No. TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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COMMON CAUSE, ROBERT E. MORRISON, CLIFF MOONE, T. ANTHONY SPEARMAN, ALIDA WOODS, LAMAR GIBSON, MICHAEL SCHACHTER, STELLA ANDERSON, MARK EZZELL, and SABRA FAIRES, Plaintiffs, v. DANIEL J. FOREST, in his official capacity as President of the North Carolina Senate; TIMOTHY K. MOORE, 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, Defendants.	)	From Wake County No. COA 18-870

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PLAINTIFFS' PETITION FOR DISCRETIONARY REVIEW

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No. TENTH DISTRICT

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PLAINTIFFS' PETITION FOR DISCRETIONARY REVIEW

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Plaintiffs respectfully petition this Court to certify for discretionary review the judgment of the Court of Appeals filed on 21 January 2020, attached to this Petition. Plaintiffs seek discretionary review under N.C.

Gen. Stat. § 7A-31(c) on the grounds that (1) the subject matter of the appeal has significant public interest, and (2) the cause involves legal principles of major significance to the jurisprudence of the State.

Seeking to vindicate their right under the North Carolina Constitution to participate in the legislative process, plaintiffs challenge the process that led to the enactment of Senate Bill 4 and House Bill 17 at the December 2016 Fourth Extra Session of the General Assembly. Those bills fundamentally changed the structure of state government and stripped the newly elected Governor of his executive authority.

Unlike each of the preceding 30 extra sessions, dating back to 1940, defendant legislative leaders gave citizens no advance notice that the Fourth Extra Session would be called, and no notice of the subjects it would address. The lack of notice was deliberate: defendants' goal was to exclude citizens from participating in the legislative process. Immediately after convening the session, defendants radically altered the legislative rules to cut short the process of hearing and debate. The legislature passed the bills less than 48 hours after they were introduced.

Article I, Section 12 of the North Carolina Constitution guarantees the people the "right to instruct their representatives." The lack of notice about the Fourth Extra Session and the truncated legislative process – with no justification ever provided by the legislature – denied plaintiffs the

opportunity to communicate with their representatives about the proposed legislation, in violation of that fundamental constitutional right.

The decision by the Court of Appeals effectively nullifies the "right to instruct" clause of Article I, Section 12. Unless encumbered by that constitutional restraint, legislative leaders have free rein to use the device of a special session, without notice, to subvert the democratic process.

While the "instruct their representatives" clause has been part of our State Constitution since 1776, it has never been interpreted by this Court. The Court should take this opportunity to balance the legislature's prerogative to convene extra sessions with the right of citizens "to instruct their representatives."

STATEMENT OF THE CASE

On 19 April 2017, plaintiff Common Cause and individual plaintiffs filed this declaratory judgment action against defendant legislative leaders, all in their official capacities. (R pp 3-27)

On 29 May 2018, a three-judge panel issued an order granting summary judgment to defendants. (R pp 280-301)

On 30 October 2018, this Court denied plaintiffs' petition for discretionary review prior to a determination by the Court of Appeals.

On 21 January 2020, the Court of Appeals issued a decision affirming the trial court's judgment. *Common Cause v. Forest*, __ N.C. App. __, __ S.E.2d __ (2020) (attached in Addendum).

STATEMENT OF FACTS

I. The 2016 Fourth Extra Session.

On 8 November 2016, Democrat Roy Cooper defeated then-Governor Pat McCrory, a Republican, in the election for North Carolina Governor. (R pp 9, 192) McCrory remained the Governor until December 31, 2016. (Id.) In October 2016, Hurricane Matthew hit North Carolina and caused catastrophic flooding in the eastern part of the state. (R pp 10, 192) On 30 November 2016, Governor McCrory announced that he would call the General Assembly into an extra session to provide relief to those affected by Hurricane Matthew. (Id.) On 9 December 2016, McCrory issued a proclamation calling an extra session on 13 December 2016 to address aid for recovery from the hurricane. (Id.)

Pursuant to McCrory's proclamation, the General Assembly convened the Third Extra Session on 13 December 2016. (R pp 11, 194) A bill providing for hurricane relief was passed in the House and Senate on December 14. (R pp 11, 194) On December 14, the Senate and House adjourned the Third Extra Session at 2:02 and 2:05 p.m. (Id.)

At approximately noon on 14 December 2016, Defendants Moore and Forest announced that a Fourth Extra Session was being called based on the request of three-fifths of the members of the House and Senate. (R pp 129-30) They issued a proclamation convening the extra session at 2:00 p.m. on December 14 "to consider bills concerning any matters the General Assembly elects to consider." (Id.) The proclamation included no notice as to the possible legislative subjects of the session, nor any explanation for why an extra session was needed.

The secrecy surrounding the Fourth Extra Session was so complete that Democratic leaders in the General Assembly had no inkling that the session was being contemplated, no notice of the possible subjects, and no opportunity to prepare. (R pp 138-39, 144) They did not learn the contents of the proposed legislation until the bills were introduced. (R pp 138, 144)

At 2:00 p.m. on 14 December 2016, the House convened the Fourth Extra Session. (R p 129) The House adopted House Resolution 1 ("HR 1"), modifying the permanent rules of the House for the extra session. (R pp 12-13, 196) The rule changes permitted the House to pass bills on an expedited basis. (Id.) Twenty-one bills were introduced in the House on the evening of December 14, including House Bill 17 ("HB 17"). (R pp 13, 196)

At 2:00 p.m. on 14 December 2016, the Senate convened the Fourth Extra Session. (R pp 221-22) The Senate adopted Senate Resolution 1 ("SR

