No. 260PA22-2 TENTH DISTRICT

****

SUPREME COURT OF NORTH CAROLINA

****

Jay Singleton, D.O.; and Singleton Vision Center, P.A.,

Plaintiffs,

v.

North Carolina Department of Health and Human Services; Josh Stein, Governor of the State of North Carolina, in his official capacity; Devdutta Sangvai, North Carolina Secretary of Health and Human Services, in his official capacity; Phil Berger, President Pro Tempore of the North Carolina Senate, in his official capacity; and Destin Hall, Speaker of the North Carolina House of Representatives, in his official capacity,

Defendants.

From Wake County
No. COA26-230

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BRIEF OF THE JOHN LOCKE FOUNDATION AND PROFESSOR JOHN V. ORTH AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS' PETITION FOR DISCRETIONARY REVEW

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BRIEF OF THE JOHN LOCKE FOUNDATION AND PROFESSOR JOHN V. ORTH AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS' PETITION FOR DISCRETIONARY REVEW [1]

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

STATEMENT OF INTEREST OF THE JOHN LOCKE FOUNDATION

The John Locke Foundation (Locke) was founded in 1990 as an independent, nonprofit think tank committed to individual liberty and limited, constitutional government. Locke has opposed North Carolina's Certificate of Need (CON) Law for many years, not only because it is unconstitutional and violates the rights of North Carolinians, but also because it directly harms patients, employers, insurers, and taxpayers by making health care more expensive and less accessible. Locke therefore has an interest in presenting to this court the best and latest research pertaining to North Carolina's CON Law, including with regard to the origin, meaning, and application of the North Carolina Constitution's Fruits of Their Labor, Law of the Land, Exclusive Emoluments, and Anti-Monopoly clauses.

STATEMENT OF INTEREST OF PROFESSOR JOHN V. ORTH

Amicus John V. Orth is a constitutional law scholar and legal historian. He is the William Rand Kenan, Jr. Professor of Law (emeritus) at the University of North Carolina School of Law, where he taught from 1978 until 2021.[2] He is the author of numerous books and scholarly articles. His work has been cited by state and federal courts, including the United States Supreme Court and the North Carolina Supreme Court. Amicus has a strong scholarly and professional interest in the proper development of North Carolina constitutional law.

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[2] Law school affiliation is provided for informational purposes only. The views expressed in this brief are the author's own.

ISSUES ADDRESSED IN BRIEF

Whether the Fruits of Their Labor, Law of the Land, Exclusive Emoluments, and Anti-Monopoly clauses of the North Carolina Constitution express fundamental principles and protect fundamental rights.

Whether the Superior Court Panel and other courts have dismissed Plaintiffs' claims in error by applying the wrong standard of review to Plaintiffs' claims under those clauses.

Whether this court should grant Plaintiffs' petition for discretionary review in order to correct that error and bring tiers of scrutiny doctrine in North Carolina into alignment with the text and history of the state constitution.

INTRODUCTION

This case involves legal principles of major significance to the jurisprudence of the state. During the second half of the 20th century, North Carolina's courts adopted the "tiers of scrutiny" approach to constitutional adjudication that had previously been developed by the federal courts to deal with constitutional adjudication involving the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution. Under that approach, the highest level of scrutiny is applied to laws that interfere with fundamental rights. Such laws may only be upheld if the government can show they are necessary to serve a compelling governmental purpose. The lowest level of scrutiny, on the other hand, is applied to laws that regulate ordinary economic activity. Such laws are presumed to be constitutional unless they are plainly irrational, and—because the governmental bodies that enact such laws are presumed to be in the best position to strike the right balance between individual liberty and the common

good—courts are supposed to defer to those governmental bodies rather than make an independent determination about whether the "rational basis" test is satisfied.

The present case illustrates what happens when state courts casually apply federal tiers of scrutiny doctrine to claims arising under a state constitution without taking the state constitution's text and history into consideration. That practice, which is sometimes called "lockstepping,"[3] can lead to dangerous error, as it has in this case.

