thus has failed to establish standing. *Allen*, 468 U.S. at 752. Despite plaintiffs' attempts to cast the constitutional amendment as the cause of any injury, the basis for their alleged harm comes instead from

subsequent enactments, which they contend fail to comport with other provisions of law.[2]

Accordingly, plaintiffs allege harms that are not fairly traceable to the constitutional provision passed by the voters, and they therefore lack standing to bring a suit to challenge that amendment.

B. Plaintiffs Cannot Establish Standing To Challenge The Constitutional Amendment Lowering The Cap On State Income Taxes.

Plaintiffs' efforts to establish standing to challenge the constitutional amendment lowering the cap on state income taxes suffer from the same infirmities as their challenge to the voter ID amendment.

Prior to passage of the amendment lowering the state income cap, the North Carolina Constitution contained a provision capping state income taxes at 10%, and that provision had been in place for almost 50 years. *See* N.C. Const. art. V, § 2(6) (2017); Session Laws 1969, c. 872 & 1200 (N.C. 1969). Plaintiffs do not allege this prior cap ever hindered any *specific* advocacy efforts in the past. (*See* R pp 128-30). They also do not allege any *specific* agenda item they seek to have enacted that would

[2] In point of fact, it is not at all clear that the subsequent voter ID legislation passed in late 2018 required the previously-passed amendment to be valid under the North Carolina Constitution.

necessarily be precluded by the new tax cap, which reduces the prior cap by 3% points. (*Id.*) Their alleged injury then is nothing but conjecture, which will not give rise to standing. *See, e.g., In re Ezzell*, 113 N.C. App. 388, 392, 438 S.E.2d 482 (1994) ("The injury in fact must be distinct and palpable—and conversely that it not be abstract or conjectural or hypothetical.") (internal quotation marks and citations omitted); *see also KERM, Inc. v. FCC*, 353 F.3d 57, 61 (D.C. Cir. 2004) (plaintiff "cannot establish standing simply by asserting a role as public ombudsman") (citation omitted).

The conjecture present in plaintiffs' purported standing is only emphasized further when it is remembered that legislative determinations about the level of public spending are driven by innumerable decisions of individual state legislators in the context of complying with myriad obligations, including payment of existing public debts and balancing the state budget. *Cf. Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980) (describing the legislative process as "the balancing of competing values and interests, which in our democratic system is the business of elected representatives"). Thus, plaintiffs cannot establish that "it is *likely*, as opposed to merely speculative, that the injury [they

allege] will be redressed by a favorable decision." *Neuse River Found., Inc.*, 155 N.C. App. at 114, 574 S.E.2d 48 (citation omitted) (emphasis added).

Perhaps most importantly, though, plaintiffs' objection to the cap on tax rates is merely a generalized claim in common with other members of the public at large. (*See, e.g.,* R p 129). Such a grievance, if there truly is a grievance, must be addressed through the legislative process rather than litigation. "[A]n organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required[.]" *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40-41 (1976) ("organizations, which described themselves as dedicated to promoting access of the poor to health services, could not establish their standing simply on the basis of that goal"). For standing, "it is not sufficient that [the plaintiff] has merely a general interest common to all members of the public." *Charles Stores v. Tucker*, 263 N.C. 710, 717, 140 S.E. 2d 370 (1965); *see Nicholson v. State Educ. Assistance Auth.*, 275 N.C. 439, 447, 168 S.E.2d 401 (1969) ("A taxpayer, as such, does not have standing to attack the constitutionality of any and all legislation.") (citations omitted). A plaintiff's failure to establish that she "occupies

with respect to those questions [at issue] any status legally different from that of all other citizens and taxpayers of the State" is fatal to her claim of standing. *Green v. Eure*, 27 N.C. App. 605, 607, 220 S.E.2d 102 (1975).

Federal cases that emphasize the requirement of a concrete and particularized injury are legion. *See, e.g., Whitmore v. Arkansas,* 495 U.S. 149, 156-57 (1990); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 217 (1974) ("The only interest all citizens share in the claim advanced by respondents is one which presents injury in the abstract."); *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923) (plaintiff "must be able to show . . . that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally").

As the above discussion makes plain, the plaintiffs here cannot establish an alleged harm that is concrete; likely to occur, rather than being speculative or hypothetical; and particularized to them, as opposed to being common to all members of the public. Therefore, their case should be dismissed for lack of standing.

IV. ENFORCING STANDING REQUIREMENTS PRESERVES THE INTEGRITY OF THE JUDICIARY.

Over 180 years ago, Alexis de Tocqueville explained the American concept of standing when he wrote that it is a characteristic of this country's "judicial power . . . to pronounce on particular cases and not on general principles . . . [S]hould the judge attack the general principle directly and destroy it without having a particular case in view, he goes outside the circle in which all people have agreed to enclose him . . . [and] he ceases to represent judicial power." Alexis de Tocqueville, *Democracy in America* 94 (Harvey C. Mansfield trans., U. Chicago Press 2000) (1835); *see Raines v. Byrd*, 521 U.S. 811, 818 (1997) ("No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.") (internal quotation marks and citation omitted).

Unsurprisingly then, this approach to judicial review is enshrined not only in the federal constitution, but also in state constitutional law, as a necessary attribute of the separation of powers. As Justice Lewis Powell observed: "The public confidence essential to [the judiciary] and the vitality critical to [the representative branches of government] may well erode if we do not exercise self-restraint in the utilization of our

power to negative the actions of the other branches." *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring). Consequently, adherence to the requirements of standing promotes respect both for the judiciary and for the rule of law, a fact that compels their continued observance in the present case.

CONCLUSION

For the reasons stated above, the decision of the Superior Court should be vacated and this matter should be remanded with instructions to dismiss the case for lack of subject matter jurisdiction.

Respectfully submitted, this the 4th day of June, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 28(i) & (j) of the North Carolina Rules of Appellate Procedure, the below counsel hereby certifies that the foregoing brief, which is prepared using a proportional font, is less than 3,750 words (excluding those parts excluded by the rules) as reported by his word-processing software.

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