1"), modifying the permanent rules of the Senate for the extra session. (R pp 221-22) The rule changes permitted the Senate to pass bills on an expedited basis. (Id.) On the evening of December 14, seven bills were introduced in the Senate, including Senate Bill 4 ("SB 4"). (R pp 14, 197)

When introduced, HB 17 was 18 pages long and SB 4 was 25 pages long. (R pp 14, 197) The drafting of SB 4 had been first requested of legislative staff in March 2016, a full nine months before the Fourth Extra Session, yet it was not made public until the evening of December 14. (R p 47) Similarly, the drafting of HB 17 had begun well before the Fourth Extra Session. (R pp 47-49) During the drafting process, the Republican legislators who requested the bills and their party caucus had numerous discussions about the bills. (R pp 44-46)

On 15 December 2016, committees convened in the House and the Senate to consider HB 17 and SB 4, respectively. (R pp 15, 198-99, 223-25) The House and Senate held simultaneous committee hearings so truncated that debate and meaningful public participation were impossible. (R p 159) By the end of December 15, the bills had passed committee, been adopted by their respective full chambers, and sent to the other chamber for approval. (R pp 15, 198-99, 223-25)

In the morning of 16 December 2016, the House passed an amended version SB 4 and the Senate passed an amended version of HB 17. (R pp 15-

16, 199-200, 223-25) At 12:39 p.m., the Senate concurred in the House's changes to SB 4, and the bill was ratified and sent to the Governor. (R pp 15-16, 199-200, 225) The House then concurred in the Senate's changes to HB 17, and that bill was ratified and sent to the Governor. (R pp 15-16, 200, 224)

At approximately 3:27 p.m. on December 16, 2016, the Senate adjourned the Fourth Extra Session. (R pp 16, 200) At approximately 3:49 p.m. on December 16, the House adjourned the Fourth Extra Session. (Id.) Governor McCrory signed the 27-page SB 4 at 1:19 p.m. on December 16. (Id.) He signed the 20-page HB 17 at 4:30 p.m. on December 19. (Id.)

SB 4 (Session Law 2016-125) enacted significant changes in the structure of North Carolina government and election administration, including merging the State Board of Elections with the State Ethics Commission into a new "Bipartisan State Board of Elections and Ethics Enforcement," which was to have four members appointed by the Governor and four members appointed by the General Assembly. (S.L. 2016-125, ss. 1-19.) HB 17 (Session Law 2016-126) enacted significant changes in the structure of North Carolina government, including transferring from the State Board of Education to the Superintendent of Public Instruction the authority to supervise and administer the public schools; and to administer the funds appropriated for the public schools. (S.L. 2016-126, ss. 1-33.)

II. The History of Extra Sessions.

There have been 30 extra sessions of the General Assembly since 1940. (R pp 55-57) An extra session may be called in either of two ways. First, pursuant to Article III, Section 5(7), the Governor, with advice of the Council of State, may call a special session "on extraordinary occasions." Second, since 1970, the president of the Senate (the Lieutenant Governor) and the speaker of the House of Representatives must convene an extra session under Article II, Section 11(2) when requested by three-fifths of the members of each house. All but three of the 30 extra sessions have been called by proclamation of the Governor pursuant to Article III. (R pp 57-58)

Until the 2016 Fourth Extra Session, the unbroken practice has been to notify the public whenever the General Assembly is going to meet, in either a regular, reconvened, or extra session, and to specify the agenda. (R pp 54-55) For extra sessions called by the Governor, Article III, Section 5(7) requires that the Governor issue a proclamation "stating therein the purpose or purposes for which they are thus convened." (R pp 57-58) Until the 2016 Fourth Extra Session, the practice for the few extra sessions called by the Senate president and House speaker pursuant to Article II, Section 11(2) has been that their proclamation, like the Governor's proclamation, state the purpose of the session. (R pp 57-58) The 2016 Fourth Extra Session is the

only extra session for which the proclamation provided no notice of the purpose of the session. (Id.)

The need for each of the 27 extra sessions called by the Governor was discussed publicly and reported in the news media ahead of the Governor's proclamation. (R pp 59-65) The timing of the Governor's proclamation for an extra session has varied over the years but has never left citizens without adequate notice. (R pp 59-60)

For each extra session other than the 2016 Fourth Extra Session the actual work of the General Assembly has been conscribed by the stated purpose of the session — legislators have stuck to the reason the session was called. (R pp 65-67) Even when an extra session enacted laws on multiple subjects, the substantive laws concerned only the subjects identified in the proclamation calling the session. (R p 67)

The 2016 Fourth Extra Session is the sole exception. Of the 30 extra sessions since 1940, it is the only one that was open-ended, both in the proclamation calling the session and the substantive legislation considered. (R p 67) It is the only one for which no advance notice was given either by formal proclamation or by the news media. (R pp 67-68) It is the only one that concerned significant substantive changes in the structure of state government. (R p 68) It is the only one for which the legislation to be

considered, and even the subject of the legislation, was unknown to the public until it was ready to be acted upon. (Id.)

III. Plaintiffs' Experiences with the Fourth Extra Session.

Plaintiff Common Cause and ten individual plaintiffs submitted affidavits describing their previous interactions with legislators, and their exclusion from the legislative process in the Fourth Extra Session. (R pp 32-51, 133-36, 146-73, 273-75) Each plaintiff is familiar with the legislative process, has communicated regularly with legislators on a variety of issues, and knows how to learn about and track pending legislation. (Id.) Each plaintiff was closely following legislative developments in December 2016 and had a strong interest in the subjects of the Fourth Extra Session. (Id.) Each was blocked from participation because of the lack of notice and the truncated legislative process. (Id.)