Like other courts before it, when the Superior Court Panel dismissed Dr. Singleton's claims that under the Right to Their Labor, Law of the Land, Exclusive Emoluments, and Anti-Monopoly clauses of the North Carolina Constitution, it treated them as if they were based on a vaguely defined right to substantive due process. Following federal tiers of scrutiny practice, the Panel assumed that, as a species of economic regulation, N.C.G.S. § 131E-175 *et seq* (2023) ("the CON Law") is subject only to minimal, rational basis scrutiny, and instead of conducting its own analysis to determine whether the rational basis test was satisfied, it accepted without question that the legislative findings appended to the CON Law satisfied the test *ipso facto*.

All of that was error. Plaintiffs' claims in this case are not based on a vaguely defined right to substantive due process. They are, instead, based on what the North Carolina Constitution explicitly declares to be "great, general, and essential principles of liberty and free government." *Preface to* N.C. Const. art. I. Not only are those

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[3] *See,* Richard Dietz, *Factories of Generic Constitutionalism*, 14 Elon L.J. 1, 1-36 (2022).

principles clearly defined and affirmed in the Constitution itself, they also have deep historical roots in our state. By any definition, therefore, those principles and the rights they protect are *fundamental*, and laws that infringe upon them ought to be subject to heightened scrutiny.

By dismissing plaintiffs' claims under rational basis review, the Superior Court Panel repeats a dangerous error that the lower courts have been making in CON Law cases for sixteen years. If its reasoning is allowed to stand, it will mean that the General Assembly has effectively nullified several express provisions of the state constitution simply by enacting a statute with an appended list of legislative findings. That cannot be right. Plaintiffs' petition for discretionary review gives this court an opportunity to correct that error and bring tiers of scrutiny practice in North Carolina into proper alignment with the text and history of the North Carolina Constitution. The court should seize that opportunity.

ARGUMENT

I. Under Conventional Tiers of Scrutiny Doctrine, Laws that Infringe Fundamental Principles or Violate Fundamental Rights Are Subject to Heightened Scrutiny.

From the start, even the most ardent advocates of rational basis scrutiny have conceded that a higher standard must apply to laws that infringe fundamental principles or violate fundamental rights. In the dissent that paved the way for modern tiers of scrutiny Oliver Wendell Holmes explained:

> I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair

> man necessarily would admit that *the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law*. *Lochner v. New York*, 198 U.S. 45, 79 (1905) (Holmes, J., dissenting)(emphasis added).

When the United States Supreme Court was finally browbeaten into adopting rational basis review "for regulatory legislation affecting ordinary commercial transactions," it reserved the right to apply a more exacting standard when legislation "appears on its face to be within a specific prohibition of the Constitution" or violates other important principles. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 & 152 n.4 (1938). Throughout the subsequent evolution of federal tiers of scrutiny doctrine, and even after the doctrine was adopted in states like North Carolina, one principle has endured: laws that infringe fundamental principles or violate fundamental rights are subject to heightened scrutiny.

Here in North Carolina, the courts have affirmed that principle on numerous occasions, *e.g.*:

> [I]f the right infringed upon is a "fundamental" right, then the law will be viewed with strict scrutiny and the party seeking to apply the law must demonstrate a compelling state interest for the law to survive constitutional attack; if the right infringed upon is not a fundamental right then the party applying the law need only demonstrate that the statute is rationally related to a legitimate state interest. *Clark v. Sanger Clinic, P.A.*, 142 N.C. App. 350, 357-58 (2001), 542 S.E.2d 668, 675 (2001).

As explained below, strict scrutiny along the lines described in *Clark v. Sanger* may not always the appropriate standard when a fundamental right is potentially infringed. *Infra* at 17-20. What is clear, however, is that rational basis as it has been understood and applied by the lower courts in the present case is the wrong

standard for laws that infringe fundamental rights. If challenges to such rights can be dismissed without so much as a hearing on the merits, judicial review is gone, and so are the separation of powers and the right to a fair trial.

