No. 109PA22-2 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA
****

DUSTIN MICHAEL MCKINNEY, GEORGE JERMEY MCKINNEY, and JAMES ROBERT TATE,

Plaintiffs-Appellants,

STATE OF NORTH CAROLINA,

Intervenor-Appellant,

v.

GARY SCOTT GOINS and THE GASTON COUNTY BOARD OF EDUCATION,

Defendants-Appellees.

From Wake County

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AMICI CURIAE BRIEF OF JANE DOES 1 AND 2 IN SUPPORT OF NEITHER PARTY

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INDEX

TABLE OF CASES AND AUTHORITIES

Cases:

Constitutional Provisions:

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AMICI CURIAE BRIEF OF JANE DOES 1 AND 2 IN SUPPORT OF NEITHER PARTY[1]

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INTRODUCTION

The argument of the Gaston County Board of Education presents this Court with an entirely academic question: whether the County Board has a

[1] Pursuant to Appellate Rule 28.1, no person or entity—other than amici curiae, their members, and their counsel—directly or indirectly wrote this brief or contributed money for its preparation.

vested right in a statute-of-limitations defense. The question is academic because the County Board has no vested rights at all.

A vested right is a right held by a person against the government and is protected by our State Constitution's law of the land clause. In other words, the law of the land clause protects people against their government. But here, the County Board's argument assumes that the law of the land clause protects the government against its citizens. This assumption turns the constitution on its head.

Another way to view the County Board's confusion is through the lens of waiver. Decades ago, this Court held that the General Assembly may, through legislation, waive any statute-of-limitations defense held by the State or its agencies. The County Board is an agency of the State. And the SAFE Child Act is a legislative waiver of the County Board's statute-of-limitations defense.

Either argument is a simple way to dispose of the County Board's constitutional challenge. Neither argument touches on how the SAFE Child Act applies to private parties, like the YMCA and churches. But both arguments suffice to resolve the actual dispute before this Court between these parties.

Amici recognize that this Court may decline to rest its decision on an argument made by an amicus, rather than the litigants. But Amici also know that this Court "will indulge every presumption in favor of [a statute's] constitutionality," *Painter v. Wake Cnty. Bd. of Educ.*, 288 N.C. 165, 177, 217 S.E.2d

650, 658 (1975), and will not invalidate a statute unless "it violates the constitution beyond a reasonable doubt." *Cooper v. Berger*, 371 N.C. 799, 804, 822 S.E.2d 286, 291 (2018). The arguments in this brief cast considerable doubt on the County Board's constitutional challenge. And it is, of course, also within this Court's discretion to order supplemental briefing on any issue. *E.g.*, *Cooper v. Berger*, 812 S.E.2d 820, 821 (N.C. 2017).

Should this Court decline to address the issues raised in this brief, and should the Court decide this appeal against the Plaintiffs, then Amici merely ask that this Court state in its opinion that it is not deciding these simpler issues—whether County Boards have vested rights at all, and whether the General Assembly may waive the County Board's statute-of-limitations defense. Otherwise, lower courts are likely to misread the opinion as foreclosing the arguments presented in this brief. That would threaten Amici in their own litigation and distort our constitutional jurisprudence.

STATEMENT OF INTEREST OF AMICI CURIAE

Amici are student victims of childhood sexual abuse. They have sued the New Hanover County Board of Education for its own culpability in harboring a child molester for a quarter of a century.

Amici have relied on the SAFE Child Act to bring their claims. But the New Hanover County Board of Education is challenging the constitutionality

of that Act, through the same attorneys representing the North Carolina School Board Association in this appeal.

ARGUMENT

I. County Boards of Education Have No Vested Rights.

The County Board's constitutional challenge rests on a false premise: that the State and its agencies have *any* vested right under the law of the land clause. The premise is contradicted by both the text of the State Constitution and precedent.

The law of the land clause protects the rights of "persons" against the State, and not vice versa. The clause provides, "No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19. The purpose of this clause, like the rest of the Declaration of Rights, is to protect individual liberty against "encroachment" by the State. *Corum v. Univ. of N.C. ex rel. Bd. of Governors*, 330 N.C. 761, 782-83, 413 S.E.2d 276, 290 (1992) ("The fundamental purpose for [the Declaration of Rights'] adoption was to provide citizens with protection from the State's encroachment upon these rights."); *accord State v. Elder*, 368 N.C. 70, 73, 773 S.E.2d 51, 53 (2015) ("The Federal and State Constitutions protect fundamental rights by limiting the power of the government."). Indeed, the preamble to the Declaration explains that the rights being "recognized and

established" are those "essential" to the preservation and promotion "of liberty and free government" for "the people of this State." N.C. Const. art. I, pmbl.