ARGUMENT

I. THE LEGISLATIVE PROCESS DENIED PLAINTIFFS THEIR "RIGHT … TO INSTRUCT THEIR REPRESENTATIVES," IN VIOLATION OF ARTICLE I, SECTION 12 OF THE NORTH CAROLINA CONSTITUTION.

Article I, Section 12 of the North Carolina Constitution provides: "The people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for

redress of grievances . . .” The text, history, and purpose of the right “to instruct their representatives” demonstrate that the provision guarantees citizens a meaningful opportunity to inform their representatives about legislation during the legislative process. The unprecedented manner in which the General Assembly convened the Fourth Extra Session and enacted SB 4 and HB 17 denied citizens that opportunity, violating plaintiffs’ constitutional right to instruct their representatives.

A. The Plain Language of the Right to Instruct Establishes a Right to Participate in the Legislative Process, Apart from the Rights to Free Speech, Assembly, and Petition.

Although the right to instruct dates back to the founding of our state, the North Carolina appellate courts have yet to interpret the contours of the constitutional right. “To determine the people’s will or intent all cognate provisions are to be brought into view in their entirety and so interpreted as to effectuate the manifest purposes of the instrument.” *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989). “The best way to ascertain the meaning of a word or sentence in the Constitution is to read it contextually and to compare it with other words and sentences with which it stands connected.” *Id*. “Constitutional terms must be given effect and not ignored as ‘mere surplusage.’” *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 173, 594 S.E.2d 1, 10 (2004).

At the time of the founding, "instruct" meant "to teach; to form by precept; to inform authoritatively." Samuel Johnson, A Dictionary of the English Language (3d ed. 1768). In the context of citizens communicating with their representatives, "to inform" is the applicable meaning of "instruct." The right to "instruct their representatives" must safeguard conduct beyond the right to exercise free speech, guaranteed by Article I, Section, 14, and the rights to assemble and petition the legislature, guaranteed by other provisions of Article I, Section 12. Otherwise, the language guaranteeing the right to "instruct their representatives" would be rendered mere surplusage.

The right to instruct representatives expressly protects the right of citizens to participate in the legislative process. It does so by guaranteeing that citizens have the opportunity to express their views of potential legislation to their representatives before the legislation is enacted.

The "right … to instruct their representatives," read contextually in Article I, Section 12, has equal status with the fundamental rights of assembly and petition. Together, the rights of assembly, petition and instruction are the essential "mechanics of popular sovereignty." John Orth and Paul M. Newby, The North Carolina State Constitution 58 (2d ed. 2013).

B. The Right to Instruct Goes Beyond Elections to Ensure North Carolina Representatives Consider and Respond to the Views of their Constituents.

The right to "instruct their representatives" has been part of the state constitution since 1776. Orth & Newby, The North Carolina State Constitution 58; Robert Luce, Legislative Principles: The History and Theory of Lawmaking by Representative Government 453 (1930).

The right to instruct elected representatives originated in English law and was adopted by the American colonies. Before the American Revolution, the right to instruct representatives played a prominent role in colonial politics, including in North Carolina. *See* Kris W. Kobach, *May 'We The People' Speak?: The Forgotten Role of Constituent Instructions in Amending the Constitution*, 33 U.C. Davis L. Rev. 1, 28-31 (1999).

The "right … to instruct their representatives" in Article I, Section 12 was a product of a long tradition and a common understanding. In the words of the leading treatise on the North Carolina Constitution, the "declaration of rights in 1776 presupposed this widespread view." Orth & Newby, The North Carolina State Constitution 58.

By the time the First Congress convened in 1789, five states recognized in their constitutions the right of the people to instruct their representatives: Pennsylvania, North Carolina, Massachusetts, New Hampshire, and Vermont. Christopher Terranova, *The Constitutional Life of Legislative*

Instructions in America, 84 NYU L. Rev. 1331, 1350, n. 115 (2009). However, the First Congress chose not to include the right in the federal Constitution.

Taking a different path, North Carolina included the right to instruct in its Constitution. Orth & Newby, The North Carolina Constitution 58. By doing so, North Carolina endorsed a system of representatives being responsive to their constituents' views not just through elections, but also by hearing and considering those views during the legislative process. *See Good Hope Hosp., Inc. v. N.C. Dep't of Health & Human Servs.*, 174 N.C. App. 266, 275, 620 S.E.2d 873, 881 (2005) ("'[A] representative democracy, such as ours, depends upon the ability of the people to make known their views and wishes to the government." (quoting *Potters Medical Center v. City Hospital Assoc.*, 800 F.2d 568, 578 (6th Cir., 1986))). Representatives act as "agents" of the people in the legislative process, with "the agency . . . necessarily subordinate to the superior authority of the constitution, which emanated directly from the whole people." *Hoke v. Henderson*, 15 N.C. 1, 7 (1833); *accord*, *State ex rel. Martin*, 325 N.C. at 448, 385 S.E.2d at 478 (recognizing that the legislature is "the agent of the people for enacting laws"); *see also Cooper v. Berger*, 370 N.C. 392, 428, 809 S.E.2d 98, 120 (2018) (Newby, J., dissenting) (recognizing that the legislature acts as "the agent of the people's sovereign power").

North Carolina regularly implemented the constitutional right to instruct during its early history. For example, the North Carolina General

Assembly required its members to travel back to their counties with copies of certain proposed bills so that constituents could "instruct their representatives with respect to the propriety of passing the same into a Law." Minutes of the North Carolina House of Commons 350 (Nov. 18, 1786 – Jan. 6, 1787) (calling upon representatives to consult constituents before voting on a canal construction bill). The right also ensured that the people were called upon when the legislature considered amendments to the State Constitution. Minutes of the North Carolina Senate 377 (Nov. 19, 1787 – Dec. 21, 1787).