II. The Principles Defined and Affirmed and the Rights Protected by Sections 1, 19, 32, & 34 of Article I of the North Carolina Constitution Are Fundamental.

A. Textual Analysis Shows that the Principles Defined and Affirmed and the Rights Protected by Sections 1, 19, 32, & 34 Are Fundamental.

Article I of the North Carolina Constitution is more than a mere miscellany of rights; it is a declaration of "the great, general, and essential principles of liberty and free government." Id. Such principles are, by definition, fundamental. Merriam-Webster.com, https://www.merriam-webster.com/dictionary/fundamental (last visited Mar. 30, 2026)(defining "fundamental" to mean: "serving as a basis, supporting existence, or determining essential structure or function"). The fact that the North Carolina Constitution uses those words to describe the principles enumerated in Article I should be sufficient to show that those principles and the rights they protect—including the rights protected by Sections 1, 19, 32, and 34—must be afforded at least a modicum of protection by the courts, and that conclusion is reinforced by Section 35, which reminds us that "[a] recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. Const. art. I.

The text of Section 19, moreover, also supports the conclusion that it, and Sections 1, 32, and 34 as well, express fundamental principles and protect

fundamental rights by declaring unequivocally, "No person shall be . . . in any manner deprived of life, liberty, or property but by the law of the land." *Id*. If that declaration means anything at all, it means that all three branches of North Carolina government must obey the law in its entirety, including Sections 1, 32, and 34 of the state constitution. It means the General Assembly may not pass a statute authorizing an administrative agency to deny to any persons the fruits of their labor, grant exclusive privileges except in consideration of public service, or create monopolies under any circumstances. It means no executive may do any of those things even pursuant to such a statute. And it means if a court finds that an administrative agency has in fact done any of those things pursuant to such a statute, the court must explain to the agency that the statute is invalid and order the agency to stop.[4]

Those textual considerations ought to be enough to show conclusively that Sections 1, 19, 32, and 34 express fundamental principles and protect fundamental rights that merit heightened protection by the courts. However, the history of those provisions provides further corroboration.

B. The Historical Record Shows that the Principles Defined and Affirmed and the Rights Protected by Sections 1, 19, 32, & 34 Are

[4] North Carolina courts have often treated the law of the land clause of the state constitution as analogous to the due process clauses of the federal constitution. In fact, however, the law of the land clause is both broader and clearer. By its own terms, "due process of law" pertains to process only. For historical and policy reasons, the federal courts have expanded the meaning to include so-called "substantive due process," and because the phrase itself is so vague, decisions about which rights it protects sometimes have been arbitrary and driven by policy considerations rather than by objective criteria. "The law of the land," on the other hand clearly encompasses both the law itself, and the procedures it specifies. That has significant implications for tiers of scrutiny doctrine. *See supra* at 9.

Fundamental.

We may begin by noting that the law of the land clause that appears in Section 19 gives expression to one of the oldest and most fundamental principles in Anglo-American jurisprudence: that everyone, including those who wield political power, must obey the law. The principle itself has been handed down from generation to generation for more than 800 years, and the language in which it is currently expressed in the North Carolina Constitution is almost identical to the language in which it was originally expressed in Magna Carta in 1215.[5] For centuries, the countries that have adopted and implemented that principle have led the world in freedom, happiness, and prosperity. Without it, liberal, republican governance is impossible. In short, history shows that the principle defined and affirmed by the law of the land clause is as fundamental as any principle of law could possibly be.

One could, of course, still argue about whether any particular law restricting economic liberty infringes on that principle, much as federal judges are inclined to do with regard to the principle that underlies the due process clauses of the federal constitution. On its face, Section 19 would appear to permit most such regulations so long as they are enacted and enforced in accordance with the other pertinent laws. The same cannot be said, however, of laws and regulations that deny to any persons the fruits of their labor, grant exclusive privileges other than in consideration of public service, or create monopolies under any circumstances. Because Sections 1, 32,

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[5] *See* John V. Orth, *The Past Is Never Dead: Magna Carta in North Carolina*, 94 *N.C. L. Rev.* 1635, 1637-39 (2016).

and 34 are unquestionably the law of the land, the execution of any such law would violate the "by the law of the land" requirement imposed by Section 19. N.C. Const. art I.