County boards of education are not people. Instead, they are mere "agencies of the State." *Silver v. Halifax Cnty. Bd. of Comm'rs*, 371 N.C. 855, 866, 821 S.E.2d 755, 762 (2018) ("[T]his Court noted that local school boards are agencies of the State, with the General Assembly having close to plenary power over them."). So, for the County Board to be a "person" under the law of the land clause, the State would need to be a "person" as well.

And that makes no sense. As another court has recognized, "[t]he due process clause protects people from government; it does not protect the state from itself." *City of Mountlake Terrace v. Wilson*, 549 P.2d 497, 498 (Wash. Ct. App. 1976). The law of the land clause does not create governmental rights, but "individual and personal rights." *Corum*, 330 N.C. at 782, 413 S.E.2d at 289. The clause is to be interpreted liberally "in favor of [State] citizens" in order "to safeguard the liberty and security of the citizens." *Id.* at 783, 413 S.E.2d at 290. It is not interpreted in favor of government power.

Federal law is the same. The Supreme Court of the United States has held that States are not "persons" with rights protected by the federal due process clause: "The word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has

never been done by any court." *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966). That Court has likewise held that local governments have no rights under the due process clause against the States that create and control them. *E.g.*, *City of Trenton v. State of New Jersey*, 262 U.S. 182, 188 (1923); *Newark v. New Jersey*, 262 U.S. 192, 196 (1923); *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907).[2]

Other state courts have reached the same result. They have, with a loud voice, condemned any notion that states, state agencies, or local school boards have any rights protected by the due process clauses of the federal or the 50 state constitutions. *See, e.g.*, *State v. City of Birmingham*, 299 So. 3d 220, 234 (Ala. 2019); *Kenai Peninsula Borough v. State*, 751 P.2d 14, 18-19 (Alaska 1988); *City of Lowell v. City of Rogers*, 43 S.W.3d 742, 745 (Ark. 2001); *County of Los Angeles v. Super. Ct.*, 18 P.2d 112, 113 (Cal. Dist. Ct. App. 1933); *Tenley & Cleveland Park Emergency Comm. v. D.C. Bd. of Zoning Adjustment*, 550 A.2d 331, 343 n.27 (D.C. 1988); *New Castle County v. Chrysler Corp.*, 681 A.2d 1077, 1088 (Del. Super. Ct. 1995); *Dep't of Cmty. Affs. v. Holmes County*, 668 So. 2d 1096, 1102 (Fla. Dist. Ct. App. 1996); *Bibb County v. Hancock*, 86 S.E.2d 511, 519-20 (Ga. 1955); *Henderson v. Twin Falis County*, 80 P.2d 801, 811

[2] Our courts generally interpret the state law of the land clause in line with the federal due process clause, or at least look to it for guidance. *See Tully v. City of Wilmington*, 370 N.C. 527, 538, 810 S.E.2d 208, 216-17 (2018).