North Carolina has continued to respect the people's right to instruct their representatives for 240 years. The right to instruct is reflected in N.C. Gen. Stat. § 120-18. That statute, first enacted in 1868, provides citizens a right to appeal to the House or Senate if one of its committees denies the request of the citizen to be heard. N.C. Gen. Stat. § 120-18.

Because North Carolina citizens have the fundamental right to instruct their representatives, the General Assembly cannot abridge the legislative process to the degree that citizens have no practical opportunity to make their views known about potential legislation.

C. The Legislative Process for the 2016 Fourth Extra Session Violated Plaintiffs' Right to Instruct Their Representatives.

Among all the extra sessions of the General Assembly over the preceding 75 years, the 2016 Fourth Extra Session stands alone. It is the only extra session for which no advance notice was given either by formal proclamation or by the news media. (R pp 67-68) It is the only extra session that was open-ended, both in the proclamation calling the session and the substantive legislation considered. (R pp 67) It is the only extra session that concerned significant substantive changes in the structure of state government. (R p 68) And it is the only extra session for which the legislation to be considered, and even the subject of the legislation, was unknown to the public until it was ready to be acted upon. (Id.)

This extraordinary deviation from established legislative practice was not accidental. There was an orchestrated plan over many months to develop SB 4 and HB 17 in secret, without informing the public of the proposed legislation until the bills were introduced on the evening of 14 December 2016. Defendants first announced the session only two hours before it began despite having collected legislators' signatures for the session two days earlier. Defendants intentionally did not disclose the purpose of the session in their proclamation on 14 December 2016, departing from an unbroken line of legislative practice. And defendants intentionally abridged the standard rules

of the House and Senate to curtail debate and restrict the opportunity for members of the public to express their views.

Defendants' scheme had its intended effect. As shown by the affidavits of the ten individual plaintiffs, even citizens well-versed in the legislative process did not have a practical opportunity to communicate with their representatives about HB 17 and SB 4 before the bills were passed. (R pp 32-51, 133-36, 146-73, 273-75) Defendants' scheme also incapacitated citizen groups from meaningfully communicating their views to representatives, their members, or the press. (R pp 157-60)

By providing no advance notice of the Fourth Extra Session, by hastily convening the General Assembly after issuing the proclamation for the extra session, by failing to timely disclose the contents of SB 4 and HB 17, and by radically abridging the process of hearing and debate, defendants deliberately denied plaintiffs and other citizens their right to participate in the legislative process, in violation of Article 1, Section 12. This was legislation by ambush – a premeditated assault on democracy.

D. The Court of Appeals Ignored the Obstacles to Plaintiffs' Participation in the Fourth Extra Session.

The Court of Appeals recognized that the right to instruct "is one of open access to the law-making process and of open communication with one's representatives in that process," and that [t]he courts have the power to

defend that right." (Add. at 2.) The Court of Appeals further recognized that "the right involves the ability of our citizenry to be informed about government action and to express their views about that action" and "protects the ability of the people to contact their representatives and convey their views about the decisions those representatives are tasked with making on their behalf." (Add. at 10.) But the Court of Appeals erred in finding no violation of that fundamental right.

The Court of Appeals focused on the facts that the challenged bills were passed 44 hours after they were introduced, the bills were available online, legislative sessions were open to the public, and legislators could be contacted by phone or email. The court, however, failed to account for the practical obstacles faced by plaintiffs, which show that there was in fact no meaningful opportunity for citizens to persuade their representatives.

For example, plaintiff Robert Morrison tried but was unable to reach any of his representatives until after they had voted. (R p 154) By the time plaintiff Cliff Moone was able to figure out the purpose of HB 17 and SB 4, the bills had already become law. (R p 148) Plaintiff Anthony Spearman did not have enough time to mobilize the North Carolina Council of Churches and NAACP because of the condensed legislative process. (R pp 167-68) Plaintiff Michael Schachter did not learn of the contents of HB 17 and SB 4 until the bills had passed out of committee, by which point he had no ability

to testify at hearings. (R pp 163-64) Even plaintiff Sabra Faires, who had 22 years of experience on the General Assembly staff, was unable to analyze the introduced bills and contact her representatives before the legislation was ratified. (R pp 50-51)

Defendants' scheme likewise incapacitated citizen groups from meaningfully communicating their views to representatives, their members, or the press. Common Cause NC's lobbyist was at the General Assembly on December 14 and 15, but was unable to engage in discussions with lawmakers due to the lack of advance notice and the radically accelerated schedule between introduction of the bills and their enactment. (R pp 159-60) Common Cause NC did not have enough time to review the bills and offer insight and analysis to its members, its allies, and the media, nor to offer specific suggestions to legislators on how the bills could be improved. (R p 159)

The Court of Appeals failed to consider that defendants' conduct was especially egregious given the scope of the legislation they enacted. The General Assembly is only afforded authority because it acts as "the agent of the people for enacting laws." *Baker v. Martin*, 330 N.C. 331, 336, 410 S.E.2d 887, 890 (1991) (citation omitted). Here, the General Assembly not only violated the constitutional requirements of that relationship – it did so as part of a plan to dramatically restructure state government, shifting power

from the executive to the legislative branch. "All political power is vested in and derived from the people" and "all government of right originates from the people." N.C. Const. Art. I, Sec. 2. The right of the people to instruct their representatives applies with special force when the General Assembly is considering legislation such as SB 4 and HB 17 that will fundamentally change the structure of the people's government.