The history of Sections 1, 32, and 34 reinforces that conclusion. As John V. Orth and Paul Martin Newby explain in *The North Carolina State Constitution*, Oxford Univ. Press (2013), the Exclusive Emoluments and Anti-Monopoly clauses were included in the original Declaration of Rights that was adopted in 1776; the Fruits of Their Labor Clause was added to the constitution of 1868; and all three clauses were reincorporated in the constitution of 1971 and given pride of place in Article I. Id. at 46 & 89-91. In a subsequent publication, moreover, Prof. Orth elaborates on what this history implies about the meaning and importance of the exclusive emoluments and anti-monopoly clauses in particular:

> These clauses, read in combination, make it clear that in the "free state" of North Carolina, there would be only one class of citizen: free men who would compete equally for political and economic advantage. John V. Orth, *Unconstitutional Emoluments: The Emoluments Clauses of the North Carolina Constitution*, 97 N.C. L. R. 1727, 1729-30.

That the fruits of their labor, exclusive emoluments, and anti-monopoly clauses have occupied such a prominent place in North Carolina's constitution for such a long time is powerful evidence that the principles they express and the rights they protect have long been understood to be fundamental. Additional corroborative historical evidence, moreover, shows that those principles and rights have been a fundamental part of Anglo-American law for more than 400 years.

In 1603, just eighteen years after the founding of the ill-fated Roanoke Colony,

the Court of King's Bench considered the legality of Elizabeth I's grant to Edward Darcy of an exclusive right to manufacture, import, and sell playing cards. The court held that the Queen's grant to Darcy was void because "the same is a Monopoly, and against the Common Law." *Darcy v. Allen* (1603) 77 Eng. Rep. 1260 (KB).

In 1624, five years before the founding of the Provence of Carolina, Parliament enacted the Statute of Monopolies:

> All monopolies and all commissions, grants, licences [sic], charters and letters patents heretofore made or granted, or hereafter to be made or granted to any person or persons, bodies politic or corporate whatsoever, of or for the sole buying, selling, making, working or using of any thing [sic.] ... are altogether contrary to the laws of this realm, and so are and shall be utterly void and of none effect, and in no wise to be put in use or execution. 1624, 21 Jac. 1, c. 3 (Eng.).

In 1689, eleven years before the partition that made North Carolina a separate province, William and Mary signed the English Bill of Rights memorializing their intent to abide by the law of land, including, presumably, the common law prohibition on monopolies that the Court of King's Bench recognized in 1603 and the statutory prohibition that Parliament enacted in 1624. 1689, 1 W. & M., c. 2 (Eng.).

The colonists in North Carolina and throughout British North America regarded themselves as Englishmen, and they believed English common law and English statutes—including *Darcy v. Allen* and the Statute of Monopolies—applied to them. However, the authorities in 18th century England saw things differently. The official position was that the colonial charters superseded English common law within the colonies and that English statutes applied to the colonies only when the statutory

language explicitly said so. Jon Guze, *North Carolina's Anti-monopoly Clause: Still Relevant After All These Years*, 2 Political Economy in the Carolinas 103, 106 (2019).

Unfortunately, the Statute of Monopolies did not include such a statement. Making matters worse, by its own terms it applied only to monopolies "within this realm, or the dominion of Wales." 1624, 21 Jac. 1, c. 3 (Eng.). As a result, Britain continued to grant legal monopolies on the colonial trade, with dire consequences for the imperial project in North America. Guze, *supra* at 106.