(Idaho 1938) (order denying petition for rehearing); *Town of Cumberland v. Ind. Dep't Env't Mgmt.*, 691 N.E.2d 206, 210 (Ind. Ct. App. 1998); *Morial v. Smith & Wesson Corp.*, 785 So. 2d 1, 11 (La. 2001); *Town of Dartmouth v. Greater New Bedford Reg'l Vocational Tech. High Sch. Dist.*, 961 N.E.2d 83, 95 (Mass. 2012); *Kent County v. Dep't of Soc. Servs.*, 386 N.W.2d 663, 666 (Mich. Ct. App. 1986); *Nelson v. Bemidji Reg'l Interdistrict Council*, 359 N.W.2d 38, 40 (Minn. Ct. App. 1984); *Tunica County v. Town of Tunica*, 227 So. 3d 1007, 1017 (Miss. 2017); *Jackson County v. State*, 207 S.W.3d 608, 614 (Mo. 2006) (en banc); *Fitzpatrick v. State Bd. of Exam'rs*, 70 P.2d 285, 288 (Mont. 1937); *Loup City Pub. Schs. v. Neb. Dep't of Revenue*, 562 N.W.2d 551, 556 (Neb. 1997); *Appeal of N.H. Dep't of Emp. Sec.*, 672 A.2d 697, 702 (N.H. 1996); *Borough of Pitman v. Skokowski*, 473 A.2d 100, 103 (N.J. Super. Ct. App. Div. 1984); *State ex rel. N.M. State Highway Cmm'n v. Taira*, 430 P.2d 773, 777-78 (N.M. 1967); *County of Chautauqua v. Shah*, 6 N.Y.S.3d 334, 338 (N.Y. App. Div. 2015); *State ex rel. Lashkowitz v. Cass County*, 158 N.W.2d 687, 692 (N.D. 1968); *Avon Lake City Sch. Dist. v. Limbach*, 518 N.E.2d 1190, 1193 (Ohio 1988); *Carl v. Bd. of Regents of the Univ. of Okla.*, 577 P.2d 912, 915 (Okla. 1978); *Ex Parte Lexington County*, 442 S.E.2d 589, 593 (S.C. 1994); *County of Tripp v. State*, 264 N.W.2d 213, 217 (S.D. 1978); *Deacon v. Euless*, 405 S.W.2d 59, 62 (Tex. 1966); *Lakehaven Water & Sewer Dist. v. City of Federal Way*, 466 P.3d 213, 227 (Wash. 2020).

The Gaston County Board's argument in this appeal contradicts these authorities. But its argument is untenable, not only given the experience of the states of the Union, but also under precedent from our Supreme Court.

Consider the case of *Wallace v. Board of Trustees of Sharon Township*, 84 N.C. 164 (1881). The plaintiff contracted with a town to build a fence. After the work was done, the plaintiff sued for payment, but his case was dismissed because, in the meantime, the General Assembly had "destroyed" the town as a "corporate bod[y]." *Id.* at 164, 167. The plaintiff complained that the legal destruction of the town interfered with his vested rights. But this Court held that neither the plaintiff *nor the town* had any "vested rights." *Id.* at 168. Municipal corporations are unlike private corporations, since they can be "changed or modified," or even "abolished," by "the will of the legislature." *Id.* at 168-69. For that reason, "neither they [the municipalities] nor those who deal with them, can acquire any vested rights such as may enforce a continuance of their corporate existence." *Id.*

If that is true for municipalities, it is doubly so for counties and county boards of education. Counties "are of, and constitute parts of the State government." *Dare Cnty. Comm'rs v. Currituck Cnty. Comm'rs*, 95 N.C. 189, 191 (1886). County boards of education are no different. *Silver*, 371 N.C. at 866, 821 S.E.2d at 762. They are all "created for political and civil purposes of the State . . . ." *Dare Cnty. Comm'rs*, 95 N.C. at 191. They are "instrumentalities

of the State government, and subject to its legislative control." *Id.* The powers of the counties rest "in the absolute discretion of the state." *Town of Boone v. State*, 369 N.C. 126, 131, 794 S.E.2d 710, 714 (2016) (quoting *State ex rel. Dyer v. City of Leaksville*, 275 N.C. 41, 50, 165 S.E.2d 201, 207 (1969)). That legislative power over counties and county boards is absolute and plenary:

- Counties and county boards may exercise only the powers delegated by the legislature. *See Dare Cnty. Comm'rs*, 95 N.C. at 191-92.
- They may be created, abolished, arranged, and rearranged. *Town of Boone*, 369 N.C. at 131, 794 S.E.2d at 714; *State v. Comm'rs of Haywood Cnty.*, 122 N.C. 812, 813, 30 S.E. 352, 352 (1898).
- The legislature may take part of one county and join it to another. *Dare Cnty. Comm'rs*, 95 N.C. at 193; *Mills v. Williams*, 33 N.C. 558, 562 (1850).
- The legislature may force a county to tax and spend for special projects. *Comm'rs of Haywood Cnty.*, 122 N.C. at 814-15, 30 S.E. at 352.
- The legislature may take and control the county's own property and use it for the legislature's purposes. *Dare Cnty. Comm'rs*, 95 N.C. at 192.