Finally, the Court of Appeals failed to consider that defendants proffered no rationale for the abridged process they employed. Defendants have not claimed their conduct is consistent with any historical practice. They have not claimed their conduct was motivated by anything other than a desire to exclude the public from the legislative process. And they have not claimed that their secretive, truncated approach was justified by any legitimate purpose.

In our system of government, there is a higher power than the legislature. "The will of the people as expressed in the Constitution is the supreme law of the land." *Martin*, 325 N.C. at 449, 385 S.E.2d at 478. Since 1776, the people of North Carolina have had the constitutional right to instruct their representatives. When the people amended the Constitution in 1970 to give the General Assembly the power to convene extra sessions in Article II, Section 11(2), they simultaneously reaffirmed their "right … to instruct their representatives" in Article I, Section 12. Those two provisions

must be read in harmony. The people did not give the legislature a license to violate the Declaration of Rights or to block "the mechanics of popular sovereignty." Orth & Newby, The North Carolina Constitution 58.

The Constitution does not permit extra sessions to be used as a tool to circumvent the people's right to instruct their representatives. Yet that is exactly what defendants did, making a mockery of the "consent of the governed." In convening the Fourth Extra Session and securing the expedited passage of SB 4 and HB 17 without any meaningful opportunity for citizen participation, defendants deprived plaintiffs of their right to instruct their representatives, in violation of Article I, Section 12 of the Constitution.

II. THE COURT SHOULD CERTIFY THIS APPEAL FOR DISCRETIONARY REVIEW.

This case merits discretionary review. First, certification is necessary because "the subject matter of the appeal has significant public interest." N.C. Gen. Stat. § 7A-31(c)(1). The General Assembly's use of special sessions to enact legislation without providing citizens notice or an opportunity to be heard has generated intense public controversy.

Second, certification is necessary because the appeal "involves legal principles of major significance to the jurisprudence of the State." N.C. Gen. Stat. § 7A-31(c)(2). The "right to instruct" clause in Article I, Section 12 has never been interpreted by this Court. The meaning of this provision of the

Declaration of Rights, protecting the fundamental right of citizens to participate in the legislative process, is of major significance to North Carolina jurisprudence.

III. THE COURT CAN UPHOLD THE RIGHT TO INSTRUCT WHILE GIVING PROPER DEFERENCE TO THE LEGISLATURE.

More than three years have passed since the December 2016 Fourth Extra Session. Portions of SB4 and HB17 have been implemented; others have been revised or struck down as unconstitutional. Plaintiffs recognize that it would be impractical, at this point, for the Court to void the statutes enacted in the Fourth Extra Session.

That practical reality does not make this appeal less worthy of the Court's consideration. Indeed, it presents the Court with the opportunity to uphold the constitutional right to instruct without unduly encroaching on the legislative branch.

The Court should clearly state that extra sessions may not be used to deny citizens the opportunity to participate in the legislative process. The Court should hold that the absence of notice for the Fourth Extra Session, without any justification, violated the right of the people to instruct their representatives. However, because this is the first case in which the courts have addressed the right to instruct and because the laws enacted have

already been implemented, the Court need not strike down SB4 and HB17. Instead, it can apply its decision prospectively.

To harmonize the people's right to instruct, guaranteed by Article I, Section 12, and the legislature's prerogative to call extra sessions, provided by Article II, Section 11(2), the Court should hold that the General Assembly must provide reasonable notice of the specific subjects to be addressed before it convenes an extra session. The Court should decline to set the time period that constitutes adequate notice, leaving that task to the legislature, following its standard rulemaking process. That resolution of the issues in this appeal would fulfill the Court's responsibility to uphold the Declaration of Rights, while giving proper deference to the legislative branch.

ISSUE TO BE CERTIFIED

Did the legislative process of the 2016 Fourth Extra Session violate plaintiffs' rights under Article 1, Section 12 of the North Carolina Constitution?

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court grant Plaintiffs' Petition for Discretionary Review.

Respectfully submitted, this 25th day of February, 2020.

PATTERSON HARKAVY LLP

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CERTIFICATE OF SERVICE

The undersigned counsel for Plaintiffs hereby certifies that a copy of Plaintiffs' Petition was sent via email and first-class mail, postage prepaid, addressed as follows:

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This the 25th day of February, 2020.

Electronically submitted
Burton Craige

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-870

Filed: 21 January 2020

Wake County, No. 17 CVS 4642

COMMON CAUSE, DAWN BALDWIN GIBSON, ROBERT E. MORRISON, CLIFF MOONE, T. ANTHONY SPEARMAN, ALIDA WOODS, LAMAR GIBSON, MICHAEL SCHACHTER, STELLA ANDERSON, MARK EZZELL, and SABRA FAIRES, Plaintiffs,

v.

DANIEL J. FOREST, in his official capacity as President of the North Carolina Senate; TIMOTHY K. MOORE, 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, Defendants.

Appeal by plaintiffs from order entered 29 May 2018 by Judges Wayland J. Sermons, Martin B. McGee, and Todd Pomeroy in Wake County Superior Court. Heard in the Court of Appeals 9 May 2019.

Patterson Harkavy LLP, by Burton Craige, Narendra K. Ghosh, and Paul E. Smith, for plaintiffs-appellants.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Matthew Tulchin, for defendants-appellees.

DIETZ, Judge.

In late 2016, Hurricane Matthew struck North Carolina and devastated many communities along our coast and our State's eastern interior. On 13 December 2016, following a proclamation from the governor calling a special session, our General Assembly gathered in Raleigh for a third extra session and, within twenty-four hours,

enacted the Disaster Recovery Act of 2016. Then, not long after that special session adjourned, the General Assembly convened a fourth extra session, this time taking on matters far more politically controversial than helping fellow citizens recover from natural disasters. Two days later, the legislature passed bills from that fourth extra session.