In "Monopolies and the Constitution: A History of Crony Capitalism," Steven G. Calabresi and Larissa C. Leibowitz describe the resulting spiral of escalating hostilities:

> England enacted an extensive set of laws granting English merchants monopolies in colonial trade for a variety of markets—from manufactured goods to all kinds of raw materials, . . . black markets arose [in] response, . . . [and] English mercantile laws were enforced with great intrusiveness. . . . The havoc wreaked by the English monopoly system on England's relationship with the American colonies cannot be overstated. 36 Harv. J.L. & Pub. Pol'y 983, 1008 (2013).

One particularly vivid example of that havoc would have been fresh in the minds of members of North Carolina's Fifth Provincial Congress in 1776: the Boston Tea Party. While it is often described as a tax protest, what happened at Boston Harbor in 1773 was also very much a protest against the British East India Company's monopoly on the tea trade. Guze, *supra* at 107.

Given the intellectual and political context, there can be little doubt about what the members of the Fifth Provincial Congress had in mind when they added the exclusive emoluments and anti-monopoly clauses to the state constitution in 1776.

They meant to secure for themselves and their posterity the same right that *Darcy v. Allen*, the Statute of Monopolies, and the Glorious Revolution had secured for their cousins back in England: the right to earn an honest living by engaging in a lawful occupation. And, given that history, there can be little doubt that the principles defined and affirmed in those clauses—and in the fruits of their labor clause as well—are fundamental.

III. By Dismissing Plaintiffs' Claims Under Rational Basis Review, the Superior Court Panel Repeats a Dangerous Error that the Lower Courts Have Been Making in CON Law Cases for Sixteen Years.

In their brief urging the trial court to dismiss this case in 2020, Defendants began their argument by stating, "To dispose of this case, the court need look no further than *Hope—A Women's Cancer Ctr., P.A. v. State*, 203 N.C. App. 359, 693 S.E.2d 673, disc. review denied, 364 N.C. 614, 754 S.E.2d 166 (2010)." (Def's. 2020 Br. 7.) Comparing the plaintiffs' claims in *Hope* to Plaintiffs' claims in the present case, they say, "In *Hope* the plaintiffs asserted similar constitutional challenges to the CON law," and they go on to note that in *Hope* "the trial court dismissed the plaintiffs' claims and the Court of Appeals unanimously affirmed the court's dismissal." (*Id.*) They conclude by arguing that because the present case is "[s]imilar to *Hope*," Plaintiffs' claims should "likewise be dismissed." (*Id.*)

Defendants have repeated that argument at every stage in the proceedings since then, and every court that has considered that argument has accepted it. *See, e.g.,* Order at 8 & 9 (citing *Hope*). Nevertheless, the argument was wrong. In *Hope*, the Court of Appeals explicitly applied the rational basis test to the plaintiffs' fruits

of their labor and law of the land clauses and found, naturally, that the factual findings appended to the CON Law satisfied the test. As explained above, however, the rational basis test is the wrong standard for claims under those clauses and under the exclusive emoluments and anti-monopoly clauses as well. The principles defined and affirmed and the rights protected by all four of those clauses are fundamental, and challenges under those clauses should be subject to a higher standard of review.

That something was wrong with the Court of Appeals' argument should have been obvious from the start. If it were correct, it would mean that by appending a set of factual findings to an enacted law, the General Assembly has effectively nullified clear and explicit restrictions on its power that are enumerated in the North Carolina Constitution. Worse still, it would mean that in the future the General Assembly could immunize other laws from judicial review under other Sections of the Constitution in the same way. That cannot be right, and it is dangerous to allow North Carolina's lower courts to go on thinking it is. This court can put a stop to it by granting Plaintiffs' petition for discretionary review and remanding Plaintiffs' claims for reconsideration under a higher standard of review.

IV. This Case Provides an Opportunity to Bring Tiers of Scrutiny Doctrine into Alignment with the Text and History of the North Carolina Constitution.