In short, counties and county boards "are, for all practical purposes, subject to the unlimited control of the Legislature." *Ramsey v. Rollins*, 246 N.C. 647, 651, 100 S.E.2d 55, 57 (1957). Thus, this Court has expressly contrasted the "vested rights of individuals" with the absence of such rights for State agencies. *Dare Cnty. Comm'rs*, 95 N.C. at 192.

These cases are right, so the County Board is wrong. If the County Board were a "person," then the law of the land clause would prevent the legislature from taking its "property." N.C. Const. art. I, § 19. Yet, as these cases reveal, the legislature can do whatever it wants with the County Board, even erasing its existence. It is absurd to think the legislature can take the County Board's life and property, but not its statute-of-limitations defense.

Like this Court recently reminded local governments, the General Assembly has "plenary" power over them because the General Assembly is the "only" body that is "equipped to organize local government and, through oversight, craft responses to the changing needs of local communities." *Town of Boone*, 369 N.C. at 131, 794 S.E.2d at 714-15. The changing needs of North Carolinians are reflected in the SAFE Child Act. The General Assembly recognized the need to revive a remedy for victims of childhood sexual abuse. County boards of education have no "vested" right to defy that legislative judgment.

II. The General Assembly May Waive a County Board's Limitations Defense.

Even if this Court were to find that the County Board, as a State agency, has vested rights under the law of the land clause, which it can enforce against State citizens, the County Board's right has been waived by the State. Long ago, this Court left "no doubt" that the General Assembly can "waive statutes of limitation" for the State and its agencies. *B-C Remedy Co. v. Unemployment Comp. Comm'n of N.C.*, 226 N.C. 52, 56, 36 S.E.2d 733, 736 (1946). That rule controls here: The SAFE Child Act waives the County Board's statute-of-limitations defense. As a mere creature of the State, subject to the State's absolute control, the County Board must bow to that legislative command.

Like any other affirmative defense, a limitations defense can be waived or forfeited. *E.g.*, *Franklin v. Franks*, 205 N.C. 96, 97-98, 170 S.E. 113, 114 (1933); *Unifund CCR, LLC v. Francois*, 260 N.C. App. 443, 445, 817 S.E.2d 915, 916 (2018) (Dietz, J.). Waiver is what happened here. The State, through the SAFE Child Act, waived the limitations defense for sexual abuse claims. Though sometimes called the "revival" of expired claims, the SAFE Child Act can also be described as a legislative waiver of limitations defenses.

This Court has already held that the General Assembly may, through legislation, waive a statute-of-limitations defense that the State or its agents and instrumentalities would otherwise have. *B-C Remedy Co.*, 226 N.C. at 56,

36 S.E.2d at 736. In *B-C Remedy*, an employer sued a State agency for a refund of overpaid taxes. *Id.* at 53-54, 36 S.E.2d at 734-35. At the time the employer had paid the tax, a statute of limitations barred any claim for refund filed more than a year after overpayment. *Id.* at 54, 36 S.E.2d at 735. The employer sued for a refund more than a year after overpayment. *Id.*

The employer relied on a retroactive change in the statute of limitations made by the General Assembly. The State agency argued that the retroactive change in the statute of limitations was unconstitutional because a stale claim "could not constitutionally be revived." *Id.* at 54, 36 S.E.2d at 735.

This Court rejected that argument. "[T]here can be no doubt," the Court held, "that the Legislature can waive statutes of limitation which have completely run in favor of the State." *Id.* at 56, 36 S.E.2d at 736. The Court agreed that it was considering the statute at issue to be a statute of limitations. *Id.* It agreed that the General Assembly's amendment to the statute of limitations was "retroactive." *Id.* at 57, 36 S.E.2d at 737. But the case did not present "any of the ordinary difficulties in the way of a revival of a remedy" because "the State has acquired no vested interest in [the employer's] money which it cannot waive by appropriate legislation." *Id.* at 56, 36 S.E.2d at 736. Just like "a private debtor may waive the bar of the statute by his own conduct," so can the State. *Id.*

B-C Remedy is an insurmountable hurdle for the County Board. But it is not a surprising hurdle—at least not for the Board's lawyers. Just a few years ago, the County Board's lawyers made this same argument to this Court. They argued that, under *B-C Remedy*, the General Assembly can waive a county's statute-of-limitations defense. Plaintiffs' Br. at 33-35, *Zander v. Orange County*, 376 N.C. 513, 851 S.E.2d 883 (2020) (No. 426A18), 2019 WL 670052, at *33-35, *available at* https://bit.ly/3RqDqA2. They likewise argued that counties do not have any "vested rights" protected by the constitution, distinguishing between public and private entities. *Id.* at 34-35. Thus, they chastised opposing counsel for "reliance on cases adjudicating the 'vested rights' of *private parties*." *Id.* at 35 (emphasis in original).