The plaintiffs in this case contend that, although the General Assembly had the authority to convene that fourth extra session, the speed with which the legislature enacted those controversial bills violates Article I, Section 12 of our State Constitution, which provides that "the people have a right . . . to instruct their representatives."

As explained below, the unanimous three-judge panel properly rejected this argument and granted summary judgment in favor of the State. The right to instruct is part of a provision in the Declaration of Rights that guarantees the people the right to assemble, to instruct their representatives, and to petition the government for redress of grievances. The right protected is one of open access to the law-making process and of open communication with one's representatives in that process. The courts have the power to defend that right.

But the decision of how quickly particular laws, on particular subjects, must be enacted is a political question reserved for another branch of government. The plaintiffs in this case believe the two-day deliberations during the fourth extra

session, without any advance notice of the topics to be addressed, were insufficient for them to fully convey their views to their legislators. But citizens who received insufficient funding, or were left out entirely, from the disaster relief act might feel the same of the one-day deliberation over that bill. And there are countless examples of legislative proposals, important to some constituency, that are added to, or cut from, a final bill with even less notice than that.

We reject the plaintiffs' claim that our State Constitution permits the courts to wade into this legislative process and dictate how much time our General Assembly must spend contemplating legislative action. The record in this case demonstrates that the General Assembly provided public notice and access to the fourth extra session and that no portion of the official deliberations occurred in secret. Indeed, this fourth extra session generated *far more* public and media attention than many other last-minute legislative acts of our General Assembly throughout its history.

To be sure, there will be times when citizens believe that the legislature's decision to move quickly on a particular bill, even though lawful public notice and access is provided, is nevertheless imprudent and that the opportunity to publicly oppose that bill, or rally opposition to it, has been frustrated. The remedy for these concerns is not with the courts; it is at the ballot box.

Accordingly, the three-judge panel properly rejected the plaintiffs' Right to Instruct Clause challenge and accompanying Law of the Land Clause challenge. We

affirm the trial court's judgment.

Facts and Procedural History

On 14 December 2016, shortly after our General Assembly concluded a third extra session to enact hurricane relief, the legislature announced that it was convening a fourth extra session based on the request of three-fifths of the members of the two houses "to consider bills concerning any matters the General Assembly elects to consider." It is undisputed that the General Assembly had the constitutional authority to convene this fourth extra session and to do so without announcing the subject matter of the bills that legislators planned to consider.

Defendants scheduled the fourth extra session to be held at 2:00 p.m. that day and members introduced twenty-one bills in the House and seven in the Senate, including the two bills ultimately enacted and challenged in this lawsuit, House Bill 17 and Senate Bill 4. As is customary for abbreviated extra sessions, the General Assembly immediately passed several procedural changes to their chamber rules to permit bills to move more quickly than in a regular session.

Within forty-eight hours after convening the fourth extra session, the General Assembly passed House Bill 17 and Senate Bill 4, and the Governor signed both bills into law. It is undisputed that, despite the speed of passage, all bills introduced during this special session, including those enacted into law, were publicly available and posted on the General Assembly's website along with up-to-date information

about the progress on those bills as they made their way through the approval process described in our Constitution.

Since 1940, this is the first extra session in which the General Assembly chose not to announce in advance the subject matter of the laws they would consider during the session. Although unusual, that choice was not unlawful—as noted above, the State Constitution does not require the legislature to explain the purpose of a special session before convening it.

According to documents included in the record on appeal, the suddenness of the fourth extra session received widespread state and national news coverage, generated an "email blitz" by thousands of frustrated citizens, and prompted hundreds of protestors to come to the General Assembly and loudly object to the process and the proposed bills while the legislature convened.

On 19 April 2017, Plaintiffs sued the leaders of the General Assembly in their official capacities,[1] alleging that the passage of the challenged laws during the fourth extra session violated the Right to Instruct Clause of Article I, Section 12 of the North Carolina Constitution, which provides that "the people have a right . . . to instruct their representatives," as well as corresponding rights in the Law of the Land Clause of Article I, Section 19 of the Constitution.

[1] "A suit against defendants in their official capacities, as public officials . . . is a suit against the State." *Harwood v. Johnson*, 326 N.C. 231, 238, 388 S.E.2d 439, 443 (1990). We therefore refer to the Defendants collectively as the State in this opinion for ease of reference.

After some early procedural motions, the case was transferred to a three-judge panel pursuant to N.C. Gen. Stat. § 1-267.1. On 21 February 2018, the three-judge panel heard arguments on Plaintiffs' motion for summary judgment and the State's motion to dismiss and for judgment on the pleadings, which the trial court converted into a cross-motion for summary judgment. On 29 May 2018, the unanimous three-judge panel granted summary judgment in favor of the State with an accompanying memorandum opinion explaining the panel's reasoning. Plaintiffs timely appealed.

Analysis

We review a trial court's ruling on state constitutional questions *de novo*. *Cooper v. Berger*, 370 N.C. 392, 413, 809 S.E.2d 98, 110–11 (2018). "When assessing a challenge to the constitutionality of legislation, this Court's duty is to determine whether the General Assembly has complied with the constitution. If constitutional requirements are met, the wisdom of the legislation is a question for the General Assembly." *Hart v. State*, 368 N.C. 122, 126, 774 S.E.2d 281, 284 (2015).