If this case is remanded for reconsideration under a higher standard of review, a question will arise: What is the proper level of scrutiny for each of Plaintiffs' various claims? This court's recent decision in *Kinsley v. Ace Speedway Racing, Ltd.* suggests that at least some of those claims ought to be subject to an intermediate level of review,

386 N.C. 418, 904 S.E.2d 720 (2024), and the text and structure of the state constitution does too. Indeed, as explained below, the text and structure of the state constitution implies three tiers of judicial review in North Carolina, and a two part test for determining which level is appropriate.

A. Minimal Scrutiny for Laws that Do Not Infringe Any Explicit Constitutional Restriction on Legislative Power

Federal tiers of scrutiny doctrine was adopted in the middle of the 20th century for the specific purpose of insulating economic regulations from judicial review. That is why the first and most important question that must be answered in order to determine the appropriate standard of review under that doctrine is whether the law in question impinges upon a "fundamental right." The distinction between fundamental rights and economic rights was always dubious even under federal law.[6] It does not work at all in North Carolina because, as explained above, our constitution explicitly recognizes that some economic rights—including the economic rights asserted by the plaintiffs—are fundamental. Nevertheless, as explained below, there are important distinctions that determine the appropriate level of judicial review in North Carolina.

The first and most important question to be answered in order to determine the appropriate standard of review is whether the law in question violates any of the Constitution's express restrictions on legislative power. The importance of that distinction is implicit in the text and structure of the North Carolina Constitution. The

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[6] *See, e.g.,* Timothy Sandefur, *The Right to Earn a Living: Economic Freedom and the Law* (Inst. 2010).

fact that the Constitution assigns legislative power to the General Assembly while also imposing enumerated, express restrictions on its use implies that a properly enacted law must be presumed to be constitutional, but also that that presumption may be rebutted by showing that the law in question violates one or more enumerated express restrictions on legislative power. For that reason, a law that appears to violate one or more express restrictions must be subject to a higher level of scrutiny than a law that does not.

In North Carolina, that has been clear from the start. In its Order dismissing the present case, the Superior Court Panel lists a number of "Conclusions of Law" that pertain to the presumption of constitutionality, the separation of powers, and judicial review. One of these states, "Since its inception, the judicial branch has exercised its implied constitutional power of judicial review with 'great reluctance.'" Order 5. In support of that conclusion, the Panel cites *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 3 N.C. 1 Martin 48 (1787)).

The Panel presumably included this conclusion of law to justify the extremely deferential standard it applied to Plaintiffs' claims, but by citing *Bayard* it actually demonstrated why laws that violate express restrictions on legislative power must be subjected to more than minimal level scrutiny.[7] The judges in *Bayard* were indeed

[7] Much the same can be said for some of the Panel's other conclusions of law. This one, for example:

> North Carolina's state constitution declares that all political power resides in the people. The people exercise that power through the legislative branch.... The people, through the express language of their constitution have assigned specific tasks to, *and expressly limited the powers of* each branch of government. *Id.* at

reluctant to involve themselves in "a dispute with the Legislature of the State." Id. at 2. Nevertheless, they also recognized that—because the law in question violated an express provision of the state constitution—they were obliged to do it anyway by "the obligation of their oaths, and the duty of their office." Id. at 2-3. In short, what *Bayard* teaches is that while a presumption of constitutionality applies to all duly enacted laws, that presumption may be rebutted by showing that the law in question violates one or more of the enumerated express restrictions on legislative power.

An interesting question that is not addressed in *Bayard* is whether the presumption of constitutionality can be rebutted for a law that does *not* violate any express restriction on legislative power.[8] That is not, however, a question that needs to be answered at this time because in each of Plaintiffs' four claims, they allege that the CON law violates an express restriction on legislative power. Under *Bayard*, the courts may not simply dismiss such claims under rational basis review. They are honor bound to review them in good faith under a heightened standard. Determining precisely *what*

> 6 (emphasis added and citations and quotation marks omitted).

And this one too:

> All power which is not limited by the [c]onstitution inheres in the people, and an act of the state legislature is legal *when the [c]onstitution contains no prohibition against it*. *Id.* (emphasis added and citation and quotation marks omitted).