The argument was right then and remains so today. *B-C Remedy* applied its waiver to a State agency. The Gaston County Board of Education is a State agency as well, since county boards of education are "agencies of the State." *Silver*, 371 N.C. at 866, 821 S.E.2d at 762.

B-C Remedy was not a novel decision. Six years before it was decided, the Fourth Circuit predicted that this Court would reach that conclusion. *See Valleytown Twp. v. Women's Cath. Ord. of Foresters*, 115 F.2d 459, 462 (4th Cir. 1940). Legislation that revives a stale claim against a municipality does not violate the constitution or "interfere[] with any vested right," the Fourth Circuit explained, since such laws "merely represent the command of the

supreme governmental authority to its agent that it recognize its just obligations and forego the defense of limitations." *Id.* And *Valleytown* was just following the lead of the Supreme Court of the United States, which had reached that same conclusion in the nineteenth century. *City of New Orleans*, 95 U.S. at 654-55, *relied on by Valleytown Twp.*, 115 F.2d at 462. Other state supreme courts concur. *See, e.g.*, *Savannah R-III Sch. Dist. v. Pub. Sch. Ret. Sys. of Mo.*, 950 S.W.2d 854, 858 (Mo. 1997) (en banc) (holding that "the legislature may waive or impair the vested rights of school districts without violating the retrospective law prohibition" because "the retrospective law prohibition was intended to protect citizens and not the state"); *Unemployment Comp. Comm'n v. Consolidation Coal Co.*, 152 S.W.2d 971, 975 (Ky. 1941) (similar); *State v. City of Aberdeen*, 74 P. 1022, 1023 (Wash. 1904) (similar); *County of Caldwell v. Crocket*, 4 S.W. 607, 612 (Tex. 1887) (similar).

It is hard to see how the rule could be otherwise. What right does a State agency have to complain about the acts of the General Assembly, which has the power of life and death over the agency? *Cf.* Romans 9:20-21 ("Shall the thing formed say to him that formed it, Why hast thou made me thus? Hath not the potter power over the clay . . . ?"). Under *B-C Remedy*, the County Board has no right to complain.

III. Amici Seek Submission of the Issues in This Brief or an Express Reservation of the Issues.

Amici have no vested interest in the outcome of this particular case between these particular parties. Amici worry, however, that lower courts will misread this Court's opinion if the Court broadly concludes that a litigant can have a vested right in a statute-of-limitations defense.

Although this Court has cautioned lower courts not to rely on "dicta" and "general expressions" in judicial opinions to resolve later cases "where the very point is presented for decision," that often happens. *State v. Jackson*, 353 N.C. 495, 500, 546 S.E.2d 570, 573 (2001) (quoting *Moose v. Board of Comm'rs of Alexander Cnty.*, 172 N.C. 419, 433, 90 S.E. 441, 448-49 (1916)). That risk is especially acute for Amici, who have also sued a county board of education, which in turn is challenging the constitutionality of the SAFE Child Act.

A trial court is likely to read a broad ruling against the Plaintiffs in this appeal as a rejection of the arguments presented in this brief. This Court may avoid that unintentional result by issuing an opinion in this case that addresses the issues raised in this amicus brief or that at least expressly reserves ruling on them to another day. *E.g.*, *Adams v. Nelsen*, 313 N.C. 442, 449, 329 S.E.2d 322, 326 (1985) (expressly reserving resolution of issues "for future cases"); *State v. Tenore*, 280 N.C. 238, 250, 185 S.E.2d 644, 651 (1972) (expressing no opinion on stated issue).

CONCLUSION

There is "no doubt" that the SAFE Child Act is constitutional as applied to the County Board. The County Board has no vested rights, and certainly no rights in a limitations defense that the legislature has waived.

Amici respectfully request that the Court reject the County Board's constitutional challenge. In the alternative, Amici request that the Court expressly reserve ruling on the issues presented in this brief.

Respectfully submitted this the 4th day of January, 2024.

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CERTIFICATE OF SERVICE

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