"In performing our task, we begin with a presumption that the laws duly enacted by the General Assembly are valid." *Id.* Thus, "a law will be declared invalid only if its unconstitutionality is demonstrated beyond reasonable doubt." *Id.*

When interpreting our State Constitution, "provisions should be construed in consonance with the objects and purposes in contemplation at the time of their adoption." *State v. Webb*, 358 N.C. 92, 94, 591 S.E.2d 505, 509 (2004). "To ascertain

the intent of those by whom the language was used, we must consider the conditions as they then existed and the purpose sought to be accomplished." *Id.*

I. Right to Instruct Clause

We begin with Plaintiffs' challenge under the Right to Instruct Clause. Article I, Section 12 of the North Carolina Constitution provides that "the people have a right . . . to instruct their representatives":

> **Sec. 12. Right of assembly and petition**. The people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances; but secret political societies are dangerous to the liberties of a free people and shall not be tolerated.

This "right to instruct" language has existed since our State Constitution was first framed in 1776. Although nearly two-and-a-half centuries have passed, no appellate court has ever interpreted what this right means.

We begin by examining what the words of this provision meant in 1776. We are, of course, no longer governed by our State's 1776 Constitution. North Carolina has had several constitutions through its history. We are now on our third. It took effect in 1971 after being ratified by the people of this State. *See* 1969 N.C. Sess. Laws 1461, ch. 1258, *ratified* Nov. 3, 1970. But the language of the Right to Instruct Clause has never changed, and the framers of the 1971 Constitution gave no indication that the meaning of those words had changed when they chose to re-adopt them.

Thus, we examine what the words of the Right to Instruct Clause meant in 1776, at the time of their adoption. Dictionaries from this time period define the word "instruct" as "to teach; to form by precept; to inform authoritatively" and "to teach, train, or bring up." Samuel Johnson, *A Dictionary of the English Language* (3d ed. 1768); Nathan Bailey, *An Universal Etymological English Dictionary* (1775). Thus, the word "instruct" appears to have had generally the same meaning then that it does today. To instruct one on some issue, in ordinary usage, generally means to teach them what you think about it.

It is not quite so easy, though, because the word "instruct" also can mean to tell someone they *must* do something. And although dictionaries at the time did not include this meaning, the concept of "instructing" one's representatives in Eighteenth Century usage sometimes conveyed that meaning: it meant a binding order telling a representative *how* to vote. For example, the three-judge panel's memorandum opinion references debates about including a "right to instruct" in the Bill of Rights in the United States Constitution, and concerns from framers at the time that this would produce an unwieldly "direct democracy." *Common Cause v. Forest*, No. 17 CVS 4642, Mem. Op. at 11 (N.C. Super. Ct. 2018).

As one scholar explained, examining the wording of a "right to instruct" provision in the Massachusetts Constitution, adopted around the same time as North Carolina's original constitution, "[t]he right to instruct legislators is distinct from the

right to present petitions and otherwise express opinions. Petitions and opinions are advisory; instructions are binding." *Rediscovering the Right to Instruct Legislators*, 26 New Eng. L. Rev. 355, 355 (1991).

The Right to Instruct Clause in our Constitution does not convey this alternative meaning. In this Court's research of legislative practice in our State, we could find no example *ever* of legislators being compelled to vote in the manner that the people they represent commanded them to. Moreover, each time our State enacted a new Constitution—first in 1868 and again in 1971—they included the same right to instruct clause although, at the time, it was universally understood that legislators were elected to act as representatives and to use their judgment to vote in ways that best reflected the will of their constituents. *See generally* John V. Orth & Paul Martin Newby, The North Carolina State Constitution 58 (2d ed. 2013). We therefore interpret the "right to instruct" using the ordinary meaning of these words at the time of adoption.

Having concluded that the words in the Right to Instruct Clause reflect a right of the people to "teach" or "advise" their representatives, not to bind them, we must determine the scope of that right. One common tool for illuminating the meaning of a phrase in a constitution is to examine it "contextually and to compare it with other words and sentences with which it stands connected." *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989).

Here, the people's right "to instruct their representatives" is nestled between two other clauses expressly guaranteeing the people's rights to "assemble together to consult for their common good" and "to apply to the General Assembly for redress of grievances." N.C Const. art. 1, § 12. This structure confirms that the right involves the ability of our citizenry to be informed about government action and to express their views about that action. We thus agree with the trial court that the Right to Instruct protects the ability of the people to contact their elected representatives and convey their views about the decisions those representatives are tasked with making on their behalf.

Having interpreted the meaning of the Right to Instruct, we now turn to the heart of this case: whether the State violated that right. The plaintiffs argue that, because they received no advance notice of the legislative topics to be introduced in the fourth extra session, and because the bills introduced in that session were debated and enacted in less than forty-eight hours, the plaintiffs were denied "the meaningful opportunity to inform their representatives about legislation during the legislative process." We reject this argument.

At the outset, it is important to note that "the people" in a general sense—that is, the public overall—unquestionably had notice of the session and the opportunity to instruct their legislators both that they opposed *any* action in the special session and that they opposed particular bills introduced during that session. The record on

appeal shows (and plaintiffs do not dispute) that the fourth extra session was convened through a joint proclamation in accordance with constitutional requirements and that the session was publicly announced. Likewise, the record shows (and plaintiffs do not dispute) that the bills introduced during this special session were publicly available in the same manner as other bills introduced during legislative sessions. There were audio broadcasts of the House and Senate sessions and other official meetings and proceedings of legislative deliberations.

Moreover, the record indicates that this special session, and the bills introduced during it, received widespread public attention while the legislature convened to debate, including extensive state and national news coverage. Many of those news reports discussed the subject matter of the proposed laws. In addition, the State's legislative services officer testified in an affidavit that "hundreds of people" were present in the chambers as the General Assembly debated the bills, far more than are typically present during a legislative session. News reports released while the session was in progress, and submitted as part of the record on appeal, describe "widespread protest" organized by the opponents of the bills during the session and even an "email blitz from thousands asking legislators not to enact the moves."