[8] The question has at least two possible answers. The first is that unless a law violates one of the enumerated express restrictions on legislative power, the presumption of constitutionality cannot be rebutted at all. That, however, might run afoul of N.C. Const. art. I, § 36, which forbids the impairment or denial of other, unenumerated rights retained by the people. That may imply that even under the most minimal level of scrutiny it must be possible for a Plaintiff to rebut the presumption of constitutionality by showing that the law in question violates an unenumerated fundamental right.

that standard should be involves another important distinction: between laws that infringe broad and abstract principles and laws that violate specific and categorical restrictions on legislative power.

B. Intermediate Scrutiny for Laws that Infringe Broad and Abstract Principles

Article I of the North Carolina Constitution consists primarily of broad and abstract declarations of principle. Secs. 1 and 19 certainly fall into that category. Section 1 declares that all persons have a right to the fruits of their labor (among other things), but that right clearly cannot be absolute. If it were, the state could not collect taxes or impose any kind of health and safety regulations on economic actors. As for Section 19, by its own terms it makes clear that persons may sometimes be deprived of life, liberty, and property as long as those deprivations are lawful. The upshot is that courts have no choice but to apply some sort of "balancing" test when attempting to determine whether a specific regulation is a legitimate exercise of the police power or one that violates the broad and abstract principles defined and affirmed by Sections 1 and 19 and other similar constitutional provisions.

In its recent decision in *Kinsley v. Ace Speedway Racing, Ltd.*, this court illustrated precisely how an intermediate scrutiny balancing test should work:

> [T]o survive constitutional scrutiny under [the Fruits of Their Labor Clause], the challenged state action must be reasonably necessary to promote the accomplishment of a public good, or to prevent the infliction of a public harm. This test involves a twofold inquiry: (1) is there a proper governmental purpose for the statute, and (2) are the means chosen to effect that purpose reasonable?

> The first step in this inquiry requires the reviewing court to identify the State's *actual* purpose for the constraint on private business activity. Initially, the State may simply assert that purpose, without the need to "come forward with evidence" proving that it is, indeed, the true purpose. *But the plaintiff may rebut that assertion with evidence demonstrating that the State's asserted purpose is not the true one, and instead the State is pursuing a different, unstated purpose.* . . .
>
> Simply put, courts assess Fruits of Their Labor Clause claims based on the *actual* purpose of the state action, *and that may not always be the purpose initially put forward by the State*.
>
> Once the actual purpose of the challenged state action is identified, the reviewing court must then assess whether that purpose is a "proper governmental purpose." Proper purposes are those that "promote the accomplishment of a public good, or to prevent the infliction of a public harm." . . .
>
> If the reviewing court determines that the challenged state action serves a proper governmental purpose, the inquiry then reaches the second stage: are the means chosen to effect that purpose reasonable? The means used must be measured by balancing the public good likely to result from their utilization against the burdens resulting to the businesses being regulated.
>
> *This requires assessing two fact-specific questions*—first, how effective is the state action at achieving the desired public purpose and, second, how burdensome is that state action to the targeted businesses. The analysis then becomes "a question of degree"—given all the options available to the state to advance the governmental purpose, was it reasonable for the state to choose this approach, with its corresponding benefits and burdens? *Kinsley v. Ace Speedway Racing, Ltd.*, 386 N.C. 418, 424-25, 904 S.E.2d 720, 726-27 (2024)(citations and quotation marks omitted, emphasis added).

The contrast between that analysis and the Superior Court Panel's analysis in the present case is striking. Far from allowing the Plaintiffs to rebut Defendants' claims about the purpose of the CON Law, the Superior Court Panel accepted without question the *Hope* court's determination that the law serves a proper government

purpose and refused to even consider evidence to the contrary presented by Plaintiffs. And instead of evaluating and balancing the factual claims about public benefits appended to the CON Law and the factual claims about public harms presented by Plaintiffs and their amici, the Panel accepted the former without question and ignored the latter.

When it remanded this case for reconsideration, this court directed the Superior Court Panel attention to its *Kinsley* decision. Nevertheless, the Panel explicitly applied rational basis review to Plaintiffs' Fruits of Their Labor claim without so much as acknowledging that this court had recently applied a different and higher standard to a Fruits of Their Labor claim in *Kinsley*. *Kinsley* goes a long way to clarify how tiers of scrutiny doctrine ought to be applied in North Carolina, but the Panel's failure to appreciate *Kinsley's* significance shows that there is still a lot of work to be done.

C. Maximal Scrutiny for Laws that Violate Specific and Categorical Limits on Legislative Power

The North Carolina Constitution has never imposed many specific and categorical restrictions on legislative power, but it has always imposed a few. As the Superior Court of Law and Equity recognized in *Bayard*, the right to a trial by jury in property cases that appeared in the original Declaration of Rights adopted in 1776 was a specific and categorical restriction. *Bayard*, 3 N.C. 1 Martin at 2. The prohibitions on exclusive privileges and monopolies that appear in the current Declaration of Rights are specific and categorical restrictions too. N.C. Const. art. I, §§ 32 & 34. The text of those sections makes it clear that they are meant to be strictly

applied. Section 32, for example says, "*No* person or set of persons is entitled to exclusive or separate emoluments or privileges ... but in consideration of public services," while Section 34 says, "Perpetuities and monopolies ... *shall not be allowed*." N.C. Const. art. I (emphasis added). How strictly, however, is less clear.

At the time *Bayard* was decided, and for a century and half thereafter, there was no balancing test at all for laws that violate categorical restrictions on legislative power. Those laws were simply held to be void. *See, e.g.*, *Bayard*, 3 N.C. 1 Martin at 3 (holding that "the act on which the present motion was grounded . . . must of course . . . stand as abrogated and without any effect."). Under federal tiers of scrutiny doctrine, on the other hand, even a law that clearly violates a categorical restriction may be upheld if it is the least restrictive way to promote a compelling state interest. Whether a *compelling interest* exception to categorical restrictions is consistent with the North Carolina Constitution is a question this court may want to consider eventually. Whatever this court decides about the contours of strict scrutiny in North Carolina, Plaintiffs' claims under Sections 32 and 34 ought to be reconsidered under that standard, and this court should make it plain to the lower courts that, henceforth, that will be the standard of review for all laws that violate specific and categorical restrictions on legislative power.

Neither those who want the courts to protect unenumerated rights nor those who want the state to have unbridled power over economic activity will be altogether happy with the tiers of scrutiny proposal that appears above. The former, however,

could be mollified by pointing out that the proposal does not rule out the possibility that there might be other, unenumerated rights that also deserve heightened protection. The latter could be mollified by pointing out that most economic regulations do not violate categorical restriction on legislative power and would only be subject to intermediate scrutiny. And both groups could take comfort in the fact that, unlike the United States Constitution, the North Carolina Constitution is easy to amend. In 2013, Orth and Newby reported that more than forty proposed amendments had been placed before the voters since the current constitution took effect in 1971, and more than three dozen had been ratified, and additional amendments have been proposed and ratified since then. Orth & Newby s*upra* at 33-35.

Both groups could also take comfort in the fact that, by making the text of the North Carolina Constitution the primary basis for determining which principles and rights merit heightened scrutiny and which do not, the proposed scheme would take that determination away from the courts and deliver it into the hands of the people, where it belongs. As the Constitution has always declared:

> All political power is vested in and derives from the people; all government of right originates from the people, is founded upon their will, and is instituted solely for the good of the whole. N.C. Const. art. I, § 2.

CONCLUSION

Plaintiffs' petition for discretionary review gives this court an opportunity to correct a dangerous error and bring tiers of scrutiny practice in North Carolina into proper alignment with the text and history of the North Carolina Constitution. The court should seize that opportunity and grant the petition.

Respectfully submitted this the first day of April, 2026.

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