Simply put, the plaintiffs' argument is not that *the people*, or even these plaintiffs individually, were not given notice of the special session or notice of the bills under consideration, or an opportunity to contact their legislators to convey their

views. Their argument, as they explain in their briefing, is that they needed more time to "mobilize" opposition to the bills and to attempt to "persuade their representatives."

To be sure, as plaintiffs establish in a series of affidavits, the law-making process ordinarily moves far more slowly, giving observers plenty of time to rally support for or opposition to proposed legislation. But not always. Take, for example, the third extra session that convened the day before. During that session, which lasted less than twenty-four hours, the General Assembly enacted the Disaster Recovery Act of 2016. *See* N.C. Session Law 2016-124. That Act contains many pages of complicated appropriations for relief from Hurricane Matthew and other natural disasters. It allocated hundreds of millions of dollars to various agencies and organizations ranging from the State Fire Marshal to the nonprofit corporation Golden L.E.A.F. *Id.*

If forty-eight hours was a constitutionally insufficient time to enact the laws from the fourth extra session, twenty-four hours could not be sufficient for a two hundred million dollar appropriations bill. This disaster relief act, and countless other acts of our General Assembly, would be rendered unconstitutional were we to accept the plaintiffs' argument that all legislative action must be done slowly enough to accommodate those who seek to oppose it politically.

Nor is there anything constitutionally significant about the challenged bills' passage during the fourth extra session, as opposed to a regular session. The plaintiffs repeatedly point out that there was no "advance notice" of the topics to be addressed in the special session. But our Constitution does not require that notice, just as it does not require the General Assembly to provide advance notice of the matters it will take up when it begins a regular session. *See* N.C. Const. art. II, § 11(1), (2). Indeed, the public record of our General Assembly's deliberations discloses countless examples of bills that were introduced without any "advance notice" to the public that a bill on that subject matter would be introduced. And, likewise, there are countless examples of bills that substantially changed in one form or another—often as the result of a sudden amendment—and were enacted just days later, again with no "advance notice" that this might occur.

The framers could have included time restrictions in Article II, for example by requiring that when bills are "read three times in each house" that it must happen on different days, or consecutive weeks. *See* N.C. Const. art. II, § 22. Instead, the framers left to the judgment of the legislative branch how quickly to move a bill through the law-making process. The Right to Instruct Clause does not change that. It simply requires that the process, however quickly it moves, must be open to the public, and that the people must have ways to contact their representatives to convey their views during that process.

In sum, the plaintiffs have not shown that they were denied the right to instruct their representatives. They have shown, at most, that their representatives chose not to listen to them. That may be a reason not to vote for those representatives in the future; it is not a constitutional violation.

The plaintiffs also argue, apparently in the alternative, that the General Assembly has the authority to act quickly to debate and pass certain laws consistent with the Right to Instruct Clause, but that when the legislature engages in this "abridged" law-making, it must "provide a valid justification for that departure from historical precedent." This argument goes far beyond the conceivable requirements of the right to instruct.

The judicial branch has no constitutional authority to demand from the legislative branch an explanation of why a particular bill must move quickly to enactment, much less the authority to review whether that explanation is "valid." *See Cooper*, 370 N.C. at 407, 809 S.E.2d at 107. The political question doctrine, which stems from our State's express guarantee of the separation of powers, "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the legislative or executive branches of government." *Id.* at 408, 809 S.E.2d at 107. In other words, the courts cannot inquire about why the legislature moves quickly on some bills but not others. That political decision is solely for the legislative branch.

Having found that the State did not violate the Right to Instruct Clause, we hold that the trial court properly entered summary judgment in favor of the State on this constitutional claim.

II. Law of the Land Clause

Plaintiffs next contend that the State violated the Law of the Land Clause—our State's equivalent of the Due Process Clause in the U.S. Constitution. *In re Moore's Sterilization*, 289 N.C. 95, 98, 221 S.E.2d 307, 309 (1976). They assert both a "substantive" and a "procedural" due process argument.

Plaintiffs' substantive due process argument turns entirely on the alleged violation of their right to instruct their representatives—they contend that the State "deprived plaintiffs of their liberty interest under Article I, Section 12 of the North Carolina Constitution 'to instruct their representatives.'" As discussed above, the State did not violate the Right to Instruct Clause and thus we reject the plaintiffs' substantive due process argument as well.

Plaintiffs also argue that the State violated their procedural due process rights by "convening the Fourth Extra Session with no notice and providing citizens no meaningful opportunity to be heard." But again, this argument collapses into their claim under the Right to Instruct Clause, which provides the contours of the procedural right to notice and opportunity to be heard. And, for the same reasons we rejected that argument, we reject this one. The State provided public notice of both

the fourth extra session and the bills introduced during that session. The General Assembly's actions during that special session complied with the Constitution, state law, and that body's own rules. The plaintiffs had notice of the special session; access to the bills proposed in this special session; the ability to contact their representatives through various means; and, as a result, the opportunity to convey their views about the proposed legislation. That is all the procedural component of the Law of the Land Clause requires. *Johnston v. State*, 224 N.C. App. 282, 307–10, 735 S.E.2d 859, 877–78 (2012).

Accordingly, we hold that the trial court properly entered summary judgment in favor of the State on the plaintiffs' Law of the Land Clause claim.

Conclusion

We affirm the trial court's judgment.

AFFIRMED.

Judges MURPHY and COLLINS concur.